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LAWYERS REPORTS
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ANNOTATED

NEW SERIES
BOOK 28

BURDETT A. RICH, HENRY P. FARNHAM,
EDITORS

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ANNOTATED

NEW SERIES.

UTAH SUPREME COURT.

A. G. FELL, Resp.,
v.
UNION PACIFIC RAILROAD COMPANY,
Appt.

(32 Utah, 101, 88 Pac. 1003.)

Pleading — amendment — shipment of stock — destination..

1. The allowance, upon due notice and argument, and a long time prior to the trial, of an amendment of a complaint in an action to recover damages for delay in transportation of live stock, changing the point of destination from the end of the defendant's

line, as originally alleged, to a point beyond such line, is not prejudicial to the defendant, where the amendment is in accordance with the allegations of the answer as to the place of destination, and the court strictly confines the damages to the loss occasioned by the neglect of defendant on its own line.

Interest — unliquidated damages — delay in transportation of live stock.

2. Damages recovered in an action *ex delicto* against a carrier for injuries to, and delay in the transportation of, live stock, draw interest, at least from the time of delivery.

(March 8, 1907.)

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I. Work and labor.

In an action of *quantum meruit* for work

A PPEAL by defendant from a judgment of the District Court for Weber County in favor of plaintiff in an action brought to recover damages for injury to live stock during transportation. Affirmed.

The facts are stated in the opinion.

Messrs. P. L. Williams, George H. Smith, and John G. Willis, for appellant:

Interest is not recoverable in actions for unliquidated damages.

Lester v. Highland Boy Gold Min. Co. 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341, 1 A. & E. Ann. Cas. 761; Atchison, T. & S. F. R. Co. v. Ayers, 56 Kan. 176, 42 Pac. 722; Nichols v. Union P. R. Co. 7 Utah, 510, 27 Pac. 693; Ferrea v. Chabot, 121 Cal. 233, 53 Pac. 689, 1092; Smith v. Turner, 33 Or. 379, 54 Pac. 166; Wilson v. Sullivan, 17

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Messrs. Heywood & McCormick for respondent.

Frick, J., delivered the opinion of the court:

This is an action for damages for injury to live stock while in transit. The plaintiff (hereinafter called respondent) alleges that he delivered to and that the defendant (hereinafter designated appellant) received from him for transportation from Granger, Wyoming, to Chicago, Illinois, a certain number of sheep; that the appellant negligently delayed the same while in transit at Schuy-

and material, it is held that interest should be allowed on account from demand, if one was made; otherwise, from the service of process; or, in the absence of proof of date of service, from the commencement of the suit. This is the latest rule, as developed since *Van Rensselaer v. Jewett*, 2 N. Y. 135, 51 Am. Dec. 275, and is applied where the damages are easily ascertained by computation. This was held in *Dempsey v. Schawacker*, 140 Mo. 680, 38 S. W. 954, 41 S. W. 100.

Interest should be allowed for each item of labor and material from the time of demand of payment. *Sweeney v. New York*, 173 N. Y. 414, 66 N. E. 101.

In *Excelsior Terra Cotta Co. v. Harde*, 181 N. Y. 11, 106 Am. St. Rep. 493, 73 N. E. 494, the case of *Sweeney v. New York*, supra, was distinguished, as the claim was not so peculiar as to take it out of the general rule, and the amount due the plaintiff was a mere matter of computation.

Plaintiff is entitled to interest from demand in an action on a *quantum meruit*. *De Carricarti v. Blanco*, 121 N. Y. 230, 24 N. E. 284.

And in assumpsit by a common carrier for freight, interest may be collected from the date of demand. *Schureman v. Withers*, Anthon, N. P. 166.

In an action for the use of a canal boat, where the cargo had not been discharged on delivery, it was held that the allowance of interest was not error. *Sipperly v. Stewart*, 50 Barb. 62. The court said: "The rule, as modified by recent decisions, allows interest upon an unliquidated demand, the amount of which could be ascertained by computation, together with a reference to well-established market values, because such values are so nearly certain that it would be possible for the debtor to obtain some proximate knowledge of how much he was to pay."

In *Reid v. Rensselaer Glass Factory*, 3 Cow. 393, which was an action of assumpsit to recover the balance of an unsettled account, it was held that an uncertain and unliquidated demand could not carry interest until demand.

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An attorney is entitled to recover interest on an account for services, after his account was rendered. *Mygatt v. Wilcox*, 45 N. Y. 306, 6 Am. Rep. 90.

So, the attorney is entitled to interest from the time of demand, where there is no fixed agreement fixing price, and after performance demand is made of the defendant for what is deemed by the court and jury to be a reasonable compensation. *Gray v. Van Amringe*, 2 Watts & S. 128.

And in a similar action, where the demand was unliquidated, it was held that, under Mo. Rev. Stat. 1899, § 3705, providing that interest is allowed on accounts after they become due and demand of payment is made, interest should be allowed on unliquidated claims from the date of demand. *Trimble v. Kansas City, P. & G. R. Co.* 180 Mo. 574, 79 S. W. 678, 1 A. & E. Ann. Cas. 363.

But in *Hadley v. Ayres*, 12 Abb. Pr. N. S. 240, in an action by an attorney on an unliquidated account, it was held that interest should not have been allowed, except as to disbursements, and on those he was entitled to interest from the time they were made.

In an action for services rendered, interest should not be allowed upon the account until after demand of payment. *Southgate v. Atlantic & P. R. Co.* 61 Mo. 89.

And in an action for work, labor, and material for furnishing sails, the plaintiff would, after the lapse of the usual time of credit, be entitled to such interest only by proof of an agreement to pay it, or by proof of a demand of payment, prior to the date of the writ. *Amee v. Wilson*, 22 Me. 116.

In an action of assumpsit for money paid and for professional services, where the defendant wrote that he would call and settle, it was held that interest should be allowed from that date, it being evidence of demand. *Barnard v. Bartholomew*, 22 Pick. 291. The court said: "Interest is to be allowed where there is an express promise to pay it, or where there is a usage proved from which the jury may infer a promise to pay; and also it may be given as damages for the detention of a debt after the

ler, Nebraska, for a period of thirty-two hours, without providing any facilities to feed and water them; that said sheep were confined in the cars of appellant without food or water for a period of seventy-two hours, by reason of which a large number of lambs died; that the others shrank in weight; that all that did not die were by such negligent delay in transportation affected thereby; and that respondent was compelled to and did sell them for 50 cents on the hundredweight less than they would have sold for if they had been promptly and seasonably transported and delivered at the place of destination. In view of the errors assigned, the pleadings need not be further noticed, except in the following particular: In both the first and amended complaints,

the respondent alleged the destination of the sheep to have been Omaha, Nebraska, but in the second amended complaint alleged the destination as Chicago, Illinois. This amendment was allowed by the court upon due notice and argument and a long time prior to the trial of the cause, but the same was allowed over appellant's objection and exception. The cause was, by the consent of the parties, tried to the court without a jury, and the court specifically found that the death of the lambs, the shrinkage in weight, and the loss in price, as alleged by respondent, were all due to the negligence of appellant in delaying the sheep at Schuyler, Nebraska, for thirty-two hours, and in not providing facilities for food and water for the sheep for a period of seventy-two hours,

time when due by the terms of the agreement, or for neglect to pay a debt after a special demand."

In an action for work and labor, interest is due from the time of demand. *Berner v. Bagnell*, 20 Mo. App. 543.

In Wisconsin there seems to have been a conflict of authority and a difference in the application of the rule as to interest in actions for unliquidated demands. But all the cases were reviewed in *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327 (an action on a contract), and the New York rule was adopted, and it was held that if there was a reasonably certain standard of measurement by the correct application of which one could ascertain the amount he owed, he should pay interest, and that a demand was a proper time to start interest.

So in an action for services, it was held that interest should be allowed from the date of demand. *Farr v. Semple*, 81 Wis. 230, 51 N. W. 319.

In other cases, interest was allowed from the commencement of the action.

In an action of assumpsit for work and labor performed, it was held that the plaintiff was entitled to interest from the commencement of the suit. *Goddard v. Foster*, 17 Wall. 123, 21 L. ed. 589. This was an action by an agent, selling cargoes and refitting vessels, for his share of the profits and for his agreed compensation.

And in an action on a bond conditioned to pay for labor and material furnished in the erection of a lighthouse, it was claimed that a party was not entitled to interest on unliquidated claims until after demand. It was held that the service of the summons and complaint was sufficient demand to set the interest running. *Dwyer v. United States*, 35 C. C. A. 488, 93 Fed. 616.

In *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063, an action for services, it was held that the commencement of a suit was equivalent to a demand, and after the institution of suit, in the absence of any averments in the complaint as to the date when payment was demanded, the debt would draw interest at the legal rate.

In an action for services rendered, where 28 L.R.A. (N.S.)

the amount was unliquidated, plaintiff was allowed interest from the commencement of the action. *Mercer v. Vose*, 67 N. Y. 56; *McCollum v. Seward*, 62 N. Y. 316.

In an action on disputed accounts for attorneys' services, interest was limited to the date of the commencement of the action. *Hand v. Church*, 39 Hun, 303.

In *Adams v. Ft. Plain Bank*, 36 N. Y. 255, an action for professional services, it was held that interest should be allowed. The court said: "The principle which governs the allowance of interest was clearly enunciated in *Van Rensselaer v. Jewett*, supra, that whenever a debtor is in default for not paying money in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him, and just indemnity, though it may sometimes be more, never can be less, than the specified amount of money, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought, in all such cases, to recover interest in addition to the debt, by way of damages."

In an action to set aside as fraudulent a preferential conveyance given partly in consideration of several years' labor by the grantor's son, and partly for future support, it was held that the grantee had a claim against the estate for the amount due for services, but that the demand being unliquidated, interest should not have been allowed prior to the conveyance. *Robinson v. Stewart*, 10 N. Y. 189.

In *Yates v. Shepardson*, 39 Wis. 173, in a suit for professional services that were disputed, it was held that interest ran from the commencement of the suit. There was no evidence of an earlier demand.

An uncertain claim for services rendered, that was denied and contested, is not entitled to interest until from and after the commencement of the suit. *Tucker v. Grover*, 60 Wis. 240, 19 N. W. 62.

In other actions for services it has been held that the plaintiff was entitled to interest from the time the balance was due.

Thus, in assumpsit on *quantum meruit*

and in confining them in cars for that length of time without food and water. The court also found the loss and damage to respondent for each item separately; that is, for loss by death, by shrinkage in weight, and for loss in price by reason of the condition of the sheep, caused by the negligent delay in transportation and in not providing facilities to feed and water them. On the whole amount of damages as found, the court allowed legal interest, as appears from the findings, from the date on which respondent made demand on appellant for damages for the injury and loss. It is not very clear, however, whether the court intended to allow interest from the date the sheep were delivered at Chicago, the place of destination, or from the date of demand

by respondent. In our view, for the purposes of this decision, it makes no difference from what date the court computed interest, because the date from which it was computed, as appears from the record, was subsequent to the date of delivery of the sheep at their destination. The court entered judgment for the amount found as damages, with interest thereon, as aforesaid, against appellant, and hence this appeal.

There are but two assignments of error argued; indeed, in the state of the record, no other assignment could be reviewed by this court. The first error assigned and argued is the one that the court erred in permitting the second amendment of the complaint, changing the place of destination of the shipment from Omaha to Chicago. This sec-

for services extending through years, interest is properly allowed by the referee by computing the balance due at the end of each year, and allowing interest on such balance. *Tucker v. Preston*, 60 Vt. 473, 11 Atl. 726.

And in assumpsit interest is proper upon a balance due for work and labor. *Baker v. Central Vermont R. Co.* 56 Vt. 302. The court said: "Where the claim in suit, in actions *ex contractu*, is unliquidated, interest is always given upon the sum found due, from the time the demand was payable. It is said that interest is allowed as damages for the detention of the debt; but the giving of such damages is not within the discretion of either court or jury; it is the right of the party, after establishing a contract demand, to have interest added from its maturity in all cases, including those where the contract is silent on the subject. Whenever a debtor neglects to pay, after it is his duty to pay, interest is recoverable; and the debtor is not relieved from its payment, upon what is really due, by showing that the creditor made too large a demand upon him."

In an action for work and labor for sawing logs, the defendants claimed damages for delay, and it was held that the damages might be measured by the rate of interest on the value of the logs for the period of delay, if the value of the logs had not changed. *Grosvenor v. Ellis*, 44 Mich. 452, 7 N. W. 59. The court said: "It is true that, as to this last item, the defendants were not entitled to interest as such, but the circumstances may have been such that the rate of interest constituted a very fair measure of the damages actually suffered. Suppose, for example, the defendants by the delay were deprived for a year of the opportunity of putting their lumber upon the market, as they intended and desired, and in the meantime the market price remained stationary; nothing could be nearer exact justice than to award damages equivalent to the lawful interest."

And in an action for work and labor, interest should be allowed from the date on 28 L.R.A. (N.S.)

which the work is completed. *Sullivan v. Nicoulin*, 113 Iowa, 76, 84 N. W. 978.

And in an action for wages, it was held that although interest was not expressly claimed, the jury could allow interest from the time the wages became due under the contract, where the aggregate of the verdict was less than the amount sued for. *Ansley v. Jordan*, 61 Ga. 482.

In an action of assumpsit for services, interest could be allowed. *Still v. Hall*, 20 Wend. 51. The court said: "The referees were correct, therefore, in allowing it, unless the principal sum stood open for liquidation, by the testimony offered in abatement. If so, and damages had been proved and deducted, interest should not have made a part of the balance found. The principal would have stood in the light of an uncertain demand, to be settled by process of law. On such demands interest is not allowed."

In *McCormack v. Lynch*, 69 Mo. App. 524, which was action for work and labor, where the amount of damages was fixed, and the court properly directed interest to be added, the court said: "The general rule undoubtedly is that interest is not recoverable on unliquidated damages or for an uncertain demand. *Dozier v. Jerman*, 30 Mo. 216. But under the evidence we think it cannot be fairly said that the plaintiff's claim for damages (if he had any at all) was unliquidated or uncertain."

Marsh v. Fraser, 37 Wis. 152, was a suit on *quantum meruit* for labor and services in moving a building, with no time of payment fixed, and no evidence of demand. For these reasons interest from the time of performance was held erroneous.

In an action on an unliquidated account for work, labor, and services, where no demand was made before suit was brought, it was held in *Doyle v. St. James Church*, 7 Wend. 178, that interest should not be allowed.

Where the amount due cannot be readily ascertained, the rule is that interest will not be allowed.

This was held in an action for work and labor, where both parties had broken the

ond amendment may have been caused by the statement contained in the appellant's answer to the first amended complaint, wherein it denied that the destination of the sheep was Omaha, and alleged that the destination was in fact Chicago, not Omaha. And it may have been due to the fact that the plaintiff alleged Omaha in his first complaint, because that was the end of appellant's line of road. The change made by the amendment was not a change or departure from the original cause of action. *Casady v. Casady*, 31 Utah, 394, 88 Pac. 32. The delict of the appellant—the cause of damages and the amount thereof—was alleged precisely the same in all the complaints. Neither could the appellant have been misled thereby, as appears from the

answer itself. Moreover, the court confined the damages strictly to the injury and consequent loss occasioned by the neglect of appellant on its own line of road, and appellant was thus not prejudiced by the amendment. The contention of appellant, we think, is answered in this respect in the case of *Missouri, K. & T. R. Co. v. Truskett*, 2 Ind. Terr. 633, 53 S. W. 444. This assignment, therefore, cannot be sustained.

The next and only other assignment of error relates to the allowance of interest by the court on the amount of damages found to have been sustained by the respondent. Appellant asserts that, this being an action for unliquidated damages sounding in tort, therefore interest cannot legally be allowed until the loss or damage

contract, and the quantity of work performed and quantity of material furnished and prices could not be readily ascertained by defendant, and the claims were unliquidated. *Delafeld v. Westfield*, 41 App. Div. 24, 58 N. Y. Supp. 277, affirmed in 169 N. Y. 582, 62 N. E. 1095.

And in an action to enforce a mechanics' lien, and a counterclaim for damages, where the court was not able to ascertain the amount, and the claim for extra work was disputed. *Excelsior Terra Cotta Co. v. Harde*, 181 N. Y. 11, 106 Am. St. Rep. 493, 73 N. E. 494, following *Delafeld v. Westfield*, supra.

And in an action on an unliquidated claim against an estate for nursing, where there was no agreement as to any scale of prices. *DeWitt v. DeWitt*, 46 Hun, 258.

So, in an action on an unliquidated claim for work, labor, and services as an attorney. *Gallup v. Perue*, 10 Hun, 525. The court said: "The services were all performed under one retainer, but the demand for the services remained unliquidated, to be determined on proof of value, as no rate of compensation had been agreed upon between the parties. The statute fee bill, although evidence bearing on the question, does not determine the value and amount as between attorney and client."

And in an action where a claim for board and lodging was unliquidated and there was no way of determining the price or value. *Holmes v. Rankin*, 17 Barb. 454.

In an action of mandamus to compel a board of supervisors to allow a claim of an attorney for services rendered to excise commissioners, it was held that the relator was not entitled to interest, as the demand had never been adjusted, and there was no proof to establish a custom to charge interest, which was known to both parties. *People ex rel. Johnson v. Delaware*, 9 Abb. Pr. N. S. 408.

On a claim against an estate for services, where no price was agreed on for wages, and the amount was unliquidated, no interest was recoverable until the amount of the claim was ascertained. *Pursell v. Fry*, 19 Hun, 595; *Smith v. Velie*, 60 N. Y. 100, 28 L.R.A. (N.S.)

In an action of assumpsit for services where the account was disputed, interest was not allowed. *Griggs v. Ganford*, 50 Ill. App. 172.

In an action to recover the value of services, the value of which was not susceptible of ascertainment by computation, plaintiff was not entitled to interest prior to the verdict or judgment. *Swinerton v. Argonaut Land & Development Co.* 112 Cal. 375, 44 Pac. 719.

And where the amount of services and value could only be ascertained by evidence in court, and not by computation, the plaintiff was not entitled to interest prior to the verdict. *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Swinerton v. Argonaut Land & Development Co.* supra.

In an action for services rendered, where the amount was in dispute and unliquidated, and there was no express agreement to pay interest, it was not allowed. *Hawley v. Dawson*, 16 Or. 344, 18 Pac. 592.

And where an action was brought to recover for the value of material and labor furnished, and the sum owing was uncertain and unascertainable by computation at the time of the commencement of the action, and it depended not only upon what was found to be the reasonable value of the material and services, but also on the amount which ought to be deducted, and this was uncertain, interest was not allowed. *Stephens v. Phoenix Bridge Co.* 71 C. C. A. 374, 139 Fed. 248.

An unliquidated claim against the state for services as attorney does not bear interest. *State ex rel. Sloan v. Warner*, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255. This was on the ground that the amount due for services would depend on proof of value, and this would be a question for a jury.

And where plaintiff in assumpsit demanded more than his services were worth, interest was allowed only from the time of the verdict. *Shipman v. State*, 44 Wis. 458. The court said: "The better rule of law is, that when the right of the party to recover his compensation under the contract is doubtful, and is contested on reasonable grounds, and the amount due him requires to be adjust-

is ascertained at the trial. It is further contended that such is the law of this state, as appears from the decisions of this court. Before referring to our own decisions upon this question, we shall examine the question in the light of the authorities. While it is true that this is an action for a tort, and that the damages were unliquidated, the cause of action, nevertheless, arose out of a contract for carriage; that is, the reciprocal rights and duties arising out of the relation of carrier and shipper arose by virtue of a contract. Both parties insist on this in their pleadings, and such, in the nature of things, must be so. But, since appellant acted in the capacity of a common carrier, its duties and respondent's rights were governed by law, and, as there is no question present-

ed for review in respect to the modification of the law by the contract, we must treat this case, for the purposes of this decision, upon the law applicable to a common carrier of live stock, regardless of any special contract. In view of the law, therefore, applicable to common carriers, where, through their negligence, a shipper suffers injury and damages to his property while in transit, or for negligent delay in transportation and delivering the same at the place of destination, what is the prevailing rule as to the amount of damages and the allowance of interest?

In the case of *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. at page 622, 37 L. ed. 306, 13 Sup. Ct. Rep. 456, the United States Supreme Court, in a case for injury to live

ed by proceedings in the suit, interest is only recoverable after the right of the party to recover, and the amount of the recovery, have been determined."

In assumpsit on a contract to haul ore to be reduced, where the balance was uncertain, interest could not be collected. *Vietti v. Nesbitt*, 22 Nev. 390, 41 Pac. 151. The court said: "Although interest is frequently allowed in actions involving torts to property, it is simply by way of damages, and in actions where the amount of damages is more or less in the discretion of the court or jury. In such cases, in the absence of special circumstances of fraud or oppression, the legal rate of interest from the time of the commission of the wrong is a safe and uniform measure of damages. *Rensselaer Glass Factory v. Reid*, 5 Cow. 609. But this is not that kind of a case, and interest was not included as a part of the plaintiff's damages, but as an incident to the amount due him under the contract, and allowed as a matter of law. As such, it does not come within the terms of our statute (Gen. Stat. § 4903, as amended, Stat. 1887, p. 82), and consequently was improper."

In other cases interest was denied.

On a *quantum meruit* for a machine constructed by plaintiff, interest as such could not be given. *Dotterer v. Bennett*, 5 Rich. L. 298. The court said: "The jury could have measured the damages by considering interest, and have given a verdict in the aggregate."

And where the cause of action was an unliquidated account, it was held that unless interest or damages were claimed, no judgment should be rendered for either. *Adams Exp. Co. v. Milton*, 11 Bush, 49. This was an action for work and labor.

In an action on an account for work and labor, it was held that interest could not be recovered on an open, running account for work and labor, goods sold, and the like, unless there was some contract to pay interest, or usage from which a contract might be inferred, or where the defendant was a wrongdoer in acquiring or detaining money. *Goff v. Rehoboth*, 2 Cush. 475.

And on a *quantum meruit* for services, 28 L.R.A. (N.S.)

interest was not allowed. *Murray v. Ware*, 1 Bibb, 325, 4 Am. Dec. 637.

II. Bailment.

A bailee will be required to pay interest where he refuses to deliver property on demand. But a stakeholder is not liable for interest under the Colorado statute, if there has not been unreasonable delay, and interest is not allowed where the amount is disputed, and not easily ascertained.

So, where a bank agreed to withhold money payable to a contractor, and to pay the same to a materialman, but withheld it, and failed to pay the money into court, the bank was held liable for interest. *Ronsael v. Mathews*, 62 App. Div. 1, 70 N. Y. Supp. 886, affirmed in 171 N. Y. 634, 63 N. E. 1122.

In an action against a factor for goods consigned, the plaintiff was permitted to recover the proceeds and interest allowed at the place of delivery. *Cartwright v. Greene*, 47 Barb. 9.

In an action against a warehouseman for failure to deliver upon demand goods deposited, the owner was given interest from the time of demand and refusal to deliver. *Schwerin v. McKie*, 51 N. Y. 180, 10 Am. Rep. 581; *Garrard v. Dawson*, 49 Ga. 434.

In an action against bailees for loss of coupon bonds, payable in gold, the measure of damages was the value of the bonds at the time demand was made for them, and the value of the gold interest thereon, from the day when it was payable, with interest on the several instalments. *Maury v. Coyle*, 34 Md. 235.

And in an action against the holder of collateral, where the proceeds of the security equaled or exceeded the amount of the debt, it was held, in regard to damages and interest, that where money was payable on demand, and there was no contract or usage requiring demand, and the defendant was not a wrongdoer in acquiring or detaining money, interest was to be computed from the service of the writ; and as the service of the writ was the only demand made, the jury were rightly instructed to compute in-

stock while in transit, states the general rule as to the measure of damages in the following language: "It is well settled as a general rule that the measure of damages in the case of a common carrier is the value of the goods intrusted to it for transportation, with interest from the time when they ought to have been delivered,"—citing, among other authorities, Hutchinson on Carriers, 2d ed. § 771, and 1 Sutherland on Damages, 629. And the court then proceeds further: "But when the matter appears to have been regulated by statute in the state, and the statute has been interpreted by its highest court, the regulation of the statute will be followed in the courts of the United States." This was done in that case, and interest was not allowed only because the

supreme court of Missouri, under the statute of that state, held that interest is not permitted in case of unliquidated damages, except in special cases. The rule is also stated by the same court, in the case of *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. Rep. 566, where, in the syllabus, it is said: "The measure of damages in an action against a common carrier for loss of goods in transit is their value at the point of destination, with legal interest."

In the case of *Wilson v. Troy*, 135 N. Y. 96, 18 L.R.A. 449, 31 Am. St. Rep. 817, 32 N. E. 44, the court of appeals of New York, in discussing the question now under consideration, at page 104 of 135 N. Y., says: "It is difficult to perceive any sound

terest from that time. *Hunt v. Nevers*, 15 Pick. 500, 26 Am. Dec. 616.

But in an action against a stakeholder for refusing to pay over money held under a bet, it was held that, in the absence of an agreement, no interest could be recovered, except in the cases provided for by statute, which authorizes interest where money is withheld by an unreasonable and vexatious delay. It was held that mere delay on the part of the defendant to pay the money on demand was not sufficient to authorize interest under this clause. *Corson v. Neatheny*, 9 Colo. 212, 11 Pac. 82.

In an action against a cold storage plant for injury to fruit, the amount of the claim must be ascertainable by mere computation in order to recover interest. *Shafer Fruit & Cold Storage Co. v. E. M. Upton Cold Storage Co.* 133 App. Div. 796, 118 N. Y. Supp. 8. The court said: "We appreciate that there has been a departure from the former rule that interest is not allowable on an unliquidated demand."

In an action against a consignee on account of a consignment, interest will not be allowed on an unliquidated balance that is disputed. *M'Connico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec. 540.

III. Admiralty and collision.

The general rule in admiralty and collision cases is that interest will be allowed on the damages from the date of collision. In some cases this is said to be within the discretion of the court or jury. In cases depending on a stipulation bond there seems to be a difference in the cases, owing to the terms of the stipulation.

In a libel for a collision between steamboats, where damages for detention were allowed, interest was allowed thereon from the time of filing the libel. *The Natchez*, 24 C. C. A. 49, 41 U. S. App. 708, 78 Fed. 183. The court said: "It has been held by this court in *New Orleans & C. R. Co. v. Schneider*, 8 C. C. A. 571, 13 U. S. App. 655, 60 Fed. 210, that a verdict assessing unliquidated damages and allowing interest from judicial demand is sufficiently specific, where it

appears clear such interest is allowed as part of the damages." Interest on the damages for two days' detention was in the nature of, and was intended as, damages.

And where goods were lost or destroyed on the high sea by reason of the fault of those in charge of the vessel, the damages were the value of the goods at the place of shipment, with charges for lading, insurance, and transportation, and interest. *The Scotland (National Steam Nav. Co. v. Dyer)* 105 U. S. 24, 26 L. ed. 1001.

In 118 U. S. 507, 30 L. ed. 153, 6 Sup. Ct. Rep. 1174, on a subsequent trial, the court said: "The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or jury."

And in an action for a cargo lost by a collision, the libellant was allowed the value at the time and place of shipment, with interest from the time of collision. *The Mary J. Vaughan*, 2 Ben. 47, Fed. Cas. No. 9,217.

And in an action for damages by collision, where the libellant, the owner of one vessel, obtained damages, he was entitled to interest from the date of collision. *The Morning Star*, 4 Biss. 62, Fed. Cas. No. 9,817.

In admiralty, on a libel for collision, interest was allowed on the demurrage. *Paul v. The M. Kalbfleisch*, 59 Fed. 198.

In a libel in admiralty for a collision, it was held that, in computing the damages, the commissioner would take, as those suffered by the libellant, the value of the vessel and the net pending freight, with interest, both to be computed by the rule given in *Marsden on Collisions*, 3d ed. p. 111. *The Rabboni*, 53 Fed. 952.

In an action for damages for sinking a canal boat by collision, the measure of damages was held to be the value of the use, and interest on the costs of repairs. *Whitehall Transp. Co. v. New Jersey S. B. Co.* 51 N. Y. 369.

So, in an action for damages for collision by a steamer, interest was allowed on the value

distinction between a case where the defendant converts or carries away the plaintiff's horse and a case where, through negligence on his part, the horse is injured so as to be valueless. There is no reason apparent for a different rule of damages in the one case than in the other." Quite true that, notwithstanding the court here clearly points out that there can be no distinction in reason, the courts of New York, in deference to early decisions, still cling to the old theory that in certain cases it is for the jury to say whether interest shall be allowed or not. The question, however, is not relegated to the jury in cases like the one at bar, even in New York, as is manifest from the case of *Dana v. Fied-*

ler, 12 N. Y. 40-50, 62 Am. Dec. 130. The following cases are all cases of injury to or destruction of personal property or live stock while in transit, and in all of them the measure of damages is stated to be the amount of loss, with legal interest from the time of delivery or loss: *Gulf, C. & S. F. R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716; *Houston & T. C. R. Co. v. Jackson*, 62 Tex. 209; *Southern P. R. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023; *Mis-souri, K. & T. R. Co. v. Truskett*, supra; *St. Louis, I. M. & S. R. Co. v. Phelps*, 46 Ark. 485; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land Transp. & Mfg. Co.* 27 Fla. 1, 157, 17 L.R.A. 33, 9 So. 661; *Erie R. Co. v. Lockwood*, 28 Ohio St. 358; *Ill-*

of the property destroyed. *Parrott v. Knickerbocker Ice Co.* 46 N. Y. 361. The court said: "In cases of trover, replevin, and trespass interest on the value of property unlawfully taken or converted is allowed by way of damages, for the purpose of complete indemnity of the party injured; and it is difficult to see why, on the same principle, interest on the value of property lost or destroyed by the wrongful or negligent act of another may not be included in the damages."

And in an action for damages resulting from collision of vessels, the cost of repairs, and rental value, and interest on the same, were allowed as damages. *Mailler v. Express Propeller Line*, 61 N. Y. 312.

Where a horse was injured in a collision of canal boats, plaintiff was allowed interest on the value of his horse. *Edwards v. Beebe*, 48 Barb. 106. The court said: "It is questionable whether the referee was technically right in saying that the law gives interest in such cases, as he seems to say in his report. But it is usual, and may be permitted, to give interest by way of damages in such a case, although I think it rests in the discretion of the jury or referee."

In libel *in rem* for damages in collision, interest was allowed in *Balano v. The Illinois*, 84 Fed. 697. This was not on the ground of strict interest (which would be due only for the withholding of a debt), but because the compensation for the permanent injury to the vessel was due as of the time when it was inflicted; and the addition of what is called interest was justly added for withholding it.

It was also allowed in *The Bulgaria*, 83 Fed. 312.

In an action in admiralty for a collision, it was held that the claimant was entitled to the amount claimed for demurrage, with interest. *New Haven S. B. Co. v. The Mayor*, 36 Fed. 716.

And in an action for a collision and damages caused to a boat, the damages allowed were such sum as the plaintiff paid for raising and repairing his boat, with interest thereon to the time of the verdict. *Atchison v. The Dr. Franklin*, 14 Mo. 63. 28 L.R.A. (N.S.)

Where both vessels were in fault, and the loss of one, with interest from the date of collision to the date of decree, exceeded the loss of the other, with like interest, by a sum one half of which was greater than the amount of the bond given to answer the decree, with interest from the date of the decree, it was held proper to award to the first as damages the amount of the bond, with interest. *The Manitoba (Beatty v. Hanna)* 122 U. S. 97, 30 L. ed. 1095, 7 Sup. Ct. Rep. 1158. The rule applied was that the damages done to both vessels should be added together in one sum and equally divided, and a decree be pronounced in favor of the owner of the vessel which suffered most, against those of the vessel which suffered least, for one half of the difference between the amounts of their respective losses.

In *The Wanata*, 95 U. S. 600, 24 L. ed. 461, a collision case, on appeal to the circuit court, a decree was rendered on the stipulation bond for value, which was \$16,000, and costs, with interest to the date of the decree in the district court, amounting to \$323, and costs in the circuit court, including interest to date on damages awarded in the district court, amounting to \$1,085,—in all, \$17,407. This was held proper, as the amount of the stipulation for value was decreed to be paid libellants for losses, and the stipulation for costs was decreed to be paid libellants in part discharge of costs, and the balance of the costs and the accrued interest from the decree of the district court to the date of the decree of the circuit court was to be paid by the sureties in the appeal bond.

This was on the ground that costs and interest were to be given in such a case, not as indemnity for the loss set forth in the libel, but for the reason that the loss ascertained in the decree of the district court was not paid at the proper time (following *The Northumbria*, L. R. 3 Adm. & Eccl. 6; *Ives v. Merchants' Bank*, 12 How. 159, 13 L. ed. 936; *The Diana*, 3 Wheat. 58, 4 L. ed. 333; *Sneed v. Wister*, 8 Wheat. 690, 5 L. ed. 717; 5 Stat. at L. 518).

But in *The Ann Caroline*, 2 Wall. 538, 17 L. ed. 833, where a stipulation was made to obtain the release of a vessel attached un-

nois C. R. Co. v. Haynes, 64 Miss. 604, 1 So. 765.

If we assume the case at bar to be one commonly called a case of pure tort for injury to or destruction of personal property through ordinary negligence, still the respondent was entitled to interest according to the great weight of authority. In 22 Cyc. Law & Proc. p. 1500, the following is stated to be the law upon the subject of allowing interest for torts to property: "While it has been laid down in many cases that interest will not be allowed on damages recovered for torts to property unless defendant has derived some benefit from his tort, or has been guilty of gross negligence, the

general rule, supported by the great weight of authority, is that, in cases of torts to property, interest on the damages may be allowed as a part of the damages and as an approximately uniform measure of compensation." This text is amply sustained by the following authorities: Woodland v. Union P. R. Co. 27 Utah, 543, 26 Pac. 298; Rhemke v. Clinton, 2 Utah, 230; Varco v. Chicago, M. & St. P. R. Co. 30 Minn. 18, 13 N. W. 921; Sabine & E. T. R. Co. v. Jonchimi, 58 Tex. 456; Fremont, E. & M. Valley R. Co. v. Marley, 25 Neb. 138, 13 Am. St. Rep. 482, 40 N. W. 948; Union P. R. Co. v. Ray, 46 Neb. 750, 65 N. W. 773; Kendrick v. Towle, 60 Mich.

der a libel for collision, it was held that the libellant was not entitled to interest as against the stipulators for value.

In *The Belle*, 5 Ben. 57, Fed. Cas. No. 1,270, it was held that in the case of *The Ann Caroline*, supra, the court failed to notice that the stipulation was also under rule 71.

In an action for damages for a collision, interest was allowed only from the date of decree, in *Kerr v. The José E. More*, 37 Fed. 123.

Where a libel was filed and a stipulation given for the discharge of a vessel, fixing the value at \$1,750, and the stipulation was entered into pursuant to the rule and practice of the court, and a decree was entered against the vessel for \$3,707, it was held that the libellant was entitled to recover interest for the \$1,750 from the date of the stipulation, under district court rule 71. *The Belle*, 5 Ben. 57, Fed. Cas. No. 1,270.

In admiralty, where a bond was taken for the appraised value of the vessel, under admiralty rule 54, it was held that the court could require that the bond should provide for interest. *Re Harris*, 6 C. C. A. 320, 14 U. S. App. 506, 57 Fed. 243.

In *Re Harris*, supra, it was said: "Appellants contend that the district court erred in requiring a stipulation for interest from the date of the bond upon the appraised value of ship and freight, and insist that, in proceedings under the act of 1851, interest upon such value can be exacted only from the date of the final decree. Several cases are cited in support of this contention (*The Ann Caroline*; *The Wanata*; *The Manitoba*; and *Kerr v. The José E. More*,—supra); but they are not controlling, because in no one of them did the bond provide for interest, and the obligors in a bond conditioned only to pay the stipulation value upon decree could not be liable for interest until the decree fixed their liability."

And in admiralty, where the owners were entitled to a discharge on turning over the vessel, or paying her value into court, it was held that they should provide for the payment of interest on her value until such time as the money is paid, if they prefer to give bond, instead of paying it at present. *The Battler*, 58 Fed. 704.
28 L.R.A. (N.S.)

In a libel on a bottomry bond it was held that the libellants were entitled to ordinary interest on the amount loaned, at least, from the commencement of the suit. *The Grapeshot*, 2 Woods, 42, Fed. Cas. No. 5,703. The court said: "But according to the American authorities, interest will be allowed after a demand of payment, even of an unsettled claim, for goods sold and delivered or services rendered, from the time of the demand; and the presentment of an account or commencement of a suit is sufficient demand on which to found and from which to date a claim of interest."

And in a suit *in personam* in admiralty for a box of gold sovereigns that was abandoned with the vessel to the custody of wreckers, damages were allowed on the value at Key West, where part of the cargo was saved, with interest on the value from the time when proceedings for salvage were instituted at Key West. *King v. Shepherd*, 3 Story, 349, Fed. Cas. No. 7,804.

Where a vessel was seized as trading contrary to the nonintercourse act of Feb. 27, 1800, it was held that the claimant was entitled to the return of the vessel and damages, and that the commissioner should be instructed to take the actual prime cost of the cargo and vessel, with interest thereon, including insurance. *Murray v. The Charming Betsy*, 2 Cranch, 64, 2 L. ed. 208.

In *Pacific Ins. Co. v. Conard*, Baldw. 138, Fed. Cas. No. 10,647, it was said that in marine trespass the Supreme Court laid down the following rule of damages in *Murray v. The Charming Betsy*, 2 Cranch, 124, 2 L. ed. 228: the prime cost of the cargo, interest, insurance, and expenses; in *The Anna Maria*, 2 Wheat. 335, 4 L. ed. 253: the prime cost of the cargo, all charges, insurance, and interest; in *The Amiable Nancy*, 3 Wheat. 560, 4 L. ed. 459: the prime cost or value of the property at the time of loss, or the diminution of the value, with interest; in *The Lively*, 1 Gall. 315, Fed. Cas. No. 8,403: the prime cost and interest; in *The Apollon*, 9 Wheat. 376, 6 L. ed. 111: where the vessel and cargo were lost, their actual value, with interest from the trespass.

And where a vessel was wrongfully seized, it was held that the value of the property

363, 1 Am. St. Rep. 526, 27 N. W. 567; *Burdick v. Chicago, M. & St. P. R. Co.* 87 Iowa, 384, 54 N. W. 439; *Johnson v. Chicago & N. W. R. Co.* 77 Iowa, 666, 42 N. W. 512; *Dean v. Chicago & N. W. R. Co.* 43 Wis. 305; *Georgia P. R. Co. v. Fullerton*, 79 Ala. 298; *Frazer v. Bigelow Carpet Co.* 141 Mass. 126, 4 N. E. 620; *Regan v. New York & N. E. R. Co.* 60 Conn. 124, 25 Am. St. Rep. 306, 22 Atl. 503; *Schmidt v. Nunan*, 63 Cal. 371.

While the foregoing by no means constitute all the authorities that could be cited upon the proposition, they are quite sufficient to show that the rule has become general, and that the allowance of interest in cases of torts to property is in harmony with the trend of modern authority. It is

quite true that there are cases against this rule, but they are not, as we conceive, based on either good reason or good logic. The rule adhered to in the Kansas and other like cases, as instances where interest is allowed if it appears that the person committing the wrong has to some extent been benefited from it, is, to our minds, manifestly unjust. In such cases interest is not allowed as compensation at all, but upon the sole ground that the person in the wrong must yield up the benefits derived by him to the one to whom they belong by reason of ownership. It is a matter of simple restoration of what has been withheld without adding anything for the use. It is only a mild way of offering a premium to withhold pay in such cases. Is there any reason why a person

lost, and, in case of injury, the diminution in value by reason of the injury, with interest thereon, was the true measure for estimating damages. *The Amiable Nancy*, 3 Wheat. 546, 4 L. ed. 450.

In a suit by an owner of captured property, lost through negligence of the captors, for compensation in damages, it was held that the damages were the value of the vessel and the prime cost of the cargo, with all charges; and the premium of insurance, where it was paid, with interest, was allowed, and out of this to be deducted the amount of the proceeds of the sale of the vessel and cargo, unless the libellants shall choose to abandon those proceeds to the defendant. *The Anna Maria*, 2 Wheat. 327, 4 L. ed. 252.

In *Holmes v. Barclay*, 4 La. Ann. 63, which was an action for damages caused by a steamboat colliding with a warehouse and a steam mill, plaintiff was allowed to recover the sum of \$1,600, with interest from the 28th of March, 1845. There was nothing to show why the court fixed the date in 1845.

In some cases it was held that interest is discretionary with the court or jury.

In an action for a collision, it was held that interest on the damages allowed was proper. It was claimed that interest was discretionary with the jury. *The America*, 11 Blatchf. 485, Fed. Cas. No. 285. The court said: "The proposition is not unqualifiedly true, without exception. . . . But, if the allowance of interest rests in discretion, still, the indemnity of the party for injury from a collision occurring through the fault of another vessel should be the object of the court in the allowance of damages. In this view, such allowance was, I think, proper. It is, in such case, not allowed as punishment. It is not like the allowance of punitive damages in actions of slander, assault and battery, and like cases. It gives indemnity only."

Where the justices were equally divided, it was held that interest would not be allowed, because that would be a new decree in admiralty on error. *Hemmenway v. Fisher*, 20 How. 258, 15 L. ed. 799. It was further (L.R.A. (N.S.)

ther held that admiralty cases were not embraced in the 62d rule. The court said: "No rule, therefore, fixing any certain rate of interest upon decrees in admiralty, whenever the decree is affirmed, could be adopted with justice to the parties. And a discretionary power is reserved to add to the damages awarded by the court below further damages by way of interest, in cases where, in the opinion of this court, the appellee, upon the proofs, is justly entitled to such additional damages. But this allowance of interest is not an incident to the affirmance affixed to it by law or by a rule of court. If given by this court, it must be in the exercise of its discretionary power, and, *pro tanto*, is a new judgment."

In *Williamson v. Barrett*, 13 How. 101, 14 L. ed. 68, which was an action of trespass for injury from a collision between boats, it was held that the proper measure of damages was a sum sufficient to raise the sunken boat, to repair her, and compensate the owner for the loss of her use; that the jury were not bound to give the interest claimed, but should give such damages as were just and equitable. The dissenting opinion held that the rule should be full damages for the injury at the time and place when it occurred, with legal interest on the amount.

Whether interest should be allowed by the court of first instance or by the appellate court in admiralty, on the amount of damages awarded in a collision case, was held to be a matter in the discretion of the court; and the court, on appeal, hearing the case *de novo*, excluded the item of interest, both vessels being in fault. *The North Star*, 10 C. C. A. 262, 22 U. S. App. 242, 62 Fed. 71.

In an action for damages for collision by steamboats, interest was denied. *Ormsby v. Johnson*, 1 B. Mon. 80.

But in *Schulte v. Louisville & N. R. Co.* 128 Ky. 627, 108 S. W. 941, *Ormsby v. Johnson*, supra, was not followed, the court saying: "The better rule is the one that allows the jury, in their discretion, to award interest in cases of this character."

In a libel for collision, it was held that

sustaining injury and damage to his property from the negligent act of another should not receive just what he has lost as nearly as this may be accomplished in a court of justice? If a person's property is destroyed or damaged, why is he not entitled to be compensated to the full extent of its value in money, so that he may replace the same with other property of a like nature? If, on the day of its injury or destruction, he restores or replaces it with his own money, why is he not entitled to interest on that money to the date of repayment? If he had loaned the money to someone, he certainly would be entitled to interest, and, if he borrowed it from someone, he would likely have to pay interest for its use. By being awarded legal interest, therefore, he

is simply placed in *statu quo*, and nothing short of this is full compensation, and that is just what the law aims to accomplish. Is it an answer to say that the damages are unliquidated, and therefore interest is not to be allowed? This, to our minds, is no reason at all in case of injury to or destruction of property. In all such cases the party sustaining the loss is limited in his recovery to the market or actual value of the property at the time of the injury or destruction. Moreover, he must establish the amount of the loss by some fixed rule or standard, and the evidence must be confined thereto, and either the court or jury must find the value in accordance with the evidence. In the class of cases, therefore, where the damage is complete, and the amount of the loss is

interest on bills incurred for salvage and repairs was a matter of discretion, as the vessel was made more valuable after repairs than she was before collision. There was some doubt whether the entire bill ought to be charged against the respondent, and it was held that interest should be refused. *The Alaska*, 44 Fed. 498. See further, *Actions against a common carrier*, V., *infra*.

IV. Bonds and undertakings.

a. Official bonds.

This note is not intended to include actions on bonds of guardians, administrators, or executors.

The weight of authority seems to be that interest will be allowed although the amount recovered may exceed the penalty of the bond. There are quite a good many cases and some conflict in discussing the question whether or not a recovery can exceed the penalty of the bond, where there was no issue made as to the interest. These cases where interest was not involved are not included in this note. There are some exceptional cases in Missouri and Virginia that refuse all interest where the official did not profit by the wrong.

In an action on a penal bond given by a cashier of a bank, it was held although the bond did not carry interest as in the contract, interest on the amount of the penal sum could be added by way of damages for the detention. *Bank of Brighton v. Smith*, 12 Allen, 243, 90 Am. Dec. 144. In this case the judgment was thereby made to exceed the penalty.

And in an action of debt on a penal bond for the payment of custom duties, it was held that the court should go beyond the penalty and allow interest from the time it became due by the breach, and the judgment was rendered in the amount of the penalty, with interest from the time it became payable. *United States v. Arnold*, 1 Gall. 348, Fed. Cas. No. 14,460.

In an action on a penal bond given by a bank cashier, where he had been guilty of misconduct, and there had been no previous

demand of the penalty or an acknowledgment that the whole was due, it was held that interest could be allowed from the commencement of the suit, but no further. *M'Gill v. Bank of United States*, 12 Wheat. 511, 6 L. ed. 711, affirming 1 Paine, 661, Fed. Cas. No. 920. This was on the ground that it was somewhat analogous to an obligation to pay a certain sum of money on demand; in which case interest accrued only from the commencement of the suit, when no actual demand is shown.

And sureties on a paymaster's bond were held liable over and above the penalty of the bond, in the nature of interest, only for so much as accrued from their nonpayment after notice of the principal's default. *United States v. Hills*, 4 Cliff. 618, Fed. Cas. No. 15,369. In this case the sureties were held liable from the date of the writ.

In *United States v. Curtis*, 100 U. S. 119, 25 L. ed. 571, which was an action on a paymaster's bond, it was held that the sureties were liable for interest from notice of defalcation, which, in this case, was held to be from the time of suit.

In an action on a county treasurer's bond for money converted, it was held that interest could be computed on such funds from the time they should have been accounted for. *Thomassen v. Hall County*, 63 Neb. 777, 57 L.R.A. 303, 89 N. W. 389. The court said: "Under the provisions of § 4, chapter 44, Compiled Statutes 1901, it would seem that interest should be computed from January 4, 1898, when the money became due."

In *Chenango v. Birdsall*, 4 Wend. 453, the sureties on a county treasurer's bond were held liable for interest, as legitimate damages arising from the breach on failure to pay over the money.

The same was held in *Monroe County v. Clark*, 92 N. Y. 391. In this case the sureties were held exonerated from the bounty moneys unaccounted for, by reason of the terms of the bond, but were liable for the balance.

Under Virginia revenue act 1782, Stat. at L. 112, providing that in actions against a public collector for failure to pay over taxes, judgments were to be entered for the prin-

fixed as of a particular time, there is—there can be—no reason why interest should be withheld merely because the damages are unliquidated. There are certain cases of unliquidated damages where interest cannot be allowed. In all personal injury cases, cases of death by wrongful act, libel, slander, false imprisonment, malicious prosecution, assault and battery, and all cases where the damages are incomplete and are peculiarly within the province of the jury to assess at the time of the trial, no interest is permissible. But this is so because the damages are continuing and may even reach beyond the time of trial.

There are also other cases where interest is not allowed, such as where exemplary damages are permitted, where the statute

fixes a penalty or determines the damages to be allowed. Of the latter class of cases, *Oregon Short Line R. Co. v. Jones*, 29 Utah, 147, 80 Pac. 732, is, in part, an illustration. Some courts also seem to make a distinction between gross or wilful negligence and ordinary negligence. In the former, interest is given; in the latter it is withheld. This is arbitrary at best. The loss to the injured person is precisely the same in either case, and he should receive compensation,—no more, no less. There is another class of cases where the matter is relegated to the jury or the court trying the case to allow interest or not, as in their judgment may seem proper, as a part of the damages to be allowed. This rule does not seem to be based upon any sound reason. Moreover, it must

be held erroneous to allow interest also, beginning prior to the judgment. *Gaskins v. Com.* 1 Call (Va.) 194.

In an action on the bond of a judge of probate for conversion of money belonging to a minor, sureties were held liable for the money converted, with interest thereon. *Bradley v. Harden*, 73 Ala. 70.

And in an action for conversion against a constable on a bond, the measure of damages was held to be the value of the goods seized at the time of conversion, with interest from that time to the judgment. *Carlson v. Lannan*, 4 Nev. 156.

But in an action for damages on the official bond of a sheriff for failure to execute a writ, it was held that in such cases, based upon the negligence of the defendant, who was not benefited by reason of the wrong, interest was not allowable. *State ex rel. Planet Property & Financial Co. v. Harrington*, 44 Mo. App. 297. The court said: "The rule which we extract from the adjudications of this state in reference to the recovery of interest as damages in actions of tort is that, where an action *ex delicto* is based upon the simple negligence of the defendant, to whom no pecuniary benefit has or could have accrued by reason of the injury or wrong, interest is not allowable."

And in an action of debt on a sheriff's bond for false return of "no property," it was held that the damages were the amount due on the execution at the return day, but no interest should be allowed. *Gibson v. Governor*, 11 Leigh, 600.

b. Replevin bonds.

The general rule is that in action on replevin bonds, interest will be allowed from the time of breach. There is some conflict of authority as to whether the damages, including interest, may exceed the penalty, Massachusetts and Maine holding the affirmative, on the ground that it is compensation for nonpayment after due; Michigan and Vermont hold contrary.

In a suit on a replevin bond, where the plaintiff had failed to return the property,

and the suit was dismissed, it was held that he would be liable for the value of the property not returned, with interest. *Pace v. Neal*, 92 Ill. App. 410.

And where the plaintiff in replevin, on a judgment of return, failed to return some of the goods, and injured the others, it was held that the measure of damages on his bond was the value of the goods not returned, with interest from the time of replevin, and the deterioration in value of the others, with interest from the date of their return. *Yelton v. Slinkard*, 85 Ind. 190.

And in an action on a replevin bond for failure to return property and for conversion, interest on the value of the property from the date of judgment of return was allowed as damages. *Walls v. Johnson*, 16 Ind. 374. This was under Ind. 2 Rev. Stat. p. 122, authorizing the giving of damages for the detention of property.

And in an action of replevin, the verdict was for defendant, and judgment was rendered against plaintiff and his surety in the bond for the amount thus returned, with interest from the commencement of the action. It was held there was no error in allowing interest on the value of the property from the time it was wrongfully taken by the writ of replevin. *Hurd v. Gallaher*, 14 Iowa, 394.

In debt on a bond to prosecute a suit in replevin, it was held that the measure of plaintiff's damages was the value of the goods replevied, with the damages and costs recovered in the replevin, and interest from the date of judgment in replevin to the time of trial. *Kenney v. Tucker*, 8 Mass. 145.

In an action of debt on a replevin bond, where the defendant confessed to forfeiture, the court said: "That where a replevin suit is tried, the jury are to assess damages for the taking and detention, and such assessment is conclusive of the amount of damages to the time of the verdict, on a subsequent hearing in chancery, upon a forfeiture of the replevin bond. And that where the suit in which the goods were attached has come to judgment during the pendency of the replevin suit, for so long a time as satisfaction of the execution was delayed by

lead to uncertainty, and may tend to favoritism in its application. In one case the jury may allow 20 per cent, in another only 2, and in another none at all, although the cases may be essentially the same. If the law is to be treated as a science, it should be as nearly exact as it can be made, and its operation should be uniform. In those cases the courts hold that, if the amount allowed by the jury in the form of interest makes the damages excessive, then the courts will require a remittitur of the excess or grant a new trial. The whole matter, then, resolves itself into a question of excessive damages. If the amount allowed by the jury is excessive—that is, not supported by the evidence when considered as a whole—in cases where the amount of damage is to

be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, or if the damages allowed are excessive, appearing to have been given under the influence of passion or prejudice, the trial courts should, when a motion for a new trial is made upon that ground, require a remittitur of the excess, or grant a new trial. The power and discretion to do this is expressly vested in the trial courts of this state, and should be exercised whenever it is manifest that justice and right require it; and, unless this appears, the courts should not interfere with the verdict of the jury. When excessive damages are allowed, the case should be treated and corrected as such, and not by this court or any court assuming the power to arbitrarily

the interposition and pendency of the replevin suit, in analogy to the statute, 6 per cent on the penalty of the bond, being 12 per cent on the value of the goods, shall be allowed. For all the rest of the time 6 per cent on the value of the goods shall be assessed as damages for the detention, in analogy to the rules of law in relation to damages for detention of money." *Huggeford v. Ford*, 11 Pick. 223.

So, in *Caldwell v. West*, 21 N. J. L. 411, the damages were held to be the value of the goods, with interest from the judgment of return. The court said: "The charge was right; the judgment below was merely *retorno habendo*, and the damages only nominal (*Gordon v. Williamson*, 20 N. J. L. 79); but from the time of the rendition thereof, the right of recovery was in the defendant, either against the sheriff, for taking insufficient security, or in the name of the sheriff, on the replevin bond; and the value of the goods at the time of the recovery, together with interest thereon from that time, is the proper and reasonable measure of damages."

In *Peacock v. Haney*, 37 N. J. L. 179, the measure of damages was held to be, as a general rule, the value of the goods, and interest thereon from the judgment of the return. The damages must be assessed by a writ of inquiry.

Ky. act 1748 expressly allows interest, and it should be included in a bond for replevying a distress. *McCormick v. Young*, 3 J. J. Marsh. 181.

So, in an action on a replevin bond given to secure rent, it was held that interest should be allowed from the date of the judgment against the principal. *Stevens v. Simmons*, 1 McCord, L. 28.

In *Brainard v. Jones*, 18 N. Y. 35, it was held that the recovery could exceed the penalty so as to include interest. This was on the ground that when the time had come for the surety to discharge his liability, and he neglected or refused to do so, he should compensate the creditor for the delay which he had interposed. The legal measure of this compensation would be interest on the sum which he ought to have paid, from the time when the payment was due from him. 28 L.R.A. (N.S.)

So far as necessary to secure the damages sustained by the obligee, the recovery may go beyond the sum of the penalty by allowing interest on such sum from the date of the breach. *Wyman v. Robinson*, 73 Me. 384, 40 Am. Rep. 360. This was on the ground that it was not any part of the penalty, but as damages for the nonpayment or the detention of the penalty after it became payable and due. The obligee was to have the penalty at a particular and definite time. Immediately upon a breach of the bond the penalty was due him.

A similar ruling was made in *Leighton v. Brown*, 98 Mass. 515. The court said: "Judgment is to be entered in favor of the plaintiff for the penalty of the bond. Gen. Stats. chap. 133, §§ 9, 10. But interest on the penal sum therein named from the date of the breach may be added as damages for the detention, and will form a part of the judgment for the penalty to be rendered both against principal and sureties."

But in *Fraser v. Little*, 13 Mich. 195, 87 Am. Dec. 741, where the judgment against sureties on a replevin bond was the amount of the bond, it was held that no judgment could be recovered beyond the penalty. *Christiancy, J.*, dissenting, said: "Most of the cases which have denied the right to recover beyond the penalty are cases which did not involve this question of interest. I think the weight of American authority is in favor of the allowance. But, however this may be, the rule which allows such interest beyond the penalty, after breach, is the only one to be deduced from all the authorities, English and American, which rest upon any sound and intelligible principle."

And in *Miltimore v. Bottom*, 66 Vt. 168, 28 Atl. 872, a surety was held not liable for interest on the damages in an action on a replevin bond, where the damages amounted to the penalty.

And in an action of debt on a replevin bond, it was held that interest was not recoverable, as the only condition of the bond was to return the goods. *Hart v. Tobias*, 2 Bay, 408. This bond was given to secure a rent debt where the goods were seized under a distress.

withhold interest in all cases of unliquidated damages. General justice is never promoted by an effort to reach it by ignoring sound principles of law in particular cases. Whenever possible, it ought not be left to the mere caprice of either court or jury to either grant or withhold that which is due. A fixed rule, when based on sound principles, is, in most instances, a safer guide than the judgment of a few individuals, however honest or pure their motives.

Counsel for appellant, however, rely on the case of *Lester v. Highland Boy Gold Min. Co.* 27 Utah, 470, 101 Am. St. Rep. 988, 70 Pac. 341, 1 A. & E. Ann. Cas. 761, where it is broadly held by this court that interest is not allowable in cases of tort for unliquidated damages. That case, however, is, as

we have attempted to show, not only against reason, but against the great weight of authority. Moreover, it is against the rule laid down by this court in the cases of *Rhemke v. Clinton* and *Woodland v. Union P. R. Co.* supra. The latter case should have been reported in 7 Utah, but is found in 27 Utah, 543, 26 Pac. 298. The rule, therefore, that we have announced herein, has practically been the rule of this state since the decision in 2 Utah, supra, and that case has been cited by both text writers and courts as placing Utah in the category of states allowing interest, in cases of torts to property, from the time of injury or destruction. In the *Lester Case*, supra, no authority is cited, except the case of *Nichols v. Union P. R. Co.* 7 Utah, 510, 27 Pac. 693.

c. Injunction bonds.

The general rule is that after the dissolution of an injunction, legal interest on the debt or judgment enjoined will be held to be the measure of damages. In *Massachusetts* and *New York* recoveries were allowed although principal and interest exceeded the penalty. The same was held in *Mississippi* in an equity case. But in a law case in the latter state, and in *Tennessee*, the contrary was held. In some cases where the damages could not be computed interest was not allowed.

The confirmation of a report of a referee fixing damages on an injunction bond was held the time from which to compute interest, as that was the time the obligor's liability was fixed. *Poillon v. Volkenning*, 11 Hun, 385. In this case the judgment was for the amount of the bond, with interest.

An injunction bond provided for the payment of \$245 interest then due on a second mortgage, and for keeping down interest on a prior mortgage of \$9,000. On dissolution of the injunction, the property sold for enough to pay the first, but not the second, mortgage. It was held in an action on the bond that a recovery could be had for \$245 and interest, and interest on the first mortgage to the dissolution of the injunction. *Foster v. Goodrich*, 127 Mass. 176.

And where the judgment enjoined and interest exceeded the penalty of the bond, interest was held proper not to exceed the principal and interest on the judgment. *Marshall v. Minter*, 43 Miss. 666. The court said that in an action at law the recovery would be limited to the amount of the penalty.

The difference between the value of property when its sale was enjoined, and the value when sold, with interest not to exceed the penalty, was held to be the measure of damages in *Rubon v. Stephan*, 25 Miss. 253.

In an action on an injunction bond, legal interest only is proper. *Lally v. Wise*, 28 Cal. 539; *Aillet v. Henry*, 2 La. Ann. 145; *Woods v. Wylie*, 8 La. Ann. 18. In the latter *L.R.A. (N.S.)*

ter case it was held that interest on interest was not proper.

The damages on dissolution of an injunction on a judgment are the principal, interest, and costs due at the time of the injunction. *Washington v. Parks*, 6 Leigh, 581.

Interest is proper, but only on the amount due at the time of the injunction. *Cannon v. Labarre*, 13 La. 399. The *La. Code Pr.* March 25, 1831, provides that on the dissolution of an injunction, the plaintiff and his surety shall be condemned to pay interest at 10 per cent on the judgment, and the order of seizure could only have been obtained in this case upon that part of the debt then due.

And a surety on an injunction bond was held required to pay interest accruing on the judgment enjoined in *Weatherby v. Shackelford*, 37 Miss. 559.

And interest on the debt when an action at law was enjoined is proper. *Horton v. Cope*, 6 Lea, 155. And the same was held where payment of a debt was enjoined. *Heyman v. Landers*, 12 Cal. 107. In this case the court said: "The legal interest in such cases is the only measure which can be followed with certainty."

In an action on an injunction bond for damages for restraining the sale of property under a mortgage, interest upon the whole sum on which the collection was suspended may be a part of the damages consequent upon the injunction. *Aldrich v. Reynolds*, 1 Barb. Ch. 613.

And in an action on an injunction bond given to restrain payment of a sum of money, interest is recoverable as a matter of right up to the time it was paid upon the dissolution of the injunction. *Wallis v. Dilley*, 7 Md. 237. In this case the debtor offered to invest the money to reduce the interest.

And where a judgment for purchase money is enjoined, interest on the purchase money should be allowed. *Hill v. Thomas*, 10 S. C. 230.

On a judgment being enjoined, interest is proper, but only to the time of the dis-

The other two cases are not mentioned. An examination of the Nichols Case discloses that it was correctly decided, and is in accordance with the view herein expressed, since it falls within that class of cases where the damages were continuing, and therefore entirely within the province of the jury to fix and assess as of the time of trial. The case, therefore, was not an authority upon the question decided in the Lester Case. While we have not been able to find any cases, except from Missouri (undoubtedly there are such), that withhold interest in a case like the one at bar, we do not desire for that reason to make a distinction in respect to the Lester Case, where there is no difference in principle. Counsel for appellant therefore had a right to rely on the Lester

Case, but, as that case is wrong in principle, in reason, and against the great weight of authority, as well as against the former decisions of this court upon the subject, it should be, and accordingly is, overruled upon the subject of allowing interest in cases of unliquidated damages.

Counsel for appellant also cite some other cases. The California cases, as well as the Nevada case, are all based upon statutes which those courts construe as forbidding interest in the class of cases passed upon. Our statute (Rev. Stat. 1898, § 1241) is general, allowing interest in all cases at the legal rate, in the absence of an agreement. Moreover, with perhaps one or two exceptions, all the cases cited by counsel are readily distinguishable from the case at bar. In most

solution of the injunction. *Amis v. Bank of Kentucky*, 8 La. Ann. 441.

In *Gist v. McGuire*, 4 Harr. & J. 10, a recovery of interest was held proper where a judgment was enjoined, and after dissolution of the injunction the judgment was paid without interest, on account of mistake in computation.

Where payment of dividends on stock was enjoined, on dissolution of the injunction, it was held that the stockholders could recover interest accruing pending the injunction. *Heck v. Bulkley* (Tenn.) 1 S. W. 612.

The measure of damages which plaintiffs in judgment are entitled to receive, for loss of the benefit of their levies through wrongful injunction, is the interest on the fund that the execution creditors would have received, if their execution had not been arrested, and property taken from the marshal. *Dodge v. Cohen*, 14 App. D. C. 582.

But where a judgment was enjoined, and then satisfied by collecting on execution after dissolution of the injunction, it was held that interest could not thereafter be collected for the time enjoined. *Grundy v. Young*, 2 Cranch, C. C. 114, Fed. Cas. No. 5,851.

Under Mo. Sess. Acts 1849, p. 85, § 12, providing that, on the dissolution of an injunction, damages shall be assessed, but if money shall have been enjoined, the damages shall not exceed 10 per cent, exclusive of legal interest and costs, it was held that the damages in such cases were not limited to 10 per cent, but might extend to the full amount of the debt. *Kennedy v. Hammond*, 16 Mo. 341. But where a sale of trust property was enjoined, it was necessary to ascertain the damages, not by the rule of per cent, but by the injury the creditor had sustained. *St. Louis v. Alexander*, 23 Mo. 483.

In *Rhea v. McCorkle*, 11 Heisk. 415, it was held that where the damages amounted to the face of the bond, interest could not be added. The covenant was only for the penalty.

In some cases, under special circumstances, interest was not allowed.

Interest as damages was disallowed when the payment of money was enjoined, but the debtor had the use of it, and did not pay it 28 L.R.A. (N.S.)

into court. *Bullock v. Ferguson*, 30 Ala. 227. In this case no supersedeas bond was given, and interest was sought for the time between the dissolution of the injunction and the affirmance of the decree.

Where an order of seizure was enjoined, it was held that interest should not be allowed. *Poydras v. Patin*, 5 La. 324. The court said: "The damages which had accrued down to the time when the slaves were sold constitute an unliquidated claim, and no obligation to pay conventional interest arises out of the injunction bond." The court held that calculating interest on the debt, and crediting principal and interest with the amount realized on the sale, would leave a balance that would constitute the damages.

And where damages on an injunction bond could not be estimated or ascertained by means of the contract, and could only be made certain by proof on the trial, it was held that interest on the damages should not be allowed. *Hooper v. Patterson* (Cal.) 32 Pac. 514.

An injunction bond was given by the owner of a tax deed to enjoin a foreclosure of a mortgage. In an action on the injunction bond it was held that the plaintiff's claim of value of the use of the land for the time he was kept out of possession, or interest on the sum for which he would have to bid it in at the sale, should not be allowed. In this case the judgment on the injunction was that it be dissolved, and that defendant convey the land to the plaintiff. *Bullard v. Harkness*, 83 Iowa, 373, 49 N. W. 855. The plaintiff claimed that the land was worth \$1,600, and he would have bid it in at that sum and obtained a sheriff's deed if injunction had not been granted; but it was held it was impossible to know what the result of the sale would have been.

And interest as against sureties was held not proper where it was not shown that the defendant in an action at law which he had enjoined was insolvent. *Derry Bank v. Heath*, 45 N. H. 524.

And where payment of an execution was enjoined at the instance of a third party, it was held in an action at law on the bond

of them the matter of the amount to be allowed as damages was not controlled by either a fixed time or by known standards of value, and are thus decided in accordance with the principles adopted by us in this case.

The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for

elements that cannot be measured by any fixed standards of value. The same rule, under the same conditions, would of necessity apply to actions for breach of contract. This is illustrated by some of the California cases, as well as by the Nevada case cited by counsel for appellant. As the case at bar falls clearly within the rule where the amount is computed as of a fixed time, and in accordance with fixed rules of evidence as to value, the court did not err in computing, on the amount of damages found, interest at the legal rate.

The judgment therefore is affirmed, with costs.

McCarthy, Ch. J., and Straup, J., concur.

Petition for rehearing overruled.

that interest should not be allowed on the fund in the sheriff's hands. *Gadsden v. Bank of Georgetown*, 5 Rich. L. 336. This was on the ground that full relief could have been awarded in the equity action.

d. Other bonds.

The general rule seems to be that in actions on indemnifying bonds, appeal bonds, and the like, interest is to be allowed. Some cases on this subject also allow interest even if the damages are thereby increased beyond the penalty.

On an indemnity bond to secure the payment of money in New York, by debtors who were trustees in Connecticut, to attach the money in their hands, it was held that interest was properly charged from the time of notice of default. This was held, although the principal, with interest, was in excess of the penalty. *Lyon v. Clark*, 8 N. Y. 148. The apparent conflict in the cases was explained in this case to arise from confounding actions on bonds for the performance of covenants with actions for the recovery of money only, saying: "In the former case the recovery is, in general, if not always, limited by the penalty, and in the latter it is not."

In an action on an indemnity bond given to a sheriff, interest may be added to the full amount of the penalty only from the date of the breach alleged. *Omaha Carpet Co. v. Clapp*, 2 Neb. (Unof.) 406, 89 N. W. 246. The court said: "In this connection it seems clear that the right to demand the penalty of the bond accrued, so far as the petition in this action discloses, only on the payment of the money; and it would therefore seem that it was error for the court to instruct the jury to return a verdict for the amount of that penalty, with interest from the giving of the bond."

And in an action of debt on a bond for a penalty against sureties, interest beyond the penalty may be recovered in the form of damages. *Harris v. Clap*, 1 Mass. 308, 2 Am. Dec. 27. The court said: "But in going beyond the penalty of the bond, the

court do not go out of the contract. It is no more than the common case of a bond conditioned for the payment of money lying until the sum mentioned in the condition, with the interest of it, exceeds the penalty,—in which cases the court will give the excess as damages for the detention of the debt; in no case, however, going so far beyond the penalty as to exceed the legal interest on the penalty."

In an action on a penal bond on a sub-let contract to carry mail, interest as damages was allowed beyond the penalty for delay in payment. *Burchfield v. Haffey*, 34 Kan. 42, 7 Pac. 548.

In an action on a penal bond given to protect the defendant in a suit on a note, where he had been served with attachment in another state, plaintiff recovered the amount of the bond, and interest thereon, as damages beyond the penalty. *Lyons v. Clark*, supra.

In *Clark v. Bush*, 3 Cow. 151, which was an action of debt on a bond securing the payment of money, the court said: "In debt on bond nothing more than the penalty can be recovered; at any rate, nothing beyond that and interest, after a forfeiture, even against the principal obligor." This case is used here although for a liquidated sum, because it is said to conflict with cases allowing interest in excess of the penalty.

In an action on a bond conditioned for the maintenance of a child, interest will not be allowed where it would compel the payment of an amount beyond the penalty of the bond, especially against the surety. *Fairlie v. Lawson*, 5 Cow. 424.

On an appeal from a decree in admiralty, the surety gave a penal bond to pay all cost and damages which might be adjudged in the supreme court, where the case was heard on agreed facts. In an action against the surety on the appeal bond, it was held proper to render judgment for the penalty of the bond (being less than the judgment under the mandate), and to allow interest from the date of suit, although the amount to be paid would exceed the penalty of the bond. *Ives v. Merchants' Bank*, 12 How.

159, 13 L. ed. 948. In this case the surety was bound in the penal bond, and this penalty the court exceeded by allowing interest on it from the time of demand by suit. It was claimed that this was error,—the action was debt and damages for detention. It was held that the judiciary act of 1789, § 26, giving the court power to assess damages according to equity on default, confession, or demurrer, did not apply to cases heard on submission, distinguishing *Farrar v. United States*, 5 Pet. 385, 8 L. ed. 104, which held in an action of debt against sureties the practice was to render judgment in debt for the penalty, to be discharged by the amount actually due, and this amount could not exceed the penalty. It was held that where unascertained damages were claimed and contested, this was the proper rule; but here the surety was bound to pay damages that might be adjudged against his principal in the supreme court, that were settled at \$6,078, and this judgment bore 6 per cent from its date, and the surety was bound to pay it to the extent of \$2,500. The rule was applied of requiring interest from the time the demand of the payment was made by suit.

In an action on a bond guaranteeing a contract to furnish granite, where there was a failure to furnish it, and plaintiffs had to procure the same elsewhere, it was held that where the amount and value could be ascertained by computation, the plaintiffs were entitled to interest, although the damages were unliquidated. *Degnon-McLean Constr. Co. v. City Trust, S. D. & S. Co.* 99 App. Div. 195, 90 N. Y. Supp. 1029, affirmed in 184 N. Y. 544, 76 N. E. 1093. This was on the ground that the general rule prohibiting interest on damages unliquidated would not deprive a party of interest if there was, at the time the demand was made for payment, means accessible to the party sought to be charged of ascertaining, by computation or otherwise, the amount to which the other party was entitled.

In an action to recover possession of personal property, where a bond was given and possession retained, and there was depreciation in value, it was held that value at the time of taking and interest from the time of taking to the verdict should be allowed. *Young v. Willet*, 8 Bosw. 486.

In an action on a delivery bond for goods seized in execution, it was held that the damages were the amount due on the execution, with interest and 10 per cent damages. *Mitchell v. Denbo*, 3 Blackf. 259.

In an action on an indemnifying bond given by execution plaintiffs to a sheriff to induce him to seize mortgaged chattels, the mortgagee was given a judgment drawing the same interest as the note secured by mortgage. *Rand v. Barrett*, 60 Iowa, 731, 24 N. W. 530. The court said: "The holding is put upon the ground that, as the condition of the indemnifying bond is that defendants will indemnify the claimants of the property for the damages which they will sustain in consequence of the seizure and sale of the property on their claim, the

measure of their liability is the value of the interest of the claimant in the property at the time the damages are paid; which, as the value of the property exceeds the amount of the debts secured by plaintiffs' mortgages, will be the amount of said debts at the time of payment."

And in an action on an indemnifying bond for wrongful taking of goods, the value at the time of taking, with interest up to the time of trial, was held to be the measure of damages. *State use of Hayden v. Smith*, 31 Mo. 566.

Where a vessel was attached for causing a collision, and a bond was given to discharge the vessel, it was held that the amount of the plaintiff's lien upon the vessel was due and payable when the bond was executed, and he was entitled to interest from that date. *Fitch v. Livingston*, 4 Sandf. 492. The court said: "In actions of assumpsit for not delivering goods on a bill of lading or charter party, interest is allowable if there were any wrongful or improper conduct; and it is allowed on an unliquidated debt, payable at a fixed time, as upon rent payable in services and grain."

But where a judgment for money did not bear interest, it was held that a judgment on a supersedeas bond did not bear interest. *Louisville & N. R. Co. v. Sharp*, 91 Ky. 411, 16 S. W. 86.

In an action on a penal bond given for the purpose of dissolving an attachment, it was held that plaintiffs were not entitled to recover interest during the pendency of the suit, in which the defendant was summoned as their trustee, as interest was not due by the terms of the contract, so as to constitute a part of the debt. It was further held that they could only recover interest for unjustly detaining the debt. *Huntress v. Burbank*, 111 Mass. 213. The court said: "Nothing appears in the case to take it out of the general rule that a debtor is not chargeable with interest as damages for delay in the payment of a debt, when such delay is caused by his being summoned as the trustee of the creditor."

V. Actions against a common carrier.

a. Generally.

In actions against carriers for damages from loss of goods shipped, or for injury to the same, or for delay in delivering, the rule, according to the weight of authority, is to allow interest from time of loss, estimating the value at the time and place of delivery. In some few cases interest was allowed in the discretion of the jury. In others, interest was allowed in the nature of damages, and not as interest *eo nomine*. In Illinois there seems to be a conflict in the cases, arising from the nature of the pleadings and form of action. In Texas the weight of authority is in favor of interest, the rule being worked out in the later cases. In Tennessee interest was held improper. In Missouri the rule is to allow interest in actions against carriers, although the Su-

preme Court of the United States in New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444, said that the rule in that state was the contrary.

b. Loss of goods.

In an action against a common carrier for loss of goods transported by it, the measure of damages is the value at the point of destination, with interest; and the failure to except to an illegal charge as to interest was held to be a waiver. *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. Rep. 506.

And in an action for compensation for goods lost at sea while on defendant's vessel, the carrier should pay the net value at place of delivery, with interest from the time the goods should have arrived. *Bazin v. Steamship Co.* 3 Wall. Jr. 229, Fed. Cas. No. 1,152.

And in an action against a common carrier for loss of goods, it was held that the measure of damages was the net value at point of destination, deducting freight, and the jury were authorized to add interest. *Woodward v. Illinois C. R. Co.* 1 Biss. 403, Fed. Cas. No. 18,006.

Interest may be allowed by the jury as part of the damages. *Kyle v. Laurens R. Co.* 10 Rich. L. 382, 70 Am. Dec. 231. This was on the ground that the plaintiff's loss was as of so much cash.

And in an action against a common carrier for loss of baggage, it was held that the plaintiff was entitled to interest from the time of conversion. *McCormick v. Pennsylvania C. R. Co.* 49 N. Y. 303. The court said: "In the action of trover, interest is as necessary a part of a complete indemnity as the value itself; and, in fixing the damages, is not any more in the discretion of the jury than the value."

Or from the time of loss to the date of the verdict. *Fraloff v. New York C. & H. R. R. Co.* 10 Blatchf. 16, Fed. Cas. No. 5,025.

In an action against a railroad for loss of baggage, it was said that formerly interest could not be recovered on unliquidated damages, but interest was allowed in this case, as it originated on a contract between bailor and bailee, and the amount of the value of the property lost by plaintiff became due from the day of the loss, and was from that time an indebtedness, and the later rule is to allow interest. *Mote v. Chicago & N. W. R. Co.* 27 Iowa, 22, 1 Am. Rep. 212. The court said: "And it appears to us that, under the rule as now understood, and the provision of the statute, Revision, § 1787, interest is recoverable in this case at the rate fixed by the instructions."

See *Texas & P. R. Co. v. Ferguson*, 1 Tex. App. Civ. Cas. (White & W.) 724, subd. V. h, Texas cases, *infra*.

In *Atchison, T. & S. F. R. Co. v. Gabbert*, 34 Kan. 132, 8 Pac. 218 (subd. XIV.) the cases of *Mote v. Chicago & N. W. R. Co.* *supra*, and *Dean v. Chicago & N. W. R. Co.* 43 Wis. 305, were distinguished, as this was an L.R.A. (N.S.)

action under a statute, and not at common law.

In *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 422, the case of *Mote v. Chicago & N. W. R. Co.* *supra*, was distinguished, the court saying: "Without doubting the rule announced in that case, we are not prepared to apply it to this. The facts upon which recovery of interest was there allowed are very different from those which are presented in the case at bar. But while we decline to apply the rule of the case cited, and allow interest *eo nomine*, we are of the opinion that interest may be considered as an element of damage under the rule which permits its allowance in order to arrive at the sum which will be a just and lawful compensation for the injury sustained. It is true that, practically, the result is the same as though interest were allowed *eo nomine*."

In an action against a carrier for failing to deliver, it was held that the value of the goods, with interest from the day they should have been delivered, was the measure of damages. *Sherman v. Wells*, 28 Barb. 403; *Robinson v. Merchants' Despatch Transp. Co.* 45 Iowa, 470.

And in an action for nondelivery of goods pursuant to a contract of affreightment, the measure of damages was held to be the value of the goods at the point of destination. *Amory v. McGregor*, 15 Johns. 24, 8 Am. Dec. 205. In this case the goods were shipped from Great Britain to the United States, and the charterer of the ship procured the cargo to be captured as a prize by a British cruiser. The court said: "Whether interest ought to be allowed or not depends, principally, upon the light in which the defendant's conduct, or that of his agents, is viewed. The jury might have given interest, by way of damages; and the verdict being subject to the opinion of the court, we are substituted in the place of the jury. If there was any fraud or gross misconduct attending the transaction, interest ought to be allowed. But we are inclined to think the conduct of the defendant's agents ought not to be stamped with so odious a character. They appear to have acted under an impression that the goods, if sent on to New Orleans, would inevitably have been seized and forfeited, and entirely lost to the owners, and that what they did would promote their interest. So that, upon the whole, we think interest ought not to be allowed."

And where a libel was brought for the nondelivery of a cargo, the measure of damages was held to be the value at the port of destination, with interest from the time the goods should have been delivered. *The Gold Hunter*, 1 Blatchf. & H. 300, Fed. Cas. No. 5,513.

And in an action against a common carrier for failing to deliver gold coin, it was held that the measure of damages was the value in legal tender notes at the time and place of delivery, with interest from the date of demand. *Cushing v. Wells, F. & Co.* 98 Mass. 550.

In an action against a carrier for not delivering goods, it was held the measure of damages was the value of the goods at the place of delivery and at the time when they should have been delivered, with interest from that time. *Spring v. Haskell*, 4 Allen, 112.

Erie R. Co. v. Lockwood, 28 Ohio St. 358, said the general rule, where goods are lost by a carrier while in his hands, is to allow the value of the goods at the destination, with interest.

In *Clarke-Lawrence Co. v. Chesapeake & O. R. Co.* 63 W. Va. 423, 61 S. E. 364, which was an action against a common carrier for failing to deliver, damages were assessed at \$144, and judgment rendered accordingly, including interest from the time the goods should have been delivered.

In *Clines v. Frisbee*, 5 Rob. (La.) 192, it was held that interest was due from judicial demand, where the sum claimed arose out of a contract, although the amount was not liquidated.

The shipper is entitled to interest on the value of the goods from the time of loss. *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349; *Harris v. Delaware, L. & W. R. Co.* 61 N. Y. 656; *St. Louis, I. M. & S. R. Co. v. Mudford*, 44 Ark. 439.

Under S. C. act 1903, p. 81, providing that a common carrier shall be liable for the amount of loss or damage, with interest from the date of filing the claim, it was held that it was error to refuse evidence for the defendant, showing the value of the property, and that it was not bound by plaintiff's invoice. *Brown v. Northwestern R. Co.* 75 S. C. 20, 54 S. E. 829.

In an action of assumpsit on a bill of lading for goods lost, it was held that the question of interest depended on circumstances. *Watkinson v. Laughton*, 8 Johns. 213. The court said: "The jury may give interest, by way of damages, in cases in which the conduct of the master was improper. But here, no bad conduct is to be imputed to him, and interest is not, in every case, and of course, recoverable, because the amount of the loss is unliquidated, and sound in damages, to be assessed by the jury."

In an action against a carrier for non-delivery of property, it was held discretionary with the jury whether they might allow interest. *Richmond v. Bronson*, 5 Denio, 55.

In *Richmond v. Bronson*, *supra*, the case of *Lush v. Druse*, 4 Wend. 313, was distinguished, the court saying: "Neither of those reasons applies to the present case. In cases like this, where there is only the general undertaking as carriers, where the loss of the goods may have been matter of accident, without any wilfulness or intentional misconduct on the part of the carrier, and where there may be circumstances of mitigation, it is quite proper that the jury should have it in their discretion to do justice according to the circumstances by allowing or withholding interest." 28 L.R.A. (N.S.)

In an action against an insurance company, the assignee of goods shipped by a common carrier was held entitled to the value of the cotton destroyed by fire through negligence at the time of the loss, with interest from the day on which the cotton should have been delivered. *Insurance Co. of N. A. v. St. Louis, I. M. & S. R. Co.* 3 McCrary, 233, 9 Fed. 811.

In an action against a railroad company for cotton that was burned in transportation, it was held the measure of damages was the value of the cotton at the time and place of its destruction, or at any place from the point of shipment to the place for delivery, plus interest. *Rome R. Co. v. Sloan*, 39 Ga. 636.

In *Whitney v. Chicago & N. W. R. Co.* 27 Wis. 327, interest was held recoverable in an action against a common carrier for damages from fire.

But in an action against a carrier for goods destroyed by fire, where the carrier was without fault, and received no advantage from the possession of the goods, it was held that interest should not be allowed. *Lakeman v. Grinnell*, 5 Bosw. 625. In this case the plaintiffs had demanded by their action more than the court adjudged them to be entitled to, and the defendants had refused to pay it, and succeeded in establishing a different valuation.

c. Damage to goods and stock.

Interest is held proper in actions against carriers for damage to goods or stock in transportation.

So, where there was a libel in admiralty for injuries to goods in course of carriage, it was held the damage was the difference between the price for which the article was sold and the market value at the place of its arrival, had it been in good condition, with interest from the time of arrival. *Western Mfg. Co. v. The Guiding Star*, 37 Fed. 641.

The measure of damages for nondelivery of goods is their value at the point of destination, with interest from the time delivery should have been made. *Thompson v. The Nith*, 36 Fed. 86. This was an action of libel against a vessel where goods were injured by misconduct of the master.

In an action against a carrier for failing to unload, feed, and water stock, it was held that the plaintiff was entitled to damages, being the difference in value as they would have been if transported with ordinary care, and their value when they arrived, estimated at the place specified in the contract, with interest from the time compensation for the loss was demanded. *Southern P. Co. v. Arnett*, 61 C. C. A. 131, 126 Fed. 75. This was on the ground that this was an action for the breach of a contract to transport live stock over the railroad of the defendant with reasonable care. Nothing less than the actual amount of the loss, and interest thereon from the time it was demanded, would fully compensate the

shipper for the breach of the agreement, and he was entitled to full compensation. The general rule is that the plaintiff is entitled to interest upon the damages which he sustains from a breach of a contract, and this case falls fairly within that rule.

A machine shipped was so damaged that the consignee refused to receive it. It was held that the measure of damages was the value of the machine and freight paid, with interest from the time the property reached its destination. *Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. R. Co.* 62 Wis. 642, 51 Am. Rep. 725, 22 N. W. 827.

In *Rogers v. West*, 9 Ind. 400, in an action against a carrier for injury done to goods through his default, where interest was demanded, the court said: "The interest—our statute gives it in certain cases, and authorizes it to be given in perhaps any case where it shall appear that money has been vexatiously withheld. In this latter class of cases, it is properly a jury question, and would require a clear abuse of discretion on their part to justify the interference of the court. 1 Rev. Stat. p. 343. In this case, the suit was kept pending about twenty months."

In an action against a carrier for killing live stock shipped on the road, it was held that where there was a basis of calculation as to the value, interest was not recoverable *eo nomine*; but it was held that the jury could consider the length of time damages were withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and increase the amount of damages by adding to the value of the property destroyed a sum equal to the interest on such value; the entire sum found returned as damages, and not exceeding the amount sued for. *Central R. Co. v. Hall*, 124 Ga. 322, 4 L.R.A. (N.S.) 898, 110 Am. St. Rep. 170, 52 S. E. 679, 4 A. & E. Ann. Cas. 128. It was said: "Where the damages found are discretionary or punitive, this rule does not apply."

In an action against a carrier for the value of horses killed in transportation, it was held that the damages should have included the interest on the value of the property, as the damages sustained to the time of trial. *Baltimore & O. R. Co. v. Dougherty*, 7 App. D. C. 378.

In a suit for damages where a cargo of tea was injured by cockroaches defacing the label, it was held that interest should be allowed. *Westray v. The Miletus*, Fed. Cas. No. 17,461.

In an action against a carrier for damages to goods, where a verdict was attacked only on the ground that it was contrary to law and evidence, it was held that it did not present the objection that it embraced interest as well as principal. *Southern R. Co. v. Horner*, 115 Ga. 381, 41 S. E. 649.

In an action by a consignor of goods against a carrier for damages for injury done to them through negligence, it was held that the court could not add interest from the sum awarded as damages from the date of the petition. *Morgan v. Bell*, 4 Mart. 28 L.R.A. (N.S.)

(La.) 616. It may be that this ruling was because the jury may have estimated interest in making up their verdict, and it would then be interest on interest. The reason is not given and the case does not hold that interest is not recoverable, but that the court could not add interest from the date of the petition.

In an action for injury to cattle shipped on a railroad, it was held that it was discretionary with the jury whether interest should be allowed or not. *Black v. Camden & A. R. & Transp. Co.* 45 Barb. 40.

d. Delay in delivering.

Interest is recoverable in actions against carriers for delay in transportation.

So, in an action for delay in transportation of merchandise, it was held that the measure of the damages was the difference between the value of the property at the time and place it should have been delivered, and its value when it was delivered, with interest, after deducting the charges and freight. *St. Louis, I. M. & S. R. Co. v. Phelps*, 46 Ark. 485.

In an action for damages for breach of an implied contract of a carrier to transport cattle over its road with reasonable despatch, it was held that the actual loss should bear interest from the date when the claim for damages was presented. *Missouri, K. & T. R. Co. v. Truskett*, 44 C. C. A. 179, 104 Fed. 728, affirmed in 186 U. S. 480, 46 L. ed. 1259, 22 Sup. Ct. Rep. 943.

In this case it was said: "In actions of pure tort, which do not sound in contract, as where the property of a third party is destroyed or injured through the negligence of a carrier, the usual practice is, as this court said in *Eddy v. Lafayette*, 1 C. C. A. 441, 4 U. S. App. 252, 49 Fed. 807, to leave the allowance of interest on the damages which may be assessed to the sound discretion of the jury. But, as the case at bar is founded upon a breach of contract, it may well be distinguished from the case last cited."

And the measure of damages in an action against a carrier for failure promptly to deliver was held to be the difference between the market value of the goods at the time they should have been delivered and the value when delivered, with interest from that date. *Newell v. Smith*, 49 Vt. 255; *East Tennessee, V. & G. R. Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809.

In an action against a railroad for failure to transport fruit in time for a sailing vessel, it was held the measure of damages was the difference between the value of the fruit at the port of shipment at the time it ought to have been delivered, and its value at the same place at the time of actual delivery, with costs of refrigerating space reserved for its export, with interest. *Frey v. New York C. & H. R. Co.* 114 App. Div. 747, 100 N. Y. Supp. 225.

And in an action against a railroad for delay in transporting machinery, where workmen were forced to remain idle, an

instruction that interest was discretionary with the jury was affirmed. *Rocky Mount Mills v. Wilmington & W. R. Co.* 119 N. C. 693, 56 Am. St. Rep. 682, 25 S. E. 854.

In an action by a grain elevator company against a railroad for not keeping its contract in handling its grain, shipped through the elevator, it was held that interest would not be allowed *eo nomine*, but could be considered as an element of damage under the rule which permitted its allowance in order to arrive at the sum which would be a just compensation. *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 422.

And in an action against a carrier for delay in transportation, it was held that interest on the value of the goods during the delay could be recovered as a measure of damage. *Murrell v. Dixey*, 14 La. Ann. 296.

In an action against a railroad company for failure to deliver cattle in reasonable time after shipment, it was held that the plaintiff was entitled to interest from the date of breach of the contract, if the suit be considered as one for breach of contract, or from the date of the injury, if the action be viewed as one in tort. *Illinois C. R. Co. v. Haynes*, 64 Miss. 604, 1 So. 765.

And in an action against a carrier for failure to deliver cotton in a reasonable time, where the carrier had no notice of special loss from delay, and there was no evidence of the difference in value of the goods, it was held that the plaintiff was entitled to recover interest only on the amount invested during the time of delay. *Lee v. St. Louis, I. M. & S. R. Co.* 136 N. C. 533, 48 S. E. 809.

In an action by a charterer by a libel against the owner of a vessel for damages in not loading a cargo, it was held that interest should be allowed from the date of demand, where the delay in prosecuting the case was occasioned by the defendant. *Oakes v. Richardson*, 2 Low. Dec. 173, Fed. Cas. No. 10,390.

c. Illinois cases.

In Illinois there is some conflict in the cases. This appears to be largely due to the nature of the damage and the form of pleading. So that if an action for conversion, or trover, or trespass could be maintained, interest would be allowed.

In an action of trover against a carrier for failing to deliver a carriage shipped by the railroad, it was held that the plaintiff was entitled to interest on the value of the property from the time of demand and refusal. *Northern Transp. Co. v. Sellick*, 52 Ill. 249.

Where a carrier delivered live stock to a wrong consignee, it was held that the owner was entitled to recover the value, in an action of assumpsit, and interest thereon. *Chicago & N. W. R. Co. v. Ames*, 40 Ill. 249. The court said: "Even in actions of trespass for seizing personal property, there is no objection to allowing interest on the value of the goods from the time they were taken from the plaintiff's possession."

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And the interest was held proper in an action on the case for loss from sample trunks shipped as baggage. *Lake Shore & M. S. R. Co. v. Hochstim*, 67 Ill. App. 515.

This case does not cite the case of *Chicago & A. R. Co. v. Davis*, 54 Ill. App. 130, which was an action against a common carrier for loss of goods. There it was held that plaintiff was not entitled to interest on the amount of damages found.

In an action of assumpsit for damages for unreasonable delay in transporting corn and oats, it was held that interest should not be given. *Illinois C. R. Co. v. Cobb*, 72 Ill. 148. The court said: "Where property has been wrongfully taken, or converted into money, and an action of trespass or trover may be maintained, interest may properly be recovered. And this is based upon the statute, which authorizes interest when there has been an unreasonable and vexatious delay of payment."

In that case the court said: "At the common law, interest was not allowed in any case. Its recovery depends entirely upon our statute, and unless authorized by the statute, it cannot be recovered. *Pekin v. Reynolds*, 31 Ill. 530, 83 Am. Dec. 244. While our statute has received a liberal construction, yet we are aware of no case similar to the one under consideration in which interest has been allowed. In *Bradley v. Geiselman*, 22 Ill. 494, the recovery of interest was sustained. The action was, however, trespass, where property had been wrongfully taken and sold, and converted into money. In the case of *Chicago & N. W. R. Co. v. Ames*, 40 Ill. 249, interest had been recovered and the judgment was sustained. The facts in that case, however, would have authorized an action of trover, for a wrongful conversion of the property. The same may also be said of the case of *Northern Transp. Co. v. Sellick*, 52 Ill. 249, where a recovery of interest was sustained. In *Chicago & N. W. R. Co. v. Shultz*, 55 Ill. 421, the recovery of interest was sustained on the authority of *Bradley v. Geiselman*, supra, the action having been trespass to personal property."

In *Omaha & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 5 L.R.A. 236, 16 Am. St. Rep. 185, 21 Pac. 925, the cases of *Bradley v. Geiselman*, supra, and *Illinois C. R. Co. v. Cobb*, 72 Ill. 148, were distinguished, on the ground that these cases were based upon the statute which authorized interest where there was unreasonable and vexatious delay of payment. The Illinois statute had, however, been adopted in Colorado, and the general rule is to adopt the same construction. The court said: "But our statute does not seem to have received the same construction here as in the state of Illinois. While in that state it has been put plainly and squarely as interest under the statute, in our state damage for the detention of the money equal to the legal interest upon the value of the chattels converted from the time of the conversion has been allowed, not as interest, but as damage."

f. Missouri cases.

In *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444, an action against a common carrier for injuries to cattle shipped from Massachusetts to Missouri, it was held that under the law in Missouri interest should not have been allowed by the jury on the damages from the time suit was brought. In this case interest was not claimed in the petition. The court tries to reconcile the conflicting cases on interest, in cases of damages from negligence, in Missouri, and says that *Gray v. Missouri River Packet Co.* 64 Mo. 47, holding that interest in an action against a carrier for damages from negligence is proper, is not sustained by the weight of authority in that state. That the general rule would be to allow interest from the time delivery should be made; but, the interpretation of a state statute would be followed. In this case many cattle were killed or injured by a collision. The court, in comparing the Missouri cases, cites the cases *contra* to 64 Mo. 47, *supra*, but those cases were actions for damages from torts, and not actions against common carriers, as such. The cases against common carriers for loss of goods or damage to freight seem all to hold in Missouri that interest should be allowed.

So, in an action against a carrier for failing to deliver goods shipped, it was held under Mo. Rev. Stat. § 4430, authorizing a jury to allow or disallow interest, that the jury were properly told that they might allow interest. *Hall v. Wabash R. Co.* 80 Mo. App. 463.

So, in an action for freight money, where the defendant alleged damages for failure to deliver within proper time, it was held that if the lead which was shipped was selling at the time it was delivered as high as it had sold when it was to be delivered, the damages would be the interest from that time, as the want of this money for several months might be a serious matter with the merchants. *Smith v. Whitman*, 13 Mo. 352.

And in an action for failure properly to take care of and deliver live stock shipped on a railroad, it was held that interest could be allowed on the damages from the institution of the suit to the time of the verdict. *Dunn v. Hannibal & St. J. R. Co.* 68 Mo. 268.

And in an action against a common carrier for negligence in transporting stock, causing death, where the negligence was gross, and the parties engaged in it were liable for prosecution for cruelty to animals, it was held that interest was properly allowed. *Gray v. Missouri River Packet Co.* *supra*.

In an action against a carrier for breach of contract of safe shipment, it was held that interest from the date of shipment could be allowed as part of the damages. *Goodman v. Missouri, K. & T. R. Co.* 71 Mo. App. 460. The court said: "Defendant has cited us to *State ex rel. Roberts v. Hope*. 121 Mo. 34, 25 S. W. 893, in support of his contention that the jury should not have 28 L.R.A. (N.S.)

been directed to allow interest. We think that case is not in point. That case gives an authoritative and undoubtedly correct interpretation to the statute. Rev. Stat. 1889, § 4430. But that case was where goods had been seized and converted; and though the supreme court had not, for many years (possibly not since its enactment), been giving effect to the statute, yet it must now be heeded in all cases embraced within its terms. But, as before stated, we think this case is not within its meaning. This case is really for damages for breach of contract of safe shipment. It falls closer to such, in character of cases, as *Padley v. Catterlin*, 64 Mo. App. 629; and it is at any rate governed by the *Dunn* and *Gray* Cases, 68 Mo. 278, and 64 Mo. 50."

In an action against a carrier for goods lost in shipment, it was held that interest should have been allowed from the time the property should have been delivered. *Lachner Bros. v. Adams Exp. Co.* 72 Mo. App. 13.

g. Tennessee cases.

In an action against a common carrier for negligence and delay in delivery of goods, it was held that interest was not recoverable, as such a case was not included in the Tennessee statute allowing interest. *Illinois C. R. Co. v. Southern Seating & Cabinet Co.* 104 Tenn. 568, 50 L.R.A. 729, 78 Am. St. Rep. 933, 58 S. W. 303. This ruling was under Shannon's Tennessee Code, § 3494, providing for interest on bills single, bonds, notes, bills of exchange, and liquidated and settled accounts signed by the debtor.

h. Texas cases.

In Texas the weight of authority and the later cases hold that interest on damages caused to stock or freight is proper, although some of the early cases held *contra*. There is some conflict of authority as to whether it is necessary to claim interest in the pleadings. In some of the cases allowing interest the rule is stated that it is not allowed *eo nomine*, but as damages for delay in nonpayment; and that the plaintiff should ask for enough damages to cover the item of interest.

In a suit against a carrier of cattle for negligence in carriage, it was held that interest might be given by the jury, where it was asked for in the pleadings. *Gulf, C. & S. F. R. Co. v. Batte* (Tex. Civ. App.) 94 S. W. 345.

And although the pleadings did not ask interest in a suit against a common carrier, it was held in *Pt. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834, that the jury could add interest to the damages. In this case the damages claimed were \$1,200, and the jury found \$900; as the evidence did not show damages to the extent of the verdict, the court sustained the verdict by presuming that the jury added interest. See *Houston & T. C. R. Co. v. Jackson*, 62 Tex. 212.

And in *International & G. N. R. Co. v.*

Lewis (Tex. Civ. App.) 23 S. W. 323, interest on damages allowed for injury caused to live stock in transportation was held proper, although not prayed for in the petition.

In an action for damages to property by a common carrier during transportation, the court said: "There was no error in allowing interest at the legal rate on the amount of damages sustained by appellee. It seems to be now well settled that such interest is allowed as a matter of law, even though it was not asked for in the pleadings. *Ft. Worth & D. C. R. Co. v. Great-house and Houston & T. C. R. Co. v. Jackson*, supra; *Galveston, H. & S. A. R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441; *Gulf, C. & S. F. R. Co. v. McCarty*, 82 Tex. 698, 18 S. W. 716." *Atchison, T. & S. F. R. Co. v. Smythe* (Tex. Civ. App.) 119 S. W. 892.

And where cattle were damaged in transportation, interest was allowed from date of injury in *Galveston, H. & S. A. R. Co. v. Johnson* (Tex.) 19 S. W. 867.

So, where a carrier lost goods in transportation, it was held liable for interest on the value. *Rio Grand R. Co. v. Petitpain* (Tex. Civ. App.) 23 S. W. 531.

And the failure of a common carrier to furnish cars to ship live stock was held to entitle plaintiff to damages and to interest thereon. *Gulf, C. & S. F. R. Co. v. McCarty*, supra.

And the failure of a common carrier promptly to deliver cotton shipped was held to entitle the owner to interest from the time it should have been delivered. *Houston & T. C. R. Co. v. Jackson*, 62 Tex. 200.

In an action against a common carrier for loss of goods, it was held that interest might be allowed as a part of the measure of damages. *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, 23 S. W. 529, 1004.

In an action against a common carrier for damages caused to live stock by reason of delay in shipping and transporting, it was held that plaintiff was entitled to interest from the time the damages accrued. *International & G. N. R. Co. v. Dimmit County Pasture Co.* 5 Tex. Civ. App. 180, 23 S. W. 754.

And where a carrier was guilty of gross neglect of duty in exposing cotton to the rain and weather, it was held that interest on the damages was proper. *Wolfe v. Iacy*, 30 Tex. 349. The court said that when a carrier is guilty of fraud, delinquency, or injustice to the owner, interest by way of punitive damages may be allowed.

Interest was held proper in an action against a carrier for goods lost. *Galveston, H. & S. A. R. Co. v. Ball*, supra.

And interest, so called, was held proper in a recovery as part of the damages in an action against a common carrier for injuries to cattle shipped. *Texas & P. R. Co. v. Smisen*, 31 Tex. Civ. App. 549, 73 S. W. 42; *Texas & P. R. Co. v. Murtishaw*, 34 Tex. Civ. App. 447, 78 S. W. 953.

And a judgment in an action against a common carrier for injuries to stock in

transportation was held to bear the rate of interest in force when the judgment was rendered. *Gulf, C. & S. F. R. Co. v. Gray* (Tex. Civ. App.) 24 S. W. 921.

But where the judgment exceeded the amount claimed in an action against a common carrier for injuries by rain to grain shipped on the cars, it was held that as the excess was interest, the judgment could be modified by striking out the excess. *Missouri, K. & T. R. Co. v. Dawson Bros.* (Tex. Civ. App.) 84 S. W. 298.

Where the jury presumably allowed interest in a verdict for damages against a common carrier, it was held erroneous for the court to add interest from the time the damages accrued, where no interest was claimed in the pleadings. *Texas & P. R. Co. v. Scott* (Tex. Civ. App.) 86 S. W. 1065.

In order to recover interest on a claim against a carrier for injuries to stock shipped, it was held necessary that interest should be claimed in the pleadings. *San Antonio & A. P. R. Co. v. Addison*, 96 Tex. 61, 70 S. W. 200.

In an action for breach of contract to furnish cars and transport cattle, it was held that plaintiff was not entitled to interest on the amount recovered from the date of the injuries to the cattle. *Gulf, C. & S. F. R. Co. v. Jackson* (Tex. Civ. App.) 86 S. W. 47. The court said: "Upon a reconsideration and a further construction of the case of *San Antonio & A. P. R. Co. v. Addison*, supra, this court has reached the conclusion that the trial court erred in rendering judgment for 6 per cent interest on the amount recovered from the date of the injuries to the cattle." This ruling may have been because the complaint did not specifically claim interest, or it may have been because the court added interest to a judgment for damages, when possibly interest was considered by the jury.

In an action against a carrier for lost goods, it was held that interest was not recoverable ordinarily as a part of the damages. *Texas & P. R. Co. v. Martin*, 2 Tex. App. Civ. Cas. (Willson) 295.

And in an action against a common carrier for nondelivery, it was held that the American cases generally that refer to interest bring it under the class where there is fraud, delinquency, or injustice of the debtor, and interest should not be allowed in this case. *Fowler v. Davenport*, 21 Tex. 626.

And where property was lost or destroyed while in charge of a common carrier, it was held that interest was not ordinarily recoverable as part of the damages. *Texas & P. R. Co. v. Davis*, 2 Tex. App. Civ. Cas. (Willson) 156.

And a common carrier was held not liable for interest in failing to deliver goods. *Texas & P. R. Co. v. Wright*, 2 Tex. App. Civ. Cas. (Willson) 292.

In an action against a carrier for lost baggage, it was held that the plaintiff was not entitled to interest. *Texas & P. R. Co. v. Ferguson*, 1 Tex. App. Civ. Cas. (White & W.) 724.

See *Mote v. Chicago & N. W. R. Co.* 27 Iowa, 22, 1 Am. Rep. 212, subd. V. b, Loss of goods, supra.

t. Ejection of passenger.

In *Nichols v. Union P. R. Co.* 7 Utah, 510, 27 Pac. 693, interest was held not allowable in an action for damages for ejecting a passenger from a railroad train. This ruling is in accord with the principle that interest will not be allowed in cases where exemplary damages can be imposed.

VI. Contracts.

The weight of authority is that interest should be allowed for breach of contracts if the amount due can be reasonably ascertained. In Wisconsin the rule seems now to be settled in favor of the rule, although some earlier cases were in conflict. In Georgia it is allowed as damages, and not *eo nomine*.

In an action for profits for selling proprietary medicine contrary to contract, it was held that interest should be allowed, in *Fowle v. Park*, 48 Fed. 789. The court said: "The liability, although *ex delicto*, arises upon contract, and interest should be included. The record shows a deliberate and inexcusable violation by the defendants of their contract, and the court is not disposed to release them from any part of the liability which they have incurred."

In a libel to recover for an engine supplied to the boat, the claimant was allowed interest from the filing of the report of the referee, although both parties dissented from the report. *The Isaac Newton*, Abb. Adm. 588, Fed. Cas. No. 7,090.

In an action for breach of a contract to receive and pay for a large quantity of gravel, interest was allowed from the date of the termination of the contract, as the legal incident of the right to damages. *International Contracting Co. v. McNichol*, 105 Fed. 553. The court said: "The right to compensation for the breach of a contract accrues when it is broken, and, if not then made, the delay must be paid for in interest. This is the ordinary rule, and the adjudications which seem to indicate that interest runs only from the time of demand rest, I think, upon the assumption that, in the cases in which they were made, the demand and refusal of payment fixed the time of default."

And in an action against a seller for breach of contract to deliver cotton at a specified time and place, it was held the amount of recovery should be the value of the article at the time of the breach, with interest for delay, unless it be shown that the article was to be delivered for some specific object, known to both parties at the time, and that thus a loss within the contemplation of both parties had been sustained. *Rose v. Bozeman*, 41 Ala. 678. In this case the purchase price was paid in advance.

In an action to enforce a mechanics' lien, the finding was for plaintiff, after deducting 28 L.R.A. (N.S.)

the damages caused by his deviation from the contract, with interest from the time the money should have been paid to the date of judgment. *Healy v. Fallon*, 69 Conn. 228, 37 Atl. 495. The court said: "It is said, however, that the amount due was unliquidated up to the time of the judgment, and that interest is never allowed upon unliquidated amounts. It may be conceded that the amount due the plaintiff was, in a certain sense, unliquidated up to the time of the judgment, inasmuch as the amount due him under the contract, which was a liquidated amount, was to be lessened by the as yet unascertained damages caused by his deviations from the contract; but it is not true that damages measured by the rate of interest are never allowed for the nonpayment of money, where the claim is an unliquidated one. In an action for the value of personal property destroyed by the negligent act of the defendant, where the claim was in a sense an unliquidated one, damages were allowed in the shape of interest upon the value of the property as found upon the trial."

In an action for damages for breach of a contract, where plaintiffs could have completed the contract two years from the time that they were prevented from completing the same, by the defendant, the jury were instructed to allow interest from whatever date the evidence shows the contract would have been completed. The action was brought before the expiration of two years, and a verdict for interest from the date proven was held not erroneous. *Sullivan v. McMillan*, 37 Fla. 134, 53 Am. St. Rep. 239, 19 So. 340. In this case it was held that interest could be allowed on unliquidated damages from the time that the exact pecuniary amount was ascertainable by simple computation, or by reference to recognized standards, such as market price and the time.

Interest was allowed for breach of contract to procure a loan to pay off a mortgage. *Padley v. Catterlin*, 64 Mo. App. 629. The court said: "The general rule is that in actions grounded on negligence, interest is not allowed. The rule, however, is that interest may be claimed of right, under various circumstances of contract and tort, on the value of property or things in action, on the value of services, on money paid, had, and received, as well as on divers other forms of loss to plaintiff, or gain to defendant, and capable of pecuniary estimate; and it is immaterial that there is no agreement for interest or forbearance. The interest in such cases may be recovered under the general allegation of damages, without being specially claimed. The law measures the interest as damages, when not specified in the contract. Such interest is recoverable as a matter of law, independent of the discretion of the jury."

And in an action by a tenant against a landlord for damages in preventing the removal of a building, it was held that the measure of damages was the value of the building on the day when the breach oc-

curred, with interest. *Neiswanger v. Squier*, 73 Mo. 192.

Interest was allowed in case of a wrongful discharge and breach of contract of hire. in *Laming v. Peters Shoe Co.* 71 Mo. App. 646. The court said: "The general rule is that interest is not recoverable on unliquidated damages or for an uncertain demand. The present case does not fall within the rule. *Prima facie*, the plaintiff's measure of damage was the amount of his salary for the remainder of the year. The court found that he was employed for a year, and that he was wrongfully discharged before its expiration; that he was unable to procure employment elsewhere; and as there is no dispute as to the date of the discharge and the amount of the plaintiff's salary, it cannot be said that his damage was unliquidated or uncertain."

Where interest is given as damages for breach of contract, the rate allowed by the laws of the state where the contract was to be performed should control. *Sutro Tunnel Co. v. Segregated Belcher Min. Co.* 19 Nev. 121, 7 Pac. 271.

For breach of a contract to furnish dredge boats to enable plaintiff to fulfil his contract with the government, the plaintiff was allowed interest, in *Watkins v. Junker*, 90 Tex. 584, 40 S. W. 11.

In this case the court reviews the authorities on this question, and holds that courts have recognized the right to recover compensation for the detention of that which was due, and by analogy have adopted interest; and that interest may be allowed upon unliquidated damages arising out of a breach of contract or tort, but not for damages arising from assault and battery, libel and slander, seduction, false imprisonment, nor for personal injuries and the like.

And under Ky. act March 20, 1871, authorizing an action against the commonweal for a breach of contract, if any, and for the recovery of damages, it was held that interest by way of damages for delay in execution of the contract, resulting from the refusal of the state to receive books contracted for, should have been allowed. *Com. v. Collins*, 12 Bush, 386.

And in an action by a whisky broker for commission on a sale of whisky, where the petition claimed interest, it was held proper to allow interest from the filing of the suit. *Brown v. Lapp*, 25 Ky. L. Rep. 1134, 77 S. W. 194.

For breach of an agreement to keep plaintiff's shop employed in producing work on material furnished by defendant, damages could be assessed as of the date of the writ. *Speirs v. Union Drop Forge Co.* 180 Mass. 87, 61 N. E. 825. It was claimed that interest should have been allowed only from the date of the assessor's report of damages.

In an action on a contract for work done and material furnished, it was held that, upon the balance of an unliquidated and contested account, interest could be recovered 28 L.R.A. (N.S.)

only from the date of the writ. *Palmer v. Stockwell*, 9 Gray, 237.

Where a receiver of a bank surrendered the same to trustees on a contract by which they were to advance a certain per cent and were to be paid their expenses, and to account for the proceeds, it was held that they were entitled to interest on the disbursements. *Woerz v. Schumacher*, 37 App. Div. 374, 56 N. Y. Supp. 8, affirmed in 161 N. Y. 530, 56 N. E. 72.

And where the child of a testator was cared for by relatives at his request, on the promise that he would provide for her by will, it was held that the child could maintain an action against the estate, and could recover the amount expended by relatives, together with interest from the death of the testator. *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20.

Interest was allowed in an action for work and material in the construction of a railroad, where the debtor was in default for not having an estimate made by the engineer. *McMahon v. New York & E. R. Co.* 20 N. Y. 403. The court said: "Interest, therefore, if allowed upon this principle, should be computed only from the time of the refusal by the defendants, when called upon, either to cause a final estimate to be made, or to correct that already made."

In an action for work and labor for drilling an oil well, where the defendant was to contribute his share of the expenses, and the defendant received from the sale of the oil and land more than \$7,000, and the action was pending for about a quarter of a century, it was held that plaintiff was entitled to interest from the date of the commencement of the suit. *Kervin v. Utter*, 120 App. Div. 610, 104 N. Y. Supp. 1061.

And in an action for services for several years, plaintiff was allowed interest only from the time of the commencement of the action, in *Cully v. Iaham*, 125 App. Div. 97, 109 N. Y. Supp. 92.

Interest should be allowed against a mutual benefit association from the time of failure to levy an assessment for the payment of the loss, as provided in the policy. *Christie v. Iowa L. Ins. Co.* 111 Iowa, 177, 82 N. W. 499. The court said: "Instead of denying interest on all claims for unliquidated damages, this court has uniformly held that 'it may be considered as an element of damage, under the rule which permits its allowance in order to arrive at the sum which will be a just and lawful compensation for the injury sustained.' *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 502. Thus, to the value of property lost or destroyed, interest from the time this happened is added, as part of the compensation. *Johnson v. Chicago & N. W. R. Co.* 77 Iowa, 669, 42 N. W. 512; *Burdick v. Chicago, M. & St. P. R. Co.* 87 Iowa, 388, 54 N. W. 439; *Arthur v. Chicago, R. I. & P. R. Co.* 61 Iowa, 648, 17 N. W. 24; *Mote v. Chicago & N. W. R. Co.* 27 Iowa, 27, 1

Am. Rep. 212. This is on the ground that value can be ascertained, and when this has been done, the owner is as plainly entitled to interest as he would be if a like sum had been payable in money."

In an action on an insurance policy for a loss of cargo, upon the question whether interest was allowable on the account, the court said: "The general rule is that interest is not to be recovered on unliquidated damages, or for an uncertain demand. Jurors have, in many cases, a discretion to allow interest, by way of damages, according to the circumstances of the case; and this is a case in which that discretion may be exercised." Anonymous, 1 Johns. 315.

In *Tifton, T. & G. R. Co. v. Butler*, 4 Ga. App. 191, 60 S. E. 1087, an action for unliquidated damages for breach of a contract, it was held that interest was not recoverable as such, but that the jury might increase the amount of damages by allowance of interest; but they should not add interest *eo nomine*, but should find a gross sum.

A navigation company agreed to purchase 2,000 coupon trolley tickets daily, and deposited \$5,000 as a guaranty; subsequently there was a breach by the trolley company, and the navigation company sued for the deposit; as there was no proof of demand, interest was excluded, except from the date of the commencement of the action. *Kirkland v. Niagara Gorge R. Co.* 109 App. Div. 201, 95 N. Y. Supp. 657.

In an action for breach of contract to deliver a cargo of tea at certain prices and of a certain quality, and the tea was inferior, it was held that, as to interest, this was a question generally in the discretion of the jury; but that it was not agreeable to legal principles to allow interest on unliquidated contested claims sounding in damages. *Gilpins v. Consequa*, Pet. C. C. 85, Fed. Cas. No. 5,452; *Willings v. Consequa*, Pet. C. C. 172, Fed. Cas. No. 17,706.

In *Wisconsin* a late and well-considered case (*Laycock v. Parker*, 103 Wis. 161, 70 N. W. 327) reviews the cases in that state, both in actions for services and actions on contracts; and in an action on a contract for building, under the supervision of an architect, it was held that if there is a reasonably certain standard of measurement, by the correct application of which one can ascertain the amount he owes, he will be liable for interest from the time of demand.

In *Gallun v. Scymour*, 76 Wis. 251, 45 N. W. 115, which was an action for damages for breach of contract to deliver bark, where the market value was disputed, it was held that interest on the damages from the commencement of the suit was proper.

And where the damages were unliquidated, and the cause of action arose on a contract for the recovery of money only, and the petition was verified, it was held that the clerk could enter judgment for the amount and interest if there was a default. *Whereatt v. Ellis*, 68 Wis. 61, 31 N. W. 762.

And in an action for breach of contract 28 L.R.A. (N.S.)

to repair a sawmill, it was held that the jury, in their discretion, might add interest to the damages. *Hinckley v. Beckwith*, 13 Wis. 31.

In *Hewitt v. John Week Lumber Co.* 77 Wis. 548, 46 N. W. 822, damages allowed upon a counterclaim for breach of contract were held to bear interest from the time the answer was served. The court said that "if he had instituted a suit on his counterclaim earlier, he would have been entitled to interest from an earlier date."

In an action on a claim against the state, it was held that until the report awarding damages had been made, the damages for breach of contract were unliquidated and uncertain, and would not bear interest. *Martin v. State*, 51 Wis. 407, 8 N. W. 248. This case was distinguished in *Laycock v. Parker*, supra, as exceptional and differing from the Wisconsin cases, in that it was an action for general damages, such as loss of profits.

In the following cases, where it was held that interest should not be allowed, it seems that the damages were uncertain, and not easily ascertained. Where damages are to be made up from unascertained profits, they are so doubtful in amount as to prevent the application of the general rule giving interest.

In an action to recover on a contract to pay \$500 a day for each day of thirty saved in completing a building, and for damages for not having a foundation ready on time, it was held that the plaintiff could not recover interest where the claims were unliquidated, contested, and uncertain. *Mansfield v. New York C. & H. R. Co.* 114 N. Y. 331, 4 L.R.A. 566, 21 N. E. 735, 1037. The court said that in actions for breach of contract "whether interest is recoverable does not rest in the discretion of the jury, but it is a question of law for the court; while in actions sounding in tort, when the recovery of interest is permissible, it is, with some exceptions, a question for the jury."

In *Mansfield v. New York C. & H. R. Co.* supra, the case of *McMahon v. New York & E. R. Co.* 20 N. Y. 463, was distinguished, as there interest was allowable on the ground that the defendant was in default for not having taken steps to ascertain the amount of the debts. In *McCollum v. Seward*, 62 N. Y. 316, and *Mercer v. Vose*, 67 N. Y. 56, which were actions for services, interest was allowed from the commencement of the actions, on the ground that when the debtor was in default for not paying pursuant to his contract, the creditor was entitled to interest, as the amount could be computed approximately; but that in cases where this could not be done, interest would not be allowed.

Interest was not allowed from the commencement of an action for breach of contract against the state, in *McMaster v. State*, 108 N. Y. 542, 13 N. Y. S. R. 674, 15 N. E. 417. The court said: "The claim is in every sense unliquidated. There was no possible way for the state to adjust the

same and ascertain the amount which it was liable to pay, and hence, within the decision of *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13, s. c. subsequent appeal 78 N. Y. 393, 34 Am. Rep. 544, it was not liable for interest. The law in reference to the allowance of interest is not in a very satisfactory condition, but it is believed that no decision in this court has yet gone the length of allowing interest in such a case. It is scarcely claimed in this case that there could be any allowance of interest for the period of time prior to the filing of the petition, which may be regarded as equivalent to the commencement of an action; and in the case cited it was held that where the claim was such that it could not draw interest before the commencement of an action, that event would not set the interest running."

In an action for damages for breach of contract to do marble work, it was held that interest could not be recovered where the damages were unliquidated. *Stannard v. Robert H. Reid & Co.* 118 App. Div. 304, 103 N. Y. Supp. 521. The court said: "It is true that there was a market price for the various items of material, but it cannot be said that there was a market price for the entire contract work, which involved the furnishing of material and the performance of labor. The plaintiff did not know even approximately what it would cost him to have the work done. He was obliged to receive bids, which differed in amount, and he selected the lowest, and did not even then assume to fix his damages on that basis or notify the defendant. Nor did he recover the amount of damages which he alleged in the complaint."

In an action to enforce a mechanics' lien, it was held that the unliquidated amount for extra work would not carry interest, in *John Weber & Co. v. Hearn*, 49 App. Div. 213, 63 N. Y. Supp. 41. The Court said: "We think the authorities sustain the principle that interest upon an unliquidated claim, even though on contract, should not be awarded unless, with reasonable certainty, the amount was or could be fixed. In other words, the theory upon which interest can be allowed as damages is that a person owes a debt, the amount of which is fixed, or which, by reference to market values or to other sources of information, is susceptible of being definitely determined."

And where the lessor agreed to pay the market value of the improvements on the expiration of the lease, and refused to appoint appraisers, it was held that the lessee was not entitled to interest on the award of the appraisers appointed by him. *Holliday v. Marshall*, 7 Johns. 211. The court said: "The value of the improvements or amount of damages was uncertain and unliquidated. Although the covenant provided for an appraisement of the improvements, in case the land was not sold to the plaintiff, yet the defendant was not a party to the appraisement. He refused to unite in it, and there is nothing in the covenant making an *ex parte* appraisement binding 28 L.R.A. (N.S.)

on the defendant. The value of the improvements was open to inquiry at the trial; the plaintiff's claim is therefore to be considered as resting in unliquidated damages, upon which interest is not recoverable."

And where plaintiff conveyed lands to a railroad on consideration that they would lay a track to his property, and bring cattle to his place, which they failed to do, it was held that he could recover the value of the land conveyed, but, as the damages were unliquidated, he could not recover interest. *Day v. New York C. R. Co.* 22 Hun, 412.

In an action by a contractor, where the municipal board had a right to cancel the contract and pay for work done, it was held that plaintiff was not entitled to interest, as the amount due was not a matter of computation. *Coates v. Nyack*, 127 App. Div. 153, 111 N. Y. Supp. 476.

And in an action by a lessee because a mill was not rebuilt by the lessor after a fire, according to agreement, it was held that, as plaintiff's claim was unliquidated, it was not proper to allow interest on the damages. *Chamberlain v. Dunlop*, 28 N. Y. S. R. 375, 8 N. Y. Supp. 125.

In an action for damages for breach of contract to build a body on an automobile chassis, where the work was insufficient and imperfect, it was held that, as the damages were unliquidated, no interest was recoverable. *Anthony v. Moore & M. Co.* 135 App. Div. 203, 120 N. Y. Supp. 402.

And in an action on a contract under which cattle were received, kept, and sold, it was held that the claim was an uncertain and unliquidated demand, and the amount due could not be ascertained from the face of the contract, and that interest by that name could not be allowed. *Brady v. Wilcoxson*, 44 Cal. 239.

In an action for a breach of contract where there was not a market price to estimate the damages without a verdict from the jury, it was held that interest would not be allowed. *Brownell Improv. Co. v. Critchfield*, 96 Ill. App. 84, affirmed in 197 Ill. 61, 64 N. E. 332. This was a subcontract for paving.

And in an action for broker's commission on a contract to lease land at a certain rate, with the privilege of purchase, it was held by the trial court that this was an agreement to convey an undivided one-third interest in some land, so indefinite in description as to render the contract incapable of specific performance, and the value of the property in money was not known, and interest should not be allowed on the damages. This was affirmed. *Harvey v. Hamilton*, 155 Ill. 377, 40 N. E. 592.

In an action for damages for breach of an executory contract to furnish a vessel for a cargo of wheat, it was held no interest could be allowed. *Kelderhouse v. Save-land*, 1 Ill. App. 65. The right to recover on money counts was held to be the test, in applying the rule to unliquidated damages.

In *Buckmaster v. Grundy*, 8 Ill. 626, it was held that where damages were assessed for breach of a contract, interest would not be allowed.

In *Wilson v. Means*, 25 Kan. 83, which was an action for money advanced for a joint purchase of hogs and for one half of the profits, it was held that for the jury to omit the rate of interest in a verdict assessing damages rendered any attempted calculation of interest uncertain, and left the court with no other alternative than to reject interest in the rendition of the judgment.

In an action by a builder to recover for breach of contract, where the defendant changed his plans and let his contract to other parties, it was held that the builder was not entitled to interest upon his profits until they were determined by the verdict. *Swanson v. Andrus*, 83 Minn. 503, 80 N. W. 405. The court said: "Whatever is, or may have been, the rule in other jurisdictions as to allowing interest by way of damages, this court has so allowed it as a matter of law, even in cases where the demand was unliquidated, provided its pecuniary amount did not depend upon any contingencies, and was ascertainable by computation, or by reference to generally recognized standards, such as market value. . . . On the other hand, interest has not been allowed where the damages claimed were not only unliquidated, but could not be ascertained by reference to any generally recognized standard, or were, or any part of them, prospective or contingent, or the amount thereof depended in whole or in part upon the discretion of the jury. Actions for personal injuries, seduction, libel, slander, and false imprisonment fall within this classification."

Where the balance due on a contract was uncertain, interest was not allowed. *Vietti v. Nesbitt*, 22 Nev. 300, 41 Pac. 151.

In the following cases, interest was held not recoverable under the circumstances of the case:

For cutting down work on a construction contract, it was held that the plaintiff was not entitled to interest where the alterations in the contract were authorized. *Clark v. New York*, 1 Keyes, 9.

And under an agreement to pay an attorney a certain per cent of an award, it was held that the attorney was not entitled to a share of interest, as the interest upon the amount was not a part of the award, but merely compensation for the use of the property. *Re Bassford*, 36 Misc. 732, 74 N. Y. Supp. 397.

In *Allison v. Juniata County*, 50 Pa. 351; and *Dyer v. Covington Twp.* 19 Pa. 200, interest was held not allowable on county warrants, as an action would not lie on such paper, but on the original claim.

Where a lessor was to pay, on termination of the lease, two thirds of the appraised value of a building, it was held that, under Cal. Civ. Code, § 1917, the sum bore interest only from the day of its judicial ascertainment. *Easterbrook v. Farquhar* 28 L.R.A. (N.S.)

son, 110 Cal. 311, 42 Pac. 811. The court said that Sec. 3287, giving interest to every person who is entitled to recover damages capable of being made certain by calculation, where the right of recovery was vested in him on a particular day, did not apply.

In an action on a note payable in sugar in Guadeloupe, no interest was allowed as damages, because at that place such notes did not carry interest, but from judgment or registration. *Courtois v. Carpentier*, 1 Wash. C. C. 376, Fed. Cas. No. 3,286.

VII. Trover and conversion.

a. Generally.

The general rule in actions of trover is that the measure of damages will be the value of the property at the time and place of conversion, with interest from that time. In Kentucky and North Carolina, interest was held to be within the discretion of the jury. In Montana, interest was denied.

Federal cases.

The general rule stated above was applied in an action by the United States for wrongfully cutting and removing timber from reservations. *United States v. Pine River Logging Co.* 32 C. C. A. 406, 61 U. S. App. 69, 89 Fed. 907.

And where a cargo of flour capsized, and the carrier sold the cargo at auction without informing the owner, it was held a conversion, and the owners were held entitled to recover the value at the port of delivery, with interest. *The Joshua Barker*, Abb. Adm. 215, Fed. Cas. No. 7,547.

And in an action of trover for a flatboat and a cargo of wheat, it was held that the jury, in the exercise of their discretion, could include interest on the value of the property from the time of conversion, as a part of the damages. *Matthews v. Menedger*, 2 McLean, 145, Fed. Cas. No. 9,289.

And in an action for conversion of a whale in the Okhotsk sea, where the only market was in New Bedford, it was held that the damages would be the value at New Bedford of the oil and bone which might have been made, less the expense, with interest on the sum thus arrived at. *Bourne v. Ashley*, 1 Low. Dec. 27, Fed. Cas. No. 1,699.

And in an action for wrongful conversion of a lot of shoes, it was held that the plaintiff was entitled to the value at the time of demand, deducting storage charges, with interest from the time of demand. *Edmunds v. Nolan*, 86 Fed. 564.

Where the defendant converted ore and received royalties thereon from his lessee, and knew the amount, as shown by his books, it was held that he was liable for interest. *New Dunderberg Min. Co. v. Old*, 38 C. C. A. 89, 97 Fed. 150. The court said: "It is a general and just rule that, where interest is reserved in a contract, or is implied from the nature of the promise, it is recoverable of right; and that, when property or money has been wrongfully

appropriated or converted by a defendant, interest should be given as damages to compensate the complainant for the loss of the use of the proceeds of his property or of his funds. In cases of the latter class its allowance is sometimes a matter of discretion; but generally, whenever one has wrongfully detained or misappropriated the money of another, he ought to pay and must pay interest at the legal rate from the date of the misappropriation, or from the beginning of the detention."

In a suit in equity against the director of a bank for fraudulently diverting its funds, it was held that no statute was necessary to give a court of equity power to allow interest, and that when money has been misappropriated or converted, interest should be given as damages to compensate the plaintiff for the loss of the use of his funds. *Cooper v. Hill*, 36 C. C. A. 402, 94 Fed. 582. The court said: "When interest is reserved in a contract, or is implied from the nature of the promise, it becomes a part of the debt, and is recoverable as of right. When money has been misappropriated or converted to his own use by a defendant, interest is given as damages to compensate the complainant for the loss of the use of his funds."

Alabama.

In *Milner & K. Co. v. DeLoach Mill Mfg. Co.* 139 Ala. 645, 101 Am. St. Rep. 63, 36 So. 765; *Ewing v. Blount*, 20 Ala. 694, interest was allowed from the date of the conversion until the trial.

And in an action for conversion of logs or trees, the rule was held to be to allow the value immediately after severance, with interest. *White v. Yawkey*, 108 Ala. 270, 32 L.R.A. 199, 54 Am. St. Rep. 159, 19 So. 360.

And in an action for conversion of wood wrongfully cut by the tenant from leased premises, the measure of the damages was held to be the value of the wood from the time of the conversion of the trees into cord wood, with interest to the time of trial. *Brooks v. Rogers*, 101 Ala. 111, 13 So. 386.

In an action for conversion, it was held that the value of the property at the time of conversion, with interest thereon to the judgment, was the measure of the damages generally. *Lee v. Mathews*, 10 Ala. 682, 44 Am. Dec. 498. The court said: "There are cases where the jury would be justified in finding the value at a subsequent period, instead of the value at the time of conversion, with interest."

In an action for conversion of slaves, it was held that the measure of damages, where the thing converted had a fixed value, was that value at the time of conversion; and the jury might give interest upon it. *Jenkins v. McConico*, 26 Ala. 213.

In an action for conversion of a slave, where the defendant had hired him from a widow and returned him before administration, and the widow was entitled to the custody until administration, it was held 28 L.R.A. (N.S.)

that the plaintiff was entitled to a verdict for the injury done by the temporary conversion of the slave, with interest upon such sum up to trial; but that the defendant was not liable for the value of the slave, where he died after his return, before administration. *Williams v. Crum*, 27 Ala. 468.

And where in trover the plaintiff recovered the value of a woman slave, and then brought a subsequent action to recover in trover her issue, not included in the first action, it was said: "In either of these cases, the value of the property at the time of the conversion, with interest, or, at most, the enhanced value at a subsequent period, is all that the law deems necessary to adequate redress." *White v. Martin*, 1 Port. (Ala.) 215, 26 Am. Dec. 365.

Arkansas.

In an action for corn converted, it was held that plaintiff was entitled to recover the value, with interest from the date the corn was taken. *Fordyce v. Dempsey*, 72 Ark. 471, 82 S. W. 493; *Ryburn v. Pryor*, 14 Ark. 505.

California.

In an action for conversion of personal property, it was held that, under Cal. Civ. Code, § 3336, providing that the measure of damages was, first, the value of the property at the time of conversion, with interest from that time; or, where the action has been prosecuted with diligence, the highest market value at any time between the conversion and the verdict, with interest, at the option of the injured party; and where the plaintiff did not exercise his option, the court could award damages under either rule. *Barrante v. Garratt*, 50 Cal. 112.

In an action for conversion of warrants, it was held that when the property converted had a fixed value, the measure of damages was that value, with legal interest from the time of conversion; that when the value was fluctuating, the plaintiff might recover the highest value at the time of conversion, or at any time afterwards. *Douglass v. Kraft*, 9 Cal. 562; *Hammer v. Hathaway*, 33 Cal. 117.

Colorado.

In an action for conversion, it was held that damages were properly allowed for the detention of property, which was equivalent to legal interest on its value from the date of conversion. *Updegraff v. Lessem*, 15 Colo. App. 297, 62 Pac. 342. The court said: "The rule in this state is that damages are allowable for the detention equal to the legal interest on the value of the chattels converted from the time of the conversion to the time of judgment."

And in an action for mining ore and converting the same to the use of the defendant, it was held that the court should instruct the jury to add interest to the amount found as the value of the ore, as further damages, a sum equal to the legal

interest on the same from the time of the conversion. *Omaha & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 5 L.R.A. 236, 16 Am. St. Rep. 185, 21 Pac. 925.

In *Greeley, S. L. & P. R. Co. v. Yount*, 7 Colo. App. 189, 42 Pac. 1023, it was said: "In the case of the wrongful taking or detention of personal property, it has been held that interest on its value is a proper measure of the damages for the detention, where they cannot readily be fixed otherwise. But the recovery was allowed as damages, and not as interest, and the legal rate of interest was used as their measure, because the character of the property was such that there was no other practicable method of ascertaining their amount. *Machette v. Wanless*, 2 Colo. 169; *Hanauer v. Bartels*, 2 Colo. 514; *Omaha & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 5 L.R.A. 236, 16 Am. St. Rep. 185, 21 Pac. 925."

In an action for conversion of a stock of merchandise, it was held the measure of damages was the value of the property at the time of the taking, with legal interest thereon from the date of taking to the date of rendering the verdict. *Sutton v. Dana*, 15 Colo. 98, 25 Pac. 90.

In an action by a mortgagee for conversion of property, it was held: "It is now the established rule in Colorado that while, as interest, damages may not be recovered for the detention of the money, or the money value of property taken and converted, yet damages equal to the legal interest upon the value of the chattels converted may be allowed, and included in the verdict which the jury may render. *Omaha & G. Smelting & Ref. Co. v. Tabor*, supra. Under the law as established in that case, the plaintiffs were entitled to recover, and have included in the verdict of the jury, a sum of money as damages for the detention of the property, which would have been the exact equivalent of the interest which the jury computed and included in the verdict, and which the court told them the plaintiffs had a right to recover. In form the charge was undoubtedly erroneous, though in substance it was a correct expression of the law. But, as committed in this case, it is not an error for which the cause will be reversed and sent back for a new trial." *Perkins v. Marrs*, 15 Colo. 202, 25 Pac. 168.

The measure of damages in trover was held to be the value of the property converted, at the time of its conversion, with legal interest upon the amount from such time. *Sylvester v. Craig*, 18 Colo. 44, 31 Pac. 387.

Connecticut.

In this state the general rule was held applicable. *Lewis v. Morse*, 20 Conn. 211. In this case the time of conversion was not shown, and therefore the plaintiff was required to take only the value of the property.

In *White v. Webb*, 15 Conn. 302, the following rules were laid down: "In actions

of trover and trespass, for property taken and converted by the defendant, where there is no malicious motive on the part of the defendant, but he takes the property under a claim of right, and the real dispute is as to the title, the rule of damages is the value of the property at the time of the conversion or taking, and interest on that sum to the time of judgment. If, however, the suit is brought by a bailee or special-property man, against the general owner, then, the plaintiff can recover the value of his special property only; but if the writ is against a stranger, then he recovers the value of the property and interest, according to the general rule; and holds the balance beyond his own interest, in trust for the general owner."

And the general rule was applied in *Oviatt v. Pond*, 29 Conn. 479; *Clark v. Whitaker*, 19 Conn. 319, 48 Am. Dec. 160; *Curtis v. Ward*, 20 Conn. 204; *Cook v. Loomis*, 26 Conn. 483. The same was held in *Hurd v. Hubbell*, 26 Conn. 389, the court saying: "We have always understood that the rule of damages in this kind of action is the value of the property at the time of conversion, and interest. It has been so from the first, in our courts, and in the English courts, with a slight qualification in the case of sales of chattels where the price is paid in advance, and in that of contracts for the delivery of stock."

And the general rule was applied in *Morrey v. Hoyt*, 62 Conn. 542, 19 Am. Rep. 611, 26 Atl. 127. The court said: "It is to be observed with regard to this class of property that the plaintiffs were not seeking to recover its value, but simply the damage they had suffered by reason of the taking and detention; and that the property was of that class, so far as we can see, that has no value for use. It was useful only for sale or for consumption."

Delaware.

The general rule was followed in *Vaughan v. Webster*, 5 Harr. (Del.) 256.

Florida.

The general rule was followed in *Moody v. Caulk*, 14 Fla. 50.

In an action of conversion for a quantity of logs, where trees had been cut on plaintiff's ground, it was held that the conversion was complete only when the logs were removed; and plaintiff was entitled to recover the value at the time and place of removal, with interest. *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1.

Georgia.

Under Ga. Code, § 3506, requiring the plaintiff in an action of trover to elect whether he will accept a verdict for the property, or its value, or whether he will demand a verdict for the damages alone, or for the property alone, and its hire, if any, where the plaintiff elected to take a verdict

for damages alone, it was held that interest should not be allowed. *Barnett v. Thompson*, 37 Ga. 335. The court said: "The Code does not declare that the plaintiff shall recover interest on the proven value of the property as part of his damages; that may have been intentionally omitted, in view of the fact that the plaintiff was not confined to the proven value of the property at the time of the conversion, but was allowed to prove its highest value between the conversion and the trial. In other cases where the damages are to be increased by the addition of interest, it is so expressly declared."

And under Ga. Code, § 5335, providing for a choice of verdict in actions of trover, it was held that the prevailing party had the election of recovering the highest value of the property, between the conversion and the trial, without hire or interest, or of recovering the value at the time of the conversion, with interest or such hire as he might prove. *Bank of Blakely v. Cobb*, 5 Ga. App. 289, 63 S. E. 24.

In an action against a railroad for refusing to deliver goods, it was held that under Ga. Code, § 3390, providing that verdicts may be the same as in actions of trover, a verdict could be rendered for the value of the property, with interest thereon, in the nature of profits, where the plaintiff chose that form of recovery, instead of proceeding for the highest proved value. *Macon & W. R. Co. v. Meador*, 67 Ga. 672. The court said: "Under it interest is recoverable on the value proved, as profits, if a recovery is not sought to be had at the highest value proved at any time between the conversion and trial. *Schley v. Lyon*, 6 Ga. 535; *Tuller v. Carter*, 59 Ga. 395; *Collier v. Lyons*, 18 Ga. 648. Here the interest is recovered instead of profits, and under the rule applicable to this form of pleading, we hold that if the recovery of the principal does not exceed the alleged value of the property sued for, interest thereon may be recovered as profits without reference to the value of profits alleged in the writ."

And in an action for conversion of slaves, sold by the defendant, it was held that the measure of damages was the purchase money received by the defendant, with interest, if the sale was for a fair amount. *Dorsett v. Frith*, 25 Ga. 537.

And where a tenant in common in a gold mine used more than his share, and there was no proof of profits, it was held that he was bound to account for the surplus, with interest. *Huff v. McDonald*, 22 Ga. 131, 68 Am. Dec. 487.

Under Ga. Code, § 3563, similar to § 3506, supra, it was held that where the plaintiff was contented to recover the value of the property at the time of its conversion, and proved its value at that date only, he would be entitled to interest at the time of trial; but if he proved its highest value between the time of conversion and the trial, the measure of damages would be such value, without interest. *Tuller v. Carter*, supra. 23 L.R.A. (N.S.)

And where a buyer of cotton took the wrong cotton, and the owner sued in assumpsit, it was held that the measure of the recovery was the value of the cotton, with interest. *Newton Mfg. Co. v. White*, 53 Ga. 395.

In *Schley v. Lyon*, 6 Ga. 530, it was said: "The general rule in actions of trover is that the measure of damages will be the value of the property at the time of the conversion, with interest thereon from that time."

In an action of trover, a verdict finding for the plaintiff the property in controversy, with certain amounts for hire and interest, was held contrary to law in regard to interest. *Newman v. Cross*, 108 Ga. 776, 33 S. E. 641.

In an action for the conversion of a mule and for the recovery of hire, a verdict finding a specific sum, with interest thereon from a date preceding the time of conversion, was held erroneous, because interest, as such, was not recoverable, and if it were, the time of accrual did not begin before the conversion. *Martin v. Oslin*, 94 Ga. 658, 19 S. E. 988.

In an action of trover, the only evidence was the value of the property at the date of the conversion. It was held that the jury might be instructed that they should find for the plaintiff the amount proved, with interest from that date to the date of the trial. *Midville, S. & R. B. R. Co. v. Bruhl*, 117 Ga. 329, 43 S. E. 717.

In an action of trover it was held that if the plaintiff elected to take the highest value of the property between the conversion and the trial, and made proof of the value after the conversion and up to the time of trial, he was not then entitled to hire or to interest. *Jaques v. Stewart*, 81 Ga. 81, 6 S. E. 815.

Illinois.

The general rule was applied in *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28, and in *Cassidy v. Elk Grove Land & Cattle Co.* 58 Ill. App. 39; *Morley v. Roach*, 116 Ill. App. 534; *Smyth v. Stoddard*, 105 Ill. App. 510, modified on another point in 203 Ill. 424, 96 Am. St. Rep. 314, 67 N. E. 980; and in *Chapman v. Burt*, 77 Ill. 337, which was an action against an attorney for converting money belonging to his client, where there was unreasonable delay in paying it over; and in *Janeway v. Burton*, 201 Ill. 78, 66 N. E. 337, which was an action of trespass for conversion of property taken under writ of replevin; also in *Robinson v. Alexander*, 141 Ill. App. 192, which was an action of trover for conversion of furniture.

Indiana.

In an action for conversion of a consignment of goods, it was held the jury had a right to add interest from the date of conversion. *Kavanaugh v. Taylor*, 2 Ind. App. 502, 28 N. E. 553.

Iowa.

In an action for conversion of a note, it was held that the measure of damages was the value, with interest from its date. *Ilubard v. State L. Ins. Co.* 129 Iowa, 13, 105 N. W. 332. The court said: "It is further urged that the judgment is excessive, in so far as it includes interest on the note from date to the rendition of judgment, it not appearing that the note provided for the payment of interest; but the court was justified in adding interest on the amount of plaintiff's damages from the time of conversion, regardless of whether the note provided for interest."

And where an attorney used money of his client as his own, it was held he was liable for interest on such use. *Mansfield v. Wilkerson*, 26 Iowa, 482.

And where there was no claim for special damages, it was held that in an action to recover for the conversion of sheep, the measure of damages was the value at the time of the conversion, with interest. *Cutter v. Fanning*, 2 Iowa, 580.

In an action against an agent for money secured by misrepresenting that he had paid a greater price for cattle than he actually did, where the court awarded 10 per cent interest on the excess of the amount received over the amount paid out, as damages, it was held erroneous, as the rate of interest was 6 per cent. *Vennum v. Gregory*, 21 Iowa, 326. The court said: "And although interest was allowed in this case as damages, it was not competent for the court to allow more than legal rate, 6 per cent."

Kansas.

In an action for conversion of a stock of merchandise, the plaintiff was entitled to recover the value of the property at the time of conversion, with interest. *Simpson v. Alexander*, 35 Kan. 225, 11 Pac. 171.

But in an action to recover cattle taken and converted, where the petition gave the number of cattle and average value, and the damages computed thereby; but the plaintiff made no claim for interest, and only a portion of the cattle taken and converted were of the value charged, it was held that a verdict larger than such value was erroneous, although the amount was reached by computing interest. *Shepard v. Pratt*, 10 Kan. 209.

Kentucky.

In trover, it was held that the measure of damages was the value of the property at the time of conversion, with interest to the time of trial; but this was in the discretion of the jury. *Sanders v. Vance*, 7 T. B. Mon. 209, 18 Am. Dec. 167.

So in *Newcomb-Buchanan Co. v. Baskett*, 14 Bush, 658.

Louisiana.

In an action for conversion, it was held the measure of damages was the value of 28 L.R.A. (N.S.)

the property converted, with interest. *Chamberlain v. Worrell*, 38 La. Ann. 347.

In an action against an attorney for money, where the means of liquidating the balance was in the hands of defendant, it was held that interest should be allowed from the date of judicial demand, under La. Civ. Code, art. 2084, providing that an attorney is answerable for interest on any sum remaining in his hands from the day he becomes a defaulter, for delay in paying it over. *Dwight v. Simon*, 4 La. Ann. 400.

In an action against an administrator to compel an accounting, it was held that those who converted property of others to their own use were in bad faith; but when the sale had been fair, and the full market value obtained, the price, with interest from the date of the sale, was the measure of damages, and this rule was not affected by the subsequent rise or fall of the thing sold. *Dadillo v. Tio*, 7 La. Ann. 487.

In an action for conversion of bonds, it was held that in Louisiana the damages could be assessed by the court in the first instance, or, as in this case, by the appellate court; and under the practice here, that all interest recoverable, due from the day of final judgment, formed part of the damages. *New Orleans Draining Co. v. De Lizardi*, 2 La. Ann. 281. In this case it was held that defendants must account, as of this day, for the par value of the bonds, and for the sums charged in their accounts for dividends or interest, and for commission allowed them on the sale of those bonds.

Maine.

In trover, the measure of damages is the value of the property converted, with interest from that time. *Robinson v. Barrows*, 48 Me. 186, *Hayden v. Bartlett*, 35 Me. 203.

Maryland.

In trover, the measure of damages is the value of the chattels at the time of conversion, with legal interest thereon up to the date of the verdict. *Swartz v. Gottlieb-Bauern-Schmidt-Straus Brewing Co.* 109 Md. 393, 71 Atl. 854; *Heinekamp v. Beaty*, 74 Md. 388, 21 Atl. 1098, 22 Atl. 67; *Hopper v. Haines*, 71 Md. 64, 18 Atl. 20, 20 Atl. 159; *Thomas v. Sternheimer*, 29 Md. 268.

Massachusetts.

The general rule was applied in *Kennedy v. Whitwell*, 4 Pick. 466. This was for gin sold by defendant to plaintiff, where the price was paid, but the goods were not delivered.

So, where a city appropriated gravel to its own use, without right. *Hunt v. Boston*, 183 Mass. 303, 67 N. E. 244.

And where the vendor on conditional sale brought an action against a third party for conversion, after payment of a certain sum in instalments, it was held that the measure of damages was the value of the property, with interest from the time of conversion.

Angier v. Taunton Paper Mfg. Co. 1 Gray, 621, 61 Am. Dec. 436.

And in an action for conversion, where property was held under a contract of conditional sale, it was held that the plaintiff could recover the value at the time of conversion, with interest from that date to the date of verdict. *Lorain Steel Co. v. Norfolk & B. Street R. Co.* 187 Mass. 500, 73 N. E. 646.

In trover by a mortgagee, where property was sold to strangers, the damages were the value of the property and interest from the time of sale by the defendant. *Barry v. Bennett*, 7 Met. 354.

For conversion of a bond bearing 4 per cent interest, it was held that an ordinary rate of interest should be allowed, after the plaintiff acquired a claim for money against the defendant. *Scollans v. E. H. Rollins & Sons*, 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 983.

And where an officer took a note from a person arrested, and retained it until the maker of the note had become insolvent, it was held the measure of damages was the value of the note at the time of conversion, with interest thereafter. *King v. Ham*, 6 Allen, 298.

And in an action against promoters of a corporation for the value of certain stock which the defendants did not tender, it was held that defendants should be charged with interest from the time the value of the stock was fixed, on the same principle as damages for wrongful conversion of personal property. *East Tennessee Land Co. v. Leeson*, 183 Mass. 37, 66 N. E. 427.

In *Greenfield Bank v. Leavitt*, 17 Pick. 1, 28 Am. Dec. 268, it was held that in trover the measure of damages was generally the value of the property converted, with interest from that time; and if the property was restored, this should be credited; but if the restoration was obtained by an offer of reward, this amount, with interest, was to be deducted from the value of the property restored.

In *Cutting v. Grand Trunk R. Co.* 13 Allen, 381, which was an action against a common carrier, it was said: "The general rule is well settled in this commonwealth that, in an action of trover, the measure of damages is the market value of the goods at the time of the conversion, and interest thereon, even if the defendant has since sold the goods at a higher price."

Michigan.

In *Winchester v. Craig*, 33 Mich. 205, it was said: "The general rule undoubtedly is, in ordinary cases, that the full value of the property at the time and place of its conversion, together with interest thereon, is the correct measure of damages in actions of trover; yet, as was said in *Northrup v. McGill*, 27 Mich. 238, 'this rule yields, when the facts require it, to the principle on which the rule itself rests; namely, that the recovery in trover ought to be commensurate, and only commensurate, with the

injury, whether that injury be greater or less in extent than the full value of the property and interest.'"

The general rule was applied in an action for cutting down timber, and converting it into logs. *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262.

And in an action of trover for wheat, it was held the damages were the price it was worth at the time it was demanded by the plaintiff's guardian, and interest on that sum to the date of judgment. *Rough v. Womer*, 76 Mich. 375, 43 N. W. 573.

In an action for conversion of horses and other livery property, the cash value of the property, with interest from the time of conversion, was allowed, where no special circumstances required a different rule. *Allen v. Kinyon*, 41 Mich. 281, 1 N. W. 863.

Where parents mortgaged the daughter's piano, and it was taken from them by the mortgagee, and the daughter replevied it, and judgment was rendered in favor of the father and mother, and also in favor of the daughter; but the piano remained in possession of mortgagee, and the daughter sued the officer for the value and the damages, it was held that she could recover only the value, with interest. *Blaisdell v. Scally*, 84 Mich. 149, 47 N. W. 585.

Minnesota.

The general rule was applied in *Derby v. Gallup*, 5 Minn. 119, Gil. 85; *Zimmerman v. Lamb*, 7 Minn. 421, Gil. 336; *Jones v. Rahilly*, 16 Minn. 322, Gil. 283.

And where logs were wrongfully cut and sold to another party, who sold them at a certain place, and the logs were greatly enhanced in value, it was held that the measure of damages for conversion was the value of the logs at the place and time of conversion by the defendant, with interest from that date. *Nesbitt v. St. Paul Lumber Co.* 21 Minn. 491.

Missouri.

In an action for conversion, it was held, under Mo. Rev. Stat. 1889, § 2863, providing that the jury, on the trial of an inquisition of damages, may, if they think fit, give damages in the nature of interest over and above the value of goods at the time of conversion, that interest was discretionary with the jury. *Vermillion v. LeClare*, 89 Mo. App. 55; *Bigler v. Leonori*, 103 Mo. App. 131, 77 S. W. 324; *Meyer v. Phoenix Ins. Co.* 95 Mo. App. 721, 69 S. W. 639 (this was under Mo. Rev. Stat. 1889, § 2869; it was further held that a claim for interest must be made in the petition); *Thomas Mfg. Co. v. Huff*, 62 Mo. App. 124; *Kamerick v. Castleman*, 29 Mo. App. 658; *Watson v. Harmon*, 85 Mo. 443; *Davis v. Fairclough*, 63 Mo. 61; *Charles v. St. Louis & I. M. R. Co.* 58 Mo. 458.

In *Wheeler v. McDonald*, 77 Mo. App. 213, it was held that, under Mo. Rev. Stat. § 4430, providing that a jury may give damages in the nature of interest over and above the value of the goods at the time of the

conversion, a direction to the jury to give interest would have been improper; and where the case was submitted to the court without the jury, a finding of law that the plaintiff was entitled to interest from the date of the conversion was held to be erroneous, as under this statute the question of interest was discretionary.

And interest was held discretionary under this statute, in *State ex rel. Roberts v. Hope*, 121 Mo. 34, 25 S. W. 893. The court said: "Aside from statutory enactment authorizing it, there are many authorities which hold that upon a recovery by plaintiff in actions for the conversion of chattels, interest on their value should be allowed from the time they are taken." *Baker v. Kansas City, C. & S. R. Co.* 52 Mo. App. 602; *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855. In the latter case the court said, as a general rule, interest is allowed on the full value of the property at the date of conversion; but in this state it is controlled by statute, which leaves it discretionary with the jury.

In *Hawkins v. Kansas City Hydraulic Press Brick Co.* 63 Mo. App. 64, it was held that it was discretionary with the jury to allow interest at the time of conversion, and a mandatory instruction was held improper.

Under Mo. Rev. Stat. 1889, § 4430, authorizing interest in an action for conversion, it was held that the petition should ask for interest, and interest, if allowed, should be calculated from the date of conversion or wrongful delivery of lumber, and not from the date it was received by a carrier at the shipping point. *Horner v. Missouri P. R. Co.* 70 Mo. App. 285.

In *Schultz v. Christman*, 9 Mo. App. 588, it was held that where a jury was authorized, in a case of unliquidated damages, to allow interest in an action for wrongful conversion and conspiracy, interest should be estimated by the jury, and found as a part of the damages assessed.

In an action for wrongful taking and carrying away merchandise, it was held that the damages were the value of the goods taken, with interest from the time they were taken, and also exemplary damages. *Freidenheit v. Edmundson*, 36 Mo. 226, 88 Am. Dec. 141.

In *Spencer v. Vance*, 57 Mo. 427, the rule of damages for the wrongful taking of goods was held to be the market value at the time, and not the price paid for them, or at which they were sold; and in trover the measure of damages was the value of the property at the time of conversion, with interest up to the time of trial.

In an action for conversion of a slave, it was held that plaintiff was entitled to interest on the assessed value, and not to damages equivalent to his hire, as the action affirmed the act of the defendant in converting. *Polk v. Allen*, 19 Mo. 467.

Montana.

In *Randall v. Greenwood*, 3 Mont. 506, an 28 L.R.A. (N.S.)

action to recover the value of goods converted, it was held that interest would not be allowed. The court said: "The claim and demands upon which interest is allowed depend entirely upon the statute. This claim or demand of respondent against appellants is not of the kind upon which interest can be allowed until after judgment. See Code Stats. 497, § 2."

Nebraska.

In *Bennett v. McDonald*, 59 Neb. 234, 80 N. W. 820, the measure of damages was held to be the value of the property at the time of the conversion, with interest.

Nevada.

In *O'Meara v. North American Min. Co.* 2 Nev. 112, it was held that the measure of damages was the value of the property at the time of conversion, with interest from that time to the time of trial.

In *Boylan v. Huguet*, 8 Nev. 345, in an action for conversion of mining stock, it was said: "It seems to us clear that any rule of damages by which the wrongdoer is made to pay more than the value of the property when it is first converted, whether in the shape of interest or money realized by a sale or otherwise, is founded upon the same principle as that which allows the highest fair market price at any date between the time when the owner is dispossessed and the trial."

New Hampshire.

The general rule was held applicable in *Chauncy v. Yeaton*, 1 N. H. 151.

And in an action for trespass and conversion of bark, it was held the measure of damages was the highest market value at the place of conversion, with interest from the time of taking. *Adams v. Blodgett*, 47 N. H. 219, 90 Am. Dec. 569.

New York.

In *Prince v. Conner*, 69 N. Y. 608, it was held that the measure of damages was the value of the goods at the time of taking, with interest.

In *Devlin v. Pike*, 5 Daly, 85, the rule was stated: "That in actions for the breach of an agreement to return or replace property, or to deliver it, where the price has been paid, or for the converting of it, in cases where there is no ground for exemplary damages, the measure of damages is a question of law, the plaintiff's recovery being limited to what will compensate him for the loss sustained; that in all cases he is entitled to recover the value of the property at the time of the breach, or of the conversion, with interest up to the day of the trial, as his additional damages."

The general rule was held to apply in *Flagler v. Hearst*, 91 App. Div. 12, 86 N. Y. Supp. 308; *Einstein v. Dunn*, 61 App. Div. 195, 70 N. Y. Supp. 520, affirmed in 171 N. Y. 648, 63 N. E. 1116; *Willard v. Bridge*, 4 Barb. 361; *Cutler v. James Gould Co.* 7 N. Y. S. R. 106; *Ormsby v. Vermont Copper Min. Co.* 56 N. Y. 623; *Tyng v. Commercial*

Warehouse Co. 58 N. Y. 308; *Mechanics' & T. Bank v. Farmers' & M. Nat. Bank*, 60 N. Y. 40; *Prince v. Conner*, supra; *Alexander v. Osborn*, 21 N. Y. Week. Dig. 298; *Roberts v. Berdell*, 61 Barb. 37, affirmed in 52 N. Y. 644; *Bissell v. Hopkins*, 4 Cow. 53; *Dillenback v. Jerome*, 7 Cow. 294; *New York Guaranty & Indemnity Co. v. Flynn*, 65 Barb. 365; *Wilson v. Conine*, 2 Johns. 280; *Whele v. Butler*, 3 Jones & S. 1, 43 How. Pr. 5; *Stevens v. Low*, 2 Hill, 132; *Hyde v. Stone*, 7 Wend. 354, 22 Am. Dec. 582; *Booth v. Powers*, 56 N. Y. 22; *People v. Gasherie*, 9 Johns. 71, 6 Am. Dec. 263.

And where saw logs were converted into boards, it was held that the plaintiff was entitled to recover the value of the boards, and interest on the value thus ascertained. *Baker v. Wheeler*, 8 Wend. 505, 24 Am. Dec. 66.

And in an action for conversion of stock, it was held that, on the refusal to pay its value on demand, the plaintiff was entitled to recover its value, with interest. *Anderson v. Nicholas*, 28 N. Y. 600.

And in an action of trover to recover the value of a barge, it was held that interest on the value at the time of the injury was properly directed to be allowed. *Andrews v. Durant*, 18 N. Y. 496. The court said: "It is as necessary a part of complete indemnity as the value itself. There is no sense in the idea that interest is any more in the discretion of the jury than the value."

And in an action by a mortgagee against a chattel mortgagor for wrongfully taking possession of hotel silverware, and for an injunction, where the purchase-money notes drew interest, it was held that the plaintiff was entitled to interest as damages to the time of actual return of the property. *Earle v. Gorham Mfg. Co.* 2 App. Div. 460, 37 N. Y. Supp. 1037.

And where a yacht was converted, and, after the action for conversion, was returned, it was held that plaintiff was entitled to interest on the value from the time of conversion to the time of trial, subject to set-off of the value at the time of return, with interest to the time of trial. *Flagler v. Hearst*, 91 App. Div. 12, 86 N. Y. Supp. 308.

And where the plaintiff was put to extra expense, it was held that he could recover the value of the property and reasonable allowance for expense caused, in addition to the value of the property, with interest. *McDonald v. North*, 47 Barb. 530. The extra trouble was hunting for lost hogs.

In an action against a purchaser from a junk dealer of stolen goods, it was held that the plaintiff was entitled to interest on recovery from the time the goods were disposed of by the defendant. *Pease v. Smith*, 5 Lans. 519.

And in an action against an executor for converting money, it was held that interest should be allowed, on the ground that the rule would apply as in trover, and that a person who converted money to his own use should pay interest. *People v. Gasherie*, supra.

In *Wilson v. Troy*, 135 N. Y. 104, 18 28 L.R.A. (N.S.)

L.R.A. 449, 31 Am. St. Rep. 817, 32 N. E. 44, the court said: "The principle that the right to interest in such cases was in the discretion of the jury was, however, gradually abandoned, and now the rule is that the plaintiff is entitled to interest on the value of property converted or lost to the owner by a trespass as matter of law. The reason given for the rule is that interest is as necessary a part of a complete indemnity to the owner of the property as the value itself; and in fixing the damages, is not any more in the discretion of the jury than the value."

North Carolina.

In an action by the owner of property sold on conditional sale against a chattel mortgagee for conversion, it was held that if the date of the conversion had been found by the verdict, the jury, in their discretion, could have allowed interest, under the N. C. Code, § 530, providing that a judgment not on contract shall bear interest until paid. *Lance v. Butler*, 135 N. C. 419, 47 N. E. 488.

Oklahoma.

In an action for conversion of personal property, it was held that, under Oklahoma Statutes, 1893, § 2640, providing that detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of conversion, with interest from that time, interest was a matter of right. *Drumm-Flato Commission Co. v. Edmison*, 17 Okla. 344, 87 Pac. 311.

Oregon.

For conversion of a hop house, where the article was returned and accepted by plaintiff, it was held the measure of damages was the value of the property at the time of the conversion, with interest to the time of trial, less its value when returned, with interest from that date. *Eldridge v. Hoefer*, 45 Or. 239, 77 Pac. 874.

For conversion of stock, it was held that interest was not recoverable as such, on an unliquidated claim, until the amount was ascertained; but that, in an action of trover, it was allowed on the value of the article converted, not as interest, but as an item of damages; and the owner could recover it as a part of the damages suffered by him. *Durham v. Commercial Nat. Bank*, 45 Or. 385, 77 Pac. 902.

Pennsylvania.

The general rule was held applicable in *Agnew v. Johnson*, 22 Pa. 471, 62 Am. Dec. 303.

In a special case the jury might give more than mere interest as damages. *Backenstoss v. Stahler*, 33 Pa. 251, 75 Am. Dec. 592.

And in *Hill v. Canfield*, 56 Pa. 454, it was said: "It has not been an unusual thing in practice, to allow damages beyond the actual value of the goods converted, and in-

terest; although the general rule undoubtedly is the value of the goods and interest."

Rhode Island.

In an action of trover against two, where one had made partial satisfaction, it was held that the measure of damages against the other was the value of the goods, with interest from the time of conversion, subject to the credit received. *Heyer Bros. v. Carr*, 6 R. I. 45.

South Carolina.

The general rule was held applicable in *Banks v. Hatton*, 1 Nott. & M'C. 221.

In an action for the conversion of a slave, the measure of damages was held to be the value of the slave at the time of conversion, with interest from then until the trial, or hire until his death. *Burney v. Pledger*, 3 Rich. L. 191, following *Kid v. Mitchell*, 1 Nott & M'C. 334, 9 Am. Dec. 702; *Hatton v. Banks*, 1 Nott & M'C. 223, note.

Where the thing converted was reduced to money by the defendant, the smallest measure of damages is always the amount received from the conversion, with interest from the time of conversion. *Ewart v. Kerr*, 2 McMull. L. 141.

But in *Daub v. Martin*, 2 Bay, 193, it was held that, in an action of debt on a judgment in trover, it was not the usage and practice to allow interest on damages.

Texas.

In some cases the general rule was held applicable. *Muse v. Burns*, 3 Tex. App. Civ. Cas. (Willson) 99; *Smith v. Bates* (Tex. Civ. App.) 27 S. W. 1044; *Harris v. Finberg*, 46 Tex. 48; *Anderson v. Larremore*, 1 Tex. App. Civ. Cas. (White & W.) 532; *Daugherty v. Lady* (Tex. Civ. App.) 73 S. W. 837; *Hatcher v. Pelham*, 31 Tex. 201; *Carter v. Roland*, 53 Tex. 540; *Grimes v. Watkins*, 59 Tex. 133; *First Nat. Bank v. Cleveland*, 36 Tex. Civ. App. 478, 82 S. W. 337; *Texarkana Water Co. v. Kizer* (Tex. Civ. App.) 83 S. W. 913.

In order to recover interest in an action for conversion, it should be demanded in the complaint. *Texarkana Water Co. v. Kizer*, supra.

In *Pridgin v. Strickland*, 8 Tex. 427, 58 Am. Dec. 124, it was said: "And there can be no doubt that it may safely be assumed that the old rule in the action of trover, that the value of the thing at the time of conversion, and interest thereon up to the judgment, if not entirely abolished, has been subjected to so many exceptions as to leave it not worth preservation, and the amount of the damage will vary according to the particular property to which it may be applied."

In an action against an agent for not paying money collected by him, it was held that interest *eo nomine* was not to be recovered, but as damages. The court should have left the question of interest to the discretion of the jury. But it was held that, under 28 L.R.A. (N.S.)

der the evidence, the verdict would not have been different. *Close v. Fields*, 13 Tex. 623.

The measure of damages in an action for the conversion of money was held to be the legal interest from the time of conversion. *Commercial & Agri. Bank v. Jones*, 18 Tex. 811. It was said that the rule was different in conversion of other personal property; there the question of interest would be in the discretion of the jury; "but in a suit for the conversion of money, if damages are allowed at all, it must be in the form of interest."

In *Moore v. King*, 4 Tex. Civ. App. 397, 23 S. W. 484, it was held that interest was not always adequate compensation for the damages sustained.

Vermont.

The general rule was held applicable in *Crumb v. Oakes*, 38 Vt. 566; *Thrall v. Lathrop*, 30 Vt. 307, 73 Am. Dec. 306; *Grant v. King*, 14 Vt. 367.

And where defendant applied plaintiff's personal property and the income from land to his own use, instead of to the discharge of a recognizance, it was held to be a fraudulent misappropriation of the funds, and he was held liable for interest on the value from the time that plaintiff had paid the amount due on the recognizance. *Crane v. Thayer*, 18 Vt. 162, 46 Am. Dec. 142.

West Virginia.

The general rule was applied in *Cecil v. Clark*, 49 W. Va. 459, 39 S. E. 202.

Wisconsin.

In some cases the general rule was held to apply. *Arpin v. Burch*, 68 Wis. 619, 32 N. W. 681; *Tenney v. State Bank*, 20 Wis. 153.

But where the real damage for wrongful detention of personal property was the value of the use, it was held that this rule would be applied instead of interest. *Williams v. Phelps*, 16 Wis. 81.

In *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762, 2 N. W. 755, it was said: "The rule fixing the measure of damages in actions for breaches of contract for the delivery of chattels, and in all actions for the wrongful and unlawful taking of chattels, whether such as would formerly have been denominated trespass *de bonis* or trover, at the value of the chattels at the time when delivery ought to have been made, or at the taking or conversion, with interest, is certainly founded upon principle. It harmonizes with the rule which restricts the plaintiff to compensation for his loss, and is as just and equitable as any other general rule which the courts have been able to prescribe, and has greatly the advantage of certainty over all others."

b. Wrongful levy.

In actions for damages for wrongful levy on plaintiff's property, and for converting

the same, the general rule is the same as in actions of trover and conversion; that is, the plaintiff is entitled to the value of the property at the time of taking, with interest from that time. In Montana interest was denied.

Federal cases.

The general rule was held to apply in favor of the holder of goods by virtue of a *respondentia* bond, with an assignment of a bill of lading. *Pacific Ins. Co. v. Conard*, *Baldw.* 138, *Fed. Cas. No.* 10,647.

Arkansas.

Where goods were wrongfully seized and sold under an attachment, the measure of damages was held to be the value at the time of seizure, with interest from that date. *Perkins v. Ewan*, 66 *Ark.* 175, 49 *S. W.* 569; *Blass v. Lee*, 55 *Ark.* 329, 18 *S. W.* 186.

And in an action of trespass against a sheriff for levying execution on plaintiff's property, it was held that it was discretionary with the jury to allow interest; and an instruction directing them to allow interest was held erroneous. *Crow v. State*, 23 *Ark.* 684.

California.

The general rule was followed in *Cassin v. Marshall*, 18 *Cal.* 689; *Phelps v. Owens*, 11 *Cal.* 22; *Schmidt v. Nunan*, 63 *Cal.* 371.

In an action to recover damages for conversion of personal property levied on under an attachment, the finding, as a conclusion of law, that the plaintiff was entitled to recover of the defendant a certain sum of \$700, with interest, was held sufficient, although the court did not expressly say that the plaintiff was thereby damaged in the sum of \$700; but from the facts found it necessarily followed that the damage accrued to plaintiff. *McCray v. Burr*, 125 *Cal.* 636, 58 *Pac.* 203.

And in an action for taking and detaining certain personal property, it was held that the measure of damages for horses sold by the defendant was their value, and interest thereon from the time of taking until the trial, and also for any injury done to the horses. *Dorsey v. Manlove*, 14 *Cal.* 553.

Colorado.

The general rule was followed in *Woodworth v. Gorsline*, 30 *Colo.* 186, 58 *L.R.A.* 417, 69 *Pac.* 705; *Hannan v. Connett*, 10 *Colo. App.* 171, 50 *Pac.* 214.

Iowa.

In some cases the general rule was followed, as in *Russell v. Huiskamp*, 77 *Iowa*, 272, 42 *N. W.* 525.

And in an action for wrongful seizure of mortgaged goods, it was held that the measure of damages was the market value of the property that was levied upon, with interest from the date of levy up to the time of the verdict, not exceeding the amount se-

cured by mortgage. *Crawford v. Nolan*, 72 *Iowa*, 673, 34 *N. W.* 754.

But in an action for wrongfully suing out an attachment on lumber, it was held that interest should not be allowed in the absence of any evidence showing loss from the failure to have the lumber. *Fullerton Lumber Co. v. Spencer*, 81 *Iowa*, 549, 46 *N. W.* 1058. The court said: "The general rule is, where personal property is wrongfully taken and detained for a time from the owner, the value of its use during such time. If it has no such value, the damage must be said to be nominal; and a rule of general damages that would give interest on the value in such a case is erroneous."

In *Hattenback v. Hoskins*, 12 *Iowa*, 109, in an action for damages for wrongful levy of an attachment, the verdict of the jury was for the sum named, and interest thereon to the date of the attachment. The judgment of the court was for the sum named by the jury, without allowing any interest. The question was not discussed on appeal.

Kansas.

In an action for damages for wrongful seizure and conversion of goods, it was held that the measure of damages was the market value of the property when taken, with interest; and that when the property was returned, the measure would be the difference between the market value when taken and the market value when returned, with interest. *Prinz v. Moses* (*Kan.*) 66 *Pac.* 1000.

Louisiana.

In an action against a sheriff for refusing to release plaintiff's perishable property that had been attached, where the attachment was discharged, it was held that interest was not authorized by law. *Green v. Garcia*, 3 *La. Ann.* 702.

Massachusetts.

In an action of trover against a sheriff for a wrongful taking and a conversion, it was held the measure of damages was the value of the goods at the time of conversion, and interest thereon from that time. *Johnson v. Sumner*, 1 *Met.* 172.

Michigan.

The general rule was followed in *Johnson v. Gillen*, 140 *Mich.* 152, 103 *N. W.* 547.

But in an action for working tools taken on execution, it was held that if the jury gave damages for loss of profits, they could not allow interest also. *McGuire v. Galligan*, 53 *Mich.* 453, 19 *N. W.* 142. The court said: "Upon this it may be remarked, in the first place, that it is not very clear how interest and profits both can be allowed. Interest is allowed as a legal compensation for lost use. If it is competent to show greater profits than the interest would cover, both cannot be proper at the same time."

In 57 *Mich.* 39, 23 *N. W.* 479, which was

a subsequent trial, it was held that the measure of damages, allowing all rights of exemption, could not exceed the sum of \$250, with interest from the return of the property replevied, and could not reach that, unless the property levied on was worth that.

Minnesota.

The general rule was followed in *Murphy v. Sherman*, 25 Minn. 196.

Missouri.

The general rule was followed in *Walker v. Borland*, 21 Mo. 289; *State ex rel. Rogers v. Gage Bros.* 52 Mo. App. 464. In the latter case the court said: "This, in theory of law, places the injured party in the same situation he was before the trespass was committed."

Montana.

In an action for damages for seizing personal property, it was held that interest could not be allowed. *Palmer v. Murray*, 8 Mont. 312, 21 Pac. 126. The court said: "Our attention is called to the case of *Bohm v. Dunphy*, 1 Mont. 333, decided by Chief Justice Warren in 1871, where he follows the usual rule of damages with interest from date of conversion; but it cannot be a case in point because the question of interest *eo nomine* under the statute was not raised or considered by the court, and hence it is not in conflict with either of the cases above referred to, but rather supports the rule announced. I take it to be the rule, in the absence of any agreement, that interest *eo nomine* will not be allowed except when the statute permits."

Nevada.

In an action against a sheriff for attachment on hay in a field, where he had baled and sold it, it was held that the conversion took place at the time of sale, and the measure of damages was the value at that time, with interest. *Newman v. Kane*, 9 Nev. 234.

New Hampshire.

In an action of trover for railway ties, where the plaintiff had a contract to cut ties from defendant's land, and to pay defendant all that he should receive for them over 10 cents each when he should sell them, and they were levied on, on a judgment against the owner of the land, it was held that the plaintiff was entitled to the amount, as damages, of 10 cents for each tie, with interest. *Harvey v. Morse*, 69 N. H. 475, 45 Atl. 239.

New York.

In an action of trespass for damages for taking goods under an attachment, it was held that in actions *ex delicto* it was discretionary with the jury to allow interest or not; and it was error to charge that the plaintiff was entitled to interest as a matter 28 L.R.A. (N.S.)

of right. *Wehle v. Haviland*, 42 How. Pr. 399.

Pennsylvania.

In an action of trespass for levying execution on plaintiff's property he bought in, it was held the measure of damages was the amount bid at the sale, with interest thereon. *McInroy v. Dyer*, 47 Pa. 118.

Texas.

The general rule was held to apply in *B. C. Evans Co. v. Reeves*, 6 Tex. Civ. App. 254, 26 S. W. 219; *Heidenheimer v. Johnson*, 76 Tex. 200, 13 S. W. 46; *Wallace v. Finberg*, 46 Tex. 35; *Schoolher v. Hutchins*, 66 Tex. 324, 1 S. W. 266.

And where malice and oppression were not shown, in an action for wrongfully attaching plaintiff's property, it was held that the ordinary damages were the value of the property and interest. *Craddock v. Goodwin*, 54 Tex. 578.

And a verdict for unlawfully seizing plaintiff's property under an attachment was held not invalid, although it exceeded the value of the property, where the excess could be accounted for by allowing interest. *Willis v. McNatt*, 75 Tex. 69, 12 S. W. 478.

In *Baker v. Smelser*, 88 Tex. 26, 33 L.R.A. 163, 29 S. W. 377, which was an action for conversion for levying on plaintiff's goods, the question involved was the jurisdiction of the supreme court, which did not have jurisdiction in appeals where the matter in controversy did not exceed \$1,000, exclusive of interest. It was held that this court had jurisdiction in this case. The value of the goods was \$1,000, and judgment was for \$1,166; the court said: "Recurring, then, to the provision in the Constitution now under consideration, we are of the opinion that it was intended to apply to cases in which interest is expressly given by statute, and not those in which the rate of interest is merely taken as a standard by which to measure in part the damages to be recovered. This case comes under the latter class; and since we infer, from the agreed statement and the judgment of the trial court, that more than \$1,000 must have been claimed in the petition, we conclude that jurisdiction over it has been given by the statute. Laws 1892, p. 26, § 5."

Utah.

Where a sheriff wrongfully attached plaintiff's goods, and returned the same in a damaged condition, it was held that where a verdict for the damage was given, interest should not be allowed, as there was no conversion. *Wilson v. Sullivan*, 17 Utah, 341, 53 Pac. 904.

VIII. Trespass.

a. Personal property.

In an action of trespass *de bonis asportatis*, the measure of damages is the value

of the property at the time of injury, with interest. *Hopple v. Higbee*, 23 N. J. L. 342; *Plumb v. Ives*, 39 Conn. 120; *Wehle v. Haviland*, 69 N. Y. 448. This is the general rule. The cases follow the rule in trover and conversion.

And where there are no special or exemplary damages. *Felton v. Fuller*, 35 N. H. 226; *Bradley v. Geiselman*, 22 Ill. 494.

In trespass for taking three cows, it was held that the measure of damages was the value of the property at the time of injury, with interest thereon. *Brannin v. Johnson*, 19 Me. 361. The court said: "The judge instructed the jury that they should give the plaintiff the value of the cows at the time they were taken. To this value, interest might be added, as a part of the indemnity to which the plaintiff was justly entitled. If the damage for detention could be so understood, the instruction might be justified. But as the term 'interest' was not used, and probably not intended, as the limit of damages for detention, the jury were at liberty to go into an estimate of the probable or speculative loss the plaintiff might have sustained, upon this ground. In our judgment the instruction was too vague and loose, and had a tendency to mislead the jury."

In an action of trespass for cutting timber and converting the same, it was held that the measure of damages was the value of ties at the time and place they were converted, with interest from date of conversion. *Central Coal & Coke Co. v. John Henry Shoe Co.* 69 Ark. 302, 63 S. W. 49.

In an action for trespass in cutting staves and cord wood on plaintiff's land, it was held that the plaintiff was not entitled under any circumstances to a judgment and interest on the value from the 22d of December, where the staves were not taken until the 24th of December. *Winchester v. Bryant*, 65 Ark. 116, 44 S. W. 1124.

And in an action of trespass to recover the value of whisky, it was held that interest was properly allowed. *Beals v. Guernsey*, 8 Johns. 446, 5 Am. Dec. 348. The court said: "The interest which was allowed by way of damages was just. The plaintiff ought not to be deprived of his property for years, without compensation for the loss of the use of it, and the jury had a discretion to allow interest in this case, as damages. It has been allowed in actions of trover, and the same rule applies in trespass when brought for the recovery of property."

And in an action of trespass for destroying property, it was held that the jury, in their discretion, might give interest on the value of the property converted or taken away or destroyed, from the time of the injury. *Ripley v. Miller*, 46 N. C. (1 Jones, L.) 479, 62 Am. Dec. 177.

And in an action of trespass for carrying away a slave, it was held the measure of damages was not only the hire of the slave from the time of his absence, with interest, but such expenses as were incurred in reclaiming him. *Brown v. Southwestern R.* 28 L.R.A. (N.S.)

Co. 36 Ga. 377. This was under Ga. act Feb. 21, 1850, providing that if any negro slave shall escape on any railroad car, the owner may recover the value and expenses incurred from the railroad company.

And in *Shepherd v. McQuilkin*, 2 W. Va. 90, it was held that the jury were properly instructed that the damages were the value of the property taken, with interest on such value from the time of taking, under Virginia Code 1860, p. 732, § 14, providing that the jury may allow interest on the sum found by the verdict.

Va. Code 1849, chap. 177, § 14, p. 673, provides that in an action on contract, the jury may allow interest; and for any cause arising thereafter, whether from contract or tort, the jury may allow interest on the sum found by the verdict, and if a verdict does not allow interest, the sum found shall bear interest from its date. This was held to apply to a verdict on a tort for taking personal property. *Lewis v. Arnold*, 13 Gratt. 454.

In an action against a master for injuries to plaintiff's cattle by reason of the master's negro and dog,—the negro and dog of defendant, one heifer of the plaintiff then and there did bite, beat, wound, and kill,—it was held that interest on uncertain damages could not be recovered. *Speer v. Vanorden*, 3 N. J. L. 652.

b. Realty.

The general rule is that the plaintiff is entitled to interest from the time of injury. In Pennsylvania this is not allowed as interest, but is discretionary with the jury, and if allowed is part of the damages; or, in other words, the jury may consider the lapse of time in paying damages in estimating the amount. In this state, the cases allowing interest on damages caused by mobs were overruled.

So, where the owner of land taken by a railroad company without condemnation brought an action of trespass, he was held entitled to interest from the time the land was taken. *Bellingham Bay & B. C. R. Co. v. Strand*, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238. In this case a corporation had taken possession of land and had the use, and had not paid the damages.

In *Clark v. Wabash R. Co.* 132 Iowa, 11, 109 N. W. 309, where the purchaser of land brought suit against a railroad for trespass, and the railroad had been occupying the land before the purchase, and the purchaser recovered interest with his damages, the court on appeal was divided and the case was therefore affirmed. The court said: "The judgment will be affirmed on condition that interest on the damages assessed prior to October 29, 1900, be remitted within thirty days from the filing of this opinion, otherwise reversed." October 29 was the day that plaintiff acquired title.

In an action for injury to property by the construction of a railroad, it was held that while such a claim was not one which, under

the statute, bore interest, if compensation was delayed for a long time, the injured party could not be made whole unless the damages awarded included compensation in the nature of damages. *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94.

In an action by remaindermen for damages to their land taken by a railroad, it was held that the value of the contingent remainder should be ascertained as of the time when the construction of the railroad began, with interest from such date. *Charleston & W. C. R. Co. v. Reynolds*, 69 S. C. 481, 48 S. E. 476.

Where a successor company retained possession of a right of way for which compensation had not been made, in an injunction suit by the owner, it was held that the defendant was liable only for interest from the time of its occupancy. *Adams v. St. Johnsbury & L. C. & L. Valley R. Co.* 57 Vt. 240.

Where the owner of land sued for trespass, instead of demanding condemnation proceedings, it was held that the jury, in their discretion, in finding the damages for trespass, could add to the value of the material taken, interest thereon, without finding that there was an unreasonable delay of payment. *Pittsburgh, Ft. W. & C. R. Co. v. Swinney*, 97 Ind. 586. It was claimed that the only remedy was to demand new condemnation proceedings. The court said: "The cases of *Victory v. Fitzpatrick*, 8 Ind. 281, *McCormack v. Terre Haute & R. R. Co.* 9 Ind. 283, and *Indiana C. R. Co. v. Oakes*, 20 Ind. 9, are relied upon as maintaining that construction of the law as it then existed. But these cases have all been either expressly or impliedly overruled, and are hence no longer followed as precedents."

In an action for damages to land for the removal of coal, the petition prayed for interest to the verdict. On rehearing the court said: "The court instructed that the measure of the plaintiff's damages was the difference between the value of the premises immediately before the defendant commenced to mine and remove the coal, and such value immediately thereafter; and the time covered by the witnesses in their estimate of such damages was limited generally to the 1st of January, 1905. The time of the injury being thus definitely fixed, plaintiff was entitled to interest on the actual amount of damage found; and, unless it can be said that the jury allowed interest in fixing the amount of its verdict, there was no error in adding it to the verdict. It was then merely a matter of computation, and the court could do that as well as the jury." *Collins v. Gleason Coal Co.* 140 Iowa, 114, 18 L.R.A.(N.S.) 736, 115 N. W. 497, 118 N. W. 36.

And in an action for injuries to grass from trespassing stock, it was held that the measure of damages was the value of the grass at the time of its consumption, with interest to the time of trial. *Gulf, C. & S. F. R. Co. v. Jones*, 1 Tex. Civ. App. 372, 21 S. W. 145. This was on the theory of compensation.
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Where stock were infected by trespassing cattle which were diseased, it was held that interest as part of the damages should be allowed. *Clarendon Land, Invest. & Agency Co. v. McClelland* (Tex. Civ. App.) 31 S. W. 1088. In this case it was said that the reasons for allowing interest in conversion and unliquidated damages like this case were as cogent in one case as in the other.

In *Rhemke v. Clinton*, 2 Utah, 230, interest was held to be a question of law, and not of fact, and the plaintiff in an action of trespass for the destruction of property was held entitled to interest *eo nomine*.

This was on the ground that where damages are easily ascertained and the value of the property fixed, the later doctrine is that the jury should be instructed to give interest.

And in an action against a mortgagee, where he had released the mortgage after he had assigned it, it was held that the measure of damages was the value of the property destroyed, with 7 per cent from the time of injury until judgment. *Sanborn v. Webster*, 2 Minn. 323, Gil. 277.

On an award of damages for taking the water from a brook, it was held that it would be presumed that interest was included to the first day of the term. *Bridgeport v. Hardwick*, 67 Vt. 653, 32 Atl. 502. It was held that plaintiffs were entitled to interest from the date of taking.

Interest is generally awarded from the time of injury, but is held discretionary in some states, and in some cases is to be allowed, if at all, as part of the damages.

In an action for mining coal under plaintiff's land, injuring her property, it was held that the lapse of time could be considered by the jury in fixing the damages, but it was error to instruct the jury to find interest. *Emerson v. Schoonmaker*, 135 Pa. 437, 19 Atl. 1025.

And in an action of trespass for an explosion of gas, it was held that interest, as such, was not recoverable, but might enter into the computation of damages. *Richards v. Citizens' Natural Gas Co.* 130 Pa. 37, 18 Atl. 600. The court said: "Into these cases the element of time may enter as an important factor, and the plaintiff will not be fully compensated unless he receive not only the value of his property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages, in the nature of interest, for the lapse of time. It is never interest as such, nor as a matter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure."

And where property was destroyed by reason of a city allowing its wharf to be used by other parties who removed piling and left debris thereon, causing plaintiff's raft to be injured, it was held that the city was liable for interest as part of the damages. *Allegheny v. Campbell*, 107 Pa. 530, 52 Am. Rep. 478. The court said: "Without the addition of interest on the value of the property from the time it was destroyed, the

remedy of the plaintiffs would be inadequate."

And in an action for damages for construction of a railroad, affecting plaintiff's property, it was held that interest could be allowed from the date of construction as part of the damages, but not as interest. *Pennsylvania Schuylkill Valley R. Co. v. Ziemer*, 124 Pa. 560, 17 Atl. 187. The court said: "In cases of this kind, interest is not allowed as interest, but it is usual to instruct the jury to increase the damages by that amount. In other words, interest is allowed as damages. If it were otherwise, a person whose property has been taken, injured, or destroyed, would not receive full satisfaction."

In *Richards v. Citizens' Natural Gas Co.* supra, the court said: "These principles have been very recently affirmed by this court in *Pennsylvania Schuylkill Valley R. Co. v. Ziemer*, 124 Pa. 571, 17 Atl. 187, and *Plymouth Twp. v. Graver*, 125 Pa. 37, 11 Am. St. Rep. 867, 17 Atl. 249; and although . . . there is some conflict in the decisions (*Philadelphia, W. & B. R. Co. v. Gesner*, 20 Pa. 242; *Delaware, L. & W. R. Co. v. Burson*, 61 Pa. 380; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580; and *Allegheny v. Campbell*, supra), it is not so much in regard to the principles as in the mode of expression. The contest has been whether the allowance should be made or not; and the name by which it should be called, whether interest or compensation for delay, measured by the rate of interest, received little attention, and it was incautiously said that interest was or was not to be allowed. The distinction, however, is important, for failure to observe it leads to confusion, as in the present case. Interest is recoverable of right, but compensation for deferred payment in torts depends on the circumstances of each case."

On an appeal from the report of viewers in the assessment of damages to land from a railroad, it was held that the direction of the court to the jury to allow interest was error. *Reading & P. R. Co. v. Balthaser*, 126 Pa. 1, 17 Atl. 518. The court said: "This would have been an appropriate direction in an action *ex contractu*, because interest is a legal incident of a debt; but is not justifiable in an action of trespass. We might not have reversed for this alone, but, as the case goes back for other reasons, we again call attention to this well-settled distinction between actions resting on contract and those growing out of a tort, so far as interest is concerned. In the former, interest is demandable as interest; in the latter, it is not. In the former, the court may properly direct its allowance; in the latter, the question belongs to the jury. It may, or it may not, enter into their calculation of the damages. Whether it shall or not depends on the judgment of the jury, in view of all the circumstances of the case."

And in an action for damages to property, caused by the construction of a railroad, it was held that the jury could add interest to the amount allowed from the date of the 28 L.R.A. (N.S.)

construction of the road. This was not allowed as interest, but as part of the damages. *Pennsylvania Schuylkill Valley R. Co. v. Ziemer*, supra.

In an action for trespass on land and removing gravel, where the defense was that it was a public highway, it was held that the jury might enhance the damages by a sum not greater than the interest on the amount from the time the action was brought to the time of trial. *District of Columbia v. Robinson*, 14 App. D. C. 512, affirmed in 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. Rep. 283. In this case interest was discretionary with the jury.

In an action for damages for wrongful sale of real estate belonging to plaintiff, and conveyed by him to a trustee to secure a note, it was held that the general rule was that interest was not recoverable on unliquidated damages, and the interest was not recoverable in addition to the damages assessed by the jury, but should enter into the estimate, and be found as part of the damages. *Dozier v. Jerman*, 30 Mo. 216.

And in a suit for trespass to realty, it was held not error to charge the jury that if they found that the plaintiff was entitled to damages, they might, if they saw proper, add interest on the same from the time such damages accrued, and embrace the whole in one amount. *Gress Lumber Co. v. Coody*, 104 Ga. 611, 30 S. E. 810.

In Kentucky, interest was held to be discretionary with the jury. In other cases interest was denied where the amount of damages was not susceptible of computation.

In an action for destruction of crops, where the jury decided adversely to plaintiff on interest, the court did not err in refusing to allow judgment for interest prior to the date of the judgment. *Connolly v. Varney* (Ky.) 116 S. W. 340.

In an action for injury to real property by reason of a tunnel constructed by defendant, it was held that the damages were unliquidated, and the amount could form no basis upon which interest could be computed until a judgment. *Chicago v. Allcock*, 86 Ill. 384.

And in an action of trespass for cutting timber, it was held that interest on the claim could be allowed only from the time of the judgment, liquidating the damages. *Robertson v. Green*, 18 La. Ann. 28.

And where an unfinished street was injured by hauling heavy machinery thereon before the work was completed, it was held in an action by the street contractor that interest could be allowed on unliquidated damages only from the date of judgment, and not from the date of judicial demand. *Wright v. Abbott*, 6 La. Ann. 569.

In New York, interest was allowed on damages caused by mobs. *Greer v. New York*, 3 Robt. 406. The court said: "The case cannot, we think, be distinguished from *Dana v. Fiedler*, 12 N. Y. 50, 62 Am. Dec. 130, which must now be regarded as having changed the rule of damages in cases of this nature. The same principle is involved in the decision in *Potter v. Merchants' Bank*,

28 N. Y. 641, 86 Am. Dec. 273, which was an action for the conversion of a promissory note, and interest was allowed as part of the damages."

And in an action to recover the value of an elevator destroyed in a riot, it was discretionary with the jury to allow interest. *Orr v. New York*, 64 Barb. 106.

But in Pennsylvania, in an action for damages caused by a riot, it was held that, in the absence of statute, interest should not be allowed. *Weir v. Allegheny County*, 95 Pa. 413. The court said: "In general, it appears to be the rule of the courts that have gone farthest in the allowance of interest, that where the defendant has not wrongfully trespassed upon or withheld the property or money of the plaintiff, or has not obtained any advantage by any wrong done, and has not been guilty of fraud, and especially where the liability arises wholly by virtue of a statute, and no provision for interest is made therein, interest cannot be allowed as a part of the damages, either as a matter of law or at the pleasure of the jury."

In *Hermits of St. Augustine v. Philadelphia County*, *Brightly* (Pa.) 116, and *St. Michael's Church v. Philadelphia County*, *Brightly* (Pa.) 121 (actions of trespass on the case for property destroyed by a mob), it was held that the jury could allow, as damages, the full value of the property at the time of its destruction, with interest to the time of the verdict.

But in *Weir v. Allegheny County* supra, those cases were overruled.

And in *Allegheny v. Campbell*, supra, the case of *Weir v. Allegheny County*, 95 Pa. 415, was distinguished as not in point.

IX. Replevin.

The general rule in replevin is that the damages will be the value of the property at the time of taking, with interest from that time. This is the rule except in cases where special damages were given for the use of the property, and cases where a statute prevented the general rule from applying. In the following cases it was held that interest should be allowed on the value from the time of taking:

Thus, in an action of replevin to recover the value of life insurance policies, where the administrator continued in maintaining his defense and insisting on his right to possess the policies, which operated as a barrier to the payment, it was held that interest was allowable from the time of demand. *Saling v. Bolander*, 60 C. C. A. 469, 125 Fed. 701. It was also held that the fact that the policies were delivered to the marshal would not stop the interest, where the claim was asserted and the matter was kept in litigation.

The general rule was held applicable in California. *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462.

Under Cal. prac. act, § 200, authorizing the recovery of damages for detention of personal property, it was held that a party 28 L.R.A. (N.S.)

was not entitled to a gross sum for such damages, and to interest on the value of the property from the time it was taken. *Freeborn v. Norcross*, 49 Cal. 313.

And in an action to recover possession of iron and for damages for the detention where the goods were delivered back to the plaintiff pending trial, it was held that where the plaintiff accepted the goods which were the subject of the suit, he had made his election to take the goods in lieu of their value, and the only damages that he could recover would be the interest on their highest value, except in case of special damages. *Conroy v. Flint*, 5 Cal. 327.

Where the findings in a suit of replevin gave the value of the property at the date of taking, it was held that the plaintiff was entitled to interest on such value as damages, under Cal. Civ. Code Proc. § 667, providing that, in an action to recover possession of personal property, judgment for the plaintiff may be for the possession or value thereof, in case delivery cannot be had, and damages for the detention. As no damages were found, interest would be regarded as damages for detention. *Kelly v. McKibben*, 54 Cal. 192.

The general rule was held applicable in Colorado. *Hanauer v. Bartels*, 2 Colo. 514; *Machette v. Wanless*, 2 Colo. 169; *Tucker v. Parks*, 7 Colo. 298, 3 Pac. 486; *Austin v. Terry*, 13 Colo. App. 141, 56 Pac. 810.

And Connecticut. *Ormsbee v. Davis*, 18 Conn. 555.

And Delaware. *Staunton v. Smith* (Del.) 65 Atl. 593.

In an action of replevin where goods were not taken under the writ, the measure of damages was held to be the value of the goods when taken by the defendant; and it was held to be the proper practice to leave it to the discretion of the jury whether interest should be allowed on the damages sustained. *Boyce v. Cannon*, 5 Houst. (Del.) 409.

The general rule was applied in Georgia. *Moomaugh v. Everett*, 88 Ga. 67, 13 S. E. 837.

And Illinois. *Merchants' Sav. Loan & T. Co. v. Goodrich*, 75 Ill. 554.

And Iowa. *Blaul v. Wandel*, 137 Iowa, 301, 114 N. W. 899; *McCoy v. Cornell*, 40 Iowa, 457; *Becker v. Staab*, 114 Iowa, 319, 86 N. W. 305.

And Kansas. *Palmer v. Meiners*, 17 Kan. 478.

And in replevin it was held that the jury should include in their verdict any interest found to be due; but where the rates and dates were stated in the verdict, the court could include the same in the judgment. *Mills v. Mills*, 39 Kan. 455, 18 Pac. 521.

The general rule is applied in Maine. *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462.

Massachusetts.—Where goods were replevied, and the plaintiff was nonsuited, it was held that the defendant was entitled, as damages, to interest on the value of the goods from the time of service of the writ

to the time of judgment. *Wood v. Braynard*, 9 Pick. 322.

In *Mattoon v. Pearce*, 12 Mass. 406, the court said: "But where, by his unlawful interference, the plaintiff in replevin not only acquires the use of another's goods, but, by unjustly arresting the process of the law, prevents the creditor from receiving his just debt, and the debtor from procuring his discharge, thereby leaving his other goods and his person exposed to be taken on the same execution,—in such case it is manifestly right that the wrongdoer should pay something by way of mulct or penalty. The legislature have thought that 12 per cent on the value of the goods is a reasonable penalty in such case; and we think that, in a parallel case, although not within the letter of the statute, the same rule should be enforced, even in a hearing in equity." This was under Mass. Stat. 1789, chap. 26, providing that if the plaintiff in replevin should neglect to prosecute, upon complaint by defendant, he should, besides judgment for return, recover damages to the amount of 6 per cent on the bond, which, being double the value of the goods replevied, gave 12 per cent as a mulct; and if upon trial there shall be judgment of restitution, the interest of 6 per cent on the bond shall be taken as a rule in case the goods were taken in execution.

The general rule is applied in Michigan. *Hanselman v. Kegel*, 60 Mich. 540, 27 N. W. 678; *Just v. Porter*, 64 Mich. 565, 31 N. W. 444.

And in an action of replevin for logs, where the defendant took judgment for the value of the property, it was held the measure of damages was the value of the logs at the time of serving the writ by which the defendant was dispossessed, with interest from that date. *Nitz v. Bolton*, 71 Mich. 388, 39 N. W. 15.

The general rule is applied in Minnesota. *Berthold v. Fox*, 13 Minn. 501, Gil. 462, 97 Am. Dec. 243.

A judgment for defendant in replevin, where the plaintiff retained the property, was held to be a money judgment, and the clerk could add interest from the date of the order as in any other money judgment, under Minn. Rev. Stat. 1894, § 504, giving the clerk such authority. *Martin County Bank v. Bird*, 90 Minn. 336, 96 N. W. 915.

The general rule was applied in Nebraska. *Hainer v. Lee*, 12 Neb. 452, 11 N. W. 888; *Romberg v. Hughes*, 18 Neb. 579, 26 N. W. 351. The court said: "The rule allowing the value of the use is peculiar to replevin, and grows out of the fact that the party to whom the property is awarded seeks to recover the property itself, and not its value. In such case; when the property is returned, the party to whom the return is made is entitled to the damages awarded for the detention. If, however, a verdict is rendered for the value of the property, the action in that regard being one for damages only, the measure of damages is the value of the property as proved, together with

lawful interest thereon from the date of the unlawful taking."

In an action of replevin it was held that the measure of damages for detention recoverable by defendant was, first, if there is no special value attaching to use of the property, interest; second, if the value of the use of the property exceeds the interest, then such value, without regard to whether the property is returned, but in such a case no interest; third, if loss, deterioration, or depreciation occur while the property is withheld, then the amount of such loss, damage, or depreciation, to be conditioned, however, upon return of the property, the alternative judgment for the value being fixed as of the date of the taking. *Schrandt v. Young*, 62 Neb. 254, 86 N. W. 1085. The court said: "If the value of the use exceeds the interest, it is unjust that the defendant, who was entitled to and deprived of the use, should be required to take the interest only; and it is equally inequitable to allow the plaintiff, by merely paying the value of the property and the interest, to retain the difference between the interest and the value of the use of the property."

In *Schrandt v. Young*, *Romberg v. Hughes* was distinguished, holding that where it precludes both interest and value of the use, the rule announced in this case was sound; but where the rule goes farther, and makes the recovery of damages for the detention depend upon the property, it works an injustice to the defendant.

The general rule was applied in *Sloan v. Fist*, 2 Neb. (Unof.) 664, 89 N. W. 760. The court said: "The court instructed the jury that, if it found for plaintiff, the measure of her damages should be the value of the property at the time it was taken, with interest from the time of taking at 7 per cent. This was clearly the correct rule by which her damages should be measured."

And where the sheriff levied an attachment upon goods, and the goods were taken from him in an action of replevin, in which latter case he obtained a verdict, it was held that the value of the interest of the sheriff was the amount of the attachment, with interest thereon, with costs. *State ex rel. Hershisher v. Kinkaid*, 23 Neb. 641, 37 N. W. 612.

The same was held in *Gamble v. Wilson*, 33 Neb. 270, 50 N. W. 3. The court said: "Where property is replevied from a sheriff holding it by virtue of a levy under an execution or attachment, the measure of the officer's damages, in case of a verdict in his favor, is, within the value of the property, the amount due upon the writ, with interest and costs."

The general rule was applied in Nevada. *Blackie v. Cooney*, 8 Nev. 44.

And New York in *Suydam v. Jenkins*, 3 Sandf. 614; *Keep v. Kauffman*, 6 Jones & S. 476; *Brizsee v. Maybee*, 21 Wend. 144; *Brewster v. Silliman*, 38 N. Y. 430.

A wool company shipped wool, and the consignee, without the knowledge of the shipper, stored the same in a warehouse.

and negotiated the receipts to a trust company, and failed. The wool company brought an action of replevin, and the holder of the receipts was made a party, and the wool remained in the custody of the sheriff. It was held that interest should be allowed the plaintiff from the date of demand, where the claim of the trust company was unfounded. *Follett Wool Co. v. Utica Trust & D. Co.* 84 App. Div. 151, 82 N. Y. Supp. 597.

In *Crossley v. Hojer*, 11 Misc. 57, 31 N. Y. Supp. 837, in an action of replevin to recover certain goods and chattels, where the question in dispute was the amount of damages, the court said: "In trover, the value at the time of conversion, with interest, is the measure of recovery. In replevin, the successful party can recover the possession of the property, with interest on its value, and the amount of the depreciation thereof, as damages for detention."

North Carolina.—In an action of claim and delivery, it was held that the jury, in their discretion, could allow interest, as damages, on the value of the property from the time it was taken. *Patapasco Guano Co. v. Magee*, 86 N. C. 350. It was said that North Carolina Rev. Code, chap. 31, made no provision for interest in actions for trover or trespass *de bonis asportatis*.

Ohio.—In an action of replevin from a sheriff holding property under execution, it was held that if the issue were found for defendant, and the value of the property were greater than the execution, the damages would be the amount of the execution, with interest and costs; but that if the value of the property were less than the amount of the execution, then the rule of damages would be the full value of the property. *Jennings v. Johnson*, 17 Ohio, 154, 49 Am. Dec. 451.

The ordinary rule is applied in Pennsylvania. *Collins v. Houston*, 138 Pa. 481, 21 Atl. 234.

In *McDonald v. Scaife*, 11 Pa. 381, 51 Am. Dec. 556, which was an action of replevin, it was held that the ordinary rule was to give damages for the value of the goods taken, with interest on the value; yet, the jury might give exemplary damages under peculiar circumstances.

Tennessee.—Under Tenn. Code, § 3300, providing that in replevin, if the jury find for defendant, the judgment shall be for the return of the property; or, on failure, that the defendant recover its value with interest thereon, and damages for its detention, it was held that the value at the time the property was taken from the defendant should be adopted. It was also held that whatever the jury might find in regard to damages for the detention, the defendant was entitled to interest upon the value as a matter of law. *Mayberry v. Cliffe*, 7 Coldw. 118.

The general rule is applied in Texas. *Halbert v. San Saba Springs Land & Live-Stock Assn.* (Tex. Civ. App.) 34 S. W. 636; *Gillies v. Wofford*, 26 Tex. 76.

And Wisconsin. *Wadleigh v. Bucking-* 28 L.R.A. (N.S.)

ham, 80 Wis. 230, 49 N. W. 745. The court said: "The measure of damages which this court has laid down in numerous cases of this kind is the legal interest on the value of the property while it was unlawfully detained, and compensation for any depreciation, if any, of the property replevied." And in *Bigelow v. Doolittle*, 30 Wis. 115, the court held that the same rule applied as would be the rule in trover.

Where property was replevied from an officer holding it under execution, if the defendant recovered, and the value of the property was greater than the amount of the execution, it was held that the amount of his recovery should be limited to the amount of the execution, with interest and costs. *Booth v. Ableman*, 20 Wis. 21, 88 Am. Dec. 730.

In the same case (20 Wis. 602), it was held that the measure of damages was the amount of the judgment, with interest to the time of replevin, with interest on that amount for detention.

Where a party obtained a judgment in his favor for the detention of goods replevied, it was held that interest on the value of the goods unlawfully taken ordinarily formed the proper measure of damages. But it was held error to make no distinction between damages for the detention before the service of the writ and after service. *Graves v. Sittig*, 5 Wis. 223.

Wyoming.—Interest as damages for detention in replevin where the property was delivered to the plaintiff was held proper. *First Nat. Bank v. Ludvigsen*, 8 Wyo. 230, 80 Am. St. Rep. 928, 56 Pac. 994, 57 Pac. 934.

A verdict in replevin for the value proved with interest, was held not excessive, in *Boswell v. First Nat. Bank*, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

Interest and the value of the use cannot both be obtained.

Where the plaintiff secured possession of property, in replevin, an instruction that if the jury found for defendant, they must find the actual damage by reason of the detention of the property, and also the actual value of the property, and also interest on the actual value from the time the property was taken, was held erroneous in regard to interest. *McCarty v. Quimby*, 12 Kan. 494.

Where 8,000 goats were killed on an island leased from Mexico, and an action for claim and delivery was brought for a large number of goat skins taken by defendant, it was held that a judgment allowing \$1 as damages for the detention of the property, and interest on the value from the date of taking, was erroneous under Cal. Code Civ. Proc. § 667. *Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 684. The court said: "If interest from the time of the taking can be allowed, which we do not decide, it cannot be allowed except as damages for the detention, and in the present case that damage was fixed at \$1."

In an action of replevin for two mules and a harness, and damages for each day the

same were detained, it was held that plaintiff was entitled to recover the value of the use, but that interest should not be the basis of computation. *Morgan v. Reynolds*, 1 Mont. 163. The court said: "The plaintiffs were entitled to the value of the use of these mules and harness. It is true that in actions in the nature of trover, the value of the article converted, together with legal interest thereon from the time of conversion, is the true measure of damages. In trover, the plaintiff seeks to recover a moneyed judgment, and it would be proper to allow him only the value of the use of that money which the law declares to be legal interest. This is, however, an action in the nature of replevin. The plaintiff seeks to recover primarily the specific property detained; and it would seem to me to be but just that he should recover the value of the use of the property so detained as compensation."

In *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641, which was an action to recover the possession of a horse, and damages for its detention, it was held that the defendant, who recovered, was entitled to prove and recover the value of the use of the horse. The court in this case reviewed the previous cases, and held that where the property has usable value, interest is not the measure of damages, and said: "In many cases interest on the value from the time of the wrongful taking would be a proper measure. It would be generally in all cases where the property detained was merchandise kept for sale, grain, and all other articles of property useful only for sale or consumption. In such cases, if the owner recover the interest on the value of his property from the time he was deprived of it, he will generally have a complete indemnity unless the property has depreciated in value, in which case the depreciation must be added to the interest on the value, taken as it was before the depreciation, and the two items will furnish the amount of the damages. This damage, together with the property or its value at the time of the trial, will give the owner a complete indemnity, as the law is generally able to give any person seeking redress for a wrong. But the same measure of damages would not generally furnish the owner an indemnity in case the property claimed had a value for use, in other words, a usable value, such as horses, cows, carriages, and boats."

In *Twinam v. Swart*, 4 Lans. 263, which was an action of replevin for a horse against a purchaser at a constable's sale, it was held that the measure of damages was ordinarily the interest on the value of the property from the time of taking to the time of assessment. In this case it was held there was no difference between actions of trover and replevin, and that the plaintiff was not entitled to damages for the use of the horse.

In *Allen v. Fox*, supra, the case of *Twinam v. Swart*, supra, was overruled.

In *Scott v. Elliott*, 63 N. C. 215, it was held that an instruction directing an allowance of 6 per cent interest was error. The court said: "As to the measure of dam-

ages, we can see no ground for making 6 per cent interest on the sworn value the rule, and his Honor erred in adopting it. The earnings of the boat might be more or less. As it does not appear whether the boat is in a condition to be surrendered, or has been destroyed, and this may materially affect the question, we give no opinion in regard to it, further than to say that the plaintiff is entitled to damages as well for the taking as for the detention, and has a right to full indemnity for the injury done to him."

Under Tenn. Code, § 3390, it was held that if the plaintiff gives up the property on a verdict for the defendant, the latter will not be entitled to interest on the assessed value; or, in other words, the judgment for value and interest would be discharged by giving up the property. *Smith v. Roby*, 6 Heisk. 546.

The owner is entitled to recover the value of the use of the property, if he prefers it to interest. *Farrand v. Board of Church Extension*, 18 Utah, 29, 54 Pac. 818.

So, in an action of replevin, it was held that the measure of damages for wrongful detention was usually the interest on the value of the property when wrongfully detained; but where the property has a usable value, the value of the use, when so detained, was held to be the proper measure of damages. *Werner v. Graley*, 54 Kan. 383, 38 Pac. 482.

In an action of replevin where the plaintiff succeeded, an instruction that he was entitled to recover the reasonable value of the use of the goods recovered was held to be proper, as he did not sue on the debt, but for the possession of the property, and was not required to sue for interest on the debt. *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883.

Where the plaintiff took household furniture by writ of replevin, and the defendant did not have the use of other property, and the plaintiff was nonsuited, it was held that an instruction that the measure of damages was the interest on the money value of the property during its detention was properly refused, as the jury could award such damages as they would be satisfied the use of the property was worth. *Boston Loan Co. v. Myers*, 143 Mass. 446, 9 N. E. 805.

In replevin for a horse, a verdict was found for defendant and damages for detention. In the absence of statute, it was held that the damages must be assessed according to the magnitude of the injury he had sustained, agreeably to the rule of common law; this was the instruction of the court. It was contended that it came within the statute, and the jury should have been instructed to consider 6 per cent on the replevin bond as the measure of damages. *Bruce v. Learned*, 4 Mass. 614. It was held that there was no statute, and the rule contended for did not apply.

An action of replevin was brought for a trunk and contents, consisting of bank bills and bonds. The verdict was taken for defendant because improperly brought. It

was held that, in order to recover more than nominal damages, the defendant should have proved actual damages, and none were proved. *Bartlett v. Brickett*, 14 Allen, 62. The court said: "Except in the special cases in which provision is made by statute, the defendant in replevin who prevails is to recover damages 'measured by the nature and degree of the injury he has sustained according to the common law.' The cases in which 6 per cent upon the value of the goods replevied has been allowed as damages, in analogy to the rule in other cases of unlawful detention of property, will be found to be cases where the defendant was entitled to a return, and where the chattels replevied were merchandise or other property capable of physical use and enjoyment. That rule has no just application to the case of securities for money, bearing interest. It does not appear from the evidence reported, nor is it suggested, that the defendant claims any property in the replevied goods, nor that he has asked for a return of them. There is nothing in the case to show that any actual loss has accrued to him from being deprived of them."

In an action to recover the value of hay, it was held that where the plaintiff in replevin took possession and suit was commenced, and the jury found for the defendant the value at a time subsequent to the taking, interest could not be added to this value from the time of taking up to the time the value was assessed. *Atherton v. Fowler*, 46 Cal. 323. In this case it was admitted by both parties that where a jury found the value nearly a year subsequent to the taking, the allowance of interest from the time of taking was erroneous, and that the allowance of interest between the times when the verdict was rendered and the judgment entered up was erroneous.

The allowance of interest on the value of property prior to the return of a verdict in replevin was held erroneous under Iowa Code, § 4178, giving a party in an action of replevin, found entitled to property not in his possession, the option to have an execution for the delivery of the property or for its value. This was held to refer to the time when the judgment was rendered, or to a later date, and not to the time when the action was commenced. *Bonnot Co. v. Newman Bros.* 109 Iowa, 580, 80 N. W. 655.

In Missouri, under Mo. Rev. Stat. § 3854 (Rev. Stat. 1855, p. 1245, § 11, Rev. Stat. 1889, § 7489, Rev. Stat. 1899, § 4473), providing that if plaintiff fail to prosecute his action with effect, and shall have the property, and the defendant claims and demands a return thereof, the jury may assess the value of the property and the damages for taking and detaining the same, for the time such property was taken until the day of trial, it was held that the value at the time of assessment controlled, and that the jury could consider depreciation in estimating damages for taking and detaining, but no interest was to be allowed. *Pope v. Jenkins*, 30 Mo. 528; *Andrews v. Costican*, 30-26 L.R.A. (N.S.)

Mo. App. 29; *Chapman v. Kerr*, 80 Mo. 158. This latter case overrules *Woodburn v. Cogdal*, 39 Mo. 228, and *Miller v. Whitson*, 40 Mo. 101, which held that interest was proper.

There are some Missouri court of appeals cases following *Walker v. Borland*, 21 Mo. 289, which was an action of trespass for seizing and selling property, which do not discuss *Chapman v. Kerr*, supra, or the statute cited therein, controlling "replevin" cases, but cite a statute on "damages." Neither line of cases attempts to reconcile the two statutes, but it would seem that the case of *Chapman v. Kerr*, applying the replevin statute, is the law of that state. Both statutes were in force when all these late conflicting cases were decided.

In an action of replevin where the plaintiff obtained possession and judgment was for defendant, it was held that it was discretionary whether the jury should or should not allow interest, under Mo. Rev. Stat. 1889, § 2869, providing that the jury on a trial of damages may, if they think fit, give damages in the nature of interest, over and above the value of the goods at the time of seizure. *Feller v. McKillip*, 109 Mo. App. 61, 81 S. W. 641.

In an action of replevin, if the property was obtained without injury, it was held that the owner was entitled only to damages for the caption and detention, and the ordinary damages were the interest on the value of the property. *Reno v. Kingsbury*, 39 Mo. App. 240.

In an action of replevin, where the judgment was for defendant, it was held that the measure of damages was the value of the property when taken, with legal interest to the time of trial. *Shenuit v. Breuggestratt*, 8 Mo. App. 46.

X. Sale.

a. Nondelivery.

The general rule is that where the price has not been paid and the vendor refuses to deliver, he will be liable for the difference between the contract and the market price, at the time and place of delivery, with interest from that time. If the price has been paid, he will be liable for the market price at the time and place of delivery, with interest from that time. In Indiana interest was denied, where there was no rescission, and in California interest was allowed under one section of the Code, where the damages were easily ascertained, and denied in another case, under another section of the Code, where the damages were not easily ascertained.

So, in an action for breach of contract for sale of goods, the price not having been paid in advance, and the vendor having failed to deliver them according to the contract, the measure of damages was held to be the difference between the contract price and the market value of the goods at the time and place of delivery, with interest. *Penn v. Smith*, 104 Ala. 445, 18 So. 38;

McFadden v. Henderson, 128 Ala. 221, 29 So. 640.

In *Bell v. Reynolds*, 78 Ala. 511, 50 Am. Rep. 52, where it was held special profits could be recovered for failing to deliver a fertilizer, where no other could be had to raise the crop, the court said: "The general rule is familiar that, in ordinary cases, when the vendor has failed or refused to deliver to the purchaser goods sold, the measure of damages for the breach of contract, if the price has not been paid, is the difference between the agreed price and the market price of the goods at the time and place of delivery, with interest."

And a vendee is entitled to recover for the nondelivery of goods the difference between the contract price and the market value of the goods at the time and place of delivery, with interest. *Bunch v. Potts*, 57 Ark. 257, 21 S. W. 437.

And where a vendor wrongfully stopped in transit goods sold to an insolvent, who had pledged the bills of lading, and the vendor thereby prevented the delivery of the goods, he was held liable for interest on their value. *Pope v. Baltimore Warehouse Co.* 103 Md. 9, 62 Atl. 1119.

In an action for breach of an agreement to sell and deliver goods, where it was agreed that if the plaintiffs were entitled to recover, they were entitled to recover at a certain rate per ton for the failure to deliver a certain number of tons, it was held that plaintiffs were entitled to interest on the amount so computed from the date of their demand. *Thomas v. Wells*, 140 Mass. 517, 5 N. E. 485. The court said: "The bill of exception states that 'it was agreed that, if the plaintiffs were entitled to recover, they were entitled to recover for the failure to deliver 46 6/40 tons, and that the measure of damages should be \$10 per ton.' The fair meaning of this agreement is, that, at the time the defendants refused to perform the contract, the plaintiffs were damaged to the extent of \$10 per ton; that is, that the goods were then worth \$10 per ton more than the contract price. This being so, in order to put the plaintiffs in as good a position as they would have been in if the contract had been performed, they are entitled to interest from the date of their demand."

And in an action for failure to ship a sawmill within the time contracted for, plaintiff was allowed interest as damages on the purchase price only from the time he was deprived of possession of the mill. *Edwards v. Sanborn*, 6 Mich. 348.

In an action for damages for nondelivery of merchandise purchased, it was held the plaintiff was entitled to recover the difference between the contract price and market value at the time and place of delivery, with interest thereon, and that the question of interest was not one of discretion with the jury. *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130. The court said: "The right to interest, in actions upon contract, depends not upon discretion, but upon legal right; and in actions like the present is as 28 L.R.A. (N.S.)

much a part of the indemnity to which the party is entitled as the difference between the market value and the contract price."

That ruling was recognized in *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544.

And in an action on a contract for failing to deliver a boat load of flour, where the plaintiffs were ready, able, and willing to perform their part of the contract, it was held that the damages were the difference between the contract price and the value on the day of delivery, with interest. *Clark v. Dales*, 20 Barb. 42.

In an action for unliquidated damages for breach of an executory contract of sale, where property had a market value, it was held that interest was allowable. *Reynolds v. Burr*, 104 App. Div. 31, 93 N. Y. Supp. 319.

The measure of damages in a breach of an executory contract for the sale of personal property was held in *Enders v. Board of Public Works*, 1 Gratt. 364, to be the value of the same when it should have been delivered, with interest from that time until paid.

Where the vendor of cotton agreed to take a certain note in exchange as payment, that the obligor becoming insolvent, the vendor refused to deliver, it was held that the damages would be the face value of the note, with interest from the time of demand. *Bicknall v. Waterman*, 5 R. I. 43.

And in an action for damages for breach of a contract of conditional sale, it was held that interest would be allowed from the date of failure to deliver the goods. *Loomis v. Norman Printers' Supply Co.* 81 Conn. 343, 71 Atl. 358.

In *Merryman v. Criddle*, 4 Munf. 542, the general rule that, in actions for breach of executory contracts, the value of the articles to be delivered, with interest from such time of delivery, forms the proper measure of damages, was held to have some exceptions founded on particular circumstances. The bill of exceptions in this case did not show enough to take the case out of the general rule.

In an action for the nondelivery of stocks, where the same were fraudulently converted by a third party, in no way for the use of the defendant, it was held that the value of the stocks from the time they were charged as delivered, with interest to the time of trial, should be the measure of recovery. *Andrews v. Clark*, 72 Md. 396, 20 Atl. 429. The agent of the broker misappropriated these stocks, and delivered forged stocks of no value.

The general rule that interest should not be allowed on unliquidated damages was held not to apply to an action against a purchaser of mining property, where he failed to deliver stock in payment, and the stock had a market value susceptible of easy proof. *Kuhn v. McKay*, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

In an action to recover damages for refusing to transfer on the books of the company and deliver certificates of stock, it was held the measure of damages was the value

of shares at the time of such refusal, with interest from that time. *Sargent v. Franklin Ins. Co.* 8 Pick. 90, 19 Am. Dec. 306.

In an action for breach of a contract to sell and deliver stock, where the purchaser did not pay the purchase money in advance, it was held the measure of damages was the difference between the contract price and the market price on the day of the breach, with interest from that day. *Currie v. White*, 6 Abb. Pr. N. S. 352.

In an action for refusing to deliver wheat, it was held that the measure of damages, where the price had not been paid, was the difference between the market value at the time of default and the contract price, with interest; and this was allowed as compensation for delay in payment of damages. *Driggers v. Bell*, 94 Ill. 223.

In an action for damages for breach of a contract to ship and transport certain wheat, it was held that the rule of damages was the difference in value at the place and time of delivery, and the value of the same kind of wheat at the place of shipment, at the same time, with cost of transportation to the place of delivery, with interest from the date when it should have been delivered. *Cowley v. Davidson*, 13 Minn. 92, Gil. 86.

Plaintiff is entitled to interest only from the time of breach. *Brackett v. Edgerton*, 14 Minn. 174, Gil. 134, 100 Am. Dec. 211.

And on a claim for damages for refusal to deliver the whole quantity of wheat according to contract, it was held the measure of damages was the difference between the contract price of the wheat not delivered and its market value at the time it was to be delivered, with interest on the difference. *Fishell v. Winans*, 38 Barb. 228.

The jury could allow interest by way of damages. *Dox v. Dey*, 3 Wend. 356.

In an action of assumpsit founded upon an agreement to deliver personal property, where the price was paid in advance, it was held that the measure of damages was the value of the property at the time of delivery, with interest thereon to the time of trial. *Bickell v. Colton*, 41 Miss. 368.

In an action for breach of a contract to deliver hemlock bark, it was held proper to allow interest from the commencement of the action. *Gallun v. Seymour*, 76 Wis. 251, 45 N. W. 115.

In an action for damages, under contract to sell and deliver so much ice per year for five years, plaintiff was entitled to interest from the close of the year. *Winch v. Mutual Ben. Ice Co.* 86 N. Y. 618.

The measure of damages for breach of contract for delivery of ice, where the vendor failed to deliver, is the difference between what the same would have cost the purchaser under the contract, and the market value at such time, with interest. *Anderson v. Savoy*, 137 Wis. 44, 118 N. W. 217.

In an action for damages for breach of contract of sale, and for failure to deliver peaches at a certain price, it was held that the court properly allowed interest upon the 28 L.R.A. (N.S.)

amount of damages sustained from the date of filing the complaint, under Cal. Civ. Code, § 3287, providing that every person who is entitled to recover damages capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled to recover interest from that day. *Cutting Fruit Packing Co. v. Canty*, 141 Cal. 692, 75 Pac. 564. The defendant delivered part of those sold, and the plaintiff was compelled to buy at an advance, and sued for the difference.

See *Hewes v. Germain Fruit Co.* 106 Cal. 441, 39 Pac. 853, subd. X., b, *infra*.

But in an action for damages for failure to deliver fruit, it was held that interest on the damages could not be allowed under Cal. Civ. Code, § 3308, providing damages for breach of contract to sell, or § 3311, providing damages for breach of contract to purchase. *Ellsworth v. Knowles*, 8 Cal. App. 630, 97 Pac. 690. It was held that neither section provided for interest, and both sections were subject to § 3357, providing that the damages prescribed in this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned. In this case the contract was to deliver 1850 12½ "lbs. kilo boxes apricots," which was a combination of two systems of weights that made it uncertain, but it was finally construed to mean kilo boxes at 27½ pounds per box. In this case, differing from the preceding one, the damages could not be made certain by calculation.

So, in an action on a contract to sell and deliver hogs, where the plaintiff did not demand rescission, and sued for damages, it was held that an instruction authorizing a verdict for interest was erroneous. *Harvey v. Myer*, 9 Ind. 391; *Dobenspeck v. Armel*, 11 Ind. 31. The court said: "But no authority has been cited, nor do we know of any, which allows interest to be recovered on money advanced on such contract, unless it has been rescinded."

b. Refusing to accept.

Interest will be allowed on damages for refusal to accept goods that were purchased under a contract of sale, if the damages can be readily ascertained.

So, in an action by vendors for breach of an executory contract to purchase, it was admitted that a party is entitled to recover interest as part of the damages, when the property sells at a market value at the time of the breach, but, as the subject of the sale was an old ferryboat that had no market value, it was held that interest could not be allowed. *Gray v. Central R. Co.* 157 N. Y. 483, 52 N. E. 555.

In an action for breach of contract to purchase lard, and for damages for refusing to take and pay for the same, it was said: "The court instructed the jury that the appellee was entitled to interest on whatever damages he sustained. Cases, even in this state, conflict upon that question. The instruction is in accord with *Driggers v. Bell*, 94 Ill. 223, and *A. B. Dick Co. v. Sherwood*

Letter File Co. 51 Ill. App. 343, affirmed in 157 Ill. 325, 42 N. E. 440," *Murray v. Doub*, 63 Ill. App. 247.

In an action by the seller for refusing to take pig iron, it was held that interest on damages from the time of the breach of the contract was allowable. *Vierling v. Iroquois Furnace Co.* 68 Ill. App. 643.

In an action for breach of contract of goods, where the measure of damages was held to be the difference between the contract price of the goods sold and the market value at the time the defendant refused to receive them, it was held that the plaintiff was entitled to interest under Mo. Rev. Stat. 1899, § 3705. *Nelson v. Hirsch & Sons Iron & Rail Co.* 102 Mo. App. 498, 77 S. W. 590.

But in *Hewes v. Germain Fruit Co.* 106 Cal. 441, 39 Pac. 853, which was an action by the vendor against the purchaser for refusing to accept a crop of fruit, it was held that interest could not be allowed under Cal. Civ. Code, § 3311, providing that the excess of the contract price over the value of the property to the seller was the measure of damages, and § 3357, providing that the damages prescribed by this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned. The court said it could not be given under § 3287, providing that every person who is entitled to recover damages certain or capable of being made certain by calculation, and the right to recover which is vested in him on a particular day, is entitled to interest from that day, "unless it can be held that the damages in this case were" capable of being made certain by calculation, "and this, we think, could not be done." And whether, if the complaint had alleged the market price at date of breach, and demanded judgment for a specific sum, interest might have been allowed, was not decided.

c. Warranty, deceit, and fraud.

Where the damages are easily ascertainable, or the property received is of no value whatever, the rule seems to be that interest will be allowed. But where the damages are unliquidated and uncertain, interest is denied.

Thus, in an action for breach of warranty of a slave, a jury could allow interest on the difference between the real value of the slave at the time of warranty and his value, if sound, according to the warranty, from the time of the sale. *Marshall v. Wood*, 16 Ala. 806; *Kornegay v. White*, 10 Ala. 255.

In an action on a written warranty of the soundness of a slave, it was held that where one party had a legal right to recover damages as due at a particular time, he was also entitled to interest from the maturity of the demand until the trial. *Stoudemeier v. Williamson*, 29 Ala. 558. This would be the difference between the value at the time of the sale and the actual value at that time, with interest from that time.

In a suit to subject a separate estate to a

judgment for purchase money of a slave, the defense was fraud in the sale of the slave, and it was held that the defendant was entitled to a deduction of a sum equal to the difference between the actual value of the slave at the time of sale, and the value the slave ought to have had, with interest on that sum. *Caldwell v. Sawyer*, 30 Ala. 283.

On breach of warranty of title of a slave, it was held that the damages were the purchase price and interest; but interest should not be computed during the time that the title was good. *Crittenden v. Posey*, 1 Head, 311.

But in *Ware v. Weathnall*, 2 M'Cord, L. 413, it was held that the measure of damages was the purchase price, with interest from the time of the purchase.

In an action for a breach of warranty for the sale of a slave, where there had been an exchange of slaves, an instruction that the plaintiff was entitled to recover interest upon the value of the slave, if he was unsound and worthless, from the date of the exchange, was held to be erroneous. *Tatum v. Mohr*, 21 Ark. 349. The court said: "On general principles, in a suit like the present, for unliquidated contested damages, the plaintiff is not entitled to recover interest as such. . . . If the plaintiff was entitled to interest under the statute (Gould's Dig. chap. 92), it was under that clause of the first section which allows interest 'on money due and withheld by an unreasonable and vexatious delay of payment,' and this was a question for the jury."

In an action for a breach of warranty in the sale of live stock, it was held that the amount ascertained to be proper compensation at the time of the breach might be increased by the addition of interest; but whether it was or not rested in the discretion of the jury, and it was held error to instruct the jury to find interest. *Snowden v. Waterman*, 110 Ga. 99, 35 S. E. 309.

Where the vendor of sheep represented that they were free from disease, when they were not, it was held that the measure of damages was the difference in value between the amount paid and what they were really worth at the time, and interest from that time. *Routh v. Caron*, 64 Tex. 292.

In an action for breach of warranty in the sale of a horse, where there was a failure to replace him, and he was returned to the seller, it was held that the measure of the buyer's damages was the value of the horse as purchased, not exceeding the purchase price, with interest from the time the horse should have been replaced. *Christie v. Crawford*, 152 Mich. 400, 116 N. W. 202.

And where the plaintiff was entitled to recover for deceit in delivering to him worthless stock, it was held the damages were the purchase money paid, with 6 per cent interest. *Heed v. Pierce*, 8 Mo. App. 568.

Where the purchaser paid more than the contract price for stock in a corporation, under an agreement that it should be adjusted, it was held that the vendor was

liable for the excess, with interest from the date of demand, but not from the date of payment. *Ft. Smith Wagon Co. v. Baker*, 84 Ark. 444, 105 S. W. 591.

In an action for fraud and deceit in the sale of notes represented to be well secured, it was held that the measure of damages was the difference between the actual value and what the value should have been at the time of the transaction, with interest to the time of trial. *Schwitters v. Springer*, 236 Ill. 271, 86 N. E. 102, affirming 137 Ill. App. 103.

And in an action for breach of warranty in the sale of a threshing machine, it was held that the jury were properly instructed to find the difference in the value of the machine as it was and as it would have been had it been as warranted, with interest from the date of sale. *Pitsinowsky v. Beard-sley*, 37 Iowa, 9.

And in an action on a note given for a reaper, where the defense was breach of warranty, it was held that the jury could augment the damages by including interest. *Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373, 13 N. W. 149. The court said: "To afford the party just compensation, since his damages accrued at a different time, he must be allowed interest, else, the longer the delay, the more inadequate his compensation would prove to be."

On a breach of warranty for manufactured goods, the purchaser is entitled to recover the price paid, with interest from that time. *South Bend Pulley Co. v. W. E. Caldwell Co.* 21 Ky. L. Rep. 1084, 54 S. W. 12.

In an action on a warranty of flour purchased, plaintiff is entitled to recover the consideration money paid for the several barrels which prove defective, with interest as allowed. *Voorhees v. Earl*, 2 Hill, 288, 38 Am. Dec. 588.

The measure of damages for breach of a contract of sale of cotton is the difference in value of that delivered and that contracted for, with interest thereon. *Connor v. S. Blaisdell Jr. Co.* (Tex. Civ. App.) 60 S. W. 890.

And in an action for damages in inducing the plaintiff, by fraudulent representations, to purchase an interest in a business, it was held that the plaintiff was entitled to recover such loss as might have been the direct result of such fraudulent representations, not exceeding the amount paid by him for the property, with interest. *Buschman v. Codd*, 52 Md. 202.

In cases where the damages are uncertain, interest is not allowed.

In an action for breach of warranty of cabbage seed, where the referee allowed interest on the damages from the time the crops should have been harvested and sold, it was held erroneous. *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544. The court said: "The demand was unliquidated, and the amount could not be determined by computation simply, or reference to market values."

And in an action for damages for breach 28 L.R.A. (N.S.)

of warranty as to the efficiency of certain boilers, it was held that no interest should have been allowed, as the damages were unliquidated. *Krasilnikoff v. Dundon*, 8 Cal. App. 406, 97 Pac. 172.

And interest was denied in the following cases:

An action for breach of warranty or unliquidated damages. *Young v. Van Natta*, 113 Mo. App. 550, 88 S. W. 123. This was a warranty in the sale of live stock.

An action for breach of warranty of rosin. *Lewis v. Rountree*, 79 N. C. 122, 28 Am. Rep. 309. The court said: "In the present case, although we may assume that the defendant had notice by the commencement of the action, that he was looked to for the payment of damages, yet, as a fact, not only was the amount technically unliquidated, but, owing to the unsettled state of the law, it was uncertain. He could not safely and without risk pay any sum until it was ascertained by a judgment, which he might expect it speedily would be."

A special assumpsit on a warranty of soundness. *Ancrum v. Slone*, 2 Speers, L. 594, following *Holmes v. Misroon*, 1 Treadway, Const. 21. The court said: "Interest being stated damages on pecuniary liabilities, to find a sum with interest in an action sounding in damages is to allow damages on damages, which is an incongruity."

But in *Jacksonville, T. & K. W. R. Co. v. Peninsular Land Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661, *Ancrum v. Slone*, supra, was not approved.

XI. Fraud and deceit.

In actions for fraud and deceit, where the damages are susceptible of computation, the cases allow interest. But in Virginia, interest was denied.

In an action for damages for falsely representing the value of land in exchange, it was held that interest should be allowed as damages where the difference in value did not compensate. *Cook v. Perry*, 43 Mich. 623, 5 N. W. 1054.

And in an action for deceit and fraud causing plaintiff loss of property, it was held that the plaintiff was entitled to have the value of the property lost, and interest might be allowed in such cases. *McBeth v. Ciddock*, 28 Mo. App. 380.

And in an action for obtaining money by fraudulent representations, where there was no question as to the amount, it was held proper to allow interest on the amount if the jury should find for plaintiff. *Arthur v. Wheeler & W. Mfg. Co.* 12 Mo. App. 335.

And in an action for fraud in procuring plaintiff to make a loan on land worth less than the sum loaned, it was held that the plaintiff was entitled to recover the difference between the amount loaned and the value she received, and interest upon this sum from the time the loan was made. *Briggs v. Brushaber*, 43 Mich. 330, 38 Am. Rep. 187, 5 N. W. 383.

In an action for money obtained by fraudulent representations, plaintiffs were en-

titled to interest. *Meyer v. Johnson*, 122 Ill. App. 87. The court said: "This money belonged to plaintiffs, and was withheld from them by defendant without the knowledge by plaintiffs that defendant had thus obtained and was holding their money. We think the case was within the spirit of § 2 of the interest act. *Stern v. People*, 102 Ill. 540. But interest was not named in the bill of particulars. A party is bound by his bill of particulars when filed under a rule of court. . . . We hold that, as it is the statute which gives the interest, it was not necessary to claim it in the bill of particulars."

In *Snow v. Nowlin*, 43 Mich. 383, 5 N. W. 443, in an action of trespass on the case for misrepresentation of the value of land exchanged, the court said: "As to the question of interest: in cases of contract and many cases of tort, the rule is well settled in this state that interest may be allowed by way of damages. The plaintiff is allowed full compensation for the injury he has sustained. He is to be placed as nearly as can be in the position he would have if the representations made had been true. The difference in value will not accomplish this unless interest is added thereto."

In an action for damages by reason of false representations to procure the delivery of personal property on conditional sale, where there was a stipulation that if plaintiff recovered, the court could add interest to the verdict, it was held that although it was discretionary with the jury, in that case the court could add interest to the verdict. *Nichols v. Coleman*, 96 App. Div. 353, 89 N. Y. Supp. 234.

In an action on the case for fraudulently obtaining property of plaintiff, it was held that, in case of tort, the allowance of interest as damages was in the discretion of the jury, but was not allowable as a matter of law. *Lincoln v. Claffin*, 7 Wall. 132, 19 L. ed. 106. But in this case the error in allowing interest could not be taken advantage of for want of an exception.

And in an action for fraud and deceit, it was held that the jury had no right to allow interest. *Brugh v. Shanks*, 5 Leigh, 598. The court said: "It was not within its province or power. It has meddled with a matter with which it had no concern. The verdict as to the interest is therefore impertinent, and mere surplusage, and that part of it should have been disregarded by the county court." After this case, Va. Code 1849, chap. 177, § 14, provides that in any action, whether arising from contract or from tort, the jury may allow interest, and fix the period when it shall commence.

XII. Eminent domain.

a. Generally.

The general rule in eminent domain is to allow interest on the damages from the time of taking. Some cases allow interest from the time of judgment, others from the 23 L.R.A. (N.S.)

time of confirmation of the report or award. In some cases interest was allowed from the time of the proceedings. The difference in the cases is largely due to the language of the statute authorizing condemnation.

In Iowa the owner of land taken and condemned by a railroad was held entitled to interest from the date of the taking of the land, but it was held that he should have the interest adjudicated when the damages were assessed. It was also held that it was the duty of the jury to assess the damages as of the date of the assessment, and then upon the verdict the court should make a proper order touching the question of interest. *Reed v. Chicago, M. & St. P. R. Co.* 25 Fed. 886.

In *Newgass v. St. Louis, A. & T. R. Co.* 54 Ark. 140, 15 S. W. 188, it was held that, as the corporation had been in the enjoyment of the land, the damages assessed would bear interest from the date of filing the petition.

But where the owner was not deprived of possession, it was held that he was not entitled to interest until the actual taking. *Los Angeles v. Gager*, 10 Cal. App. 378, 102 Pac. 17.

And where a judgment in condemnation was reversed on appeal by the owner, on the second trial it was held that he was entitled to interest on the judgment from the time possession was taken. *Moll v. Sanitary Dist.* 228 Ill. 633, 81 N. E. 1147. In this case the plaintiff was compelled to appeal, and possession was taken of his property and held for three years, and just compensation was held not only to include the value of the property from the time of filing the petition, but the use of the property from the time the petitioner took possession, measured by the interest for that time on the value of the property, as found by the jury.

And in an action of assumpsit to recover interest on an award of damages, it was held that the owners had no vested right to the condemnation money until the possession was taken; and until that time could not maintain an action for interest. *Beveridge v. West Chicago Park*, 7 Ill. App. 460. The court said: "As the park commissioner had not taken possession of the plaintiffs' land before the institution of this suit, the plaintiffs had no right of action to recover the damages awarded, and if not, the claim for interest is without foundation."

Interest from time of taking was allowed in *Evanston v. Clark*, 77 Ill. App. 234; *Chicago v. Smythe*, 33 Ill. App. 28; *Lawrence v. New Orleans*, 2 La. Ann. 651; *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Guinn v. Iowa & St. L. R. Co.* 131 Iowa, 680, 169 N. W. 209; *Drury v. Midland R. Co.* 127 Mass. 571; *Reed v. Hanover Branch R. Co.* 105 Mass. 303; *Whitman v. Boston & M. R. Co.* 7 Allen, 313; *Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194; *Chandler v. Jamaica Pond Aqueduct Corp.* 125 Mass. 544; *Miller v. St. Louis & K. C. R. Co.* 162 Mo. 424, 63 S. W. 85; *Panhandle & G. R. Co. v. Kirby* (Tex. Civ. App.) 108 S. W. 498 (it was said the statutes do not pro-

vide for interest, but there was no reason "why interest may not be recovered as in other cases of appropriation"); *San Pedro, L. A. & S. L. R. Co. v. Board of Education (Utah)* 99 Pac. 263; *Sweaney v. United States*, 62 Wis. 396, 22 N. W. 609 (overflow caused by a dam); and *Lough v. Minneapolis & St. L. R. Co.* 116 Iowa, 31, 89 N. W. 77. The court said: "There was evidence tending to show that defendant took possession of the land in the month of September, 1899. This would have justified an award of interest after October 1st of that year. It was a matter for the court to act upon, and need not have been submitted to the jury, for no disputed questions of facts were involved."

And where a railroad took land without condemnation, and subsequently brought an action under the statute to assess damages, it was held that the measure of damages was the value of land, with interest from the time of its appropriation. *Daniels v. Chicago, I. & N. R. Co.* 41 Iowa, 52. The court said: "It will be seen, in view of these considerations, that the value of the land at the time of the appropriation, with interest upon the sum assessed from that date until judgment in this case, is the just measure of plaintiff's damages."

A sheriff's jury found for plaintiff \$1,500. On appeal and trial by jury, the damages were assessed at \$1,300, with interest. This was held equivalent to a general verdict for \$1,300, with interest, and a special verdict that the damages sustained at the time the land was taken were \$1,300, and the court properly computed the interest and rendered judgment for \$1,414. *Noble v. Des Moines & St. L. R. Co.* 61 Iowa, 637, 17 N. W. 26.

And where the jury did not include interest in their verdict, the allowance of interest by the court from the time of the appropriation to the date of judgment was held not erroneous. *Hollingsworth v. Des Moines & St. L. R. Co.* 63 Iowa, 443, 19 N. W. 325.

In a proceeding for condemnation it was held that the owner was entitled to interest from the time the land was appropriated; but it would make no difference that the company had deposited the amount of the valuation and assessment with the treasurer of the county. *Missouri River, Ft. S. & G. R. Co. v. Owen*, 8 Kan. 409.

And where a railroad appropriated a strip of land, and the owner sued for damages, it was held that he could recover interest, or damages in the nature of interest, on the amount due him, from the time of taking. *Cohen v. St. Louis, Ft. S. & G. R. Co.* 34 Kan. 158, 55 Am. Rep. 242, 8 Pac. 138. The court said there were exceptions to this rule, but this case did not come within the exceptions.

In a proceeding to condemn land, it was held that if interest could be allowed at all, it could be allowed only from the time the land was taken, and not from the time of the location. *Gay v. Gardiner*, 54 Me. 477. The court said: "Till then the owners would have no right to demand payment

of their damages, and the respondents would not be in fault for not paying them. In the absence of any express promise or agreement to pay interest, the law does not make a party liable for interest till he is in fault for not paying the principal. *Rev. Stat. chap. 18, § 7.*"

Mass. Stat. 1894, chap. 288, and Stat. 1895, chap. 450, providing that the board shall estimate the damages sustained by any person by the taking of land, or of any right therein; but anyone aggrieved may have such damages assessed by a jury in the same manner as the laying out of ways, was held to have reference only to the mode of procedure, and not to the rule of damages. It was held that interest was to be allowed from the time of taking, and not merely from the time of plaintiff's removal from the premises. *Hay v. Com.* 183 Mass. 294, 67 N. E. 334. The court said: "Where land is taken for a highway, the damages are not payable till entry is made upon the land for the purpose of constructing the way; and the statute of limitations does not begin to run till then. Accordingly it has been held that in highway cases interest is to be reckoned from the date of the entry, and not from the date of the location. . . . But in the present case the title passed and the right to damages accrued upon the taking. . . . The taking is the point of time as of which the damages are to be assessed, and the general rule must therefore apply and interest be computed from the taking."

And where a leasehold property used for greenhouses was taken in eminent domain, it was held that in a case of this kind, interest should be allowed upon the damages, ascertained from the time when they were payable, which ordinarily is the time of taking. *Pegler v. Hyde Park*, 176 Mass. 101, 57 N. E. 327. The court said: "By the *Pub. Stat. chap. 49, § 14*, when land is taken for a public way, damages cannot be ordered paid, and a person claiming damages has no right to demand them, until the land is entered upon and possession taken for the purpose of constructing the way. Under this statute, which applies to the present case, the interest does not begin to run until the land is entered upon for the purpose of construction."

And under *Mass. Stat. 1900, chap. 472*, providing for the abolition of grade crossings in Fall River, it was held that interest was to be reckoned from the date of taking, and not from the date of entry. *Providence, F. R. & N. S. B. Co. v. Fall River*, 187 Mass. 45, 72 N. E. 338. The court said: "The reason for the provision of the *Rev. Laws, chap. 48, § 13*, relied on by the respondents, is not applicable to the assessment under this statute, which statute in itself shows a final determination that the work shall be done, and under which no land of the petitioners was taken, but only certain rights in land."

Where the owner of land retained possession after condemnation, it was held that the owner was entitled to interest from the

time of taking to the date of the verdict. *Imbescheid v. Old Colony R. Co.* 171 Mass. 209, 50 N. E. 609. The court said: "The petitioner's loss of title occurred at the date of the taking. His compensation was then due, and his right to recover it, with interest from that date, is settled."

Mass. Pub. Stat. chap. 77, § 3, chap. 171, § 8, providing for interest at 4 per cent from the date of actual entry in taking by eminent domain, was held constitutional, although the general law allowed interest at 6 per cent in other matters. *Norcross v. Cambridge*, 166 Mass. 508, 33 L.R.A. 843, 44 N. E. 615. The court said: "The rule has been generally laid down in this state that the landowner is entitled to interest from the time of the taking, because compensation has generally been regarded as due and payable then. We think, however, that the rule cannot be held so far to express a matter of common right that a departure from it by the legislature in a statute authorizing a taking by eminent domain would render the statute in which it occurred wholly or partly unconstitutional. In the highway act it is expressly provided that interest shall be payable only from the date of actual entry. Pub. Stat. chap. 49, § 14. The constitutionality of that provision, so far as we are aware, has never been questioned."

And in *Edmands v. Boston*, 108 Mass. 535, it was held that interest on damages assessed should be allowed only from the time of actual entry, in the absence of any evidence of loss from the use of land. The court said: "The question of interest upon the amount of damages, estimated 'as of the date of the formal paper taking,' is reserved for our determination. In *Parks v. Boston*, 15 Pick. 198, interest upon the value of the land at the time it was taken was held to be recoverable from that time. The decision was put upon the ground that the taking is the purchase of a public easement, and that the consideration is due, as in other purchases, at the moment the purchase is made, and ought then to be paid; but delay being necessary for the purpose of ascertaining the proper amount of the consideration, interest in the meantime is a suitable compensation therefor."

In *Hay v. Com.* supra, the cases of *Edmands v. Boston*, and *Pegler v. Hyde Park*, supra, were distinguished, as in those cases the statute provided that the rule of damages should be the same as in cases of laying out of ways, but there is no such statute in this case.

Where an amended statute was passed June 28, 1902, extending the time when claims for damages could be asserted under an act restricting the erection of buildings to a certain height, it was held that plaintiff was entitled to interest from June 28, 1902, which was the date of the only taking under which the petition could be maintained. *Raymond v. Com.* 192 Mass. 486, 78 N. E. 514. The court said: "But it is obvious there can be no entry upon the premises in the sense that when land is taken for the use of the public, physical possession

at some period in the proceedings becomes requisite, as in the laying out of public ways, and where interest on the damages awarded, or recovered by suit, is to be computed only from the date of entry."

And under Mass. Gen. Stat. chap. 43, § 73, providing for assessing damages from laying out a private way in a town, over private land, it was held that in the assessment an allowance of interest from the time when the land was taken could be given by the jury. *Kidder v. Oxford*, 116 Mass. 165.

And in an action for taking land for the purpose of widening a street, it was held that the rule of damages was the value of the land at the time of taking, with interest thereon, as the measure of damages, adding to or deducting any consequential damages or benefit. *Parks v. Boston*, supra.

In a petition under Mass. Gen. Stat. chap. 43, for a jury to assess damages occasioned by widening a street, the commissioners awarded \$2,000, as damages. On appeal to a sheriff's jury, who awarded \$2,166, as the jury were directed to add interest from the time of taking, it was presumed that they followed the direction, and the original damages were not increased so as to entitle the petitioner to costs. *First Baptist Soc. v. Fall River*, 119 Mass. 95.

Where the company in condemnation had possession of the land from the date of entry, it was held that the owners were entitled to interest from such time of entry. *Webster v. Kansas City & S. R. Co.* 116 Mo. 114, 22 S. W. 474. The court said: "The parties throughout the trial recognized that entry as an appropriation, and plaintiffs are equitably entitled to interest to compensate for the use."

In 1877 a railroad prosecuted condemnation proceedings for a right of way and for a depot, and judgment was rendered fixing compensation in 1880. The road was sold under foreclosure in 1881. The owner brought suit to compel payment. The railroad used the right of way, but did not use the part condemned for a depot. It was held that the owner was entitled to compensation for the land actually used, with the election to take the present value or the value at the time of the entry, with interest. And the railroad could elect whether it would take all the land, or relinquish its claim to more than that used as a right of way. *Williams v. New Orleans, M. & T. R. Co.* 60 Miss. 689. The court said: "Ordinarily, interest upon the assessment is not allowed the owner when possession remains with him, but in this instance there has been partial possession all the while in the corporation, and as this must have operated in connection with the judgment of condemnation to some extent as a hindrance to the enjoyment and power of sale of the whole, we think interest should be paid in the manner indicated above."

And where the jury in condemnation were instructed to allow interest from the time the railroad took possession, and the jury found a gross amount, it was held that the court could not add interest thereto. *Butte*

Electric R. Co. v. Mathews, 34 Mont. 457, 87 Pac. 450.

And where property was condemned for a right of way by a railroad, and an appeal was taken, it was held that the damages were to be estimated at the time the property was taken. If the railroad company appealed and failed to reduce the amount, it was held that the appellee would be entitled to interest on the award. *Atchison & N. R. Co. v. Plant*, 24 Neb. 127, 38 N. W. 33.

Landowners made a contract with a railroad company to give a right of way in consideration of building a depot, which was not done, and the railroad passed into the hands of receivers and successors. It was held that the latter would be required to pay the value of the land, with interest from the time the land was occupied. *New York & G. L. R. Co. v. Stanley*, 35 N. J. Eq. 283. The court said: "The foreclosure and sale of the company's property and franchises under the mortgage did not divest the landowners' right to compensation for their land, and they are entitled to such compensation from the purchasers at the sale, though the purchasers are created a new corporation; and interest from the time the lands are occupied is part of the compensation which is recoverable in such a proceeding."

And where a city wrongfully appropriated private property for a street without condemning the same, it was held that the owner could recover the value from the time of taking, and was entitled to interest thereon. *Longworth v. Cincinnati*, 48 Ohio St. 637, 29 N. E. 274.

And in case of overflow caused by a dam, it was held that the time of complete submergence, and not the date of appraisal, was the time of taking, from which interest would be allowed. *Velte v. United States*, 76 Wis. 278, 45 N. W. 119. It was held that the rule as in the case of personal property applied.

Where the verdict covers the damages and interest, interest may be allowed on that amount from the date of the verdict, but not from the time of taking. *Diedrich v. Northwestern Union R. Co.* 47 Wis. 662, 3 N. W. 749.

In the following cases interest was held proper from the time of judgment, decree, or confirmation of the report or award. In California the statute gives interest after thirty days from confirmation of the award.

In a proceeding in the District of Columbia, it was held that under the act of March 2d, 1893, chap. 197, 27 Stat. at L. 532, § 18, providing that when a final decree shall have been made for the payment of damages, and when the money has been paid, the commissioner shall be entitled to take immediate possession of the land, the owner was not entitled to interest pending the proceeding. *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966.

Interest should be allowed on the damages assessed from the date of filing the report of the committee. *New Haven Co.* 28 L.R.A. (N.S.)

v. Trinity Church, 82 Conn. 378, 73 Atl. 789.

Under Ill. Stat. (1 Starr & C.) chap. 74, § 3, providing that judgments bear interest at 6 per cent, a judgment in condemnation would also bear interest. *Epling v. Dickson*, 170 Ill. 329, 48 N. E. 1001.

A judgment bears interest where possession was taken. *Chicago v. Palmer*, 93 Ill. 125.

Ill. Stat. (1 Starr & C. 1359) chap. 74, § 3, providing that judgments shall draw interest at 6 per cent, was held to apply to a judgment in an action at law for injury to property on account of the construction of a railroad on the property. *Epling v. Dickson*, supra. The court said: "No exception is made in the statute where a judgment has been rendered as compensation for lands taken or damaged for public use, and in the absence of an exception, the statute which controls judgments in other cases must control here. Moreover, it has often been held that a final judgment for the amount found to be due as just compensation will draw interest. *Cook v. South Park*, 61 Ill. 116; *Chicago v. Palmer*, supra."

In *Cook v. South Park*, supra, it was held that interest would not be allowed until final judgment. The court said: "We think that interest should be allowed upon judgments, when final, in proceedings of this character."

That was followed in *Illinois & St. L. R. Co. v. McClintock*, 68 Ill. 296.

After property had been taken, the owner was held entitled to interest, where payment was not made within a reasonable time after confirmation. *Beveridge v. West Chicago Park*, 100 Ill. 75. The court said: "The land here is shown to have been unoccupied and unproductive, and appellant demanded payment of the damages, thus manifesting an intention not to hold the possession as an equivalent for interest. The demand was made more than five years after the judgment approving the condemnation and assessment of damages. The commissioners were under the legal duty to provide the means and pay the damages within a reasonable time; and failing to do so, they were guilty of a neglect of duty. They should have paid appellant the money before the demand was made, and failing to do so on demand, the commissioners became liable to pay interest."

Where the landowner appealed and obtained a new trial and an award for a larger sum, it was held that interest should be allowed from the date of the award. *Hartshorn v. Burlington, C. R. & N. R. Co.* 52 Iowa, 613, 3 N. W. 648. The court said: "Ordinarily, it may be conceded that interest cannot be allowed upon unliquidated damages. But the theory of the law is that damages for right of way shall be estimated as of the date of condemnation, and that payment shall be made before possession is taken of the property. Where

possession is taken of the property, and the damages are not paid because of the failure of the sheriff's jury to assess sufficient damages, it seems to us to be proper that interest should be allowed upon the damages finally recovered, if they are in excess of those awarded by the sheriff's jury."

In *Lake Koen Nav. Reservoir & Irrig. Co. v. McLain Land & Invest. Co.* 69 Kan. 334, 76 Pac. 853, it was held that the proper rule was to allow interest on the damages from the date of condemnation; but the amount should be reduced by the value, if any, to the owner for use of the land.

On an appeal from an award by commissioners, it was held that the court properly instructed the jury that if they found the damages greater than \$510, they should allow interest from the time of the appropriation; but if they found the sum not greater than \$510, no interest should be allowed, as this instruction did not inform the jury what the previous award was, but simply directed them as to interest. *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 104, 18 Pac. 75.

In an action for damages for appropriating land by a railroad, where the verdict did not include interest nor give data for its computation, it was held error for the court to compute interest for a period prior to the date of the verdict. *Southern Kansas R. Co. v. Showalter*, 57 Kan. 681, 47 Pac. 831. Kansas Code, Civ. Proc. § 288, provides that when, by the verdict, either party is entitled to recover money, the jury must assess the amount of recovery. The court said that under this it has been held that interest must be computed by the jury and included in the verdict.

Where the company had taken possession, it was held that interest should be allowed from judicial demand. *Shreveport & A. R. Co. v. Hollingsworth*, 42 La. Ann. 749, 7 So. 693.

After the payment of the judgment, where the owners claimed interest from the day of inquisition, it was held that where property was vacant, the standard of damages should be interest on the value from the day of inquisition, for the time that delay was without justifiable excuse; but that a mandamus did not lie until the jury had ascertained the amount. *Norris v. Baltimore*, 44 Md. 598.

The owners were entitled to interest on the claim from the day of the confirmation of the inquest. *Harness v. Chesapeake & O. Canal Co.* 1 Md. Ch. 248.

In *Jackson v. Brockton*, 182 Mass. 26, 94 Am. St. Rep. 635, 64 N. E. 418, where an appeal was taken because judgment was entered upon an auditor's report for damages, without including interest from the date of the writ, the court said: "In some cases, where the amount to be paid is unliquidated until the report is filed, it would be unjust to treat the defendant as in default before that time. Under such circumstances, the usual practice under Pub. Stat. chap. 171, § 8, is to compute interest from the date of the report."

Interest was properly allowed on the 28 L.R.A. (N.S.)

amount of the verdict from the date of filing the award. *Knauff v. St. Paul, S. & T. F. R. Co.* 22 Minn. 173; *Wilkin v. St. Paul, S. & T. F. R. Co.* 22 Minn. 177.

And where the proceedings were confirmed and the city, prior to that date, took possession and had occupied the property ever since, and on appeal the order of confirmation was the same, it was held that interest should be allowed from the date of the award. *Weide v. St. Paul*, 62 Minn. 67, 64 N. W. 65.

The date of filing of the award by the first commissioners was to be deemed the time of taking property, for the purpose of assessing its value; and as the landowner was deprived of all claims subsequent to the first award, and was prevented from selling his property pending appeal, or improving it, he should be allowed interest from that date. *Minneapolis v. Wilkin*, 30 Minn. 145, 15 N. W. 668.

The interest should be computed upon the amount of verdict from the date of filing of the award, to the entry of the judgment. *Warren v. First Div. St. Paul & P. R. Co.* 21 Minn. 424. It was said: "It is true that until the company actually takes possession, at the end of the proceedings, the owner has the legal right to possess and use the land. It cannot be assumed that the value of this legal right is equivalent to the interest on the assessed value of the land. . . . Where the owner has actually derived benefit and value from his possession and use, between the filing of the award and the assessment by the jury, the value of such possession and use may be ascertained by the jury, and the amount of it deducted from the interest allowed."

The jury was required to determine claimant's damages, as of the date of the taking of the property by the company, which was constructively the time when the award was filed; and in the absence of anything in the record to the contrary, it was presumed that the verdict referred to the amount of damages the claimant was entitled to at the time the award appealed from was filed, and the district court could allow interest on such verdict to the time of entry of the judgment. *Whitacre v. St. Paul & S. C. R. Co.* 24 Minn. 311.

Under U. S. Rev. Stat. § 1091, U. S. Comp. Stat. 1901, p. 747, interest is not recoverable against the United States upon an unpaid account or claim; but this is not applicable to a condemnation proceeding by the United States; but a state statute providing that all damages shall bear interest from the time of filing the commissioner's report applies. *United States v. Sergeant*, 89 C. C. A. 81, 162 Fed. 81.

In *Martin v. St. Louis*, 139 Mo. 246, 41 S. W. 231, it was held that the owner was entitled to interest on the award from the date of final judgment. The court said: "What might be the city's right if the property owner shall appeal is an entirely different question. Here the city could have avoided all interest by paying the money

into court, as permitted by the Constitution and charter. It must be constantly borne in mind that neither the award of the commissioners nor the approval of the court are final. No final order is entered until the city has elected to pay the amount awarded, and certified its assent to the court. Then for the first time we hold that the final judgment is rendered and bears interest like any other money judgment or order."

Interest should be allowed on the judgment from the date of its rendition. *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491.

Where there is no statute making a provision for interest after a sum is fixed by the award, unless the corporation makes a tender or deposits the money, interest should be allowed from the time of award. *Concord R. Co. v. Greely*, 23 N. H. 237.

In an appeal from an award in condemnation for a highway, it was held that the owner was entitled to interest from the time of filing the report by the referee until the date of judgment. *Wentworth v. Portsmouth*, 68 N. H. 392, 44 Atl. 531. The court said: "In the present case, the judgment on the report of the commissioners legally established the highway. The question of the plaintiff's land damages was still being litigated, and was undetermined during the pendency of her appeal. *Lyman's Bridge Co. v. Lebanon*, 59 N. H. 196. There was no judgment for the plaintiff, entitling her to receive interest upon it, until the judgment upon the report of the referee. The damages were not ascertained until the referee made his report. Before then the plaintiff could not demand them. It is assumed that before then the land was not actually taken from the plaintiff to build the highway, and that she had the use of it until then. But if the land was actually taken from her before then, it is to be presumed that the referee's report, like the verdict of a jury, included in the assessment of damages such interest as she was entitled to receive to that time. The plaintiff is entitled to interest on the award only from the time of filing the report of the referee until the date of the judgment thereon."

And where damages were for plaintiff on laying out a road, and he subsequently brought an action of debt for the amount, it was held that he was entitled to interest from the time the road was opened. *Fiske v. Chesterfield*, 14 N. H. 240.

In an action for damages to land caused by opening a street, it was held that the owner was entitled to interest from the date of the award. *Pepin v. Elizabeth*, 57 N. J. L. 653, 32 Atl. 213. This was under New Jersey Pamphlet Laws, 1863 p. 109, § 99, providing that the person entitled thereto may sue for and recover interest from the date of the award.

Under N. J. act March 7, 1873, providing that in case assessments are made in connection with an improvement, the award shall not be payable until the assessment for 28 L.R.A. (N.S.)

benefits has been ratified by the council, and only the difference shall be payable to the owner, and interest upon the award shall commence on the date of ratification of the assessment for benefits; and in case the city shall have taken possession before the date of ratification, the award shall be payable and the interest commence on the date of possession,—it was held that interest should be allowed, but that if the landowner, after ratification, had had any use of the property, the value of such use should diminish the interest claim. *Fink v. Newark*, 40 N. J. L. 11.

And under Tenn. Code, § 1326, where commissioners or a jury allowed damages, but did not give interest as such, it was held that the case was in the nature of a proceeding in equity; and the jury not having been directed to find interest, the court could add interest on the confirmation of the report. *East Tennessee, V. & G. R. Co. v. Burnett*, 11 Lea, 525.

And where the property owner, on an appeal, increases the award, he is entitled to interest on the amount of the verdict from the date of the award. *Neilson v. Chicago & N. W. R. Co.* 91 Wis. 557, 64 N. W. 849.

In *Re Water Comrs.* 132 App. Div. 75, 116 Supp. 495, that case was distinguished, in that it rested upon *West v. Milwaukee*, L. S. & W. R. Co. 56 Wis. 318, 14 N. W. 292, and *Uniacke v. Chicago, M. & St. P. R. Co.* 67 Wis. 108, 29 N. W. 899, the first of which does not discuss this question, and the other says there might be equitable considerations which would take a given case out of the rule.

Under a California act concerning railroads, § 36, providing that the railroad company shall pay or tender the amount of award within thirty days after final confirmation of the report, it was held that the owner was entitled to interest on the award, to commence thirty days after the confirmation. *Phillips v. Pease*, 39 Cal. 582.

In the following case interest was held proper from the date of the condemnation proceedings: *Harlan County v. Hogsett*, 60 Neb. 362, 83 N. W. 171. The court said: "This is upon the principle that the land is regarded as appropriated as of that date. Upon the same rule, damages by reason of the location of a highway accrue at the date of the condemnation proceedings."

So, in the following cases, where the award was increased by appealing to the court: *Burlington & M. R. Co. v. White*, 28 Neb. 166, 44 N. W. 95; *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205, 76 N. W. 571 (the court said: "It is well settled that where, on an appeal for an award of damages for lands taken for right of way, the damages are found to exceed the sum returned by the commissioners, the owner is entitled to interest from the date of the appropriation"); *Sioux City, etc. R. Co. v. Brown*, 13 Neb. 317, 14 N. W. 407 (the court said: "It is true, as claimed by counsel for the plaintiff in error, that there is a hard-

ship in requiring the payment of interest on the whole amount of the condemnation money, when, during the time for which it is computed, a large portion thereof has been lying idle in the custody of the law. But it would be a hardship, also, to deprive the owner of the property of its use during the same time without compensation therefor; and, besides, it would be a flagrant violation of his constitutional right to a 'just compensation.' In such case, we think, a nearer approximation to exact justice is reached by visiting the loss upon the party at whose instance and for whose benefit it was incurred, than by putting it upon the one whose property is forcibly taken from him for the benefit of others").

In *Atchison & N. R. Co. v. Plant*, 24 Neb. 127, 38 N. W. 33, *Sioux City, etc. R. Co. v. Brown* was distinguished, as that case was not intended to preclude a landowner from recovering interest in case of an appeal by the railroad company, where it failed to reduce the amount of the award.

The Tennessee statute on condemnation makes no provision for interest; but, on general principles, interest should be allowed from the time of the appropriation of the property. *East Tennessee, V. & G. R. Co. v. Burnett*, 11 Lea, 526; *Chicago, St. L. & N. O. R. Co. v. Moggridge*, 116 Tenn. 445, 92 S. W. 1114; *Alloway v. Nashville*, 88 Tenn. 510, 8 L.R.A. 123, 13 S. W. 123.

And the order of condemnation was held to start the running of interest, as the order vested the petitioner with the right to use the property and deprive the landowner of its use. *Snowden v. Shelby County*, 118 Tenn. 725, 102 S. W. 90.

In an action for an injunction on the ground that no steps in eminent domain had been taken and no compensation paid by a railroad, it was held that the jury could add interest from the date of the commencement of the suit. *Taylor v. Bay City Street R. Co.* 101 Mich. 140, 59 N. W. 447. The court said: "The authorities are not uniform upon this subject. The old rule undoubtedly was that interest could not be allowed upon unliquidated damages, and, in action of tort, damages are, of course, unliquidated. The tendency of courts has been, however, to set this rule aside, and adopt the more reasonable one, in cases of injury to property, that the jury must first determine the actual damage sustained, and allow interest upon that sum from its date."

Interest cannot be given except as part of the damages, and then only from the time the damages occurred. *Selma, R. & D. R. Co. v. Redwine*, 51 Ga. 470. In this case the road was partly graded in 1859, and nothing was done on the road until 1870, when the writ of assessment was sued out, and interest could not have gone back of that time.

b. Pennsylvania cases.

Interest seems to have been allowed from the time of award. In some cases it is held 28 L.R.A. (N.S.)

that interest is not allowed as interest, but the jury may consider the lapse of time in awarding damages.

Under Pa. act 1849, P. L. 79, making the sum awarded payable when the judgment was entered, it was held that the award of damages bore interest only from the time of filing the award. *Hays v. Baltimore & O. R. Co.* 3 Pennyp. 52.

Where a railroad appealed, it was held that it should pay interest on the amount of award, although it abstained from taking actual possession of the land. *Davis v. North Pennsylvania R. Co.* 2 Phila. 146. The court said: "This, as well as any other judgment, draws interest; and if the company did not choose to exercise the rights which they demanded and obtained upon the entry of the judgment, by taking possession of the land, that delay would not affect the rights of the parties, who, by not objecting to the judgment, consented to the immediate use of the property by the company."

And under Pa. act Jan. 6, 1864, providing that when the report of a jury assessing damages for opening a street shall be finally confirmed, the sum assessed as damages, against the owners found to be benefited, shall be liens for six months, and when said award is confirmed the street shall be opened and the city shall pay the damages, it was held that interest began to run at confirmation. *Norris v. Philadelphia*, 70 Pa. 333.

In *Pennsylvania R. Co. v. Cooper*, 58 Pa. 408, it was held that the owner was entitled to recover interest on the value of his property taken by the railroad from the time that it was taken. The court said: "He is in the position of a vendor of land, who has always been held to have a right to interest on the purchase money where possession has been delivered to the vendee. The viewers, no doubt, allowed him interest up to the date of the report. He has been paid by the company, interest from the time of the final confirmation of it by the court below, including the period during which the cause was delayed by the certiorari from this court. Why shall he not also have interest during the period that the cause was delayed in the court below by the exceptions filed there? No good reason has been or can be given."

Where either party under the charter of a railroad had the right to institute proceedings to ascertain the amount of damages for taking property by the railroad, and the injured party was a lunatic, it was held that the jury could allow interest, where the railroad had used the property for a long time without paying any attention to his rights. *Philadelphia, W. & B. R. Co. v. Gesner*, 20 Pa. 240.

And under Pa. act 1834, April 15, it was held that the owner was entitled to interest on the confirmation of the report assessing damages. *Re Second Ave.* 42 W. N. C. 104. The court said: "It was a common rule to allow interest for the detention of money after it should have been paid, and this rule was applicable here."

And under Pa. act April 14, 1868, providing that whenever any report of commissioners shall have been confirmed by the court, the valuation made shall be forthwith payable, it was held that interest should be allowed from the confirmation. *Miskey v. Philadelphia*, 68 Pa. 48.

In assessing damages for opening a street, it was held that interest could be allowed from the time of taking. It was further held that Pa. act 1851, P. L. 320, amended by act May 22, 1883, related only to the subject of interest after adjudication. *Weiss v. South Bethlehem*, 136 Pa. 294, 20 Atl. 801. The court said: "In this case, the court directed the jury that if they found for the plaintiffs they should allow interest from October 10, 1887, the date when the report of viewers was filed. As the land of the plaintiffs was taken before that date, there was no harm to the defendant in fixing that time as the period when interest should commence. We do not think the filing of the report had anything to do with this subject, but it was no injury to the defendant to give such an instruction."

A railroad company failing to have the amount of damages ascertained has no right to complain of compensation for the delay in the shape of interest. *Delaware, L. & W. R. Co. v. Burson*, 61 Pa. 369.

The jury could not allow interest as interest, but could consider the lapse of time in allowing damages. *Becker v. Philadelphia & R. Terminal R. Co.* 177 Pa. 252, 35 L.R.A. 583, 35 Atl. 617.

Klages v. Philadelphia & R. Terminal R. Co. 160 Pa. 386, 28 Atl. 802. The court said: "Interest as interest has no place in the computation of damages. The question for a jury in every case is what sum will make a just compensation to the landowner for the entry and appropriation by the corporation. The land occupied may have been wholly unproductive, and without value except for speculative purposes; it may have been highly productive and valuable; it may have been built upon, and its net income capable of easy ascertainment; the entry may have increased the value of the remainder of the tract more than enough to compensate for what was taken. All these considerations are for the jury, and will help them in the effort to determine what just compensation in any given case requires."

In making up the damages, the jury could include interest in their estimation from the time the damages should have been paid. *Getz v. Philadelphia & R. R. Co.* 105 Pa. 547.

In an action for injuries to mill property by reason of an appropriation of water, it was held error to instruct the jury to allow interest as interest, but the jury could consider the lapse of time. *Mengell v. Mohnsville Water Co.* 224 Pa. 120, 73 Atl. 201. The court said: "It is wholly within the province of the jury to determine whether the plaintiff is entitled to any additional

sum for the delay, and, if so, what amount will compensate him for the delay. They may allow a sum not exceeding 6 per cent, but they can allow a smaller amount, just as they think the circumstances require, in order to make the plaintiff whole. It is therefore purely a question for the jury to determine whether any or what sum shall be added to the amount of damages ascertained to be due as of the date of the appropriation of plaintiff's property."

Where the owner appealed, and withdrew his appeal, and asked to have the judgment entered *nunc pro tunc*, with interest from a prior date, it was held that he was not entitled to such interest, as he had put it out of the power of the railroad to pay his claim by his appeal. *Ross v. Pennsylvania R. Co.* 14 W. N. C. 143; *Donaldson v. Pennsylvania R. Co.* 15 W. N. C. 312.

Under Pa. act 1855, April 21, authorizing the laying out of streets, and providing that no proceedings to assess damages shall lapse by delay of a year in paying damages, and authorizing a suit to be brought for the sum assessed at the expiration of the year, it was held that the first assessment fixed the extent of the liability, and the time when the owner had a right to his money, and delay beyond that time entitled him to interest from the date of the assessment. *Philadelphia v. Dyer*, 41 Pa. 463.

In *Norris v. Philadelphia*, 70 Pa. 333, the court said: "Whatever has or may be said of *Philadelphia v. Dyer*, supra, the fact is shown by a simple calculation of interest on the award, that interest was only allowed in the final judgment, from the confirmation of the award. Any person can satisfy himself of this by making the calculation from the papers on file. The result of the case was this and no more. It required an act of assembly to authorize an allowance of interest on a verdict before judgment. *Kelsey v. Murphy*, 30 Pa. 340. Why should it not be so in case of an award like the one in question, before confirmation, which is equal to a verdict at least?"

Pa. act April 21, 1869, providing that no interest will be allowed on damages for ground taken up to the time of their payment or the issue of any warrant for their payment, was held invalid as retroactive in applying to proceedings commenced under prior statutes. *Miskey v. Philadelphia*, 68 Pa. 49.

Under Pa. act March 26, 1867, providing that owners of ground taken shall be paid according to the value to be ascertained, it was held that interest was to be allowed from the date of the assessment; and it was further held that the Pa. act of April 21, 1869, declaring the intent of the act of 1867 and 1868 to be, that no interest shall be allowed on damages for ground taken up to the time of their payment, or the issue of any warrant for their payment, was destitute of retroactive force because it was an act of judicial power, and in contravention of the Constitution. *Haley v. Philadelphia*, 68 Pa. 45, 8 Am. Rep. 153.

In *Miskey v. Philadelphia*, *Haley v. Phila-*

delphia was distinguished, as there was a difference in the statute.

Under Pa. act March 19, 1860, providing that the damages awarded landholders for the opening of streets shall be paid within six months after approval, it was held that, under general principles, interest was to be calculated only from the time the demand was payable; and it is to be presumed that the viewers took this delay into consideration, and if the owner continued undisturbed in the full receipt of the rents and profits, he should not receive full interest. *Re Second Street*, 66 Pa. 132.

In *Stewart v. County*, 2 Pa. St. 340, where land was entered upon to open a street, it was held that the damages did not bear interest until occupation. The court said: "The report had relation to the time when the street should be opened, for, till then, the plaintiff, having the use of his ground, could receive no injury. The proceedings would be vacated by lapse of time, at the end of a year, if the public did not exercise its right; and it is true that, in the meantime, he might be prevented, by the uncertainty of the event, from making improvements; but that is an inconvenience which the legislature did not mean to compensate."

In *Philadelphia v. Dyer*, *Stewart v. County* was distinguished, as in that case the statute was different, and no right to sue for damages from a street opening was given by statute.

c. New York cases.

Proceedings for condemnation are now required to be made under N. Y. Code Civ. Proc. §§ 3357-3384, except in condemning for streets or public places, provided for by special acts. The Code does not make specific provisions for interest. The cases in this state, where the question of interest arose, were generally under special differing statutes. It seems that in New York city interest was held due from date of vesting of title. In some cases interest is held to be due from the confirmation of the report.

Under New York Code of Civ. Proc. §§ 3371-3373, providing that if the report is confirmed, the court shall enter a final order, directing compensation to be made to the owner, and that, on payment thereof, plaintiff shall be entitled to possession, and that on entry of the final order the same shall be docketed with the force and effect of a money judgment, it was held that the entry of the final order fixed the date from which interest should be computed. *New York & B. Bridge v. Third M. E. Church*, 45 N. Y. S. R. 615, 18 N. Y. Supp. 257.

In *Re Mott Haven Canal Docks*, 196 N. Y. 175, 89 N. E. 474, where a case had been sent back to the commissioners to make an award to unknown owners, it was held that interest on the value of land was to be calculated to the date of the second report, and 28 L.R.A. (N.S.)

such interest, with the value of the land, should then become a new principal, carrying interest until paid. This was under Greater New York charter, § 990, requiring the commissioners to allow interest from the time of vesting of title to the date of their report, and § 1001, providing for the payment of the damages with interest from the date of report, interest to cease six months after confirmation unless demand is made within that time. This involves compound interest from the date of the report.

New York city charter, Laws 1897, chap. 378, § 990, authorizes an allowance of interest on the value, from the date of vesting of title to the date of report. *Re East 158th Street*, 39 Misc. 598, 80 N. Y. Supp. 594. It was said: "That compensation the legislature has determined shall be the value at the time of taking, plus interest thereon to the date of the commissioners' report."

Under Greater New York charter, § 1001, it was held that one claiming an award to an unknown owner could recover only six months' interest after the date of the confirmation of the report, when the claim was made more than six months after the award. *Re New York*, 91 App. Div. 532, 86 N. Y. Supp. 1035.

A provision in an order confirming a report of commissioners, allowing interest from date of confirmation, was held proper in *United States v. Engeman*, 27 Abb. N. C. 141. This proceeding was under 26 Stat. at L. 316, providing that the proceeding is to be in accordance with the laws of the state.

Commissioners were appointed to acquire land in New York city, March 31, 1897, under N. Y. consolidation act. Laws 1882, chap. 410, § 992, amended by Laws 1893, chap. 660, and Laws 1895, chap. 449. It was held that Greater New York charter, taking effect January 1, 1898, and providing that, unless a demand for payment of an award was made within six months from date of confirmation, interest ceased, did not apply, as the proceeding was instituted and title vested while the consolidation act was in force, and interest was allowed on the award up to the date of payment. *Re Cromwell Ave.* 96 App. Div. 424, 89 N. Y. Supp. 180.

Under Buffalo charter, Laws 1870, § 519, providing that an award of condemnation shall be paid within one year after confirmation, it was held, in an action by the county against the city, to recover the amount of an award, that interest should be allowed from one year subsequent to the confirmation, as provided in the statute. *Erie County v. Buffalo*, 63 Hun, 505, 18 N. Y. Supp. 635, affirmed in 138 N. Y. 629, 33 N. E. 1083.

Under N. Y. Laws 1882, chap. 410, and amendments, providing for street openings in New York city, it was held that the land was taken by the city when the title vested, and the right to compensation was vested at the moment of the taking, and interest from that moment began to run upon any award, as compensation therefor, as of that

date. *Re Morris Ave.* 118 App. Div. 117, 103 N. Y. Supp. 180.

Under N. Y. Laws 1897, chap. 665, authorizing commissioners to condemn lands, and providing that the value shall be paid with interest from the day when the title vests, it was held that interest on interest could not be allowed. *Re Dorsett*, 179 N. Y. 496, 72 N. E. 522. The court said: "The interest still ran upon the sum fixed as the value of the land, but it did not run upon the sum which the commissioners reported as the interest on that value down to the date of their report. As already observed, they were not required to report the interest, since that was determined not by anything contained in their report, but by the terms of the statute, which declared that the sum awarded as the value of the land, together with interest from the date when the title vested in the city, became due and payable by the city immediately upon the confirmation of the commissioners' report."

Under N. Y. consolidation act, Laws 1882, chap. 410, amended by Laws 1893, chap. 660, providing that the city must pay interest from the date when the title to land shall have vested, the city was held liable for interest. *Re Board of Street Opening*, 35 App. Div. 406, 54 N. Y. Supp. 911.

And under N. Y. consolidation act, Laws 1882, chap. 410, as amended by Laws 1893, chap. 660, providing that the damages awarded and interest from the date when the title should vest in the city should be paid by the city, it was held that interest began to run from the time when the report was confirmed. *Re Board of Street Opening*, 21 App. Div. 357, 47 N. Y. Supp. 564. The court said: "The very fact that the statute expressly provides that, as to the premises situated in the twenty-third and twenty-fourth wards, the damages shall be due and payable at the date of the confirmation of the report, and that it makes no such provision with regard to damages for lands taken elsewhere in the city, shows the intention of the legislature that a different rule should be applied to the payment of these damages than is applied in the case of premises situated elsewhere."

In proceedings by the city of New York to acquire land for a public park, it was held that when an award was made it related back to the time the property vested in the city, and under a contract entitling plaintiff to one half the award, it was held that he was entitled to interest from that time to the time of payment. *Re Board of Street Opening*, 128 App. Div. 432, 112 N. Y. Supp. 845.

Under N. Y. Laws 1894, chap. 56, providing for appraisement of lands in New York city for a park way, and that from the date when the commissioners decided what lands should be acquired, such lands shall be a public park way for public use, it was held that the owners were entitled to the actual cash value of their lands upon that date. And upon that obligation the right of interest rested. *Re New York*, 40 App. Div. 281, 58 N. Y. Supp. 58.
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And under N. Y. Laws 1888, chap. 191, providing for school sites in New York city and for payment with interest within four months from confirmation, it was held that interest on the award was part of the compensation, and could be recovered in an action where the owner had accepted the award under protest. *Devlin v. New York*, 131 N. Y. 123, 30 N. E. 45, reversing 60 Hun, 68, 14 N. Y. Supp. 251.

But under Greater New York charter, § 1001, interest cannot be collected in a separate action after acceptance of the award, although interest was demanded at the time the award was paid. *Cutter v. New York*, 92 N. Y. 160, affirming 14 N. Y. Week. Dig. 296.

In an action of money had and received, in *Boyce v. Wight*, 2 Abb. N. C. 163, interest was allowed under N. Y. act 1813, chap. 86, relating to awards for compensation for lands taken for local improvements, and authorizing the owner to sue for and collect the same, with interest.

Where there was a delay of four years in making a report, and the property had increased in value, it was held that the commissioners properly awarded the value at the time of appropriation, with interest to the time the award was payable. This was under N. Y. Laws 1894, chap. 56, providing for a just and equitable estimate of the damages to parties affected in taking for public parks. *Re New York*, supra.

In condemnation of springs for a water supply, where payment of damages given for injuring water power was delayed for six years, it was held that interest should be given. *Port Henry v. Kidder*, 39 App. Div. 640, 57 N. Y. Supp. 102.

In some cases interest was held not to run until after demand.

So, demand was held necessary to start interest, under N. Y. Laws 1894, chap. 56, § 4, requiring the city to pay the award within four months from confirmation of the report. *Deering v. New York*, 51 App. Div. 402, 64 N. Y. Supp. 606; *Carpenter v. New York*, 44 App. Div. 230, 60 N. Y. Supp. 633.

Also under Greater New York charter, § 1001, providing that interest shall cease to run six months after confirmation of report, unless demand be made within that time. *Barnes v. New York*, 27 Hun, 236.

A demand made prematurely was held not to start interest under N. Y. Laws 1894, chap. 746, § 4, providing that an award in taking for a park shall be paid in four months after confirmation, and if not paid on demand, interest shall run. *Fredericks v. New York*, 44 App. Div. 274, 60 N. Y. Supp. 724, affirmed in 165 N. Y. 656, 59 N. E. 1122.

And under N. Y. Laws 1888, chap. 191, in regard to condemnations in New York city, providing that, on confirmation, the mayor of the city shall be seised in fee, and shall take possession, and on confirmation the comptroller shall pay; and, in default within four months after date of such confirmation, the parties may sue for and recover the same, with interest from and after the demand thereof, it was held that a demand

was necessary, and after a demand, interest was due. *Irwin v. New York*, 31 N. Y. S. R. 104, 9 N. Y. Supp. 264.

And under N. Y. Laws 1874, chap. 746, authorizing the taking of land for the purpose of a park, and § 4, providing that the amount should be paid within four months, and in default the owner may sue for and recover the same, with interest after demand, it was held that after refusal to pay on demand, after the four months, interest would be allowed from the date of the demand; but where the demand was made on Saturday, and the four months expired on Sunday, it was held that the demand was premature and interest would not be allowed. *Fredericks v. New York*, supra.

Under Greater New York charter, § 990, providing for opening streets, and that in such cases interest at the legal rate upon the date of vesting of title, from said date to date of report of the commissioners, shall be allowed, it was held that if the claimant was entitled to interest, he should have made such claim to the commissioners, and if they did not allow it, he should have opposed the confirmation of the report; and his only remedy was to appeal or move to vacate and set aside the report. It was held that the statute was the only authority by which interest could be allowed, and the court had no power, in case interest was not awarded by the commissioners, to allow it. *Re Belmont Street*, 128 App. Div. 636, 112 N. Y. Supp. 858.

In condemnation for a canal, it was held that the state was liable for interest after a demand made by the party entitled. *People ex rel. Bank of Monroe v. Canal Comrs.* 5 Denio, 401. The court said: "Hence, if the question of the liability of the state to the payment of a claim for damages come properly before a judicial tribunal, whether so brought up by the public officer or the other party, the tribunal, in adjudicating upon the question, will, if it determines the claim against the state to be just, in addition to directing its payment, also direct the payment of interest thereon, where it would in other cases direct such interest to be paid. In the case of *Canal Fund Comrs. v. Kempshall*, 26 Wend. 404, the proceedings to award canal damages were brought before the court by the state officers by certiorari, and the court, on affirming the proceedings and deciding that the state was liable to pay the award (as appears by the report and also by the rule entered on that occasion, which we have examined), directed the payment of interest thereon."

In an action by a mortgagee to recover the proceeds of an award made for condemnation of the mortgagor's land, it was held that interest could not be claimed before a demand made for the money, under N. Y. Laws 1874, chap. 604, providing that an award is payable on the confirmation of the report. *Barnes v. New York*, 27 Hun, 236. The court said: But the statute "did not provide that interest should be payable on it from that time."

Under N. Y. act, 1869, providing for con-

demnation in New York city, fixing the time when the widening of a street should take place, it was held that the time of payment of an award should run from the confirmation of the report; and under N. Y. act 1813, providing for payment of interest on an award after demand, it was held that interest did not run until after demand. *Phillips v. Cudlipp*, 50 How. Pr. 363. In this case the court held: That in *Hamersley v. New York*, 67 Barb. 35, the act of 1813 was so far altered as to suspend the right to sue for nineteen months after confirmation, unless the corporation took possession by the act of 1818, authorizing a corporation to suspend the opening, not exceeding fifteen months. This did not apply to the proceedings under the act of 1869, but the previous acts are made applicable.

And mortgagees were held entitled to interest on their mortgages to the date when the award was payable, and if unpaid after demand, to subsequent interest. *Carpenter v. New York*, 51 App. Div. 584, 64 N. Y. Supp. 839.

And under N. Y. 2 Rev. Stat. 1552, 7th ed., providing that when a new appraisal in condemnation for a railroad has been made, and the second is less than the first, the difference shall be refunded, it was held that the party repaying the same was not required to pay interest, until he was in default after a copy of the final order of confirmation had been served on him. *Re New York Elev. R. Co.* 44 Hun, 117.

Greater New York charter, § 990, relating to interest on awards, was held to apply to original proceedings after Jan. 1, 1898, and would not apply to proceedings instituted under the consolidation act. *Re Whitlock Ave.* 51 App. Div. 436, 64 N. Y. Supp. 717; *Re East 175th Street*, 49 App. Div. 114, 63 N. Y. Supp. 468, affirmed in 162 N. Y. 601, 57 N. E. 1117.

Under N. Y. Laws 1882, chap. 410, consolidation act, chap. 978, authorizing the city to acquire title to land for the opening of a street, where the award was made to compensate for damages by reason of an injury to a building, it was held that the relator was not entitled to interest, as the city did not acquire title to any of its land. *People ex rel. New York City Church v. Coler*, 60 App. Div. 77, 69 N. Y. Supp. 863, affirmed in 168 N. Y. 644, 61 N. E. 1133.

Where a statute appropriated certain land for parks, it was held that the owners were not entitled to interest. *Re Public Parks*, 53 Hun, 280, 6 N. Y. Supp. 750. In this case the commissioners reported especially that they took into consideration the fact of delay in realizing upon the award which was to be made by them, and made their estimate accordingly.

On an appeal for a new taxation of costs, it was said: "The second question raised upon this motion is whether the clerk was right in inserting in the bills of costs interest on the amounts awarded to the claimants by the order of June 18, 1907. I do not see any justification for this allowance of interest. The rights of the parties under

that order were fixed by the order, and, if they are entitled to interest, it is by virtue of that order. One of the counsel cites in his brief the provision in § 500 of the charter of New York (Laws 1901, chap. 466, p. 224), which he claims shows that the respective amounts ordered to be paid to the owners by way of costs draw legal interest. If this be so, the interest may be collected in the same way as the principal sum. This interest is certainly not a part of the costs of the court of appeals or of the appellate division. There is no provision in the Code which justifies such allowance." *Re Pine's Stream*, 129 App. Div. 929, 114 N. Y. Supp. 681.

d. Possession by owner.

Possession of the land by the owner will prevent interest from running during that time.

In condemnation for a park by the United States in the District of Columbia, it was held that the owner of the land was not entitled to interest from the initiation of the proceedings to the time of payment of the money into court. *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 381. In this case the owner was in receipt of the rent and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences were presumed to be considered and allowed for in fixing the amount of compensation.

In *United States v. Sargent*, 89 C. C. A. 81, 162 Fed. 81, the dissenting opinion said that the allowance of interest was in conflict with *Shoemaker v. United States*, 147 U. S. 284, 37 L. ed. 177, 13 Sup. Ct. Rep. 381.

Where the owner of land taken in condemnation had the right to use the same until the damages were paid, it was held that he was not entitled to interest from the commencement of the suit to the trial. *South Park v. Dunlevy*, 91 Ill. 49.

And, where a town had condemned a right of way of a sewer and water system, and the same was again condemned by the United States, it was held that as it was admitted that, at the time of the trial, there had been no actual interruption of the town's possession, and that the town had continued in its enjoyment of the right as fully as if the government proceedings had not been instituted, interest should not be recovered. *United States v. Nahant*, 82 C. C. A. 470, 153 Fed. 520.

And, where the property had not been injured or taken, it was held that the judgment would not bear interest. *Chicago v. Barbican*, 80 Ill. 482. The court said: "That such a judgment bears interest was first announced in *Cook v. South Park*, 61 Ill. 115, where it was assumed possession had been taken of the property prior to the judgment of condemnation, and subsequently held; and it was allowed not because the order of court possessed all the elements of an absolute judgment, but because it was within 28 L.R.A. (N.S.)

the spirit of the statute allowing interest on judgments. And in the subsequent case of *Illinois & St. L. R. Co. v. McClintock*, 68 Ill. 296, where interest was also allowed upon a like judgment, the fact was made to distinctly appear that possession had been taken and retained of the condemned property.

In an action to enjoin a city that had taken possession of land condemned without paying interest on the award from the date it began, it was held that plaintiff should do equity by accounting for rents and profits received from the possession of the land since that date. *Plum v. Kansas City*, 101 Mo. 525, 10 L.R.A. 371, 14 S. W. 657. The court said: "The theory on which plaintiff's case proceeds is that the final judgment of condemnation was the 'taking' of plaintiff's beneficial title. Assuming that theory correct, it would be inequitable to permit him to recover interest on that judgment and retain the benefits of the possession held by him meanwhile (in contemplation of equity, at least), as trustee for the city."

Where the instructions directed the jury to add interest to the damages, but did not require plaintiffs to account for rents after the date of taking possession, it was held that it was too late to raise this question on appeal. *Ragan v. Kansas City & S. E. R. Co.* 144 Mo. 623, 46 S. W. 602.

In *Re Riverside Park*, 59 App. Div. 603, 69 N. Y. Supp. 742, affirmed in 167 N. Y. 627, 60 N. E. 1116, the owners were held entitled to interest from the date of appropriation until the confirmation of the report, to be offset by rents or value of use during that time, under N. Y. Laws 1894, chap. 152, providing for acquiring title to certain property.

In *Donnelly v. Brooklyn*, 121 N. Y. 9, 24 N. E. 17, an owner in possession was held not entitled to interest on a street widening improvement. The city was held liable only from the time of demand for payment. The city charter did not provide the time of payment, but seemed to extend it so long as the right to make assessments continued.

N. Y. act 1818, chap. 206, authorizing the suspension of the opening of a street, not exceeding fifteen months, was held to change Laws 1813, chap. 86, requiring payment to be made within four months after confirmation, but the act of 1818 gave the owner the rents and profits for the fifteen months. The award in this case was paid within four months after the lapse of fifteen months, and the owner was held not entitled to interest. *Hamersley v. New York*, 56 N. Y. 533, affirming 67 Barb. 35.

In *Eric County v. Buffalo*, 63 Hun, 565, 18 N. Y. Supp. 635, *Hamersley v. New York*, 56 N. Y. 533, was distinguished because of difference in possession.

Under N. Y. act 1818, chap. 206, altering N. Y. act April 9, 1813, substituting the

right of possession during fifteen months for interest on the award, it was held that, in such a case, interest should not be allowed. *Re Public Parks*, 53 Hun, 280, 6 N. Y. Supp. 750, following *Detmold v. Drake*, 46 N. Y. 320.

In *Re New York City*, 40 App. Div. 281, 58 N. Y. Supp. 58, *Re Public Parks* was distinguished, on the ground of use.

On reversing an order refusing to affirm an award, it was held that interest should not be added from the date of refusal to affirm, as payment could not be made until final confirmation. *Re New York & B. Bridge*, 137 N. Y. 95, 32 N. E. 1054. This was on the ground that there was no statute as to interest, and the special or general term could not alter the award, and that under N. Y. Code Civ. Proc. § 3371, providing for change of possession on payment, the owner would be enjoying the fruits.

And where land was taken for a road, it was held that the owner was not entitled to interest during the time that he was in possession, and it was held that it was doubtful if interest could be given where it was not claimed in the pleadings or submitted to the jury. *Morris v. Coleman County* (Tex. Civ. App.) 35 S. W. 29.

And under Utah Rev. Stat. § 3001, providing that, in eminent domain, the plaintiff must, within thirty days after final judgment, pay the sum of money assessed, it was held that interest could not be recovered where there was no entry or occupation of property and the amount of liability was not ascertained prior to the verdict, and there was no time when possession could have been taken. *Oregon Short Line R. Co. v. Jones*, 29 Utah, 147, 80 Pac. 732.

And in *State ex rel. Donofrio v. Humes*, 34 Wash. 347, 75 Pac. 348, the owner of land taken was held not entitled to interest, where he had retained possession, and had not accounted for the rents and profits.

e. Tender or deposit of money.

The deposit in court of an amount sufficient to cover the damages will stop interest, where the landowner appeals and the amount of damages is not increased. But an increase of damages on appeal, or a deposit that could not be drawn by the landowner, will entitle to interest. If the clerk loans out the deposit, it seems that the landowner will be entitled to the interest earned.

Where the railroad paid the money into court, it was held that the landowner was entitled to interest received by the clerk from the deposit. *Snyder v. Cowan*, 120 Mo. 389, 25 S. W. 382. The court said: "Defendant was under no obligation to place the funds deposited with him as clerk of the court upon interest. 'Had he locked them up in his chest, or merely deposited them in the bank for safe keeping, and received no compensation for the use of them, he would not have been accountable for interest. But having placed them where they drew interest, that interest must be consid-

ered as having the same ownership as the principal which produced the interest.'"

So, the owner was only entitled to such interest as the deposit had earned. *St. Louis, K. & N. W. R. Co. v. Clark*, 121 Mo. 169, 28 L.R.A. 751, 25 S. W. 192, 906. The court said: "It has been held in the appeal of defendant in this case that he was entitled to have the damages awarded by the commissioners paid to him, or into the court for him, before plaintiff had a right to the possession of the property. Defendant was not, therefore, entitled to interest on the damages found by the jury. The money was paid to the clerk for him, which was a sufficient compliance with the law. It was subject to the order of the court (*St. Louis, O. H. & C. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069; *St. Louis, K. & N. W. R. Co. v. Clark*, 119 Mo. 357, 24 S. W. 157), and should have been paid to the defendants when demanded by them."

Under N. H. act Dec. 25, 1844, requiring that railroads, before taking a lease from the state, should pay into the treasury a sum equal to the amount assessed for the land, and that a railroad cannot enter until the damages assessed have been tendered, and act of July 3, 1845, providing that, in case of appeal, the railroad may enter upon land by giving security, it was held that a railroad could not be charged with interest on the money which it had paid into the treasury to satisfy the damages awarded; but where the railroad elected to give security, the landowner who appealed could not take damages awarded until the determination, and he ought to have interest on the same which had been detained from him on giving security. *Shattuck v. Wilton R. Co.* 23 N. H. 269.

In *Re Water Comrs.* 132 App. Div. 75, 116 N. Y. Supp. 495, *Shattuck v. Wilton R. Co.* was distinguished because the landowner was deprived of the use of the money.

In *Burlington & M. R. Co. v. White*, 28 Neb. 166, 44 N. W. 95, and *Sioux City R. Co. v. Brown*, 13 Neb. 317, 14 N. W. 407, *Concord R. Co. v. Greely*, 23 N. H. 237, and *Shattuck v. Wilton R. Co.* supra, were distinguished, the court saying: "By the statute under which these two cases were decided, in case of appeal from an award of damages for right of way, the railroad company had the option either to deposit the money awarded for the use of the landowner, or to give security for the costs and damages that might be adjudged on the appeal; and, if a deposit were made, the landowner had the privilege of taking it without prejudice to his appeal. . . . In principle, those decisions seem rather to uphold the view taken by the court below, inasmuch as, by our statute, it is provided that the deposit, in case of an appeal, 'shall remain in the hands of the probate judge until a final decision be had,' so that it is legally impossible for the owner, although deprived of his land and all benefit of a possible rise in its value during the delay, to have the use of the money until the proceedings under the appeal are terminated."

Interest was held proper from the date of filing the award, where the railroad company appealed, and instructed the clerk not to pay the owner the amount deposited, although the possession was not taken. *Seefeld v. Chicago, M. & St. P. R. Co.* 67 Wis. 96, 29 N. W. 904; *Uniacke v. Chicago, M. & St. P. R. Co.* 67 Wis. 108, 29 N. W. 899.

In an action to recover the amount of two awards where a deposit had been made, but an appeal was required to correct the order of deposit, so that plaintiff could draw the money, it was held that he could recover interest from the date of confirmation. *Eno v. Metropolitan Elev. R. Co.* 24 Jones & S. 95, 1 N. Y. Supp. 521.

And where a new assessment was awarded on appeal, it was held that, in making the assessment, the jury could allow interest from the time the possession of the property was taken, although the money had been deposited in court under the first assessment. *Atlantic & G. W. R. Co. v. Koblenz*, 21 Ohio St. 334. The court said: "It is not just that the loss should be cast upon the owner. The law by which the loss is occasioned is no act of his, but an act of the public, and he has no power to repeal or modify it, so as to avoid the loss. He is compelled to be passive, and can only insist, as he does in this case, that compensation for his property taken by the public shall either be paid at the time it is taken, or paid with interest, or with a fair allowance for the use of the property during the time it is withheld."

But where a landowner appealed, and the amount was reduced, it was held that he was not entitled to interest on the money deposited pending the appeal. *Reisner v. Atchison Union Depot & R. Co.* 27 Kan. 382.

Where the owner appealed and the amount was not increased, it was held that interest could not be recovered, where the amount of damages had been tendered. *March v. Portsmouth & C. R. Co.* 19 N. H. 372.

Under N. Y. Code of Civ. Proc. 3375, providing in eminent domain that proceedings shall not be stayed on appeal, but by order of the court, and the appeal shall not affect the possession of property taken, it was held that where the petitioner deposited the award with the county treasurer, and the award was confirmed on appeal, that the owner was not entitled to interest. *Re Water Comrs. supra.*

Under Mo. Constitution, art. 2, § 21, providing that until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, it was held that if the condemning company was not satisfied to pay into court for the immediate use of the owner, and not simply by way of a mere deposit as a security, it should defer taking possession until the final adjudication; and that, as the landowner could withdraw the money paid to the clerk for him, the company should not thereafter be required to pay interest on the amount paid into court, but it should pay interest on the excess, if any, found by the jury. *St. Louis, O. H. & C. R. Co. v. Fowler, supra.* 28 L.R.A. (N.S.)

Approved in *Re Water Comrs. supra*, and *Chicago, S. F. & C. R. Co. v. Eubanks*, 130 Mo. 270, 32 S. W. 658.

Where money has been paid into court, the owner is not entitled to interest pending the determination of exceptions filed to the commissioner's report. *Chicago, S. C. & C. R. Co. v. Eubanks, supra.* The court said: "By § 21 of article 2 of the Constitution, as well as by § 2736, Revised Statutes 1889, the landowner's property shall not be disturbed or his proprietary right therein devested, until the award of the commissioners shall be paid to the landowner, or into court for him; and as the money is paid in for him, subject at all times to his disposition, the railroad company cannot be required to pay interest on defendant's money, by his carelessness or obstinacy left idle and unproductive."

Where a city paid into court the amount of condemnation, and filed an interpleader on account of doubt as to who was the proper party to receive the money, under Mo. Rev. Stat. 1879, p. 1607, authorizing the payment into court, and it was not shown what was the nature of the property, nor that the city had ever taken possession, it was held that interest did not run while the party claiming the property remained in undisturbed possession, especially where the substituted party was guilty of laches in the prosecution of the suit. *Tilton v. St. Louis*, 99 Mo. 190, 12 S. W. 657.

In a bill filed by one railroad to enjoin another road from obstructing the construction of a crossing, where a tender of the amount was made, it was held to stop interest. *National Docks & N. J. Junction Connecting Co. v. Pennsylvania R. Co.* 54 N. J. Eq. 142, 33 Atl. 936.

Where two claimants asserted a right to a fund, and litigated the same, it was held that the corporation was excused from paying interest. *Gillespie v. New York*, 3 Edw. Ch. 512.

f. Other cases.

In an action against a city for damages assessed to open a street, it was held under Illinois interest law, giving interest on money withheld by an unreasonable and vexatious delay of payment, that a delay for more than two years was unreasonable, under city charter, chap. 8, § 4, giving a lien for two years after confirmation and report, and the injured party was entitled to receive interest at the expiration of that time. *Chicago v. Wheeler*, 25 Ill. 478.

On certiorari against the county commissioners who failed to provide for the payment of damages sustained by the proprietor of a bridge in laying out a highway, it was held that the court might charge the county with payment of interest on the sum apportioned to the city from the time of said demand. *Haverhill Bridge v. Essex County*, 103 Mass. 120, 4 Am. Rep. 518. The court said: "Upon the correction of the error and the entry of the proper judgment, it became necessary to provide for the payment by the county not only of so much of the damages

as remained in arrear, but also of the interest which had accumulated in the meantime. The delay was owing to no fault on the part of the bridge proprietors, and if interest should not be allowed them, they would not receive the full indemnity intended in the original award."

On an appeal from an award of damages for right of way, where the appeal was not prosecuted with diligence, and the award was affirmed, it was held that the appellant could not dismiss its appeal without payment of interest. *Berggren v. Fremont, E. & M. Valley R. Co.* 23 Neb. 620, 37 N. W. 470.

Where the railroad company appealed, it was held that interest should be allowed. *Metler v. Easton & A. R. Co.* 37 N. J. L. 222. The court said: "If the owner is the sole appellant, and the verdict of the jury should not be in excess of the appraisement of the commissioners, interest should be disallowed. In that event, the postponement of the receipt of the compensation adjudged by the commissioners and decided by the jury to have been adequate would be due to his own act. To allow him indemnity for such delay in the form of interest would be unreasonable and unjust. But in this case the company was also an appellant."

Where it was apparent from the verdict that the jury did not include interest, and the party was entitled to interest in addition to the amount stated in the verdict, and the interest could be computed from uncontroverted facts, it was held that the court could compute the interest and add such sum to the verdict. *St. Louis, E. R. & W. R. Co. v. Oliver*, 17 Okla. 589, 87 Pac. 423, 10 A. & E. Ann. Cas. 748.

Where the jury were authorized to give interest, and the record did not show whether they did or did not, it will be presumed that they exercised their discretion, and the court could affirm the verdict. *Blackwell, E. & S. W. R. Co. v. Bebout*, 19 Okla. 63, 91 Pac. 877, 14 A. & E. Ann. Cas. 1145.

Where damages were awarded for a highway, it was held the owner was entitled to recover interest, although the road was discontinued, and interest was recoverable from the time of demand. *Clough v. Unity*, 18 N. H. 75.

In *West v. Milwaukee, L. S. & W. R. Co.* 56 Wis. 318, 14 N. W. 292, a direction to the jury not to allow interest on the verdict was held error; but the defendant could cure this by a stipulation to allow interest. If the plaintiff had continued in possession, such instruction might have been proper.

On appeal, where the amount was decreased, it was held that the railway company was entitled to interest on the amount which the owner was required to refund. *Watson v. Milwaukee & M. R. Co.* 57 Wis. 332, 15 N. W. 481. The court said that "interest is always allowed the owner upon the sum so fixed, from the date of the taking to the rendition of the verdict;" and this rule should be reciprocal.

Where a city did not pay the money into court, but claimed readiness to pay to the

party entitled thereto, it was held that it should pay interest. *Kluender v. Milwaukee*, 57 Wis. 636, 15 N. W. 769.

But where there was a reassessment, and the amount was paid under a stipulation, it was held that thereafter there remained no principal to draw interest. *Bishop v. New Haven*, 82 Conn. 51, 72 Atl. 646.

And where the owners of improved land agreed together to lay out an improved street, and agreed that the payment of damages should be delayed until the balance between the damages and betterments was ascertained, it was held that no claim could be made until the time had come for setting off the betterments against the damages, and that interest should not be allowed before that time. *Burrage v. Boston*, 198 Mass. 580, 84 N. E. 1017. The court said: "Interest is never allowed upon the value of land so taken on the ground that it is included in a contract, or is a stipulated part of a debt, but only as damages for the failure to pay the money when it ought to be paid."

There is no provision in the California Code requiring the payment of interest to be allowed from the date of verdict. *San Francisco & S. J. Valley R. Co. v. Leviston*, 134 Cal. 412, 66 Pac. 473. Cal. Code Civ. Proc. § 1251-3 provides for the payment of the sum "assessed" within thirty days after final judgment.

Interest is not allowed under the Colorado statute. *Greeley, S. L. & P. R. Co. v. Yount*, 7 Colo. App. 189, 42 Pac. 1023.

Where an application was made for mandamus to require a township board to draw their order for the sum appraised to applicant in laying out a highway, "with interest," it was held that the writ should be denied, as no interest could be legally claimed, but by virtue of a statute or custom; and this was not embraced in the Michigan Revised Statute. *People ex rel. Anderson v. Le Grange*, 2 Mich. 187. But see *Taylor v. Bay City Street R. Co.* 101 Mich. 140, 59 N. W. 447, subd. XII. a, supra.

Where the owner of land conveyed a part to a railroad for its track, it was held that a mortgagee of the whole land was not entitled to interest on the award subsequently made, as the amount due the mortgagee could not be ascertained until a sale was made of the residue of the mortgaged premises. *North Hudson R. Co. v. Booraem*, 28 N. J. Eq. 593.

In a suit for compensation for land taken for a highway, it was held that interest would not be allowed, where it was not claimed in the petition. *Cunningham v. San Saba County*, 11 Tex. Civ. App. 557, 32 S. W. 923, 33 S. W. 892.

Under Cal. Civ. Code, § 3287, providing for interest for every person who is entitled to recover damages capable of being made certain by calculation, it was held that this did not apply to damages against the county for laying out public roads, and interest was not allowed. *Hopkins v. Contra Costa County*, 106 Cal. 566, 39 Pac. 933.

XIII. Highway, — change of grade.

Some cases allow interest from date of injury, other cases allow interest from the date of report. In some cases interest was allowed on account of delay.

In an action for damages for injury to property, caused by changing the grade of a street, it was held that interest was properly allowed from the time the injury was done, down to the trial. *Hampton v. Kansas City*, 74 Mo. App. 129. The court said: "There is a class of cases which allow interest when the land has been taken from the owner, and assign as a reason that the party taking the land has had the use of it. But that reason is not the only one which would suggest the allowance of interest. The injury to the other party must be compensated. The injury to the property is based on an estimate at time of injury. If he is deprived of the sum thus estimated, he is deprived of complete compensation unless he receives interest."

And in an action for damages for changing the grade of a street, where there was long neglect to compensate, it was held that the damages were properly measured by the condition of the property immediately after the change of grade, and compensation should be made by interest also. *Cincinnati v. Whetstone*, 47 Ohio St. 196, 24 N. E. 409.

In *Kimball v. Salt Lake City*, 32 Utah, 253, 10 L.R.A. (N.S.) 483, 125 Am. St. Rep. 859, 90 Pac. 395, it was held that interest should be allowed from the time of completion of the work. *Utah Rev. Stat.* 1898, § 282, provided that cities shall be liable for consequential damages to property in case the established grade is changed. The court said: "We have had occasion to pass upon the subject of when interest is to be allowed on claims for unliquidated damages at this term in the case of *FELL v. UNION P. R. Co.*, and this case clearly falls within the principles announced in that case."

On an appeal from an assessment of benefits and damages resulting from a change of grade in a highway, it was held that the landowner could not recover interest from any date prior to that of filing the committee's report, as they should take into consideration the allowance in the nature of interest from the period when the damages were liquidated to the time of judgment. *New Haven Steam Saw Mill Co. v. New Haven*, 72 Conn. 276, 44 Atl. 229, 609.

Where a plaintiff failed in his suit for damages for raising the grade of the street, and then brought another action, it was held that the jury could consider the lapse of time caused by the failure of the first suit, in assessment of damages. *Peabody v. New York, N. H. & H. R. Co.* 187 Mass. 489, 73 N. E. 649. The court said: "The principal sum to be ascertained would be the damages directly resulting from the acts of the defendant, assessed as of the time of the completion of the act, or series of acts, which caused the injury; and if the jury found that this method of assessment would not give the plaintiff full compensation be- 28 L.R.A. (N.S.)

cause of the delay to which he had been subjected, they might allow such additional sum, computed as interest at the legal or any reasonable rate, they found proper and necessary for this purpose, and these sums combined would make the amount of damages assessed by them."

In an action for damages caused by change of grade of a street abutting on plaintiff's ball ground, it was held that damages in lieu of interest for detention of payment should not be allowed, where the owner caused delay by an unreasonable demand. *Philadelphia Ball Club v. Philadelphia*, 192 Pa. 632, 46 L.R.A. 724, 73 Am. St. Rep. 835, 44 Atl. 265.

In an action by a property owner for damages for change of grade, it was held that interest, as such, could not be allowed by the jury upon the amount of the damages. *Leavenworth v. Duffy*, 10 Kan. App. 124, 62 Pac. 433.

The rule that a demand which was in its nature uncertain and unliquidated did not draw interest until the amount was fixed by a court or jury was held to apply to damages from a change of grade. *Tyson v. Milwaukee*, 50 Wis. 78, 5 N. W. 914.

XIV. Negligence.**a. Damages from fire.**

The weight of authority holds that interest should be allowed in actions for damages to property caused by fire, and interest "as damages" is allowed in Iowa and Massachusetts. Interest is held to be discretionary with the jury in California, Georgia, Indiana, Michigan, New York, North Dakota, South Dakota, and Tennessee. But interest is denied in Missouri, and is not within the Kansas statute, and is not allowed in New Hampshire where there is a tender.

In the following cases it was held that interest should be allowed:

Injury to property by fire from a locomotive. *Regan v. New York & N. E. R. Co.* 60 Conn. 124, 25 Am. St. Rep. 306, 22 Atl. 503. The court said: "It has been sometimes said that interest is not to be allowed on unliquidated demands. There are actions, such, for instance, as assault and battery or slander, to which the rule is applicable. But where the demand is for property that has a market value susceptible of easy proof, there is no propriety in such a rule. A loss of property having a definite money value is practically the same as the loss of so much money; the loss of the use of the property is practically the same as the loss of the use (or interest) of so much money. We think, therefore, a just indemnity to the plaintiff required the addition to the value of the goods at the time of their destruction, of the interest from that time to the date of judgment."

Destruction of an ice house by fire. *Parrott v. Housatonic R. Co.* 47 Conn. 575. The court said: "In cases of trover, where

property has been taken, the rule is that the plaintiff is entitled to recover the actual value of the property at the time of its conversion by the defendant, with interest on the amount to the day of the judgment. It is only thus that the plaintiff can be made whole. The interest thus allowed is not technically interest, but an addition to the damages of a sum equal to interest. In trespass for taking property, if the case be one where no exemplary damages ought to be assessed, as is the case here, the rule should be the same. If the plaintiff's property is taken or destroyed, the rule as to damages should be the same, whatever the form of action may be."

Destruction of property by fire through negligence of a railroad. *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661. In this case it was held that there should be no distinction between the cases of trespass and trover, and damages for negligence and replevin, and that just compensation means the interest on the value of the property destroyed.

Injuring timber by fire from a locomotive. *Buridick v. Chicago, M. & St. P. R. Co.* 67 Iowa, 384, 54 N. W. 439.

Injury to plaintiff's wheat stored in an elevator. *Arthur v. Chicago, R. I. & P. R. Co.* 61 Iowa, 648, 17 N. W. 24. The court said: "But notwithstanding it is unliquidated, we think the court did not err in allowing interest. Indeed, we can see no difference between this case and the case of *Mote v. Chicago & N. W. R. Co.* 27 Iowa, 22, 1 Am. Rep. 212. That was a case where, by reason of the negligence of the defendant, the plaintiff's baggage was stolen from the warehouse of the defendant, and it was held that interest on the value of the stolen property was properly allowed."

Hay burned by fire caused by a railroad engine. *Johnson v. Chicago & N. W. R. Co.* 77 Iowa, 666, 45 N. W. 512. The court said: "The plaintiff was deprived of his property by the fire. He was entitled at that moment to recover its value. He ought to have the legal interest for the time compensation was withheld from him. When personal property is destroyed, the measure of damages is fixed by this rule. See *Field, Damages*, p. 619, § 781, and note. *Brentner v. Chicago, M. & St. P. R. Co.* 68 Iowa, 530, 23 N. W. 245, 27 N. W. 605, is not in conflict with our conclusion on this branch of the case. The statute under which that action was prosecuted fixed the measure of damages. It was therefore rightly held that these damages could not be increased by adding interest thereto."

Destruction of property through negligence by fire. *Lucas v. Wattles*, 49 Mich. 380, 13 N. W. 782. The court said: "Interest was certainly not demandable of right, but it was admissible and just to give it."

Destruction of a sawmill by fire, in the operation of a private logging railroad. *Kendrick v. Towle*, 60 Mich. 363, 1 Am. St. Rep. 526, 27 N. W. 567. The court said 28 L.R.A. (N.S.)

that unless the addition of interest would increase the damages unduly, so as to be unjust, no objection could be made to the allowance of interest.

Action against a railroad company for destroying property by fire. *Union P. R. Co. v. Ray*, 46 Neb. 750, 65 N. W. 773. The court said: "Finally, it is contended that the court erred in directing the jury if it found for the plaintiff, to allow interest on the value of the hay from the time of its destruction; but this rule of damages was precisely that stated in *Fremont, E. & M. Valley R. Co. v. Marley*, 25 Neb. 138, 13 Am. St. Rep. 482, 40 N. W. 948, to wit: 'Where property is destroyed by the negligence of another, the owner will be entitled to interest on the value of such property from the time of its destruction.'"

Injury to fruit trees by fire. *Whitbeck v. New York C. R. Co.* 36 Barb. 644.

Negligently burning a house. *Pacific Exp. Co. v. Lasker Real Estate Asso.* 81 Tex. 84, 16 S. W. 792.

Injury to property from fire from railroad trains. *Gulf, C. & S. F. R. Co. v. Shepherd* (Tex. Civ. App.) 76 S. W. 800; *Gulf, C. & S. F. R. Co. v. Jagoe* (Tex. Civ. App.) 32 S. W. 717; *Gulf, C. & S. F. R. Co. v. Cusenberry*, 5 Tex. Civ. App. 119, 23 S. W. 851; *Gulf, C. & S. F. R. Co. v. Day* (Tex. Civ. App.) 22 S. W. 772; *Galveston, H. & S. A. R. Co. v. Horne*, 69 Tex. 643, 9 S. W. 440. The court said: "The rule in such cases is the same as in an action for trespass; namely, the value of the property, with interest from the date it was lost to him."

Cotton stored in a warehouse. *Texas & P. R. Co. v. Tankersley*, 63 Tex. 57. This was on the ground that, in cases of tort, the owner was entitled to the value of his property in money at the time it was destroyed.

Destruction of property by fire. *Chapman v. Chicago & N. W. R. Co.* 26 Wis. 295, 7 Am. Rep. 81. The value was held to be merely a matter of compensation.

The following cases hold that interest may be allowed, within the discretion of the jury:

Destroying hay by a locomotive fire. *Eddy v. Lafayette*, 1 C. C. A. 441, 4 U. S. App. 247, 49 Fed. 807. The court said: "We entertain no doubt that interest may be allowed as damages in cases where property has been destroyed through the culpable negligence of another, as well as when it has been wrongfully converted; but the usual, and perhaps the better, practice, is to leave such allowance to the discretion of the jury."

Goods stored in a warehouse. *King v. Southern P. Co.* 109 Cal. 96, 29 L.R.A. 755, 41 Pac. 786. The court said: "Section 3288 of the Civil Code provides: 'In an action for the breach of an obligation arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury.'"

Action against a railroad for damages by fire. *Albany & N. R. Co. v. Wheeler*, 6 Ga. App. 270, 64 S. E. 1114.

Action for damages occasioned by fire.

Chicago, St. L. & P. R. Co. v. Barnes, 2 Ind. App. 213, 28 N. E. 328.

Injuries caused by locomotive fire. *Brush v. Long Island R. Co.* 10 App. Div. 535, 42 N. Y. Supp. 103, affirmed in 158 N. Y. 742, 53 N. E. 1123; *Jamieson v. New York & R. B. R. Co.* 11 App. Div. 50, 42 N. Y. Supp. 915, affirmed in 162 N. Y. 630, 57 N. E. 1113; *Hinds v. Barton*, 25 N. Y. 544; *Garratt v. Chicago & N. W. R. Co.* 36 Iowa, 121.

Action by an insurance company subrogated for the insured, against a railroad company, for loss by fire. *Home Ins. Co. v. Pennsylvania R. Co.* 11 Hun, 182.

Destruction of trees by fire, under Dak. Comp. Laws, § 4578, providing that the giving of interest was discretionary with the jury. *Bailey v. Chicago, M. & St. P. R. Co.* 3 S. D. 531, 19 L.R.A. 653, 54 N. W. 506; *Uhe v. Chicago, M. & St. P. R. Co.* 3 S. D. 563, 54 N. W. 601, s. c. subsequent appeal 4 S. D. 505, 57 N. W. 484.

So, for injuries to property, caused by fire from a railroad. *Johnson v. Northern P. R. Co.* 1 N. D. 354, 48 N. W. 227.

Negligently causing fire to damage plaintiff's property. *Louisville & N. R. Co. v. Fort*, 112 Tenn. 432, 80 S. W. 429. This was on the ground that it was allowed as compensation to the injured party.

In the following cases it was held that the jury could consider interest in making up the damages, but it was to be as damages, and not as interest:

Thus, in an action for damages caused by defendant's wall, after a fire, falling on plaintiff's property for lack of support, it was held that the proper instruction would be, that, in assessing damages of this kind, the plaintiff was not to be awarded interest as interest, but that, in ascertaining the damages at the date of the verdict, the jury should take into account the lapse of time, and put the plaintiff in as good a position in reference to the injury as if the damages directly resulting from it had been paid immediately. *Ainsworth v. Lakin*, 180 Mass. 397, 57 L.R.A. 132, 91 Am. St. Rep. 314, 62 N. E. 746. This would authorize the jury to fix the damages at the date of their verdict by adding interest at the legal rate on the amount of damages at the time of the injury, but it would not require them to do so.

And in an action for damages caused by fire from an engine, it was held that the court could not add interest to the verdict, although the jury might have included interest in their amount of damages. *Garratt v. Chicago & N. W. R. Co.* supra.

And in an action against a railroad for injury to property by fire, it was held that the damages were unliquidated, and plaintiff was not entitled, as a matter of law, to interest; but, in estimating the unliquidated damages, the jury might take into account interest on the sum found necessary to compensate the plaintiff for the injury suffered at the time of the loss, on the theory that such interest was a part of his damages. *Black v. Minneapolis & St. L. R. Co.* 122 Iowa, 32, 96 N. W. 984.

Interest was denied in Missouri and in 28 L.R.A. (N.S.)

New Hampshire, where a tender had been made, and in Kansas under the interest statute.

In actions for injury caused by fire of a locomotive, no statutory provision allowing interest for such damages appeared to exist and it was denied. It was held that the statute allowing interest for wrongful conversion did not apply. *Kenney v. Hannibal & St. J. R. Co.* 63 Mo. 99; *Atkinson v. Atlantic & P. R. Co.* 63 Mo. 367; *De Steiger v. Hannibal & St. J. R. Co.* 73 Mo. 33; *Flannery v. St. Louis, I. M. & S. R. Co.* 44 Mo. App. 396; *Atchison, T. & S. F. R. Co. v. Ayers*, 56 Kan. 176, 42 Pac. 722. The court said: "A recovery of damages for simple negligence of a party to whom no benefit could accrue by reason of the injury inflicted does not include interest as such. Neither the act of 1885 nor chapter 51, Gen. Stat. 1889, relating to interest, in terms authorizes it; and, in the absence of a statute, we think interest is not allowable any more for damages by fire than for the killing of cattle."

Where the defendant offered to pay more than the amount recovered in a suit for damages by fire, although no formal tender was made, it was held that the plaintiff was not entitled to interest. *Thompson v. Boston & M. R. Co.* 58 N. H. 524. The court said: "The reason for allowing the jury to add interest is more satisfactory in cases of liquidated than unliquidated damages: In the first, it is for the detention of money due, while in the latter it is the theory of the law that nothing is due till the damages are liquidated. Still an analogy exists between the two in this: that the right to recover unliquidated damages accrues at the time the injury is done, and the damages are assessed for the injury as then received; and if the wrongdoer causes long and vexatious delay, and the jury cannot add interest as damages for the delay, as is done in cases of liquidated damages, injustice is the result."

b. Injury to stock.

In some cases, interest was held recoverable in actions for injuries to stock from the operation of railroads, and interest was held to be properly allowed in the following cases:

Loss of a cow, killed by negligence of a railroad. *Georgia P. R. Co. v. Fullerton*, 79 Ala. 298.

Injuries to live stock. *Alabama G. So. R. Co. v. McAlpine*, 75 Ala. 113.

Negligently killing stock. *St. Louis, I. M. & S. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. 724 (the court said that the old rule was that interest was not recoverable on unliquidated damages; but the modern rule of allowing interest in such cases has been adopted by this court); *Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 29 N. E. 455; *Varco v. Chicago, M. & St. P. R. Co.* 30 Minn. 18, 13 N. W. 921.

Injuries to stock by a railroad train. *Chicago & N. R. Co. v. Shultz*, 55 Ill. 421. The court said: "The object in allowing a

recovery for injuries sustained is that the party wronged may be compensated for the loss; and to allow interest from the date of the injury, on the value of the property, would only give appellee compensation."

Horses killed by a railroad train. *Woodland v. Union P. R. Co.* 27 Utah, 543, 26 Pac. 298. The court said: "The authorities are not in harmony, but the weight of them is to the effect, as we think, that interest may be given as damages, where the plaintiff has been deprived of his property by the wrongful act or neglect of the defendant, and the latter delays payment. Some of the authorities hold that interest should be computed on the value of the property, and added from the time of its destruction; others, from the time of instituting the suit. *Fremont, E. & M. Valley R. Co. v. Marley*, 25 Neb. 138, 13 Am. St. Rep. 482, 40 N. W. 948; *Whitney v. Chicago & N. W. R. Co.* 27 Wis. 327; *Chapman v. Chicago & N. W. R. Co.* 26 Wis. 295, 7 Am. Rep. 81; *Parrott v. Knickerbocker Ice Co.* 46 N. Y. 361; 1 *Sutherland, Damages*, p. 473."

In *Dean v. Chicago & N. W. R. Co.* 43 Wis. 305, the court told the jury they should allow interest on the immediate damages from the time the stock was killed by a railroad train. It was held that there was no exception sufficient to require the court on appeal to consider this question. It was said that in a prior case a direction to the jury to allow interest from the commencement of the action was upheld.

Under W. Va. Code, chap. 131, § 18, providing that a judgment shall bear interest from date, and § 14, providing that the jury shall find the aggregate of the principal and interest due at the time of the trial, and judgment shall be entered thereon, with interest from date of judgment, it was held that a judgment for interest on damages found by the jury prior to the day the judgment was entered, in an action for negligence, was erroneous. *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 629, 36 Am. Rep. 825.

On a verdict for \$800 for killing stock by a railroad company, on the affidavit of the jurymen that the \$800 did not include interest, but was only the value, and that the foreman had been instructed to add \$168 interest, it was held that the court erred in amending the verdict, as the remedy was a motion for a new trial. *Parker v. Lake Shore & M. S. R. Co.* 93 Mich. 607, 53 N. W. 834.

In the following cases interest was held to be discretionary with the jury:

Injury to cattle by railroad. *Hodge v. New York C. & H. R. R. Co.* 27 Hun, 394.

Injury to horses. *Schulte v. Louisville & N. R. Co.* 128 Ky. 627, 108 S. W. 941.

In an action against a railroad for killing stock on the track, the finding by the referee, allowing interest on the value of the property destroyed, was held not erroneous. *Lackin v. Delaware & H. Canal Co.* 22 Hun, 309.

In the following cases interest was held allowable, but only as part of the damages: 28 L.R.A. (N.S.)

Where there is a basis of calculation of value in an action for killing stock by a railroad, interest is not recoverable *eo nomine*, but the jury may consider the length of time, the character of the tort, the conduct of the defendant, and to that extent increase the damages. *Central R. Co. v. Hall*, 124 Ga. 322, 4 L.R.A. (N.S.) 898, 110 Am. St. Rep. 170, 52 S. E. 679, 4 A. & E. Ann. Cas. 128 (the court said: "Where the damages found are discretionary or punitive, this rule does not apply. *Western & A. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912; *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. 684"); *Western & A. R. Co. v. McCauley*, 68 Ga. 818.

And in an action for killing cattle, it was held that the finding of interest, as such, was contrary to law. *Chattanooga, R. & C. R. Co. v. Palmer*, 89 Ga. 161, 16 S. E. 34. The court said: "The verdict is contrary to law in finding interest, the action being one *ex delicto*; and if interest was found at all, it should be added into the principal sum of the verdict."

In an action for negligently killing stock, it was held that unliquidated demands arising *ex delicto* did not bear interest, and the jury could not find a given amount for principal, with an additional amount as interest; but it was held that the jury might add to the value of the property destroyed, a sum equal to the interest on such value, but such sum should be found and returned as damages, and not as interest. *Western & A. R. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130.

And in an action for damages against a railroad for killing stock, the whole amount awarded by the verdict was held to be the damages, although it might include interest added to the value; but if the amount thus found exceeded the amount claimed, the verdict should be set aside, or the excess struck off. *Georgia R. & Ekg. Co. v. Crawley*, 87 Ga. 191, 13 S. E. 508.

In a suit for damages for negligently killing stock, it was held error to charge the jury that after ascertaining the market value, they should add interest from the time of the judgment of the court below to the time of the verdict. *Western & A. R. Co. v. Calhoun*, 104 Ga. 384, 30 S. E. 868. The court said: "While in cases of this character the jury are authorized to increase the damages found by the addition of interest from the time that the property was damaged or destroyed, they are not compelled to do so."

In an action for negligence for frightening a horse by operation of a railroad, it was held that the jury should not have been instructed to allow interest. *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580.

In Missouri, in cases of this kind, interest is not allowed.

Frightening a horse, causing a runaway. *Damhorst v. Missouri P. R. Co.* 32 Mo. App. 350.

Killing stock at a public crossing. *Kimes v. St. Louis, I. M. & S. R. Co.* 85 Mo. 611.

Injury to stock by operation of a railroad

train. *Meyer v. Atlantic & P. R. Co.* 64 Mo. 542. The court said: "The precise question as to allowance of interest in cases like this has been expressly decided in the cases of *Kenney v. Hannibal & St. J. R. Co.* 63 Mo. 99; *Atkinson v. Atlantic & P. R. Co.* 63 Mo. 367, and necessarily leads to a reversal of the judgment in this case; and as it will be retried, it may be well to observe that this action is founded upon the common law, and not the statutory liability of defendant."

In *Goodman v. Missouri, K. & T. R. Co.* 71 Mo. App. 460, it was said that in this state there are cases where interest is recoverable as a matter of right, and others where the jury may or may not allow interest, as they see fit (*State ex rel. Roberts v. Hope*, 121 Mo. 34, 25 S. W. 893); and others, where interest is not allowed, as for killing stock or setting out fires.

In *Toledo, P. & W. R. Co. v. Johnston*, 74 Ill. 83, an action for damages for killing stock by a railroad company, it was held that the plaintiff was not entitled to interest on the value from the time of the killing.

Tex. Rev. Stat. 1895, art. 4528, giving a right to recover for stock killed by a railroad train, was held not to include the right to interest. *International & G. N. R. Co. v. Barton*, 93 Tex. 63, 53 S. W. 1117, s. c. (Tex. Civ. App.) 54 S. W. 797; *St. Louis Southern R. Co. v. Chambliss*, 93 Tex. 62, 53 S. W. 343; *Galveston, H. & S. A. R. Co. v. Vaughan* (Tex. Civ. App.) 54 S. W. 1055. This statute was the same as act 1860, *Paschal's Dig.* art. 4926. The court said that this was the ruling in *Houston & T. C. R. Co. v. Muldrow*, 54 Tex. 233, and that would have to be followed, although no good reason is shown why the owner should not have damages commensurate, with interest for the detention.

Under Tex. Rev. Stat. art. 4245, providing that railroads shall be liable for the value of stock killed by their trains, it was held that interest could not be recovered. *Houston & T. C. R. Co. v. Muldrow*, supra. The court said that this decision was not intended to conflict with those cases of trespass or conversion of goods where interest was discretionary with the jury.

And under Ind. Rev. Stat. 1894, § 5312, providing that a railroad is liable for stock killed or injured, and § 5316, providing that the court or jury should give judgment to the plaintiff for the value of the animal killed or injured, it was held that interest should not be allowed. *New York, C. & St. L. R. Co. v. Zumbaugh*, 12 Ind. App. 272, 39 N. E. 1058. In this case the court said that interest in addition to the value of property is ordinarily held to afford the fair measure of damages; but our statute "does not allow any discretion in the assessment of damages in excess of the value of the animals killed."

And in an action under Kan. Laws 1874, chap. 94, providing that a railroad company shall be liable to pay the owner of stock full value for each animal killed, and damage to each animal wounded, in the

absence of a fence, no interest was recoverable. *Atchison, T. & S. F. R. Co. v. Gabbert*, 34 Kan. 132, 8 Pac. 218.

c. Personal injuries and death.

1. Personal injuries.

The general rule is that interest will not be allowed on damages for personal injuries. There seems to be a conflict as to whether a verdict will bear interest. In some Federal cases, interest on the verdict was allowed, to give jurisdiction on appeal.

In *Quebec S. S. Co. v. Merchant*, 133 U. S. 376, 33 L. ed. 656, 10 Sup. Ct. Rep. 397, where a stewardess was injured on a steamer and the judgment was reversed on appeal, because of the fellow-servant doctrine, where the verdict was for \$5,000, and the judgment was for that amount, and \$306 interest between the verdict and judgment, it was held that the Supreme Court had jurisdiction on appeal.

In *Griffith v. Baltimore & O. R. Co.* 44 Fed. 574, where there was a verdict of \$5,000 for damages against a railroad company for personal injuries, the defendant demanded that interest should be added to the verdict in order to give the Supreme Court jurisdiction. The court said: "I have conferred with the circuit judge upon this question, and the conclusions in which we concur are as follows: That it is proper to allow interest on the verdict from the date of its rendition up to the entry of judgment. This was done below in *Quebec S. S. Co. v. Merchant*, 133 U. S. 376, 33 L. ed. 656, 10 Sup. Ct. Rep. 397, and the Supreme Court sanctioned it, and entertained jurisdiction. It does not appear that the practice was rested upon any New York statute."

In an action against a railroad for negligence in causing injury to an employee, it was held that interest was discretionary with the jury. *Ell v. Northern P. R. Co.* 1 N. D. 336, 12 L.R.A. 97, 26 Am. St. Rep. 621, 48 N. W. 222. This was under Dak. Comp. Laws, § 4578, providing that in an action for breach of an obligation not rising from contract, interest may be given in the discretion of the jury.

In an action against a railroad company for personal injuries caused by negligence, it was held that the jury could allow in their verdict, by way of damages, interest on the sums expended by the plaintiff on account of the injury to his wife. *Washington & G. R. Co. v. Hickey*, 12 App. D. C. 269. It was said: "It is true that, in actions of tort, at least in this jurisdiction, interest is not allowable upon the judgment recovered. *Washington & G. R. Co. v. Harmon* (*Washington & G. R. Co. v. Tobriner*) 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557. But that is quite a different question from that here presented. Whether a judgment bears interest or not is purely a legal question, that can only be decided by the court. But in actions of tort, interest can only be allowed as damages, and

whether it shall be allowed or not rests entirely in the discretion of the jury, in arriving at what is a fair and just indemnity of the plaintiff for the wrong suffered."

In an action for personal injuries sustained by a passenger on a railroad, where verdict was rendered for the plaintiff, it was held that where the entry of the judgment was delayed by motion on the part of the defendant, the plaintiff was entitled to judgment for the amount of the verdict, with interest from the date of its rendition. *Freemont, E. & M. Valley R. Co. v. Root*, 49 Neb. 900, 69 N. W. 397.

Under W. Va. Code, 1868, as amended by Acts 1882, p. 341, chap. 120, providing that judgment shall be entered with interest from the date of the verdict, it was held in an action for negligence that the judgment should bear interest from the date of the verdict. *Campbell v. Elkins*, 58 W. Va. 308, 2 L.R.A. (N.S.) 159, 52 S. E. 220. The cases of *Fowler v. Baltimore & O. R. Co.* 18 W. Va. 579, and *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 628, 36 Am. Rep. 825, hold that the original section applies to actions for damages, and the amendment would therefore apply also.

But in the following cases interest was held improper:

Personal injuries caused by negligence. *Texas & N. O. R. Co. v. Carr*, 91 Tex. 332, 43 S. W. 18.

Action for personal injury against a master, where the party causing the injury could not be benefited. *Marshall v. Schricker*, 63 Mo. 308. The court said: "It has been recently decided by this court, that in actions *ex delicto* based upon the simple negligence of a party to whom no pecuniary benefit could accrue by reason of the injury thereby inflicted, interest is not allowable."

In an action for injuries to a passenger on a train, the refusal of an instruction that no interest could be allowed on any damages to which they might find the plaintiff entitled, neither as part of such damages nor as interest proper, was held to be immaterial error, where the instruction as to damages left no room for the allowance of interest. *Trumbull v. Donahue*, 18 Colo. App. 460, 72 Pac. 684.

And where discretionary damages were awarded for personal injuries, it was held that interest at the legal rate could not be added; that only special damages, computable upon evidence of actual malice, could be thus increased. *Western & A. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912. In this case the court instructed the jury that they might, in their discretion, award further damages in the nature of interest, computed at 7 per cent from the date of injury to the time of trial. This was held erroneous, as there could be no payment nor any tender where the amount was uncertain. The court said: "As far back as 1799 we have statutory evidence adverse to the policy of increasing verdicts on account of interest upon unliquidated de-

mands. Cobb's Dig. 495. It was thought consistent with this statute to increase the damages in trover by the addition of interest on the value of the property from the time of conversion. See *Collier v. Lyons*, 18 Ga. 648, and other cases. So, in *Georgia R. & Bkg. Co. v. Garr*, 57 Ga. 280, 24 Am. Rep. 492, the power of the jury to add interest in computing damages recoverable by a widow for the homicide of her husband is tacitly recognized. And in *Central R. Co. v. Sears*, 66 Ga. 499, there is apparently a like recognition of the power, whilst the direct adjudication was that it is not obligatory as a duty. To the same effect, perhaps, is *Western & A. R. Co. v. McCauley*, 68 Ga. 818, where the action was for killing a bull. But in all these cases the damages recoverable were special, and had to be proved by evidence applying directly or indirectly to values; whilst in the present case there is no such evidence, and the entire recovery is for damages of a nature incapable of any standard of measurement external to the minds and consciences of the jury."

And in an action for personal injury, it was held error to allow interest on the verdict for the time between the finding and the rendition of judgment. *Clyde Mill. & Elevator Co. v. Buoy*, 71 Kan. 293, 80 Pac. 591.

And under Ky. Rev. Stat. vol. 2, p. 65 (1852), providing that a judgment, except for malicious prosecution, libel, slander, or injury to the person, shall bear legal interest from its date, it was held that the judgment for personal injury to a passenger on a railroad did not bear interest. *McMurtry v. Kentucky C. R. Co.* 84 Ky. 462, 1 S. W. 815.

In an action by an employee for negligence causing injury, it was held that no Oregon statute made any provision for interest on unliquidated damages arising out of a tort until after judgment. *Sorenson v. Oregon Power Co.* 47 Or. 24, 82 Pac. 10. So it was held, where there was a counterclaim for unliquidated damages in an action on a note, interest would not be allowed. *Smith v. Turner*, 33 Or. 379, 54 Pac. 166.

In an action against a common carrier for personal injuries, it was held that, in the District of Columbia, a judgment for tort did not bear interest. *Washington & G. R. Co. v. Harmon*, supra. In this case it was held that D. C. Rev. Stat. § 829, and 5 Stat. at L. 516, 518, chap. 188, and §§ 713-717, 16 Stat. at L. 91, providing for interest on judgments, did not change the act of 1812, providing for interest on judgments on contracts.

In a libel against a steamer for personal injuries, it was held that interest in admiralty is within the discretion of the court; but this rule does not apply to actions for personal injuries, and a demand for such damages will not bear interest until they are judicially ascertained and determined. *Burrows v. Lownsdale*, 66 C. C. A. 650, 133 Fed. 250.

2. Death.

In actions for causing death, interest is allowed in some of the cases. Nebraska allows it where there is delay. Georgia allows it as damages. The cases in New York give interest under the act of 1870, chap. 78, providing for interest. But in Tennessee and Louisiana interest is not allowed.

For killing a slave, it was held the measure of damages should be the value of the slave at the time of the trespass, with interest on such value. *Fail v. Presley*, 50 Ala. 342. In this case the court charged the jury that they might add interest in addition to the value.

In an action for damages for death, for the benefit of a widow, the court reduced the verdict based on the expectancy of life of the deceased, and estimated the amount of the damages as that which would give the widow \$150. a year for twenty-seven years, with interest, which was estimated to be \$1,650. *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350, 9 So. 870.

In an action for death caused by negligence, an instruction that the measure of damages was that sum which, being put out at interest at 8 per cent per annum, would yield each year, by taking a proportionate part of the principal and adding it to the interest, the amount of deceased's yearly contributions to his family, less his personal expenses; and such that the whole remaining principal at the end of his expectancy of life, added to the interest on his balance for that year, would equal the amount of his yearly contributions to his family. *Decatur Car Wheel & Mfg. Co. v. Mehaffey*, 128 Ala. 242, 29 So. 646.

In an action for death caused by the negligence of a railroad, it was held that recovery should be allowed for damages, with interest from the date of decedent's death to the date of recovery. *St. Louis, I. M. & S. R. Co. v. Cleere*, 76 Ark. 377, 88 S. W. 995.

Where a slave was sent to mill with corn to be ground, and in assisting to put the water wheel in order, was killed, in an action for damages against the mill owner, it was held that the measure of damages was interest on the value from the time of death to the time of trial. *Collier v. Lyons*, 18 Ga. 648. The court said: "We are not unmindful of the statute which forbids a verdict for unliquidated damages to be increased by the computation of interest, but suppose that the act was not intended to prohibit a resort to interest merely as an element or criterion by which to estimate the damages. The interest on the value was less than the hire; and the verdict, as rendered, less than the largest price put upon the boy."

In an action by a widow for the death of her husband, it was held erroneous to instruct the jury, as a matter of law, to add interest to the damages they might find at the date of the homicide. It was held that the question of increasing damages was for the jury. *Central R. Co. v. Sears*, 66 Ga. 28 L.R.A. (N.S.)

499. The court said: "In trover and conversion, where property has been taken and converted, the plaintiff has been considered as entitled to have interest calculated by the jury and added to the actual damage, thus making the full measure of his rights; but this rule has never been applied, as far as we can ascertain, to other classes of torts, where no property was taken or involved, and where the question was one of damages purely, unliquidated, and to be assessed by the jury. The rule, even in cases where property is involved, is to leave the question to the jury, not only as to the damages, but the interest."

In an action for personal injuries causing death, by a railroad train, it was held, where there was delay occasioned by the defendant after verdict, that the plaintiff would be entitled to interest on the verdict from the date of judgment. *Missouri P. R. Co. v. Fox*, 60 Neb. 531, 83 N. W. 744.

In an action for causing death through negligence, under N. Y. act 1870, chap. 78, providing that the amount of damages shall draw interest from the time of the death, it was held that the rate of interest was governed by the statute regulating interest in force when the damages were ascertained. *Salter v. Utica & B. River R. Co.* 86 N. Y. 401.

And under this statute, it was held that interest should be calculated at 7 per cent, which was the lawful rate at the time of the death. *Erwin v. Neversink S. B. Co.* 23 Hun, 578.

This statute was held to be constitutional in *Cornwall v. Mills*, 12 Jones & S. 45.

And under this statute the jury had nothing to do with the question of interest, but it should be added by the clerk. *Manning v. Port Henry Iron Ore Co.* 91 N. Y. 664.

But in an action under N. Y. Laws 1847, chap. 450, for damages for negligence causing death, it was held that the jury could consider the time that had elapsed, as affecting the amount of damages, but they could not properly give interest as such, and it was held that Laws 1870, chap. 78, amending this act, allowing interest, did not apply, as this action was commenced prior to that act. *Cook v. New York C. & H. R. R. Co.* 10 Hun, 426. The court said: "But in actions where the damages rest in the discretion of the jury, interest, as such, upon the damages, cannot be recovered."

Under N. Y. Code of Civ. Proc. § 1904, providing that when final judgment for plaintiff is rendered, the clerk must add to the sum so awarded interest thereon from the decedent's death, and include it in the judgment, it was held that the plaintiff, in an action for wrongful death, was not entitled to interest on a verdict for the full amount claimed from the date of the decedent's death. *Robostelli v. New York, N. H. & H. R. Co.* 34 Fed. 719. In this case, as the addition of interest by the clerk would have exceeded the amount claimed in the petition, it was held that a remittitur would be required, and judgment entered for \$5,000 only.

But in an action for negligence causing death, it was held that interest could not be allowed, in *Louisville & N. R. Co. v. Wallace*, 91 Tenn. 35, 14 L.R.A. 548, 17 S. W. 882. In this case the cases allowing interest for injuries to personal property were distinguished, also the different editions of *Sedgwick on Damages*, saying that the later editions had stated the more correct rule.

And in an action for death of a child killed by a railroad train, it was held that interest would be allowed on the judgment liquidating the damage, and not from judicial demand. *Ortolano v. Morgan's L. & T. R. & S. S. Co.* 109 La. 902, 33 So. 914.

d. Defective highways.

In actions for damages from defective highways in New York, interest is allowed in the discretion of the jury. In Pennsylvania it is allowed as part of the damages, but not *eo nomine*. In all the other cases it is not allowed.

So, in an action for damages for injury to a horse from falling into a trench in the street, it was held that interest could be allowed in the discretion of the jury. *Wilson v. Troy*, 135 N. Y. 103, 18 L.R.A. 449, 31 Am. St. Rep. 817, 32 N. E. 44.

In an action against a township for injury caused by a defective road on which plaintiff was driving, it was held that the jury could consider the time which had elapsed in estimating the amount of his damages. *Plymouth Twp. v. Graver*, 125 Pa. 24, 11 Am. St. Rep. 867, 17 Atl. 240. The court said: "It is true the plaintiff was not entitled to interest, as such, upon the value of his horse, but, in computing the amount of the damages, the jury may consider the time which has elapsed since the injury was received. There is some conflict in the cases (*Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580; *Allegheny v. Campbell*, 107 Pa. 530, 52 Am. Rep. 478); but this we think is the rule generally recognized."

In the following cases interest was disallowed: *Missouri & K. Teleph. Co. v. Vandervort*, 71 Kan. 101, 79 Pac. 1068, 6 A. & E. Ann. Cas. 30; *Sargent v. Hampden*, 38 Me. 581; *Gerst v. St. Louis*, 185 Mo. 191, 105 Am. St. Rep. 590, 84 S. W. 34 (injury to a house, caused by excavating an alley); *Brown v. Southbury*, 53 Conn. 214, 1 Atl. 819 (injury to property, caused by a defective highway; but it was held that the amount allowed was too small to justify a reversal).

e. Other injuries.

Interest was held discretionary in actions for other injuries to property in Ohio, Wisconsin, Alabama, and New York, and could be estimated in increasing the damages in Massachusetts. But interest was denied in Colorado, Missouri, and Virginia.

In an action of assumpsit for negligently constructing a chimney, causing damages, it 28 L.R.A. (N.S.)

was held that the jury could add interest to the expenditures from the time they were made. *Somerby v. Tappan, Wright (Ohio)* 570.

In a suit for damages to personal property, caused by the negligence of the defendant, an instruction that "you may allow interest from the day this action was commenced" was held proper. *McArthur v. Green Bay & M. Canal Co.* 34 Wis. 139.

In a claim against a bankrupt estate for damages resulting from negligence in running a ferry, causing loss of horses and vehicle, it was held that the measure of recovery was the amount of the injury sustained, to which interest might be added. *Borden v. Bradshaw*, 68 Ala. 362.

In an action for injury to personal property from negligence, it was held that interest was discretionary with the jury. *Reiss v. New York Steam Co.* 27 Jones & S. 57, 12 N. Y. Supp. 557.

In an action against a village for injury caused by a wall falling on plaintiff's property, it was held the measure of damages was the actual injury of plaintiffs, with interest from the time of injury. *Ludlow v. Yonkers*, 43 Barb. 493.

In an action for injury to a horse, causing death and expenses, it was held that interest *eo nomine* would not be allowed in this class of cases; but that, in determining the amount of damages, the lapse of time might be considered, and the fact that the assessment was made on the day of the verdict, for a loss which occurred a long time before. This might be necessary to make the compensation adequate. *Atwood v. Boston Forwarding & Transfer Co.* 185 Mass. 557, 71 N. E. 72.

But in an action for negligently storing gunpowder near plaintiff's dwelling, causing damages, it was held that interest was not recoverable upon the damages. *Denver, S. P. & P. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142. The court said: "Interest in this state is a creature of statute and regulated thereby. It is only recoverable, in the absence of contract, in the cases enumerated in the statute, and damages to property arising from the wrong or negligence of a defendant is not one of the enumerated cases." The same was held in a similar case. *Denver, S. P. & P. R. Co. v. Moynahan*, 8 Colo. 56, 5 Pac. 811.

And in an action for collision between a wagon and cable cars, it was held the damages should not include interest. *Sonnenfeld Millinery Co. v. People's R. Co.* 59 Mo. App. 668.

In an action for property destroyed through the negligence of the defendant, it was held that interest could not be recovered. *Fisher v. New Orleans Anchor Line*, 15 Mo. App. 577.

And in an action *ex delicto*, based upon the simple negligence of the defendant, where no pecuniary benefit could arise from the injury, it was held error to allow interest on the damages found by the jury. *Eagan v. Missouri P. R. Co.* 6 Mo. App. 594. The case does not show the kind of injury.

The failure of an attorney to use diligence in collecting bad debts was held to render him chargeable for the principal lost, but not with interest. *Rootes v. Stone*, 2 Leigh, 650.

And in a special action on the case for negligence, it was held that N. Y. Session Laws 1844, p. 508, authorizing interest to be taxed upon verdicts, did not apply to verdicts rendered before the act, and interest was not allowable. *Bailey v. New York*, 7 Hill, 146.

And in an action against an abstractor for damages, it was held that the plaintiff was not entitled to interest on the loss occurring from defective title, where he had the uninterrupted possession of the lots, and enjoyed the rents and profits. *Keuthan v. St. Louis Trust Co.* 101 Mo. App. 1, 73 S. W. 334.

Whether interest *eo nomine* was recoverable in an action of negligence was held unnecessary to determine, in *Lindsey v. Danville*, 46 Vt. 145.

Where damages were given for negligent delay in transmitting a telegram, it was held error to allow interest from the commencement of the suit, where the amount allowed was the amount claimed in the complaint. *Pacific Postal Teleg. Cable Co. v. Fleischner*, 14 C. C. A. 166, 29 U. S. App. 227, 66 Fed. 899. The court said: "In the complaint, the allegation of the amount of damages is \$3,704.37. The demand for judgment is for the same amount. The claim in this case was for unliquidated damages. Such demands do not bear interest."

XV. Nuisance.

It seems that in actions for damages from nuisance, interest will not be allowed. It was held discretionary in a case in New York, and refused in other similar cases in the same state.

In an action for a nuisance to real property, thereby preventing a sale, it was held that the allowance of interest by a jury for three years, where the only attempt to make a sale was less than two years before action brought, was erroneous. *Hetzel v. Baltimore & O. R. Co.* 6 Mackey, 1.

In a similar action it was held that it was not admissible to assume as a matter of law that the loss of enjoyment occasioned by the diminution of the value of land on account of a nuisance was to be measured by interest on the diminution of the value. *Moore v. Langdon*, 6 Mackey, 6. This case holds that damages may be recovered for wrongful detention, or the wrongful diminution of the use of property, but the jury cannot consider interest in estimating the damages.

In *Lester v. Highland Boy Gold Min. Co.* 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341, 1 A. & E. Ann. Cas. 761, and *Evans v. Highland Boy Gold Min. Co.* 27 Utah, 475, 76 Pac. 1135, it was held that for injury to crops by reason of deposits and nuisance caused by a smelter, the damages were unliquidated, and interest was 28 L.R.A.(N.S.)

not recoverable. The *Lester Case* was overruled in *FELL v. UNION P. R. Co.*

In an action for injuries caused by the operation of an elevated railroad, it was held that the jury, in their discretion, could give interest. *Moore v. New York Elev. R. Co.* 126 N. Y. 671, 27 N. E. 791. And the same was held in regard to a decision of the court where part of the interest was stricken out. *Kerr v. New York Elev. R. Co.* 49 Misc. 331, 96 N. Y. Supp. 1021.

But in *Remsen v. Metropolitan Elev. R. Co.* 9 App. Div. 533, 41 N. Y. Supp. 593, the interest allowed on annual rents estimated as damages for the injury caused to abutting property by the operation of an elevated railroad was stricken out. And in a similar case interest was denied. *Klipstein v. New York Elev. R. Co.* 9 Misc. 708, 29 Supp. 1145.

XVI. Penal actions.

The rule seems to be that interest will not be given in penal actions. In Michigan, however, under the statute, interest was allowed.

So, in an action against a constable for not returning an execution, it was held that interest was not recoverable, as the remedy was the penalty given by statute, which could not be extended beyond the letter of the statute. *Thomas v. Weed*, 14 Johns. 255. The court said: "If the plaintiff had brought an action for negligence or for money had and received, he would have been entitled to interest."

And in an action against a sheriff for an escape, it was held that plaintiff could not recover interest, under N. Y. 1 Rev. Laws, 425, § 9, making the sheriff liable for the debt and damages. *Littlefield v. Brown*, 1 Wend. 398; *Hutchinson v. Brand*, 6 How. Pr. 73; *Rawson v. Dole*, 2 Johns. 454. In *Renick v. Orser*, 4 Bosw. 384, referring to this last case, it was said: "This case arose prior to the passage of the statute allowing interest upon the amount of the judgment to be collected or demanded upon the execution issued thereon." The *Renick Case*, however, gave judgment only for the amount due on the judgment, without interest.

In *Little v. Banks*, 85 N. Y. 258, an action by booksellers for the refusal of the publishers to sell to them New York Reports, published under contract with the state, providing \$100 as liquidated damages, the claim was held to draw interest. This was so held because the contract was construed as providing for liquidated damages, and not a penalty.

Interest on treble damages in a penal action for overcharge by a common carrier was held improper in *Blair v. Sioux City & P. R. Co.* (Iowa) 73 N. W. 1053.

And, in a similar action for unjust discrimination, it was held that the plaintiff was not entitled to interest. *Blair v. Sioux City & P. R. Co.* 109 Iowa, 369, 80 N. W. 673. The court said: "The court allowed interest on the treble damages claimed from

the time the alleged cause of action accrued to the date of the judgment. We think this was error. This statute is penal in character, and therefore liability should be limited to the amount fixed by the statute as compensation for damages sustained; to wit, the treble damages, attorneys' fees, and costs."

In an action to recover double the value of cattle killed by railroad, under Iowa statute, § 2077, allowing a recovery of double the damages sustained, it was held that under this statute no interest could be allowed on claims of this character. *Brentner v. Chicago, M. & St. P. R. Co.* 68 Iowa, 530, 23 N. W. 245, 27 N. W. 605.

Interest was not allowed in an action against a railroad for injuring stock through failure to have a fence, under the statute authorizing double damages. *Wade v. Missouri P. R. Co.* 78 Mo. 362. The court said: "This instruction might do in an action of trover for the conversion of personal property. I allude to that part of it relating to interest. But it has been held that it will not apply to actions for negligence."

Nor in an action for treble damages for cutting timber. *McCloskey v. Powell*, 138 Pa. 383, 21 Atl. 148, 150.

In an action for treble damages for cutting trees, where the jury gave a verdict for damages and interest, it was held that the court could not, in trebling damages, treble interest. *Dunbar Furnace Co. v. Fairchild*, 121 Pa. 563, 15 Atl. 656.

And under Wis. Rev. Stat. 4269, authorizing a recovery of the highest market value of lumber, in actions for damages for cutting timber, it was held that this was a statute penal in its nature, and interest could not be added. *Smith v. Morgan*, 73 Wis. 375, 41 N. W. 532. Prior to this statute, where the owner recovered only stumpage value, interest was allowed on the damages. *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762, 2 N. W. 755.

In an action under the statute to recover for damages of trespass by cattle, it was held interest should not be allowed, as the damages were in the nature of a penalty fixed by statute, without any reference to fault on the part of the owner. *Jean v. Sandiford*, 39 Ala. 317.

In an action of trespass *quare clausum fregit*, it was held that damages would not bear interest until after verdict and judgment (following 39 Ala. 317). *Glidden v. Street*, 68 Ala. 600.

But under Mich. Comp. Laws, chap. 211, § 24, authorizing complainant, in summary proceedings in an action of trespass, or trespass on the case, to recover treble damages, and all other damages to which he may be entitled, where the court trebled the rent and added interest and damages, it was held doubtful whether the court was authorized to treat the rent or interest reported by the jury as damages subject to be trebled. *Howser v. Melcher*, 40 Mich. 185.

In *Gates v. Comstock*, 113 Mich. 127, 71 28 L.R.A.(N.S.)

N. W. 515 (Penal Stat.), *Howser v. Melcher*, supra, was distinguished, because the court did not decide whether, if the damages in trespass had been properly found and included interest, they could be trebled.

Under this statute the jury assessed plaintiffs' damages at \$1,669, and damages on account of the revenues which might have accrued to them if the defendant had not retained possession, at \$156. The trial court entered judgment for single damages only, and struck out the item of interest. This was held error, and judgment was entered upon appeal on the treble damages, with interest from the date of the verdict below. *Lane v. Ruhl*, 103 Mich. 38, 61 N. W. 347.

Under Mich. How. Stat. § 7957, providing that in trespass for cutting timber a person shall be liable to the owner of such land in three times the amount of damages which shall be assessed, in an action of trespass, by a jury, it was held that the assessment contemplated in the statute was to be according to the usual forms of law by the jury (which would, in a proper case, include interest), and that such damages, when found, should be trebled by the court. *Gates v. Comstock*, supra.

See Trespass, subd. VIII., supra.

XVII. Infringement of patents.

The general rule in equity cases seems to be to allow interest from the date of decree, or from the date of the master's report. Some cases allowed interest from the commencement of the action, and some from the date of infringement where the damages were estimated on the basis of royalties. In some cases interest was denied.

The profits allowed in equity for infringement of a patent were held to be the measure of damages in *Tilghman v. Proctor*, 125 U. S. 136, 31 L. ed. 664, 8 Sup. Ct. Rep. 894, which, as a general rule, do not bear interest until their amount has been judicially ascertained.

In *Keep v. Fuller*, 42 Fed. 896, in a suit for infringement, on confirmation of the master's report, interest was allowed from the date of its submission to the court. In *Rose v. Hirsh*, 51 L.R.A. 801, 36 C. C. A. 132, 94 Fed. 177, and in *Winchester Repeating Arms Co. v. American Buckle & Cartridge Co.* 62 Fed. 278, the same rule was adopted.

On a decree for profits, interest was held proper from date of the master's report. *Illinois C. R. Co. v. Turrill*, 110 U. S. 301, 20 L. ed. 154, 4 Sup. Ct. Rep. 5.

And in *Creamer v. Bowers*, 35 Fed. 206, it was held that interest should be allowed from the date of the interlocutory decree. The court said that the general rule is that interest should be allowed on royalties from the time they ought to be paid, where a royalty is the measure of damages, but that no interest is due on damages measured otherwise than by a royalty, because unliquidated. But this was subject to ex-

ceptions, and in equity appears largely to have been left to the discretion of the court.

In *Steam Stone Cutter Co. v. Windsor Mfg. Co.* 17 Blatchf. 24, Fed. Cas. No. 13,335, it was held that the plaintiff was entitled to interest on the profits decreed, from the time of the entry of the interlocutory decree. The court held: In *Silsby v. Foote*, 20 How. 378, 15 L. ed. 953, *Mowry v. Whitney*, 14 Wall. 620, 20 L. ed. 860, and *Littlefield v. Perry*, 21 Wall. 205, 22 L. ed. 577, interest upon profits of an infringement was disallowed in the first without remarks; in the second on the ground that profits were unliquidated, upon which interest was not generally allowable; and in the latter, that profits were usually the measure of unliquidated damages; that circumstances might arise which would justify interest, but this was for the court to determine. That the tendency in the cases prior to the act of 1870 seems to have been towards confining the liability to account for gains and profits, not strictly to those actually received, and at the same time recognizing a liability for interest on the profits received, but no rule was laid down. It was held that since the entry of a decree the money has been detained with full knowledge of the detention, and for that reason defendant should be charged with interest.

Where the royalty constituted the measure of damages, the jury were instructed to allow interest from the commencement of the action. *May v. Fond du Lac County*, 27 Fed. 691.

In *McCormick v. Seymour*, 2 Blatchf. 240, Fed. Cas. No. 8,726, it was held that the plaintiff was entitled to interest from commencement of the suit; but in 16 How. 480, 14 L. ed. 1024, the decision was reversed, because the court had laid down an erroneous rule of damages, as the jury gave a verdict for nearly double the amount demanded for the use of three patents in a suit where the defendant was charged with violating one only.

In *Pitts v. Hall*, 2 Blatchf. 229, Fed. Cas. No. 11,192, interest was allowed from the commencement of the suit.

In *Bates v. St. Johnsbury & L. C. R. Co.* 32 Fed. 628, where interest was found from a demand which was made, as part of the damages, it was held that although damages do not carry interest as such, interest may be allowed as part of the damages by the trier of the facts, in awarding damages.

In *Sickels v. Borden*, 3 Blatchf. 535, Fed. Cas. No. 12,832, it was held that if the patentee has an established price in the market for his patent right, or what is called a patent fee, that sum, with the interest, constitutes the measure of damages.

And where damages were estimated by the value of royalties, interest was held proper from the time of infringement. *Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co.* 5 Bann. & Ard. 514, 2 Fed. 677. The court said: "The amount of the royalty was fixed when the defendants began to use the invention. To that amount 28 L.R.A. (N.S.)

complainants were entitled at that time, and interest, therefore, is only compensation for the delay of payment of a liquidated sum."

In *Tatham v. LeRoy*, 2 Blatchf. 474, Fed. Cas. No. 13,760, it was claimed that plaintiffs were entitled to damages, with interest upon the same from the time of infringement down to the present. It was held that the jury, in estimating damages, could take into account interest if they chose, and give it in the way of damages; and they could take into account, in estimating the damages, the fact that the party had been deprived of them from the time infringement took place down to the present time.

But in *Mowry v. Whitney*, supra, it was held that interest was not generally allowable on unliquidated damages. In this case the defendant manufactured under his own patent, and his infringement of the complainant's patent was not wanton, and although he was responsible for damages, those facts were held to relieve him from liability to interest upon the profits.

And in *Littlefield v. Perry*, supra, it was held that, as a general rule, interest was not recoverable upon the account of profits, except under peculiar circumstances.

And profits were held to be unliquidated damages which did not draw interest without a special order of the court. *Parks v. Booth*, 102 U. S. 96, 26 L. ed. 54.

In *Silsby v. Foote*, supra, interest on the decree for profits found for complainant was stricken out, the judges being divided in respect to the amount of profits which should be allowed the plaintiff.

And where a bill for infringement was dismissed, and an injunction had been issued on an indemnifying bond being given, it was held that the defendant was not entitled to interest on his damages, under the circumstances of this case. *Tobey Furniture Co. v. Colby*, 35 Fed. 592.

XVIII. Water and water courses.

The general rule seems to be that interest should be allowed in actions for damages to property caused by water, sewage, or by diversion of water. This is under the rule that the value of the property destroyed is susceptible of computation. Some cases hold that it is discretionary with the jury. In *Michigan*, *Missouri*, and *South Carolina*, where the damages could not be easily computed, interest was denied.

So interest was allowed on damages from overflow of water in an action against a railroad, the overflow causing destruction of a crop. *St. Louis, I. M. & S. R. Co. v. Yarrowborough*, 58 Ark. 612, 20 S. W. 515; *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512; *Gulf, C. & S. F. R. Co. v. Calloun* (Tex. Civ. App.) 24 S. W. 362. The court said that "in this class of cases, the party whose property has been destroyed is as much entitled to interest on its value as to the value itself."

In an action for damages to crops, caused by diverting and discharging surface water

on plaintiff's land. *Fremont, E. & M. Valley R. Co. v. Marley*, 25 Neb. 138, 13 Am. St. Rep. 482, 40 N. W. 948.

In an action against a milldam company for damages to property. *Pick v. Rubicon Hydraulic Co.* 27 Wis. 433.

In an action against the United States for causing injury by a dam in Lake Winnebago. *Jones v. United States*, 48 Wis. 385, 4 N. W. 519.

In *Folsom v. Apple River Log Driving Co.* 41 Wis. 602, where the defendant, in an action for damages for overflow of a stream, claimed that the measure of damages was the difference between the rental values of the land with and without injury, and interest, it was held that the value of the crops destroyed was the measure of damages.

And in an action for damages to land, caused by a waste ditch, it was held that if the land was permanently injured, but not totally destroyed, the owner would be entitled to recover the difference between the cash value of the land at a time immediately preceding the injury, and the actual cash value after the injury, with legal interest to the time of trial. And if the land was temporarily, but not permanently, injured, it was held that the owner was entitled to recover the amount necessary to repair the injury, and put the land in the same condition in which it was before, with legal interest to the time of trial. *Young v. Extension Ditch Co.* 13 Idaho, 174, 89 Pac. 296.

In an action for injury to a railroad, caused by a break in a reservoir, where the defendant had the means of ascertaining what the repairs to the roadway and costs were, it was held that he would be liable in a sum equal to what would be interest on the amount of compensation to which the plaintiff was entitled, computed from the date of the loss. *New York, N. H. & H. R. Co. v. Ansonia Land & Water Power Co.* 72 Conn. 703, 46 Atl. 157.

And in an action for damages caused to a stock of goods by water on the adjoining premises, it was held that interest was properly allowed. *Mairs v. Manhattan Real Estate Asso.* 89 N. Y. 498.

And interest was allowed,—in *New Milford Water Co. v. Watson*, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57, where there was a wrongful diversion of water, caused by the maintenance of a reservoir.

In *Lakeside Paper Co. v. State*, 55 App. Div. 208, 66 N. Y. Supp. 959, an action for injury to a paper mill, caused by the state cutting off the water. The court said: "That the claimant is entitled to interest upon his claim from the date of the filing of the claim seems to have been settled both in this court and in the court of appeals and in this very case. (See this case upon the former appeal, 45 App. Div. 114, 60 N. Y. Supp. 1081; *Wilson v. Troy*, 135 N. Y. 105, 18 L.R.A. 449, 31 Am. St. Rep. 817, 32 N. E. 44; *Weeks v. State*, 48 App. Div. 357, 63 N. Y. Supp. 203.)"

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In *Dodge v. Rockport*, 199 Mass. 274, 85 N. E. 172, an action by a mill owner for diversion of water, under Mass. Stat. 1894, chap. 78, § 4, providing that the town should pay all damages sustained by any person by the taking of any land for a water right.

In an action for injury to a boat, caused by a dam built in a navigable river, and for failure to open a lock, it was held that interest could be allowed on the damages. *Hogg v. Zanesville Canal & Mfg. Co.* 5 Ohio, 410. The court said: "My own opinion is that this interest ought not to be allowed, and that the recovery should be for the value of the property only. In this, however, the other members of the court differ from me, and think that the interest is a proper item of charge against the defendants."

And in an action against the purchasers of Pennsylvania canals under act of May 15, 1857, requiring the purchaser to keep the same in repair, it was held that the purchasers were liable for damages caused by failure to repair, and for interest from the date of each loss that plaintiff had sustained up to the time of the trial. *Pennsylvania R. Co. v. Patterson*, 73 Pa. 491.

In the following cases interest was held to be discretionary with the jury. A New York case denied interest, but a subsequent case distinguished this by saying that it was discretionary:

In an action for the destruction of buildings, dams, and personal property by accumulation of water, where the defendant had denied liability, and interest had been allowed in a similar case against the same defendant, it was held that where the plaintiff had been kept out of the sum that would have made him whole at the time, so long that the sum was no longer an indemnity, the jury, in their discretion, could consider the delay caused by the defendant, and award interest on the original damages as a measure. *Frazer v. Bigelow Carpet Co.* 141 Mass. 126, 4 N. E. 620. The court said: "It is argued that the discretion was exercised wrongly, because delay was due to the plaintiff's not bringing his action. But he presented his claim, and was informed that the defendants denied their liability. Under such circumstances, the most prudent and economical thing for both parties was for the plaintiff to postpone his suit until a test case settled the question. The delay for that purpose was caused by the defendants as truly as if a suit had been begun and continued to await the decision."

And in an action for damages caused by the erection of a dam below plaintiff's sawmill, it was held that the allowance of interest was in the discretion of the jury. *Walrath v. Redfield*, 18 N. Y. 457.

In an action for damages occasioned by an eviction from, and injury to, the lands of plaintiff, caused by a sewer, it was held that the allowance of interest was in the discretion of the jury. *Duryee v. New York*, 96 N. Y. 477.

In a claim against the state for damages caused by water from a canal, it was held

that interest should not be allowed, in *Sayre v. State*, 123 N. Y. 291, 25 N. E. 163. The court said: "The claimant's causes of action are based upon the negligence of the state, and all his damages were caused by the flooding of his land. They are damages caused by a tort, and were in every sense unliquidated, and we can find no case justifying an allowance of interest in such a case."

In *Wilson v. Troy*, 135 N. Y. 103, 18 L.R.A. 449, 31 Am. St. Rep. 817, 32 N. E. 44, *Sayre v. State* was distinguished, because in that case the court acted as a court of original jurisdiction, and refused interest in its discretion.

For diverting water from a tannery, the jury may allow interest from the commencement of the suit to the time of the verdict. *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42.

But in the following cases interest was denied. In Michigan this was on the ground of inability to compute damages:

In an action for damages for preventing the passing of logs by maintaining a boom, and preventing the plaintiff from completing a contract, it was held that, as the damages were not only unliquidated, but as the claim could not be determined prior to the verdict, interest could not be allowed from the time that the last expense was incurred. *Coburn v. Muskegon Booming Co.* 72 Mich. 134, 40 N. W. 198.

For obstructing natural water courses interest is not allowable. *Brink v. Kansas City, St. J. & C. B. R. Co.* 17 Mo. App. 177.

And in an action to compel the removal of obstructions from a water course and for damages, plaintiff is not entitled to interest on the damages. *Lamar v. Charlotte & S. C. R. Co.* 10 S. C. 476. It was said that interest was never allowed on unliquidated damages.

XIX. Splitting actions.

In an action of trespass on the case for a breach of a statutory duty in having in the city treasury a sum of money accruing from a special assessment to which plaintiff was entitled, it was held that whatever right plaintiff had, he should have recovered in the proceedings referred to as part of that demand, and he could not split his cause of action and maintain one for interest. *Hoblit v. Bloomington*, 71 Ill. App. 204.

Where the defendant in a condemnation proceeding made a deposit of the amount awarded, it was held that the owner could not bring a separate action or motion to obtain interest, as such matter should have been presented while the case could be said to be in court. *Jamison v. Burlington & W. R. Co.* 87 Iowa, 265, 54 N. W. 242.

Where the owner of land accepted damages for widening a street in the city of New York, and receipted in full, it was held that he could not thereafter maintain an action for interest on the same, although he entered a protest for nonpayment of interest at the time of settlement. *Cutter v. New York*, 92 N. Y. 166.
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After payment of the award in a condemnation proceeding, it was held that the owner could not maintain a separate action for interest on the amount awarded. *Hayes v. Chicago, M. & St. P. R. Co.* 64 Iowa, 753, 19 N. W. 245. The court said: "Where the landowner is kept out of both the use of the money and the use of the land, he is entitled to what would be equivalent to 6 per cent interest upon the money. *Daniels v. Chicago, I. & N. R. Co.* 41 Iowa, 52; *Hartshorn v. Burlington, C. R. & N. R. Co.* 52 Iowa, 616, 3 N. W. 648. The assessment is to be reached through a computation. But from what date? The date of the commissioner's appraisal is not material. That appraisal, as we have seen, did not of itself give a right to interest, or anything equivalent thereto. The date, manifestly, from which computation is to be made, is the time of taking possession. But this date does not appear in the record upon which the appeal is heard. It is to be established by evidence, and calls for an adjudication. It is not true, then, as the plaintiff claims, that the amount of damages which he is now claiming has been rendered certain by the adjudication already had, and it is true that he is seeking the adjudication of his case by piecemeal."

On a rule against executors to hold them liable for interest, it was held that interest could not be recovered distinctly from the principal, the law making no distinction between interest as damages and interest as in other cases. The claimant should have insisted on the right to interest on the trial, in opposition to the account. *Anderson's Succession*, 12 La. Ann. 95; *Mann's Succession*, 4 La. Ann. 28.

Where the principal of a debt was paid and accepted, it was held that an action of *quantum meruit* could not be maintained for the interest. *Simmons v. Almy*, 103 Mass. 33.

But where, on an award, it was agreed that claims for interest on the award should be determined in a subsequent action, it was held that the prior action did not bar an action for interest. *Grote v. New York*, 190 N. Y. 235, 82 N. E. 1088.

XX. Other actions.

Interest should not be allowed where exemplary damages are permitted. *Oregon Short Line R. Co. v. Jones*, 29 Utah, 147, 80 Pac. 732.

In an action for assault and battery, it was held that where exemplary damages could be allowed in the discretion of the jury, it was error to charge that interest could be computed on the sum awarded. *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. 684. The court said: "In a case of tort, when the law allows the recovery of exemplary damages, the allowance of which and the amount thereof being entirely in the discretion of the jury, we do not think that the law contemplates or will allow interest to be computed on the sum awarded by them."

Interest was held to be a question of fact

for the jury, and not a matter of law, in actions of tort, and where the plaintiff paid under duress an illegal warrant for a highway tax, to avoid imprisonment, it was held that he could recover, in an action for false imprisonment, the amount paid, without interest. *Taylor v. Coolidge*, 64 Vt. 506, 24 Atl. 656.

Under Va. Code, § 3390, providing that, if a verdict be rendered which does not allow interest, the sum thereby found shall bear interest from its date, it was held that a verdict for damages for seduction should bear interest from the date of the verdict, and the judgment should be so entered. *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671.

XXI. English cases.

a. Eminent domain.

In England, under the statutes, it seems that in condemnation proceedings the owner is treated as the vendor and the condemner as the purchaser; and interest is generally given from the time of taking possession. This was held in the following cases:

In *James v. Ontario & Q. R. Co.* 12 Ont. Rep. 624, it was held that interest was properly allowed to the landowner from the time of taking, which was held to be the date the railroad company gave notice to the landowner of its intention to take the land.

And in a proceeding under the lands clauses consolidation act, it was held that the railroad should pay interest from the time it took possession, where the title was satisfactory. *Blount v. Great Southern & W. R. Co.* 2 Ir. Ch. Rep. 40.

And a railway company was held liable for interest from the time of taking possession, where the money had been paid into court under railway act (Ireland) 1851, 14 & 15 Vict. chap. 70, where the company did not move after the final award to have the money applied to the credit of the sum awarded, or did not pay the amount awarded to the parties out of court, and asked to have the deposit returned. *Re Dublin, W. & W. R. Co.* Ir. L. R. 27 Eq. 79.

And where the amount due from a company was ascertained by the verdict of a jury upon the traverse of an award, it was held that the owner was entitled to 5 per cent from the date of entry, under § 22, railways (Ireland) act 1851, providing that the company shall, where they enter upon lands, pay interest at the rate of £5 per annum upon the compensation money from the time of their entry until the time of the payment. *Re Belfast Water Comrs.* Ir. L. R. 15 Eq. 13. This overrules *Ex parte Spear*, 11 Ir. Ch. Rep. 467.

Under railway act (Ireland) 1851, § 27, providing that where there is an increased award on a traverse, the difference between the amount paid in (under the certificate) and the damages shall, at the cost of the company, be paid into court, it was held that where the company had paid this amount into court, it would not be liable for interest at £5 per cent on the damages 28 L.R.A. (N.S.)

awarded by the verdict, from the time of taking possession. *Ex parte Spear*, supra. It was admitted that if there had been no traverse, interest at £5 per cent would have been payable on the sum certified by the arbitrator from the time of entry. The court said this phase of the question was overlooked by the legislature.

And under land clauses consolidation act 1845, interest was held payable from the time possession might have been taken. *Re Spencer-Bell*, 33 Week. Rep. 771.

A railroad company that delayed depositing the amount of the award was held liable for interest from the time it might prudently have taken possession,—that is, from the time a good title was shown. *Re Pigott*, L. R. 18 Ch. Div. 146. This was under land clauses consolidation act 1845.

A holder of a leasehold which was taken in eminent domain was held entitled to interest on the amount due him, as agreed in the bond, from the time the board of public works took possession. *Cooper v. Metropolitan Bd. of Works*, L. R. 25 Ch. Div. 472. The holder of this leasehold had mortgaged the same, and had agreed that his other damage to trade and expenses would be £250, which the board agreed to pay. The plaintiff brought an action for specific performance, and the board took possession and paid the money into court.

In *Willey v. South Eastern R. Co.* 18 L. J. Ch. N. S. 201, it was said, in a proceeding to condemn land, when possession was taken under land clauses consolidation act (8 Vict. chap. 18), that the act provides that interest shall be calculated from the time of taking possession.

In condemnation, where there was an appeal, and the award was increased, it was held that interest should be allowed on the difference from the time of taking possession. *Re Shaw*, 33 Week. Rep. 74. The same was held where the award was increased on a traverse. *Re Navan & K. R. Co.* Ir. Rep. 10 Eq. 113.

And interest was held to be due from the time the railroad took possession of land under land clauses consolidation act 1845. *Rhys v. Dare Valley R. Co.* 23 Week. Rep. 23. The court said: "From the time when the railroad company exercised their statutory rights and took possession of that property which had been the plaintiff's, they became the owners of the land, and the plaintiff became the owner of the price payable for the land."

Some cases hold that interest attached at the time of verdict or award; but these cases do not seem to have been approved.

In a proceeding under vendor and purchaser act 1874, and notice to treat, under public health act 1875, which includes the compulsory powers contained in lands clauses consolidation act 1845, it was held that from the time of the verdict the vendors ceased to be owners, and were entitled to receive the purchase money; that interest was payable to the persons to whom that purchase money belonged; that if the vendors collected rents during that time, they

should be deducted. *Re Eccleshill Local Board*, 49 L. J. Ch. N. S. 214.

The case of *Re Eccleshill Local Board*, L. R. 13 Ch. Div. 365, holding that interest in eminent domain attached from the time of verdict, was criticized in *Re Pigott*, supra, the court saying: "I am quite unable to understand the principle on which that case proceeded. I am not embarrassed by it, because I have no verdict of a jury to deal with in this case."

In an action for specific performance, it was held, under the charter of the company and enabling act 5th of June, 1851, that the company could maintain a bill for specific performance of a contract with the landowner, without proceeding under the compulsory clauses of their act; that as soon as the company had given notice, the relative situation of vendors and purchasers was constituted; that where the amount was fixed by an award, the purchaser would have to pay interest on the purchase money, and the vendor account for the rents. *Regent's Canal Co. v. Ware*, 23 Beav. 575.

In *Re Pigott*, 50 L. J. Ch. N. S. 679, it was said: "There have been some cases cited, but they do not appear to me to have any direct bearing on the subject. The cases rather assume that this is the law than decide it; but there is certainly one case (*Regent's Canal Co. v. Ware*, supra,) where the company was plaintiff, and the title having been accepted before the amount was ascertained, interest was given by the award. The cases, as I said before, seem rather to assume that interest is payable. There is another, before Vice Chancellor Bacon, where he adverted to the fact of the verdict of the jury being given, and he held interest to rise from that moment. I am quite unable to understand the principle on which that case proceeded. I am not embarrassed about it, because I have no verdict of a jury to deal with in this case; but I am free to confess that, if I had the case to deal with, I should not have been able to decide it otherwise than I have decided the one before me."

Under 8 Vict. chap. 18, § 85, making £5 per cent interest payable on a sum recovered under § 68, for neglecting to issue the warrant to the sheriff within twenty-one days after notice that the proprietor wishes to have compensation settled by a jury, the company failing to issue the warrant in time was held required to pay the amount claimed, and interest. *Re Aberdare R. Co.* 8 Week. Rep. 603.

Where a municipal corporation had lodged in court the amount awarded by an arbitrator for land condemned under the labourers and artisans' act 1875, and took possession, and the owners appealed, and a verdict of the jury increased the award, it was held that interest should be allowed from the time of the award. *Re Shaw*, 54 L. J. Ch. N. S. 51.

On a bill for specific performance and for injunction under land clauses consolidation act 1845, notice of the intention to take plaintiff's property had been served. The 28 L.R.A. (N.S.)

court said: "After that notice, the only thing to be ascertained was the amount of the purchase-money; and as the mode of ascertaining that is prescribed by the statute, it is, in contemplation of law, certain, although it remains to be ascertained." *Walker v. Eastern Counties R. Co.* 6 Hare, 594.

Where, in eminent domain proceeding, the railroad company paid into court the sum assessed by the jury, it was held that the court had no jurisdiction to make any order as to interest on the purchase money, although there was some controversy by a judgment creditor and mortgagee as to the fund. *Re Crystal Palace R. Co.* 1 Jur. N. S. 995.

And under railway clauses consolidation act (Scotland) 1845, and land clauses consolidation act (Scotland) 1845, it was held that interest would not be allowed where the landowner did not take the proper and usual mode of having the amount of payment ascertained. *Caledonian R. Co. v. Carmichael*, L. R. 2 H. L. Sc. App. Cas. 56.

b. Admiralty and collision.

Interest will be allowed from the date of the collision.

Under 25 & 26 Vict. chap. 63, limiting the liability in cases of collision to £8 a ton of the ship's tonnage, it was held that the shipowners were liable for interest on that amount from the date of the collision. *Smith v. Kirby*, L. R. 1 Q. B. Div. 131.

And under 25 & 26 Vict. chap. 63, § 54, on a bill to determine the liability for collision at sea, it was held that interest would be allowed on the damages from the date of collision. *Straker v. Hartland*, 11 L. T. N. S. 622. In this case the court said: "Surely, if the debt is not paid on that day, then interest begins to run. There is a further difficulty: that this is a question of tort, and not of contract, and it is hard to see how to give interest for a tort; but if you find that interest has, for a long series of years, been allowed by a given court (and this appears to be the result of the researches made by the court of admiralty in the case of *The Amalia*, 10 L. T. N. S. 826), then this becomes a settled rule of law, and will be followed by this court."

Under merchant shipping act 1854, § 504, it was held that the value of the vessel causing such collision and damage to person or goods, where the damage to the person was satisfied, should be estimated at its actual value. *Nixon v. Roberts*, 4 L. T. N. S. 679. The court said: "As to the interest, an inquiry will be directed as to whether there was any freight earned. If so, interest from the time when the freight would become due. If no freight, then from the time of collision."

In *The Kong Magnus*, 65 L. T. N. S. 231, it was held that interest should be allowed although the action was not instituted until twelve years after the collision. It was held that the rule in admiralty differed from that of the common law. The rule in admir-

alty is on the ground that the person liable in damages, having kept in his pocket the sum of money which ought to be paid to the claimant, ought to be held to be keeping it for the person to whom the court has found it payable.

In *The Dundee*, 2 Hagg. Adm. 137, under 53 G. III. chap. 159, § 1, providing that a shipowner is not liable for loss or damage done by his ship, beyond the value of his ship, appurtenances, and freight, it was held that interest should be allowed on the amount reported by the registrar and merchants to whom it had been referred, and whose report included interest. The court said that "if, without payment of interest, the wrongdoer could retain the money due to the sufferer, he might apply it to the purpose of an unjust and persevering litigation."

And under 25 & 26 Vict. chap. 63, § 54, limiting the liability of the owners only in respect of damages to ship, goods, or merchandise, it was held that the practice under the old law, which decreed a *restitutio in integrum* by the wrongdoer to the sufferer, was applied, limited by the statute, and it was held that the limited amount took the place of the *restitutio in integra*, and there was no reason why interest should not accrue on the delay to pay that limited amount, as well as in the case where the amount was unlimited. *The Northumbria*, L. R. 3 Adm. & Eccl. 6. In this case the prior decisions were reviewed, saying: "The contention is that interest is part of the damages, and that therefore the court is precluded by the statute from giving it, in addition to the statutory limitation of £8 per ton. The answer to this contention appears to me conclusive. First, if it were necessary, I should be inclined to dispute the axiom; but, in truth, the application of it is at variance both with the decided cases in the court of chancery as well as in the court of admiralty, and with the principle on which they are founded; that principle being, that the lien attaches from the moment when the injury has been inflicted. The cases are, in the court of chancery, *African S. S. Co. v. Swanzy*, 2 Kay & J. 660, decided in 1856; *General Iron Screw Collier Co. v. Schurmanns*, 29 L. J. Ch. N. S. 877, decided in 1860; and *Nixon v. Roberts*, 30 L. J. Ch. N. S. 844, decided in 1861. All these cases were decided upon the provisions of the merchant shipping act 1854, § 504; and I think it was well remarked by Mr. Clarkson, that the legislature, when it passed the subsequent merchant shipping act of 1862, must be taken to have been aware of these decisions; and in this last merchant shipping act the words of the former act, 'shall not be answerable for damages,' are repeated, without any provision that they shall not be deemed to include interest. The cases under this last act are *Straker v. Hartland*, 34 L. J. Ch. N. S. 122, in the court of chancery, decided in 1864; and *The Amalia*, 34 L. J. Prob. N. S. 21, in the court of admiralty, the best report of which appears to be contained

in the New Reports. (5 New Reports, 164, note.) In all the cases in the court of chancery it is to be observed that they have avowedly followed the practice of the court of admiralty. I arrive, therefore, without hesitation, at the conclusion that, notwithstanding the merchant shipping acts, some interest is payable on the limited amount. I entirely agree with the observations of Wood, V. C., in *Straker v. Hartland*, 34 L. J. Ch. N. S. 123: 'It was quite clear that justice required that a debt which was due, but the payment of which was delayed, should carry interest.'

c. Trover and conversion.

The statute authorizes interest in trover or trespass *de bonis*.

Under 3 & 4 Wm. IV. chap. 42, § 29, authorizing a jury in trover or trespass *de bonis asportatis* to give damages in the nature of interest in addition to the value of the goods at the time of seizure, and 21 & 22 Vict. chap. 27, § 2, Lord Cairn's act, authorizing courts of equity in injunctions to give damages, which power was vested in the high court by § 16, judicature act 1873, which was not affected by the repeal of Lord Cairn's act, it was held, in an action by the holders of bills of lading, for an injunction against the master of the vessels' and a claimant of cargoes, to prevent the delivery to anyone but themselves, that the proper measure of damages would be interest on the amount which plaintiffs had been prevented from receiving to the date of the judgment. *Dreyfus v. Peruvian Guano Co.* L. R. 42 Ch. Div. 66. In this case, part of the cargoes was put in the hands of a receiver, and plaintiff deprived of possession, which occasioned plaintiff's loss, and the rule of damages in trover was held applicable.

In Chitty on Pleadings, 7th ed. p. 412, it was said: "Before the 3 & 4 Wm. IV. chap. 42, § 29, interest was recoverable only in a few cases of contract; but under that act a jury may give damages, in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance."

In *Fisher v. Prince*, 3 Burr. 1363, it was said: "In Trover for money numbered, or in a bagg. The court have ordered it to be brought in: Yet the Jury may give more in Damage; they may allow interest, (and in some Cases they ought.)"

And where a vessel and cargo were bought from the commander, who had no power of sale, it was held that the purchaser was liable for the value, with interest at the rate allowed in India from the time of obtaining the property. *Elkins v. East India Co.* 1 P. Wms. 396. The interest in India was about 12 per cent, and the plaintiff had rested thirteen years.

In *Mercer v. Jones*, 3 Campb. 477, which was an action of trover for a bill of ex-

change, it was held that the damages were "the amount of the principal and interest due upon the bills of exchange at the time of the demand." This case was overruled as to the time of estimating value, and it was held that the jury could give the value at the time of conversion or any subsequent time. *Greening v. Wilkinson*, 1 Car. & P. 625.

But an action to compel the defendants to account for the profits which they had made out of wrongs that they had committed in mining coal on plaintiff's land was held to be neither trespass nor trover, as one of the defendants had died, and such action would have abated, and did not entitle to interest under 3 & 4 Wm. IV., chap. 42, § 29, providing for interest in actions of trover or trespass *de bonis*; and it was further held that laches of plaintiff prevented any recovery of interest. *Phillips v. Homfray*, 61 L. J. Ch. N. S. 210.

d. Common carrier.

A common carrier, having lost a piece of machinery in transit, was held liable in damages for the amount necessarily expended in replacing the same, and the freight, and interest upon the amount for the time the plaintiffs were delayed. *British Columbia & V. I. Spar, Lumber & Sawmill Co. v. Nettleship*, L. R. 3 C. P. 499.

e. Contract.

The latest case holds that where the amount could and should have been ascertained at a time certain, interest should be allowed.

In *Mackintosh v. Great Western R. Co.* 4 Giff. 683, where, by a contract, a sum of money was payable at a time certain, to be ascertained by engineer's certificates, and the amounts were disputed, but settled by the court, it was held that, under 3 & 4 Wm. IV. chap. 42, interest should be added. The court said: "When a dispute arises as to the sum payable at a certain time, and the proper amount ought, according to the contract, to have been ascertained at the time which was certain, the result of the litigation being to settle the amount which was certainly due at the time, certain interest is payable."

In *Hill v. South Staffordshire R. Co.* L. R. 18 Eq. 154, the case of *Mackintosh v. Great Western R. Co.* supra, was criticized, the court saying: "The Vice Chancellor Stuart, however, did not, in his judgment as to interest, refer to the cases which I have already mentioned, but he seems to have gone on some earlier authorities, which, in the case to which I have referred, were reviewed and considered to be no longer applicable at law. . . . I do not consider that that case is an authority in favor of the plaintiffs for the allowance of interest."

In *Mildmay v. Methuen*, 3 Drew. 91, a demand was made of executors to pay £10,097 and interest on a contract for building, to be paid within six months after an architect should certify. No certificate was made. 29 L.R.A.(N.S.)

A reference was made by the vice chancellor to an architect, who reported a deduction of £1,500. It was held that plaintiff was entitled to interest from the date of his demand and notice, under 3 & 4 Wm. IV. chap. 42, § 28, providing that on all debts or sums certain the jury may allow interest from the time when such debts were payable, if payable by a written instrument, or, if otherwise payable, from the time of demand of payment in writing. This was held to be a sum certain, although the demand exceeded the allowance by £1,500.

Mildmay v. Methuen was criticized in *Hill v. South Staffordshire R. Co.* supra, the court saying that in the former case there was a demand for £10,000, from which a deduction of £1,500 was made on investigation of the accounts, and interest was allowed on the balance. The circumstances under which reference was made to an architect to ascertain the amount are not set out with that amount of detail which would make the decision satisfactory, and "the nature of the deduction is not explained. No authority was referred to, and the judgment of the vice chancellor is not a very full one."

In an action by a contractor who was to be paid monthly on engineer's certificate, where the certificate was not given, it was held in an equitable action that interest could not be collected under 3 & 4 Wm. IV., chap. 42, § 28, providing for interest on a sum certain, or where there is a written demand for interest. *Hill v. South Staffordshire R. Co.* supra. In this case the amount due was disputed. It was claimed that the balance demanded was a sum certain. It was held that § 29 did not apply, as that section was applicable in trespass and trover and insurance. The court said that if § 28 applied, it was discretionary with a jury to allow interest, and a new trial would not be granted for not allowing interest.

f. Negligence.

A purchaser of a leasehold estate, where the title failed by reason of a prior mortgage, and who sued his attorney for damages in failing to discover the defects in the title, and who was liable to the mortgagee for mesne profits, was held entitled to have the jury instructed "that he was entitled to interest or to rent, and that the damages should be increased by that amount." *Allen v. Clark*, 7 L. T. N. S. 781. This action was for the purchase money and costs of ejectment.

g. Injunction.

On the dissolution of an injunction restraining the payment of money, it was held that the damages would be interest at 5 per cent during the delay, minus any interest the party might have made. *Graham v. Campbell*, L. R. 7 Ch. Div. 490.

h. Waste.

In an action by the tenant in tail after taking possession, against the estate of the

life tenant, for waste, it was held that the personal estate of the late duke was liable to account to his son for all the beneficial profits which he received from those acts of dilapidation, with interest at £4 per cent from the time of his death. *Leeds v. Amherst*, 14 Sim. 357.

Cases involving interest on actions of covenant or on contracts for the sale of real estate are not intended to be included in this note.

I. T.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,

CHARLES E. NEWMAN.

(— Ark. —, 127 S. W. 735.)

Negligence — property unsafe for cattle — duty.

A railroad company which permits a leaky oil car to stand near where cattle are rightly accustomed to graze along a highway and its unfenced track, so that the oil forms pools, the drinking of which will be injurious to the cattle, is bound to guard the pools, or drive away cattle which it sees drinking the oil.

(April 11, 1910.)

Note.—*Liability of railroad company for attracting animals running at large, to its premises, by allowing freight or waste attractive to live stock to remain exposed thereon.*

This note is confined to cases where the question considered was the negligence of the railroad in allowing substances attractive to animals to remain exposed upon its premises, and it does not include cases passing upon the question of its negligence in managing or operating its trains.

Where a railroad negligently permits substances calculated to attract animals, to remain upon their premises, they are liable for injury resulting to animals running at large.

Thus, where salt, in some manner not appearing, gets upon a railroad track near a depot platform, early in the morning of the day previous to that on which a horse which was attracted thereby was killed, and railroad employees could have discovered that stock had been licking the salt, the railroad is liable. *Brown v. Hannibal & St. J. R. Co.* 27 Mo. App. 394.

And where stock is attracted upon a railroad track in front of the company's warehouse, by drippings of molasses from cars, and there killed by its train, the road is liable. *Page v. North Carolina R. Co.* 71 N. C. 222.

So, a railroad which permits cotton seed to accumulate on or about its track must

APPEAL by defendant from a judgment of the Circuit Court for White County affirming a judgment of a Justice of the Peace in plaintiff's favor in an action brought to recover damages for the death of a cow which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. W. E. Hemingway, E. B. Kinsworthy, and James H. Stevenson, for appellant:

The acts alleged and relied upon by the plaintiff, as constituting negligence, did not, in law, amount to such, and were not done in violation of any duty which the defendant owed to the plaintiff.

Morrison v. Cornelius, 63 N. C. 346; *Hess v. Lupton*, 7 Ohio pt. 1 p. 216; *Little Rock & Ft. S. R. Co. v. Finley*, 37 Ark. 562; *Kansas City, S. & M. R. Co. v. Kirksey*, 48 Ark. 366, 3 S. W. 190.

The leaving of the leaky cars at Judsonia is not shown to have been the proximate cause of the death of the cow.

Ingham, Animals, §§ 42, 47, pp. 121, 147; *Fennell v. Seguin Street R. Co.* 70 Tex. 670, 8 S. W. 486; *Herold v. Meyers*, 20 Iowa, 378; *Bush v. Brainard*, 1 Cow. 78, 13 Am. Dec. 513; *Hess v. Lupton*, 7 Ohio, pt. 1, p. 216; *Henry v. Dennis*, 93 Ind. 452, 47 Am. Rep. 378; *Ferguson v. Miami Powder Co.* 9

exercise reasonable care to prevent injury to stock attracted thereby, and the burden is upon it, in an action to recover the value of stock killed by its trains, to overcome the prima facie case made by showing a killing of the stock. *Little Rock & Ft. S. R. Co. v. Dick*, 52 Ark. 402, 20 Am. St. Rep. 190, 12 S. W. 785.

And where a railway, for more than a year, permits brine and other rubbish coming from a refrigerator situated near its track, and owned by third persons, to drain upon its premises near its track, with knowledge that it attracts stock, and that several cattle have been killed at that point, it is liable for the killing of a cow which was struck by its cars. *Morrow v. Hannibal & St. J. R. Co.* 29 Mo. App. 432.

But where the matter which attracts the animals is under the control of a third person, the railroad is not rendered liable by its presence.

Thus, it is not liable for the killing of a cow attracted by barrels of salt left open and exposed in a warehouse on its right of way, where the warehouse was not owned by it, and the salt was stored there by the railroad's agent personally, as a merchant, and not as agent for the railroad. *Whitesides v. St. Louis, K. & N. W. R. Co.* 58 Mo. App. 655; *Burger v. St. Louis, K. & N. W. R. Co.* 123 Mo. 679, 27 S. W. 393.

And where a railroad leases a part of its right of way for use as an elevator, it is not liable for the killing of a cow which

Ohio C. C. 445; Morrison v. Cornelius, 63 N. C. 346; Gilman v. Noyes, 57 N. H. 627; Durham v. Musselman, 2 Blackf. 96, 18 Am. Dec. 133.

Mr. P. R. Andrews also for appellant. Messrs. S. Brundidge, Jr., and H. Neely, for appellee:

Defendant was bound to either guard the pools, or drive the cattle away.

Jones v. Nichols, 46 Ark. 207, 55 Am. Rep. 575.

Frauenthal, J., delivered the opinion of the court:

One of appellant's freight trains was wrecked at Bald Knob, and several tank cars containing raw cotton seed oil were damaged to such an extent that they leaked. These tank cars were hauled to Judsonia, Arkansas, and left there for several days, during which time the oil ran out of them in a steady flow. The cars were first placed near a road crossing, and later a short distance therefrom, and the oil ran down into the ditches by the sides of the track and road, and stood in great pools in these ditches and in the road. The grounds on which the cars were placed were uninclosed, and cattle were accustomed to pass over them at will, and there graze at times. A number of cattle drank of this oil, and from twenty to twenty-five head of them died therefrom, amongst which was a cow owned by the appellee. The oil gave forth a great stench, and some of the owners who saw their cattle drinking it drove them away, because they feared they would be injured by the oil. The appellant made no effort to guard the cattle from the oil, or to drive them away. The plaintiff did not see his cow drinking the oil, or know of it until sometime afterwards. He sued the appellant, and recovered judgment for the value of his cow, and

this appeal is brought to reverse that judgment.

It is urged by counsel for appellant that, under the evidence in this case, it owed no duty to appellee, and therefore was guilty of no act of negligence for which appellee would be entitled to a cause of action, and that, if the appellant was guilty of any negligence, it was not the proximate cause of the injury, and, on this account, the appellee is not entitled to recover for the death of the cow. The liability of the appellant for the death of the cow depends upon the right of appellee to permit his cow to range at large, and the effect that the act of appellant had in permitting the oil to run in the ditches at an uninclosed place near a public road, and in thus attracting the cow to drink, the oil which caused its death. The common law made it the duty of the owner of domestic animals to keep them upon his own land, and, if he failed in that duty, and permitted them to stray upon the land of another, though uninclosed, he was chargeable with a trespass. But such a doctrine is not recognized in this state. The stock owner in this state is not accountable as a trespasser for permitting his stock to stray upon the open premises of another. Little Rock & Ft. S. R. Co. v. Finley, 37 Ark. 562. The owner of domestic animals is therefore guilty of no violation of duty or of any act of negligence in permitting his cattle to run at large on such uninclosed lands of another. On the other hand, the owner of the land is not required to fence out the stock, and ordinarily owes no duty to one who thus suffers his stock to stray upon his land. He has the right to use his own property as he may see fit, but in that use he has no right to do a negligent act which will result in an injury to another. His liability arises in the use of his prem-

was attracted by cobs and corn which the lessees allowed to accumulate. Gilliland v. Chicago & A. R. Co. 19 Mo. App. 411.

And the proper use of salt to free its switches from ice and snow, in order to enable it to manage and handle its trains, does not render a railroad liable for the killing of stock which is attracted thereby. Kirk v. Norfolk & W. R. Co. 41 W. Va. 722, 32 L.R.A. 416, 56 Am. St. Rep. 899, 24 S. E. 639; Louisville, N. O. & T. R. Co. v. Phillips (Miss.) 12 So. 825.

In Schooling v. St. Louis, K. C. & N. R. Co. 75 Mo. 518, where there was no evidence that plaintiff's cow which had been killed was enticed to the defendant's track by hay loaded on cars, the court said that negligence could not be imputed to the railroad for receiving the hay and loading it on its cars, when they were despatched within a reasonable time. But it was stated that, if the evidence had showed that the cow had

been killed at the place where the hay was loaded, and that the car had been left standing an unreasonable length of time, recovery might have been had; and it was also implied that, if the hay had been negligently loaded so as to scatter it on the track, and it had been negligently left there, and cattle had thereby been attracted to it and killed, the railroad would have been liable.

In Harlan v. Wabash, St. L. & P. R. Co. 18 Mo. App. 483, where an action was brought to recover the value of a cow killed by railway cars, it was held that the railroad was not negligent in leaving a car which was loaded with hay in the afternoon on a side track during the following night.

It has been held that the fact that the owner of the horse turned it out knowing that there was salt on the track, and that it was attracting animals, does not render him guilty of contributory negligence. Brown v. Hannibal & St. J. R. Co. 27 Mo. App. 394.

28 L.R.A. (N.S.)

ises, when he fails to observe, for the protection of the property of another, that degree of care and precaution which the circumstances demand, whereby an injury results to such other person's property. He does owe therefore to the owner of straying stock the duty to refrain from attracting or drawing to a dangerous object or substance which he has placed upon his land such stock. Such act becomes one of negligence whereby, if injury results to another, a liability is incurred. The landowner has no right to thus actively draw into peril straying stock. He may not be under any duty to guard the stock from the dangers to which they ordinarily might be exposed, but if he places on his land a dangerous substance which would attract passing animals, and thereby the animals are injured, if the injury is the natural and probable result of the act, which a prudent man would have foreseen, then the landowner is liable for the injury resulting therefrom. *Kansas City, S. & M. R. Co. v. Kirksey*, 48 Ark. 366, 3 S. W. 190; *Ingham, Animals*, p. 153; *St. Louis, I. M. & S. R. Co. v. Ferguson*, 57 Ark. 17, 18 L.R.A. 110, 38 Am. St. Rep. 217, 20 S. W. 545.

Thus, in the case of *Crafton v. Hannibal & St. J. R. Co.* 55 Mo. 580, some salt was spilled at a depot while the employees were unloading it, and afterwards a cow was attracted to the place by the salt, and killed by the cars, and it was held that it was an act of negligence to leave the salt on the track. *Page v. North Carolina R. Co.* 71 N. C. 223. In the case of *Henry v. Dennis*, 93 Ind. 452, 47 Am. Rep. 378, the defendant placed and left exposed an open barrel of fish brine upon a public street where the plaintiff's cow was lawfully running at large, and the cow ate and drank of the fish brine, and was thereby poisoned. It was held that the defendant was guilty of an actionable wrong. See also *Young v. Harvey*, 16 Ind. 314. But we think that the doctrine announced in the case of *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575, is decisive of this case. In that case the appellants were the owners of a cotton gin, and, in an open space under the building, a pit was dug for their cotton press. The appellee's cow fell into the pit, and was killed. In that case the court said: "The pit which the appellants dug, and into which the cow fell in the nighttime, was close to the highway. It was uninclosed, and was without signal of warning or protection. Moreover, cotton seed and corn had been left by the appellants scattered in the neighborhood of it, so that, in the language of one of the witnesses, it was not only a stock trap, but was actually baited for the game. The court instructed the jury, in effect, that, if they should find such a state

of facts from the proof, the appellants were guilty of negligence which would render them liable for the injury done. This proposition cannot be controverted."

In the case at bar the appellant placed, in an open space on its land, its cars from which the oil leaked until it filled the ditches along the roadside. Here, the domestic animals of the townspeople were accustomed to stray and graze, and they were attracted to the pools of oil, and drank of it. This the employees of appellant saw and permitted for some days; and, although they saw that the owners of some of the animals, seeing this, drove them away, because they feared the oil would kill them, the appellant's employees made no effort to guard the cattle from the danger, or to drive away the animals of the other owners, but permitted them to drink the oil, amongst which was this cow of appellee's. The oil was a poison to the cattle when drunk in the quantities as was done by them; and appellee's cow was killed by the oil which it thus drank. Under these circumstances, we think that the appellant was guilty of negligence which rendered it liable for the death of the cow.

The instructions given by the court were in accord with this view of the case, and we find no error in the rulings of the court upon any of the declarations of law given or refused.

The judgment is affirmed.

LOUISIANA SUPREME COURT.

ALEXANDER J. CARRICK, Appt.,
v.
JACOB JOACHIM.

(— La. —, 52 So. 173.)

Slander — vilification — right to damages.

Where one man (and he much the heavier of the two), without provocation, assaults another upon the street, and, in a voice which is heard half a square away, applies to him the vilest epithets in the English language, the injured party ought not to be denied such compensation for the wrong done him as money can afford.

(April 11, 1910.)

Headnote by MONROE, J.

Note. — *Libel and slander; applying vile epithets to man.*

The question of slander and libel in charging woman with unchastity is treated in the note to *Battles v. Tyson*, 24 L.R.A. (N.S.) 577.

On the actionable character of epithets that impute immorality to a woman, see

A PPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans, Division B, in defendant's favor in an action brought to recover damages for alleged assault and slander. Reversed.

The facts are stated in the opinion.

Mr. Arthur J. Peters, for appellant:

A plaintiff who makes out a case of slander and abuse is entitled to substantial redress.

Simpson v. Robinson, 104 La. 180, 28 So. 908.

Mr. Meyer S. Dreifus for appellee.

Monroe, J., delivered the opinion of the court:

Plaintiff demands damages for injuries alleged to have been sustained by reason of the fact that defendant, on the morning of

September 13, 1908, repeatedly applied to him vile epithets and struck him, all on the public street and in the presence of third persons.

Defendant pleaded the general denial, and added a reconventional demand, which latter has since been abandoned. The suit was dismissed by the trial judge, and plaintiff has appealed.

The case, disclosed by the testimony in the record, is as follows: Defendant is about forty-five years old and weighs over 200 pounds; he is, or was, engaged in the business of putting up electrical fixtures; and, having married plaintiff's sister, took plaintiff into his shop and kept him, off and on for some twelve or thirteen years, until he was about twenty-four years of age. During that period he sold plaintiff a house,

the note to *Feast v. Auer*, 4 L.R.A. (N.S.) 560.

This note is confined to the use of those gross and vile epithets which inveigh against a man's genealogy, or which impute immorality to him personally. This, of course, means that cases turning upon the use of such words as "thief," "crook," or "scoundrel" are not included.

Not many cases have been found in which the question of the application of such epithets to a man has been considered. What judicial utterances there are on the question incline to the view that there is no right of action for the use of epithets, however vile, unless it appears that there was an intention to make a charge against the plaintiff, which, if made in language in itself unobjectionable, would have been defamatory. Indeed, it has been said that one who utters contumelious epithets does so in a state of mental excitement which negatives any intention to make a defamatory charge.

Thus, in *Robertson v. Edelstein*, 104 Wis. 440, 80 N. W. 724, the court said generally concerning the use of the words "son of a bitch," which, in that case, were applied to a woman, that such epithets are of that unreasonable, inaccurate, and unmeaning character which are usually found in a verbal assault made with the purpose of insulting the person addressed, and without the purpose of making any specific charge, and of evincing the exasperation and contempt of the person speaking. The court continued: "The whole manner and matter of the assault must, to the ordinary hearer, negative the idea that defendant meant to charge anything specific, or had any meaning or purpose other than to give vent to his own anger and to affront and hurt the feelings of the plaintiff. Exuberance of invective and meaningless epithet has often been recognized as cogent to refute a slanderous meaning in some of the words, which, if used deliberately and alone, would clearly charge crime. It evinces a heat of passion in some measure, at least, incon-

sistent with definiteness of meaning and choice of expressions."

The words, "you are a God damned, lying, thieving son of a bitch," were held upon demurrer, in *Reynolds v. Ross*, 42 Ind. 387, to be actionable because of the presence of the word "thieving," which charged the offense of stealing. Similar words were held in *Bridgman v. Armer*, 57 Mo. App. 528, not to be actionable, in the absence of a showing that they were not intended as mere abuse, but as a charge that the plaintiff was a thief. Language embracing such epithet has also been held not actionable, the courts laying little or no stress upon the use of the epithet. Such a case is *Curtis v. Iseman* (Ky.) 127 S. W. 150, where, in addition to such epithet, the defendant said: "I'll learn you how to steal a buggy whip." The same is true of the case of *Johnson v. Brown*, 4 Cranch, C. C. 235, Fed. Cas. No. 7,375, where such epithet was applied to a white man, together with the words, "yellow negro, villian, and liar."

Stating that one is a loafer and a pimp was held in *Flatow v. Von Bremsen*, 19 N. Y. Civ. Proc. Rep. 125, 11 N. Y. Supp. 680, not to be actionable *per se*.

And it was held in *Baxter v. Mohr*, 37 Misc. 833, 76 N. Y. Supp. 982, that to call another a dirty drunken cur was not to impute moral turpitude, which is an element of actionability *per se*.

It was held in *Robbins v. Treadway*, 2 J. J. Marsh. 540, 19 Am. Dec. 152, where the exact language employed did not appear, that opprobrious epithets were not actionable.

The Ohio court held in *Melvin v. Weiant*, 36 Ohio St. 184, 38 Am. Rep. 572, that words of the most gross and scandalous character, imputing to another an act of sodomy, were not actionable without a showing of special damage, sodomy not having been declared a crime in that state.

The word "whoremaster" has been held, when applied to a married man, to impute the crime of adultery, and to be actionable *per se*. *Georgia v. Kepford*, 45 Iowa, 48.

and for the price plaintiff gave a note which was to mature on September 15, 1908; but there was a verbal agreement between them that plaintiff was to pay it in instalments of \$3 a week, and those payments were made at defendant's shop, so long as plaintiff worked there. Plaintiff, however, left defendant's employ about April, 1908, after which the payments were made generally at defendant's house, every Sunday. On Sunday September 6, 1908, he failed to make the payment due that day, and on Sunday September 13th, he called with \$6 to make both payments. Defendant happened, at the moment (say, between 9:30 o'clock and 11:30 o'clock in the morning), to be standing at the corner, near by, talking to a friend who called his attention to the fact that plaintiff was at his gate. He walked to the gate, and plaintiff handed him the \$6 folded in a receipt which was prepared for his signature. According to his own testimony (which, in that respect, does not materially differ from that of plaintiff), he said to plaintiff: "It is a fine name you have made for yourself; your note was due on the 15th, and I want you to take it up." Plaintiff replied: "That was not the agreement you made with me verbally." Defendant, by way of rejoinder, said: "That is the agreement now." Or (as he testifies): "Agreement or no agreement, I don't want to have a d— thing to do with you any more; I am done with you forever,"—which was followed by a vile epithet and a blow, from the force of which, or in the effort to escape which, plaintiff stumbled and fell, and, in attempting to recover himself, was struck again, and defendant then made towards him with a piece of a shrub or young tree which plaintiff had broken in falling, and plaintiff went to the other side of the street and got out of his way. A little later plaintiff returned to get his receipt, which defendant gave him, and plaintiff then walked off, but, as it appears, turned his head and looked back, when defendant again, as he had several times before, applied vile epithets to him, and told him not to look back. Defendant's version of the matter is that, when he told plaintiff that he wanted him to pay his note on the 15th, whether it had been previously so agreed or not, plaintiff struck at and applied an epithet to him, and that it was then that he struck him,—admitting that he struck plaintiff twice,—and that he once used an epithet attributed to him. His version is overborne by the testimony of four witnesses who saw him striking plain-

tiff, and heard him repeatedly using language towards plaintiff which is not generally heard in polite society, but which, on that occasion, was heard by witnesses who were as much as 175 feet distant. Several witnesses were introduced on behalf of defendant, who testified to some things that had happened while plaintiff was in defendant's employ,—going back as much as three years. Other witnesses testified that plaintiff had said things about defendant which they had repeated to him; but as defendant himself does not attempt to justify his assault and bad language by saying that those were the things which irritated him, and as plaintiff had been calling at his house and paying him \$3 every Sunday for six months or more, the cause of his sudden outbreak remains unexplained.

In such cases, the injured party can choose between submitting to a wrong, resenting it by force and violence, resorting to a criminal prosecution, or, as plaintiff has done, appealing to a civil court for redress.

If, in pursuing such course, he should obtain no redress, he might very well conclude that the law expects him to redress his own grievances in his own way. Whilst, therefore, we agree with our learned brother of the district court that, in the case of an ordinary street brawl in which the parties are equally to blame, neither should be allowed to recover damages, we are decidedly of the opinion that where, as in this case, one man (and he much the heavier of the two), without provocation, assaults another upon the street, and applies to him, in a tone that can be heard more than half a square away, the vilest epithets in the English language, the injured party ought not to be denied such compensation for the wrong done him as money can afford. Plaintiff is not shown to have suffered physically from the blows received by him, but he is entitled to damages for the indignity and for the slander, and we fix the amount at \$300. It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and that there now be judgment in favor of plaintiff, Alexander J. Carrick, and against the defendant, Jacob Joachim, in the sum of \$300, with legal interest thereon from the date at which this judgment shall become final until paid, together with all costs.

Provosty, J., thinks the judgment should be for \$500 at least.

ARIZONA SUPREME COURT.

JOHN CONCHIN, Appt.,
v.
EL PASO & SOUTHWESTERN RAIL-
ROAD COMPANY.

(— Ariz. —, 108 Pac. 260.)

Master — watchman — liability for acts.

1. A person employed to watch premises and turn over to a police officer any person whom he believes to be committing a crime against the property acts within the scope of his employment in firing at a fleeing trespasser to compel him to halt.

Same — wanton injury.

2. A watchman is guilty of wantonness which will render his master liable for the consequences of his act, in firing in the night at a technical trespasser upon the master's property, who is retreating to avoid arrest or assault, although he did not intend to hit him, but only to halt or frighten him.

Negligence — fleeing trespasser — disobeying order to halt.

3. A technical trespasser on the property of a railroad company is not guilty of contributory negligence in running when told by a watchman to stop, which will prevent his holding the railroad company liable for the injury in case he is hit by a bullet.

(April 2, 1910.)

A PPEAL by plaintiff from a judgment of the District Court for Cochise County in defendant's favor in an action brought to recover damages for personal injuries al-

Note. — Liability of master for arrest or false imprisonment by servant employed as detective, policeman, or watchman.

For the earlier cases on this question, see the note accompanying *Milton v. Missouri P. R. Co.* 4 L.R.A. (N.S.) 282. Only the cases since decided are included here.

A master is liable for the acts of his servant employed to keep off trespassers, in assaulting another, if the acts of the servant are committed in the course of his duty to put off the trespasser, even though the assault was wanton or vindictive. *Schmidt v. Vanderveer*, 110 App. Div. 758, 97 N. Y. Supp. 441.

The owner of an island is responsible for the result of an act of his caretaker in casting off the moorings of a vessel which had sought refuge at the wharf in a storm, although he was not expressly instructed to do so; and it is immaterial whether the act was done carelessly or wilfully, if it was not done to serve some purpose of the caretaker. *Ploof v. Putnam* (Vt.) 26 L.R.A. (N.S.) 251, 75 Atl. 277.

A master was held liable for the acts of a servant in *Johnston v. Chicago*, St. P. M. & O. Co. 130 Wis. 492, 110 N. W. 424, 28 L.R.A. (N.S.)

leged to have been caused by the wrongful act of defendant's servant. Reversed.

The facts are stated in the opinion.

Mr. William B. Cleary, for appellant:

Anything done by the watchman in the course of the employment, even though he exceeded his authority, was the act of the company, binding it in damages for its negligent performance.

St. Louis, I. M. & S. R. Co. v. Hackett, 58 Ark. 381, 41 Am. St. Rep. 105, 24 S. W. 881; *Sharp v. Erie R. Co.* 184 N. Y. 100, 76 N. E. 923, 6 A. & E. Ann. Cas. 250.

Messrs. Herring, Sorin, & Ellinwood, for appellee:

The fact that the defendant was retreating at the time the shot was fired shows conclusively it was not fired for or with the intent of protecting the defendant's property or in the line of the watchman's duty.

Golden v. Newbrand, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537; *Belt R. Co. v. Banicki*, 102 Ill. App. 642; *Holler v. Ross*, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472; *Davis v. Houghtellin*, 33 Neb. 582, 14 L.R.A. 737, 50 N. W. 765; *McPeak v. Missouri P. R. Co.* 128 Mo. 617, 30 S. W. 174; *Georgia R. & Bkg. Co. v. Wood*, 94 Ga. 124, 47 Am. St. Rep. 146, 21 S. E. 288; *Healy v. Patterson*, 123 Iowa, 73, 98 N. W. 576; *Candiff v. Louisville, N. O. & T. R. Co.* 42 La. Ann. 477, 7 So. 601; *Kaiser v. McLean*, 20 App. Div. 326, 46 N. Y. Supp. 1038; *Brown v. Boston Ice Co.* 178 Mass. 108, 86 Am. St. Rep. 469, 59 N. E. 644; *Turley v. Boston & M. R. Co.* 70 N. H. 348, 47

where the servant in question was a watchman with authority to investigate past offenses. He assaulted and imprisoned the plaintiff for the sole purpose of obtaining information as to whether the latter had been guilty of throwing sticks at passenger cars, and the court said that the servant was performing his duty in his own way, and, although the methods employed were unlawful and unauthorized, they were within the scope of his duty, and were therefore the acts of his master.

It was held in *New Ellerslie Fishing Club v. Stewart*, 123 Ky. 8, 9 L.R.A. (N.S.) 475, 93 S. W. 598, that the defendant club was liable for an assault and battery by a servant employed to eject from their grounds persons fishing without authority. It was said in this case that when a servant begins a quarrel while acting within the scope of his agency, and immediately follows it up by a violent assault, the master will be liable, as the law under the circumstances will not undertake to say when, in the course of the assault, he ceased to act as agent, and acted upon his own responsibility. See note to that case in 9 L.R.A. (N.S.) 475, on the latter point.

A property owner is liable for the act of his servant charged with the duty of guard-

Atl. 261; *Waalor v. Great Northern R. Co.* 18 S. D. 420, 70 L.R.A. 731, 112 Am. St. Rep. 794, 100 N. W. 1097; *Sagers v. Nuckolls*, 3 Colo. App. 95, 32 Pac. 189.

Where a complaint based on mere negligence discloses that the injury occurred on the premises of the defendant, the plaintiff must show that the person injured was there by invitation, express or implied.

29 Cyc. Law & Proc. p. 567; 14 Enc. Pl. & Pr. p. 339; *Arnold v. St. Louis*, 152 Mo. 173, 48 L.R.A. 291, 75 Am. St. Rep. 447, 53 S. W. 902; *Bahr v. National Safe Deposit Co.* 234 Ill. 101, 84 N. E. 719; *Mathews v. Bensel*, 51 N. J. L. 30, 16 Atl. 195.

Defendant owed plaintiff no duty except not to wantonly or wilfully inflict injury upon him.

Illinois C. R. Co. v. O'Connor, 189 Ill. 559, 59 N. E. 1098; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512; *Magar v. Hammond*, 183 N. Y. 387, 3 L.R.A. (N.S.) 1038, 76 N. E. 474.

In not halting upon demand, the plaintiff was guilty of contributory negligence to such an extent as precludes him from recovering.

Candiff v. Louisville, N. O. & T. R. Co. 42 La. Ann. 477, 7 So. 601; *Magar v. Hammond*, *supra*.

Doe, J., delivered the opinion of the court:

The plaintiff (here appellant) brought his action seeking to recover damages from the defendant for injuries inflicted by a watch-

man in its employ. In the first cause of action plaintiff, in substance, alleges that the defendant employed one Stafford as watchman of all its property at certain railroad yards on its line of road, to guard its said property from depredations, to apprehend and turn over to a peace officer for arrest all persons who he believed had committed or attempted to commit any depredation upon its said property, to ascertain the identity of, and to keep off and frighten away from said premises and property, all persons acting in a suspicious manner; and armed him with a revolver to carry out his said employment. That plaintiff, about 3 o'clock in the morning, while passing the place where Stafford was stationed as such watchman, in a peaceable manner, and without having committed or intending to commit any depredation upon its property, was fired upon by Stafford, who called to him to halt, but that plaintiff, being frightened, ran. That Stafford continued to fire towards him, and hit him in the knee, but that Stafford did not intend to hit, but only to frighten him. For a second cause of action, in addition to the foregoing matters, plaintiff alleges that Stafford was, at the time, a deputy sheriff, but does not allege that he was acting in such a capacity at the time of the acts complained of. Defendant filed general demurrers which were sustained, and, plaintiff declining to amend, judgment was rendered for defendant, and from said judgment plaintiff prosecutes this appeal. His only assignment of error is predicated

ing his property, in shooting at a poacher thereon, if the act was within the general scope of the servant's employment, and was done with a view to the furtherance of the master's business, although it was wilful, wanton, or reckless. Whether or not such an act of a servant was within the scope of his employment is a question for the jury. *Magar v. Hammond*, 183 N. Y. 387, 3 L.R.A. (N.S.) 1038, 76 N. E. 474.

The mere employment of a watchman to guard property does not authorize him to shoot a person who has entered the property to get warm, and who, under the watchman's order to leave the property, is running away therefrom, so as to render the employer liable for the act; but one who employs a watchman, and authorizes him to carry firearms and use them whenever in his judgment it seems necessary or advisable for him to do so, cannot be absolved from liability for such use merely because the injured person was not on, but near, the property when shot, when the watchman adjudged that he was doing or attempting wrong, and that it was necessary to fire to protect the property. *Robards v. P. Bannon Sewer Pipe Co.* 130 Ky. 380, 18 L.R.A. (N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429.

But one employed by a railroad company 29 L.R.A. (N.S.)

as a special secret service agent, to look after criminal matters, such as stealing from the cars or stations, and other trouble about the station, who has no authority to make arrests, acts beyond the scope of his employment in arresting one engaged in an altercation with a switchman, and the company is not liable therefor. *St. Louis & S. F. R. Co. v. Wyatt*, 84 Ark. 193, 105 S. W. 72.

When a railroad watchman, as a part of his duty, questioned one who was removing freight as to his right to do so, and, being apparently satisfied, allowed the removal, no liability attaches to the railroad company for the act of the watchman in shooting the freight handler later on and at a different place, as a result of a further dispute over the freight. *Hidalgo v. Gulf C. & S. F. R. Co.* (Tex. Civ. App.) 128 S. W. 683.

See also the *dictum* in *Kehoe v. Marshall Field & Co.* 141 Ill. App. 140, to the effect that a person employed to do general detective work acts beyond the scope of his authority in arresting persons charged or suspected of committing criminal acts.

As to the liability of private persons or corporations for the acts of special police officers appointed by public authority, see the note to *McKain v. Baltimore & O. R. Co.* 23 L.R.A. (N.S.) 289.

upon the action of the court in sustaining the demurrers.

The question presented by this appeal may most conveniently be determined by a consideration of the propositions advanced by appellee in support of its demurrers, and in the order stated; the same being: First. That the acts complained of were without the scope of the watchman's employment. Second. That the complaint was fatally defective in failing to negative that the plaintiff was a trespasser, the injuries having been inflicted upon the premises of the defendant, and the action based upon mere negligence. Third. That the plaintiff being a trespasser, to whom the defendant owed no duty except not to wantonly or wilfully inflict injury upon him, the complaint is defective, in that it fails to charge wanton or wilful injury, and alleges mere negligence on the part of the defendant. Fourth. That by running away instead of stopping when challenged, plaintiff was guilty of such contributory negligence as to prevent recovery.

While plaintiff's allegations that the acts complained of were within the scope of Stafford's employment are mere conclusions and to be treated as surplusage, yet all allegations of fact contained in the complaint which are properly pleaded must, for the purpose of this case, be treated as true. It is alleged in the complaint that Stafford was employed as a watchman to protect the defendant's premises and property from depredation, to ascertain the identity of persons who might commit or attempt to commit such depredation, "to apprehend and turn over to a peace officer for arrest all persons who he had reason to believe or did believe had committed or attempted to commit any crime against the property," to keep off and frighten away from the property all persons acting in a suspicious manner, and "that said Stafford was armed by defendant with a revolver to carry out his said employment."

The words, "within the scope of his employment," as applied to the liability of a master for the wrongful acts of his servant, are probably not susceptible of any satisfactory definition of general application; each case must be determined by the particular facts and circumstances surrounding it. Before the master can be held liable for the negligence or wrongful act of his servant, it must appear that the servant was engaged at the time in performance of the duties of his employment, and if so engaged, and the wrongful act was performed in connection with such duties and in apparent furtherance of their accomplishment, the master will be liable, even though the act be in excess of the authority conferred by him, or in violation of his express directions, provided, however, that it is not done in furtherance alone of the personal desires or ends of the servant.

provided, however, that it is not done in furtherance alone of the personal desires or ends of the servant.

The intent with which an act is done affords a more reliable test as to whether it is within the scope of the servant's employment than do the methods of its accomplishment. The nature of Stafford's employment carries with it an implied authority to use force when necessary. "And even where the master owes no duty to the person injured, the authority to use force may be implied from the nature of the employment so as to render the master liable, even though the servant goes beyond the necessity of the situation and uses more force than necessary. For instance, the authority to use force is ordinarily implied where the employee is a watchman or doorkeeper." 28 Cyc. Law & Proc. p. 1541. In *Rogahn v. Moore Mfg. & Foundry Co.* 79 Wis. 573, 48 N. W. 669, the court says: "Where the servant is authorized to use force against another when necessary in executing his master's orders, or in conducting the business intrusted to him, the master commits it to him to decide what degree of force he shall use, and if, through misjudgment or violence of temper, the servant goes beyond the necessity of the occasion, and gives a right of action to another, he cannot be said, as to third persons, to have been acting beyond the line of his duty, or to have departed from his master's business." The New York court of appeals has said: "It is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty, to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders." *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597.

Applying the foregoing tests to the facts alleged in the complaint, it seems clear that Stafford was not acting independently, but strictly within the scope of his employment.

Counsel for appellee, in his second proposition, assumes that the complaint is based upon simple negligence. If this assumption be true, the complaint is fatally defective in failing to show any right or license for plaintiff's presence upon the defendant's premises, for clearly the defendant would not be liable to a trespasser for injuries due to its mere negligence. The plaintiff, however, could, at most, have been a trespasser,

to whom the defendant would be liable for wilful or wanton injury, which brings us to a consideration of appellee's third proposition.

In many cases the words "wilful" and "wanton" are treated as synonymous, and, in those cases where an attempt has been made to distinguish them, it has usually been with reference only to the facts of the particular case. An act is "wilful" where the resulting injury is intentional or the natural and probable consequence of the act. The word "wanton" is, we think, more comprehensive than "wilful." To constitute "wantonness," it is not essential that the injury should have been intentional or the probable consequence of the wrongful act; it is sufficient that the act indicates a reckless disregard of the rights of others, a reckless indifference to results, or that the injury is the likely, and not improbable, result of the wrongful act. The word "likely" is here used in the sense of something more than possible, and less than probable. "Wantonly. Done in a licentious spirit, perversely, recklessly, without regard to propriety or the rights of others; careless of consequences, and yet without settled malice." 2 Bouvier's Law Dict. 1207.

The complaint expressly negatives any intent to inflict injury, and consequently eliminates the element of wilfulness from our consideration. It only remains to consider whether the pleader has negated wantonness as well. We think he has fallen a little short of so doing. Stafford had no right to arrest the plaintiff under the circumstances alleged in the complaint. Crim. Code, chap. 3, title 5 (Rev. Stat. 1901). The injury is alleged to have been inflicted in the night while the plaintiff was, at most, a mere technical trespasser upon defendant's right of way, and was guiltless of the commission or intent to commit any crime, and while he was retreating to avoid apprehension or arrest, or, as he may well have thought, a felonious assault. In firing towards and near the plaintiff while he was running, and in the nighttime, though without intending to hit him, but only intending to try to halt or frighten him away, Stafford must have known that injury was the not improbable but likely result of his wrongful act, and displayed a reckless disregard of the rights of plaintiff and a disregard of and indifference to results constituting wantonness.

Appellee's fourth proposition is obviously without merit. There is nothing in the complaint from which a duty on the part of plaintiff to halt may be implied.

Plaintiff, in his second cause of action, alleges that Stafford was a deputy sheriff: but the facts stated do not indicate that he
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acted in such capacity, but clearly show that, at the time of the injury, he was acting in the capacity of watchman.

For the foregoing reasons, the judgment of the District Court is reversed, and the cause remanded for further proceedings.

Kent, Ch. J., and Campbell and Lewis, JJ., concur.

DISTRICT OF COLUMBIA COURT OF APPEALS.

DISTRICT OF COLUMBIA, Appt.,

v.

THOMAS P. HESS et al.

(35 App. D. C. 38.)

Eminent domain — dismissal of proceedings — verdict.

A municipal corporation may dismiss proceedings to condemn land for a street after a verdict assessing damages for the land taken, if the benefits assessed did not equal the damages awarded as required by statute, so that the right of the property owner has not become complete and no process remains by which the verdict can be corrected.

(April 5, 1910.)

Note. — Right of condemning party to dismiss condemnation proceedings after award or verdict and before confirmation or judgment.

This note is confined strictly to the question of the right to dismiss condemnation proceedings after an award or verdict has been returned, and before the confirmation of the award or the entry of judgment on the verdict. And the question as to the terms upon which such proceedings may be dismissed is not within the scope of the note.

In the absence of statutory provisions expressly regulating the stage at which the condemning party may dismiss or abandon condemnation proceedings, and where the acts authorizing such proceedings do not contemplate the passing of title before confirmation or judgment, it is generally held that prior to confirmation or judgment, the proceedings may be dismissed although there has been an award or verdict returned.

This result was reached in the following cases, where there had been no confirmation of the award or judgment on the verdict: *Lamb v. Schottler*, 54 Cal. 319; *Denver & N. O. R. Co. v. Lamborn*, 8 Colo. 380, 8 Pac. 582; *Chicago v. Goodwillie*, 208 Ill. 252, 70 N. E. 228; *Kadish v. Chicago (Ill.)* 6 N. E. 467; *Hyde Park v. Dunham*, 85 Ill. 569; *Elkhart v. Simonton*, 71 Ind. 7; *Hunting v. Curtis*, 10 Iowa, 152; *Klopp v. Chicago, M. & St. P. R. Co.* 142 Iowa, 474, 119 N. W. 373; *State ex rel. Hiatt v. Keokuk*, 9 Iowa, 438; *Hastings v. B. & M. R. Co.* 38 Iowa, 316; *Corbin v. Cedar Rapids, I. F. &*

A PPEAL by the District of Columbia from a judgment of the Supreme Court vacating an order of the Commissioners of the District of Columbia dismissing a certain condemnation proceeding. Reversed.

The facts are stated in the opinion.

Messrs. Edward H. Thomas and James Francis Smith, for appellant:

The commissioners had the right to abandon or discontinue the proceeding before the confirmation of the verdict.

Lewis, Em. Dom. §§ 655, 656; O'Neill v. Hudson County, 41 N. J. L. 161; Nichols, Em. Dom. §§ 337, 338.

Mr. George C. Gertman for appellees.

Robb, J., delivered the opinion of the court:

Appeal from a judgment of the supreme court of the District of Columbia vacating an order of dismissal filed by the District after verdict and before confirmation there-

N. W. R. Co. 66 Iowa, 73, 23 N. W. 270; Re New Orleans, 4 Rob. (La.) 357; Witt v. St. Paul & N. P. R. Co. 35 Minn. 404, 29 N. W. 161; State Park v. Henry, 38 Minn. 266, 36 N. W. 874; Louisville, N. O. & T. R. Co. v. Ryan, 64 Miss. 399, 8 So. 173; North Missouri R. Co. v. Lackland, 25 Mo. 515; North Missouri R. Co. v. Reynal, 25 Mo. 534; St. Joseph v. Hamilton, 43 Mo. 282; Clarke v. Manchester, 56 N. H. 502; Re Waynesboro School Dist. 1 Pa. Co. Ct. 422; Schuylkill & S. Nav. Co. v. Decker, 2 Watts, 343; Re Penn Alley, 1 Pa. Dist. R. 141; Roberts v. Philadelphia, G. & N. R. Co. 1 Phila. 262; Stevens v. Duck River Nav. Co. 1 Sneed, 237.

This rule was also applied in the following New York cases: Washington Park v. Barnes, 2 Thomp. & C. 637; Re New York, W. S. & B. R. Co. 38 N. Y. Civ. Proc. Rep. 470; People ex rel. Dikeman v. Brooklyn, 1 Wend. 318, 19 Am. Dec. 502; Re Syracuse, B. & N. Y. R. Co. 4 Hun, 311; Hudson River R. Co. v. Outwater, 3 Sandf. 689; Re Canal Street, 11 Wend. 154; Re Wells Ave. Sewer, 46 Hun, 534; Martin v. Brooklyn, 1 Hill, 545; Re Washington Park, 56 N. Y. 144; Re Wall Street, 17 Barb. 617; Re Anthony Street, 20 Wend. 618, 32 Am. Dec. 608; Re Board of Education, 59 App. Div. 258, 69 N. Y. Supp. 572; Re Military Parade Ground, 60 N. Y. 319.

But it has been held in New York that the right to dismiss after award or verdict was discretionary with the court. New York, W. S. & B. R. Co. v. Thorne, 1 How. Pr. N. S. 190; Re Waverly Water Works Co. 85 N. Y. 478; Re White Plains, 65 App. Div. 417, 72 N. Y. Supp. 1026.

And where commissioners had been appointed, and they had reported, and their report had been set aside and new commissioners appointed, an application to discontinue the proceedings was refused, the court holding that it was given no power to grant such application, and that the power ought not to be exercised if it existed, since the plan first proposed had been relied upon by person purchasing lots with reference thereto. Re Beekman Street, 20 Johns. 269.

In New Jersey it is held that where lands are to be taken for public use, the public authorities have a reasonable time after the award of damages, in which to decide whether to accept the property or dismiss the proceedings. O'Neill v. Hudson County, 41 N. J. L. 161; State ex rel. Mabon v. Halsted, 39 N. J. L. 640; Re Jersey City Water Comrs. 31 N. J. L. 72, 86 Am. Dec. 28 L.R.A. (N.S.)

199. In the first two of these cases there was no provision for confirmation, but an opportunity to appeal was given before the vesting of title.

And in State ex rel. Rogers v. Hug, 44 Mo. 116, the city was held authorized to abandon proceedings to condemn land for a street after the assessment of damages, no provision being made for the rendition of a judgment or confirmation, it being merely declared that the property should not be taken until the damages are paid.

The right to dismiss in many cases is governed by express statutory or charter provisions.

Thus, in Brokaw v. Terre Haute, 97 Ind. 451, where a statute, on payment of costs, etc., gave a city a right to discontinue proceedings if, upon appeal, the report of the commissioners was greatly increased, it was held in that event to have power to discontinue after verdict and before judgment, although it had taken possession of the property.

And commissioners of highways were held authorized to annul proceedings for locating a road after the damages had been agreed upon by the landowners and supervisors, where the statute provided that the commissioners should revoke such proceedings if they regarded the damages as too high. People ex rel. Foos v. Highway Comrs. 88 Ill. 141.

And under a statute providing that any proceeding to condemn land might be abandoned within twenty days after the filing of the report of the commissioners, it is held that the proposed condemnation may be abandoned, although an appeal from the award of the commissioners is made. Walsh v. Board of Education, 73 N. J. L. 643, 64 Atl. 1088.

So, the charter of St. Louis permits the city in a proceeding to condemn land for a street, to discontinue at any time before the final confirmation of the report of the commissioners. St. Louis Brewing Asso. v. St. Louis, 168 Mo. 37, 67 S. W. 563.

The Missouri statute authorizing telegraph, telephone, gravel, and plank, and railroad companies to condemn land, provides that the assessment of damages may be enforced by execution unless the company, within ten days from the return of the assessment, elect to abandon the proposed appropriation. This act is construed to give the condemning party a right to abandon the proceedings within ten days from the original assessment, or, if a new

of, in condemnation proceedings, overruling the motion of the District to dismiss said proceedings, and confirming said verdict.

By the act of February 27, 1907 (34 Stat. at L. 1001, chap. 2076), the commissioners of the District were authorized and directed to institute proceedings to condemn land necessary for the extension of T street from Thirty-fifth street to Wisconsin avenue, and from Wisconsin avenue to the east side of proposed Rock Creek drive,

said proceedings to be in accordance with the provisions of §§ 491a to 491n, both inclusive, of an act amending the Code (34 Stat. at L. 151, chap. 2070). It was further provided "that, . . . the [total] amount found to be due and awarded as damages, . . . plus the cost and expenses of the proceeding, . . . shall be assessed by the jury as benefits."

On April 27, 1907, pursuant to the authority thus conferred, the commissioners

assessment is allowed, ten days thereafter. *State ex rel. Hilleman v. Fort*, 180 Mo. 97, 79 S. W. 167.

Under § 1000 of the charter of New York, the board of estimate and apportionment has power to discontinue proceedings for opening streets at any time before the title passes, and it is held that proceedings may be dismissed prior to the date set by the board for the vesting of title. *Re New York City*, 127 App. Div. 650, 111 N. Y. Supp. 895; *Simpson v. Berkowitz*, 59 Misc. 160, 110 N. Y. Supp. 485.

In *Re Casacaloo & M. Streets*, 20 La. Ann. 497, where the statute gave persons interested the right to continue to object to the successive reports of the commissioners, until such reports were made as the court would confirm, it was held that no part of the report was binding on the city proposing to open a street until it was confirmed by the court, although the person whose land was to be taken expressed satisfaction with the price fixed by the appraisers.

Where park commissioners are given the right by statute, at any time before final confirmation of the report of appraisers in condemnation proceedings, to withdraw such proceedings upon payment of costs, the board is held entitled to notice and an opportunity to withdraw its proceedings after an order increasing the award, and it cannot be deprived of this right by the immediate confirmation by the court of the increased award. *Duluth v. Lindberg*, 70 Minn. 132, 72 N. W. 967.

Where a statute is express that no title shall pass until payment or deposit of the amount ordered by the commissioners, the party condemning may abandon after the assessment of damages, although it is provided that the amount assessed shall become conclusive after the expiration for the time for appeal. *Stacey v. Vermont C. R. Co.* 27 Vt. 38.

But it has been held that condemnation proceedings cannot be dismissed after award or verdict.

Thus, in *Pollard v. Moore*, 51 N. H. 188, where a proceeding was brought by mill owners to condemn land under an act passed for the encouragement of manufacturing, it was held that, after the damages had been assessed, the petitioners could not become nonsuit. The court said: "The plaintiffs in this case have undertaken to invoke the aid of a statute thus made for their benefit; have summoned the defendants into court to have their damages

appraised; they have come in, and their case has been sent to a committee who have heard the same and made report; and now, because the damages have been assessed perhaps a little higher than the plaintiffs anticipated, shall they have leave to withdraw and leave the defendants without payment of their damages, or without any valid assessment of them, but to await the uncertain pleasure of the plaintiffs, to have their lands flowed without the right to object, until other proceedings shall be instituted and another assessment of damages be made? A plaintiff has the right, it is said, to become nonsuit during certain stages of the proceedings; but he has not that right after a verdict is returned in his case. . . . So, after a reference of a cause to arbitrators by rule of court, the plaintiff cannot rescind the rule or revoke the submission, nor can he become nonsuit, or discontinue his action."

And it was held in *Crume v. Wilson*, 104 Ind. 583, 4 N. E. 169, that after the filing of the commissioner's report and the lapse of the time for appeal, the cause was ready for judgment, and the petitioner could not have it dismissed.

So, in *Beale v. Pennsylvania R. Co.* 86 Pa. 509, it was held that after a railroad had made a location on land, and damages had been assessed, it was too late to interpose an exception that it had subsequently adopted a new line on the same land.

This case is distinguished in other Pennsylvania cases where the condemning party is a public corporation, on the ground that in the *Beale* Case the party condemning was a private corporation.

And where the statute indicates that the filing of the report of the commissioners making an award of damages shall be in effect a judgment fixing the rights of the parties, the proceeding cannot be dismissed against the protests of the landowner. *Sprague v. Northern P. R. Co.* 122 Wis. 509, 106 Am. St. Rep. 997, 100 N. W. 842; *Milwaukee & L. W. R. Co. v. Stolze*, 101 Wis. 91, 76 N. W. 1113.

And where the city charter did not provide for any confirmation, but gave a right to appeal within ten days after the report awarding damages, and it was provided that, if no appeal was taken, the common council should direct the commissioners to assess the amount as damages, the proceedings cannot be discontinued after the time for appeal has expired. *People ex rel. Gaslight Co. v. Syracuse*, 78 N. Y. 56.

instituted condemnation proceedings. A jury was regularly summoned, and in due course, on November 27, 1908, returned a verdict awarding \$31,287.06 damages for the land taken, and assessing as benefits against the land within the assessment zone the sum of \$26,806.14. No objections or exceptions were filed to this verdict, and on January 5, 1909, the District filed an order dismissing said proceeding. Thereafter, on January 9, 1909, Thomas P. Hess, who had been awarded \$2,125 damages, and who had been assessed nothing on account of benefits, filed a motion to vacate and quash said order of January 5th dismissing said proceeding, which motion the court granted over the objection and exception of the District. Thereupon, on February 8th, the District formally moved the dismissal of said proceedings upon the grounds "that the entire amount of the damages awarded herein, plus the cost and expenses of the proceeding, have not been assessed as benefits, as provided for in and by the act of Congress under which this proceeding has been instituted," and "that, as no objections or exceptions have been taken to the verdict of the jury herein filed within the time prescribed by the statute, the court is without jurisdiction to order a new jury herein, and that therefore further proceedings under the aforesaid act of Congress and of the Code are impossible." This motion was overruled, and a final order was passed ratifying and confirming the verdict of the jury as a whole. This appeal followed.

A proceeding to condemn property for public use is not in the nature of a contract between the owner and the condemning party, and, until the property is actually taken and compensation is made or provided, the power of the condemning party over the matter is not exhausted. *Garrison v. New York*, 21 Wall. 196, 22 L. ed. 612; *District of Columbia v. Prospect Hill Cemetery*, 5 App. D. C. 497; *Ross v. United States*, 8 App. D. C. 32. Accordingly it is a rule of almost universal application that, in the absence of any statutory provision showing a legislative intent to the contrary, condemnation proceedings may be discontinued by the condemning party at any time before the right of the property owner has become complete. *Manion v. Louisville*, St. L. & T. R. Co. 90 Ky. 491, 14 S. W. 532; *Simpson v. Kansas City*, 111 Mo. 237, 20 S. W. 38; *O'Neill v. Hudson County*, 41 N. J. L. 161; *Nichols*, Em. Dom. §§ 337, 338.

In the present case the District, for reasons satisfactory to itself, failed to take advantage of § 491h of said act amending the Code, which authorized the court, with-

in twenty-one days after verdict, to hear and determine objections or exceptions thereto and to set the same aside, in whole or in part, when satisfied that it is unjust or unreasonable, in which event a new jury is summoned. When, therefore, the order of dismissal was filed, the proceedings had resulted in a verdict which failed to satisfy the requirements of the law. In such a situation the District was, we think, fully justified in filing its notice of abandonment.

Judgment reversed, with costs, and cause remanded for further proceedings.

MARYLAND COURT OF APPEALS.

CATHERINE WERNER et al., Appts.,

LOUIS T. CLARK, Assignee.

(108 Md. 627, 71 Atl. 305.)

Mortgage — resale — objection — mortgagor.

The confirmation of a sale under a power contained in a mortgage does not so far deplete the interest of the mortgagor as to deprive him of the right to except to the confirmation of a resale in case the first bidder defaults, and the property is resold at his risk at an amount considerably less than the first bid.

(November 14, 1908.)

APPEAL by defendants from a decree in equity of the Circuit Court for Howard

Note. — No cases other than those set out in the opinion of the principal case have been found in which the confirmation of the first sale has been relied on to deprive the former owner of the property of the right to object to confirmation of a resale made after default of purchaser of first sale.

In *Watkins v. Jones*, 107 Va. 6, 57 S. E. 608, where land was sold at judicial sale for \$2,175, and resold for \$2,100 after confirmation of the first sale, because of default of the purchaser, it was held error to refuse to confirm the second sale, though one of the defendants, a half owner of the property, offered to pay \$300 more for the property. It appeared that the terms of the sale had been complied with in all respects, that confirmation of the sale was recommended by the commissioners who reported the sale to the court, and that the defendant had attended both sales. The right of the owner to object to the second confirmation, however, was not questioned in that case, but the case was disposed of on the ground that, as the price bid at the second sale was a fair one, the court should refrain from setting aside judicial sales, so as not to discourage bidders, but to inspire confidence in the stability of such sales.

County ratifying a resale of property under a mortgage. Reversed.

The facts are stated in the opinion.

Messrs. Edgar H. Ganis, and Joseph L. Donovan, for appellants.

Mr. Louis T. Clark, for appellee:

The mortgagors had no right to except to the resale, as, by the final order of ratification passed at the mortgage sale, their interest in the mortgaged property terminated.

Lannay v. Wilson, 30 Md. 536; *Sloan v. Safe Deposit & T. Co.* 73 Md. 239, 20 Atl. 922; *Lurman v. Hubner*, 75 Md. 268, 23 Atl. 646; *Albert v. Hamilton*, 76 Md. 304, 25 Atl. 341; *Richardson v. Jones*, 3 Gill & J. 163, 22 Am. Dec. 293; *Boyle v. Schindel*, 52 Md. 1; *State v. Second Nat. Bank*, 84 Md. 325, 35 Atl. 839; *Miller, Equity*, p. 620; *Mealey v. Page*, 41 Md. 172; *Early v. Dorsett*, 45 Md. 462; *Brundige v. Morrison*, 56 Md. 407; *Griffith v. Hammond*, 45 Md. 85.

Pearce, J., delivered the opinion of the court:

This is an appeal from an order of the circuit court for Howard county, sitting as a court of equity, ratifying a sale of mortgaged premises made under powers of sale contained in two mortgages.

The record discloses the following facts: The property in question was the property of one Charles J. Werner, deceased. After his death, intestate, his widow and six children, on April 20, 1894, united in the execution of a mortgage upon a tract of land in Howard county, to Gabriella Mackubin, to secure a loan to them of \$1,200, payable one year after date with interest. On October 6, 1902, the same parties, together with Louis Werner and Ethel Werner, united in the execution of another mortgage upon the same tract of land, and also upon another tract in Baltimore county, with the German Building Association of Howard county, a body corporate, to secure a loan to them of \$1,000, payable one year after date with interest, and these two mortgages were subsequently duly assigned to the appellee, Louis T. Clark, for foreclosure, after default made thereunder. On September 10, 1907, the appellee filed copies of these two mortgages, together with a bond, as required by law, and advertised both said tracts of land for sale under the powers contained therein, but actually sold only the tract in Howard county. His report of sale, filed December 20, 1907, shows that he sold this tract on December 18, 1907, to Miss Catherine Werner for \$3,850, who "elected to pay all cash on final ratification of sale, and gave satisfactory assurances of her compliance." The report also set forth that the proceeds

of this sale would be more than sufficient to satisfy both mortgages, and that for this reason the appellee did not offer the other tract for sale. The usual order nisi was published, and on February 1, 1908, this sale was finally ratified and confirmed. On February 24, 1908, the appellee filed a petition alleging that the purchaser, Miss Catherine Werner, had failed to comply with the purchase and found herself unable to do so, and he prayed for an order upon her "to show cause why an order should not be passed setting aside said sale, and directing an order of resale of said property at the risk of said purchaser." On the same day, the court passed an order requiring "Catherine Werner to show cause on or before March 11, 1908, why said sale made in the above-entitled cause should not be set aside, and a resale ordered at her risk," provided a copy of said petition and order be served on her on or before February 27, 1908. She failed to show cause as required, and on March 20, 1908, in due course of law, an order was passed "that the property mentioned in this cause, and sold by the petitioner, be resold by the said petitioner, Louis T. Clark, assignee, plaintiff in the above-entitled cause, for the payment of the purchase money thereof, viz., \$3,850, as reported in the report of sale filed December 20, 1907, etc., and it is further ordered that said resale be made at the risk of the said Catherine Werner." It will be observed here that this order did not, in terms, provide that said sale should be set aside as prayed in the petition, and as provided in the order to show cause. On April 24, 1908, the appellee filed a report setting forth that, in pursuance of said order of resale, he did, after due notice and advertisement, offer said property at public sale on April 21, 1908, and sold the same to John G. Rogers for \$2,800, and that said sale was made at the risk of the former purchaser, Miss Catherine Werner. The usual order nisi was again published, and on May 22, 1908, the day before the expiration of this order, two of the mortgagors in each of the two mortgages, Augustus H. and Frederick A. Werner, filed ten exceptions to the ratification of this sale. On May 29, 1908, the appellee filed a motion to dismiss these exceptions, and that a day be set for the hearing, and on the same day the court set the motion down to be heard on June 4, 1908, after notice to the exceptants. The motion does not state the ground on which it was based, nor does the record disclose the ground, nor whether any hearing was had; but the appellee in his brief states that "this was upon the theory that the exceptants had no standing in court in the proceeding relating to the re-

sale," and there could be no other rational ground for declining to hear the exceptions. On June 4, 1908, an order was passed "that motion to dismiss be sustained, and exceptants be dismissed" and on the same day the resale was finally ratified and confirmed. The appeal was taken "from the order of court dated June 4, 1908." The two orders of that date, though separately signed, cover but one transaction, and might properly have been made effective by one signing, as they were evidently concurrent in execution. The appeal will therefore be treated as taken from both orders.

The narrow question thus presented is well stated in the appellants' brief in these words: "When property has been sold under a power in a mortgage, and the purchaser fails to comply with the terms of sale, and a resale of the property is ordered and made, has the mortgagor any standing in court to except to the ratification of the resale?" It is conceded in the brief of the appellee, and could not reasonably have been denied, that Miss Catherine Werner, as the defaulting purchaser, might have excepted to the ratification of the resale, though she was one of the mortgagors; but she did not except. Therefore the concrete facts, as hereinbefore recited, are accurately embraced in the question framed by the appellants' counsel, which must be taken as implying that the excepting purchaser is not one of several mortgagors, who, if the sale to him were ratified, would acquire the interest of the other mortgagors in the property. The appellee rests his case wholly upon the proposition that the effect of the ratification of the original sale was to divest absolutely the title of the mortgagors, and to vest a complete equitable title in the defaulting purchaser, and that upon ratification alone, without more, "the mortgaged real estate became personal property, and the mortgagors' rights and interest in the former were transferred to the fund arising from the ratified mortgage sale." It has certainly never been expressly so decided in this state, and we do not think it could be so held consistently with our decisions involving this question.

Dalrymple v. Taneyhill, 4 Md. Ch. 171, decided in 1853, appears to be the earliest case decided after the passage of the act of 1841, now § 209 of art. 16 of the Code, declaring the authority of the court to compel purchasers under a decree to comply with all the terms of sale, by process of attachment or other execution suited to the case, or to direct a resale at the risk of the purchaser. In that case, land belonging to an infant had been sold under a decree for that purpose, and the sale had

been ratified. The purchaser having utterly failed to comply with the terms of sale, a resale was ordered at his risk. The infant died October 4, 1852, and on the 12th of the same month the property was resold, and that sale was ratified. The controversy in the case was over the proceeds of this resale. The infant's personal representative claiming the proceeds as personal property, while her heir at law claimed them as real estate; the question being whether there had been a conversion from real to personal estate at the original sale, during the life of the infant. Chancellor Johnson held there had been no conversion, and that the proceeds of sale, though actually money, were in legal contemplation real estate, and went to the heir at law. He supported this conclusion by reference to the cases of *State use of Rogers v. Krebs*, 6 Harr. & J. 31; *Leadenham v. Nicholson*, 1 Harr. & G. 267; and *Hammond v. Stier*, 2 Gill & J. 81, in which, as he says: "It was held, upon great deliberation," that "the mutation of real into personal estate was complete when the sale was ratified by the court, and the purchaser has complied with the terms of it by paying the money, if the sale is for cash, or by giving bonds if the sale is on credit," and the chancellor adds: "No case can be found in which it has been held or intimated that the concurrence of all these circumstances is not necessary to effect the change." The appellee cites the case of *Early v. Dorsett*, 45 Md. 462, in support of his contention above; but we do not so understand that decision. Judge Miller, in the opinion in that case, expressly says: "It has been the settled law of this state since the case of *Leadenham v. Nicholson*, supra, that, where land is sold under a decree like the present, the mutation from realty to personalty is complete when the sale is ratified and the purchaser has complied with the terms of sale as prescribed by the decree." The decree in that case was for sale of real estate devised by will for distribution among the devisees. One of the devisees became the purchaser, and he paid the cash instalment and gave bonds with security for the credit payments as prescribed by the decree. While in possession, but before payment in full of the purchase money or obtaining a deed from the trustee, he mortgaged the land to *Early*. He subsequently defaulted in his payments, and the property was resold at his risk. The auditor stated several accounts distributing the proceeds of resale, in one of which accounts the original purchaser's share was applied to *Early's* mortgage, and in another to certain persons to whom he had subsequently assigned his share. There

was no account showing any distribution of the original purchase money. The court held that, if the sum in controversy represented exclusively purchase money under the original sale, it could not be applied to the mortgage, and should be applied to the assignments, and as it did not appear from the record whether any part of the sum in controversy was the surplus proceeds of the resale, over and above what was necessary to pay principal, interest, and costs due on the original sale, and costs of resale, the case was remanded to determine that fact. The court said Early, "in respect to his mortgage, occupies substantially the same position as if he had taken a mortgage of real property, subject to a vendor's lien for unpaid purchase money, and the land had been afterwards sold under a bill to enforce that lien. In such case, if the property does not sell for enough, or only for enough, to pay the lien, the mortgagee gets nothing; if it sells for more, he gets the surplus." It is apparent, from the above examination of *Early v. Dorsett*, supra, that it does not sustain the proposition of the appellee.

Recurring again to the case of *Dalrymple v. Taneyhill*, the observations of the chancellor are so pertinent to the case before us that we may profitably quote further from that case. He said: "The argument pressed now is that one of the circumstances, and that a very important one, which the court of appeals say is necessary to work the mutation from real to personal estate, may be dispensed with; that the sale, and the confirmation of the sale by the court, are sufficient for the purpose, though the purchaser may have neglected to comply with the terms, either by paying the money, or giving the bonds, though the appellate court have said, when the question was, what combination of circumstances shall change the nature of real, and impress upon it the character of personal, estate, that a compliance by the purchaser with the terms is necessary. If the purchaser does not comply with the terms of sale, the thing which is the equivalent for the real estate sold does not exist, and may never exist. The land would be gone, or its nature changed, and neither money, nor security for the money to be paid for it, brought into existence. . . . If real estate is converted into personality, . . . it should be into something tangible and substantial, and the mere bid of an irresponsible man, though that bid may have been accepted by the court, cannot be permitted to have such an effect. The Acts of 1841, chap. 216, under which the proceeding for a resale was had, gives no countenance to the idea that a noncomplying pur-

chaser is regarded as the owner of the estate sold by a trustee. It authorizes a resale of the property at his risk, but not as his property. On the contrary, the order which the court is authorized to pass by this act, and the order which was in fact passed in this case, is a revocation of the order confirming the sale, and destroys any inchoate title which the first purchaser may have acquired by the confirmation."

We cannot discover that this clear and emphatic language of the chancellor has ever been questioned or criticized in any decision of this court, nor do we think it can be said that the principle announced by him has been disapproved in any such decision. It is true that in *Mealey v. Page*, 41 Md. 183, 184, the court said: "The property was sold as that of the original purchaser, and at his risk, he being entitled to any excess in the proceeds of sale over and above the costs and expenses of the resale, the commissions on the amount of the proceeds thereof, and the amount of the purchase money due on former sale." But the last clause of the sentence just quoted, which we have underlined, shows conclusively that the distinguished judge who wrote that opinion did not mean to be understood as saying that the defaulting purchaser was to be regarded as the owner of the property, but that he meant that in any event the proceeds of the resale, after payment of costs and commissions properly allowable, were to be applied to the amount of the purchase money due on the former sale, without regard to whom such amount was due. In other words, that anyone interested in the property when the original sale was made, the purchaser not having fully complied with the terms of sale, still continued to be interested in the property, when resold by reason of default by the original purchaser. Or, as expressed in the passage quoted above from *Early v. Dorsett*, the purchaser at the original sale, after a resale for his default, occupies substantially the same position as one who purchases property subject to a vendor's lien. Or again, as expressed in the appellants' brief, upon making the first sale, there was a vendor's lien for the whole purchase money. This lien followed the property, under the resale, and inured to all the mortgagors equally, after satisfying the mortgage debt, interest, and costs. What we have said as to *Mealey v. Page*, supra, is equally applicable to the case of *Aukam v. Zantzing*, 94 Md. 421, 51 Atl. 93, which the appellee claims to be conclusive in his favor. In both these cases, the property brought more at the resale than at the original sale, and the question presented in the case before us

did not arise, and was not dealt with. The vendor's lien for the original purchase money was fully satisfied out of the proceeds of the resale, and when that was done, but not until then, the original purchaser was entitled to the surplus, because the interest of the former owners of the property was then extinguished. This consideration shows why the court, in *Aukam v. Zantzinger*, not only held that the first purchaser was entitled to except to the resale, but also why it held that the mortgagor was not so entitled. Here the conditions are reversed, and the same reason which required the court in that case to hold that the first purchaser could except to the resale requires us to hold that the mortgagor in this case is entitled to except to this resale. There is an outstanding vendor's lien in this case for \$1,050, the difference between the two sales, and this difference, after deducting costs, etc., represents the interest of the mortgagors in the property.

The case of *State v. Second Nat. Bank*, 84 Md. 325, 35 Atl. 889, proceeds upon the principle announced in *Dalrymple v. Taneyhill*. The local law of Baltimore City provided that all real estate sold at public auction in said city should be subject to a certain tax, "each and every time it should be struck off," and this court held that this provision applied only to "completed and consummated sales, and payment of purchase money." In that case the property was sold for \$68,200, and this sale was confirmed by the court; but the purchaser failed to comply with the terms of sale, and the property was resold by an order of court, bringing only \$55,300. The auditor allowed the tax on each sale, and on exception the court below disallowed the tax on the first sale, and on appeal this court affirmed the decision, saying that "whilst, under a judicial resale, the property is in fact again put under the hammer, it is put there, not as a new distinct independent procedure, but as a means, and solely as a means, to realize the money which the original but defaulting purchaser failed to pay. The resale takes place under the original decree, supplemented by an order, . . . and [is made] with a view to pay off the same indebtedness for the payment of which the property was sold in the first instance, and the money realized by it is always applied precisely as would have been applied the money bid at the original sale, had that money been paid by the first purchaser. The resale is simply an execution of the decree for a sale. Its very name imports that it is not such a new sale as to be a distinct proceeding." It is obvious that the above language ap-

plies as well to a sale under a power in a mortgage as to sale under a decree.

As what we have said is decisive of this case, it will be unnecessary to consider the other ground for reversal urged in argument. The sufficiency of the exceptions is, of course, not before us on this appeal.

Orders of June 4, 1908, dismissing the appellants' exceptions and ratifying the resale, reversed, with costs to the appellants above and below, and cause remanded.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

LOUIS RIEDEL, by Next Friend, et al,
Plffs. in Err.,

v.

WEST JERSEY & SEASHORE RAILROAD COMPANY.

(— C. C. A. —, 177 Fed. 374.)

Negligence—unsafe premises—third rail.

An electric railway company maintaining an unprotected third rail carrying a heavy current, on its right of way at a point where the right of way is securely fenced against intruders, is not liable for injury to a child who wanders through a gate maintained in the fence by an abutting property owner,

Note.—Liability of electric railway for injury to trespasser or licensee from exposed third rail.

Similar in principle to the above decision and to *Sutton v. West Jersey & S. R. Co.* (N. J. L.) 73 Atl. 256 (mainly relied upon by the Federal court in *RIEDEL v. WEST JERSEY & S. R. Co.* and sufficiently set forth in that opinion), is *McAllister v. Jung*, 112 Ill. App. 138, in which recovery was denied for injuries sustained by a child of tender years in coming in contact with a live rail used upon an elevated railway company's structure, which he climbed for the purpose of getting a ball.

But in *Anderson v. Seattle-Tacoma Interurban R. Co.* 36 Wash. 387, 104 Am. St. Rep. 962, 78 Pac. 1013, recovery was allowed for injuries received by a passenger coming in contact with an unprotected third rail of which he was not warned and had no notice, while walking along the right of way after he had been wrongfully ejected from the train. The court said: "If modern transportation methods involve the use of such concealed, unprotected, dangerous, and deadly devices, where persons of common experience may be expected to come in contact with them, we believe those who use them should not escape liability, unless they exercise such a degree of care to warn and protect those who are injured as the circumstances and surroundings reasonably require."

and comes in contact with such rail, although there is nothing to distinguish the dangerous rail from the harmless ones.

(February 21, 1910.)

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Argued before Gray, Buffington, and Lanning, Circuit Judges.

Messrs. Rowland C. Evans and I. G. G. Foster for plaintiffs in error.

Mr. John Hampton Barnes, for defendant in error:

The defendant performed its full duty in regard to the obligation to fence.

New York C. & H. R. R. Co. v. Price, 16 L.R.A. (N.S.) 1103, 86 C. C. A. 502, 159 Fed. 330.

The defendant was not negligent in failing to cover the third rail.

Holbrook v. Aldrich, 168 Mass. 16, 36 L.R.A. 493, 60 Am. St. Rep. 364, 46 N. E. 115; Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; Moore v. Pennsylvania R. Co. 99 Pa. 301, 44 Am. Rep. 106; Thompson v. Baltimore & O. R. Co. 218 Pa. 444, 19 L.R.A. (N.S.) 1162, 120 Am. St. Rep. 897, 67 Atl. 768, 11 A. & E. Ann. Cas. 894; Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; Cleveland, C. C. & St. L. R. Co. v. Balentine, 28 C. C. A. 572, 56 U. S. App. 266, 84 Fed. 935; Berlin Mills Co. v. Croteau, 32 C. C. A. 126, 50 U. S. App. 419, 88 Fed. 860; Hughes v. Boston & M. R. Co. 71 N. H. 279, 93 Am. St. Rep. 518, 51 Atl. 1070; American Advertising & Bill Posting Co. v. Flannigan, 100 Ill. App. 452; Uthermohlen v. Bogg's Run Min. & Mfg. Co. 50 W. Va. 457, 55 L.R.A. 911, 88 Am. St. Rep. 884, 40 S. E. 410; Briscoe v. Henderson Lighting & P. Co. 148 N. C. 396, 19 L.R.A. (N.S.) 1116, 62 S. E. 600; Palmer v. Oregon Short Line R. Co. 34 Utah, 466, 98 Pac. 689, 16 A. & E. Ann. Cas. 229; Mayfield Water & Light Co. v. Webb, 129 Ky. 395, 18 L.R.A. (N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712; Thomp. Neg. § 1025.

Gray, Circuit Judge, delivered the opinion of the court:

The writ of error in this case brings up from the court below a record disclosing the following facts: Louis Riedel, who, by his father and next friend, brought suit in the court below, was a boy between seven and eight years of age, and was permanently injured by falling across the electric third rail of the West Jersey & Seashore Railroad Company, the defendant.

The day the injury occurred, he had been taken by his parents from Philadelphia, where they resided, to spend the day with some friends, the yard of whose house abutted against the line of the right of way of said defendant company, just above the village of Westfield, New Jersey. The right of way of the defendant company near this point, as well as elsewhere, was fenced with a three-strand wire fence about 4 feet high, but at the premises in question there was a picket fence dividing the same from the right of way of the defendant company, about 5 feet in height, which served as part of the line fence of said company, the wire fence coming up to and ending at each end of this picket fence. In this picket fence was a gate opening onto the defendant's right of way.

The defendant company was originally chartered as a steam railroad, but, by the revision of the act of the legislature of New Jersey concerning railroads, in 1903, the power was conferred upon it to substitute for steam any other motive power which it might deem best adapted to the economical operation of its railroad, and to use such devices and appliances for conducting and distributing power as might be required. Accordingly, at the time of the accident, and for a considerable period prior thereto, the company had installed an electric system for the operation of its road, the electricity being conveyed from the power house through what is known as a "third rail." This rail was situated between the two tracks upon which the cars traveled, but was in close proximity to the rail on one side and ran parallel therewith. It was in all respects like the rail which carried the cars, and was without cover or protection of any kind, so that, to a casual observer, there was nothing to distinguish it in appearance from the other rails. The current of electricity carried by this third rail was normally 675 volts, a charge sufficient to seriously injure or even destroy the life of anyone coming in contact therewith. This road ran entirely across the state of New Jersey, from Camden to Atlantic City, a distance of some 60 miles. At stations and road crossings, the third rail was covered, so that persons using said stations and crossings were protected therefrom; but, with these exceptions, throughout the entire length of the road, the third rail was uncovered.

On the day of the accident, the plaintiff, Louis Riedel, with two companions of about the same age, a boy and a girl, were playing together in the back part of the lot above described. What then occurred is

thus stated: "Looking through the fence, they saw and were attracted by some flowers growing on the other side of the rails, and went to the gate to open it. Finding it fastened, the plaintiff's companion, as he testified, 'put a nail or a piece of wood, then pulled it out again, and it came open.' Having thus unbolted the gate, the two started to pluck the flowers. The first boy crossed the tracks in safety, but the plaintiff fell, apparently having tripped over something, and, coming in contact with the third rail, was shocked and burned by the electric current, sustaining severe and permanent injuries."

Upon these facts, the court directed a verdict for the defendant, and, upon exceptions to this charge of the court, the case comes before us upon two assignments alleging error in this action of the court. The facts are simple and undisputed, and the single question for our determination is, whether or not the defendant company owed a duty to the plaintiff to use such care in guarding and protecting this third rail as would have prevented the injury which happened to him, or, as more generally put by the defendant, is a property owner who maintains on his premises a dangerous agency in the proper exercise and use of his premises, responsible to a child trespassing thereon, who is hurt by contact with such agency, if there is nothing about it to entice or attract him, and where the owner has done nothing to invite such trespasser on his premises, or has any reason to expect that he will come upon them?

The exceeding danger presented by the "third rail," which has recently come into use in the operation of important electric roads, when such rail is uncovered and exposed, justly challenges our attention. The character, however, of this dangerous and death-dealing agency must not be allowed to obscure the well-settled principles by which the duty of the owner of premises upon which such dangerous agency or instrumentality is situated, with respect thereto, is to be determined.

The plaintiff was a trespasser, and it must therefore appear, in order that he may recover from the defendant, that his case is an exception to the ordinary and well-settled rule that the owner of premises owes no duty to a trespasser, whether an infant or adult, to keep such premises in a nonhazardous condition, or to protect him against concealed dangers lurking thereon. The contention of plaintiff's counsel, urged with much ability and insistence, is that the extreme danger arising from the exposed third rail was a concealed danger, by reason of the fact that the third rail, in size and appearance, was undistinguishable from the other

rails by a boy of the immature age of the plaintiff, there being no evidence that he had been informed or in any way made aware of the character of such rail. It is therefore contended that the maintenance of this instrumentality argued such a wanton recklessness as to consequences on the part of the defendant, and willingness to inflict injury, as would render it liable to the plaintiff, even though he were technically a trespasser. Of course, though the owner of premises may owe no duty to guard and protect a trespasser from dangers lurking thereon, he has no right wilfully to inflict injury on such a trespasser. It is on this ground that the so-called "spring gun" cases have been decided. Whether the conduct of such owner, in maintaining a dangerous situation or instrumentality on his land, would amount to such a wanton and reckless indifference to consequences as would imply a willingness to inflict an injury on a trespasser, must depend upon the circumstances of the case. There is a class of cases well known, in which it is held that a railroad company is liable where its servants in charge of moving trains wilfully run down a person in full view upon its tracks, even though they have given warning of their approach, and even though such person be a trespasser. Such cases serve to illustrate the proposition that one may not wilfully injure even a trespasser upon his premises. Of this class are the cases referred to by the counsel for plaintiff. *Chicago Terminal Transfer R. Co. v. Gruss*, 200 Ill. 195, 65 N. E. 693; *Chicago Terminal Transfer R. Co. v. Kotoski*, 199 Ill. 383, 65 N. E. 350; *Lafayette & I. R. Co. v. Adams*, 26 Ind. 76.

But these decisions do not support the contention that the mere maintenance of a dangerous instrumentality upon one's land for ordinary and lawful purposes, and incident to its natural use in carrying on a lawful business, makes such a one a wilful tortfeasor with respect to a trespasser who has come within its danger. In the present case, there was nothing wilfully injurious in the defendant's installing upon its own premises this third rail, dangerous though it was to those who came in contact with it, for the lawful purpose of operating an electric railway system; nor can we say from that fact alone, or from any other evidence in the case, that the nonprotection of the third rail was such a wanton and reckless indifference to consequences as would legally imply wilfulness and intentional wrong, as to any injury that might be occasioned thereby, whether that injury was suffered by an infant or an adult. There is nothing in the case from which the purpose to inflict injury can be inferred, as in the "spring gun" cases, or a wilful indifference to consequences,

as in the railroad cases above referred to. One's right to maintain, for a lawful purpose, a dangerous appliance or instrumentality on his own premises, is not limited or qualified by the degree in which it may be dangerous.

The precise question here involved has recently been decided by the supreme court of New Jersey, in the case of *Sutton v. West Jersey & S. R. Co.* (N. J. L.) 73 Atl. 256. The facts were practically the same. The action was for the death of a child thirteen years of age, who, in crossing the tracks of the defendant at a point other than a public crossing or station, came in contact with a third rail charged with electricity, and was killed. It was conceded that the decedent had no legal right to go upon defendant's premises at the point where he crossed the tracks. The court below sustained a demurrer to the declaration, and gave judgment for the defendant. The supreme court affirmed that judgment, saying: "The real distinction running through the cases seems to me to be this: Where the landowner in the development of his property, and solely for the purpose of obtaining a more beneficial user therefrom, installs upon it an appliance which will be dangerous to people coming in contact with it, he is under no obligation to trespassers to so guard it that they shall not be injured; but where he installs the appliance for the purpose of inflicting injury upon the persons or property of those who unlawfully come upon his land, he is liable when harm is inflicted by such appliances." The right of the plaintiff, therefore, depends upon whether the defendant company owes to a trespasser upon its right of way the duty of using care, either to safeguard its third rail in such a way as to prevent him from coming in contact with it, or else of giving him notice that such contact is dangerous to life and limb. The rule is settled in this state that a landowner is under no obligation to a trespasser to keep his premises in a nonhazardous state; that, as to him, the landowner's sole duty is to abstain from acts wilfully injurious. And this rule is applicable whether the trespasser is an infant or an adult. . . . In the case in hand, the defendant installed the electric third rail system for the more complete beneficial user of its property. In doing so, it acted under legislative sanction. . . . Having the lawful right to install this system for the operation of its road, it was within the protection of the rule which we have been discussing, and

was under no obligation to the deceased, except to abstain from acts wilfully injurious to him. That it failed in this obligation is not suggested in the declaration."

There is nothing in the record to bring this case within the *ratio decidendi* of the so-called "turntable" cases, and other cases decided on the same principle, to which the plaintiff refers. In the present case, the railroad property was guarded by a statutory fence, and the gate through which the plaintiff and his companion entered upon the railroad premises was fastened by a bolt, which had been withdrawn by them. There is no evidence that there was anything to allure or entice children to go upon the railroad premises at the place where the accident occurred, and none that children had ever been in the habit of entering upon the railroad premises through this gate, or otherwise, for play or amusement, or for any other purposes. The motive of the children in attempting to cross the railroad, as testified by the children themselves, was to gather flowers growing on the other side of the railroad property. The present case, therefore, differs obviously from the cases referred to, the decisions in them being founded upon the maintenance of a dangerous appliance or object on the owner's premises which presented enticement and allurement to children, and to which they were in the habit of resorting, to the knowledge of the defendant. There was thus an implied invitation or license to the children to enter upon the premises by reason of which they were deprived of the character of trespassers; and there was imposed upon the defendants the duty of exercising reasonable care for their protection. *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Snare & T. Co. v. Friedman*, 94 C. C. A. 369, 169 Fed. 1; *Cooke v. Midland G. W. R. Co.* [1909] A. C. 229, 15 A. & E. Ann. Cas. 557.

However deplorable these cases may be, we cannot, in order to remedy them, disregard those well-settled principles which have heretofore regulated and limited the restraint imposed upon landowners in the use of their own premises. If the comparatively recent use of the third rail has developed dangers to the public at large hitherto unknown, the legislature of the state may feel called upon to exercise its undoubted police power, by imposing upon the users of these instrumentalities such precautions in their use as will measurably afford protection to those coming within their danger.

The judgment below is affirmed.

FLORIDA SUPREME COURT.

W. M. DAVIDSON et al., Appts.,
v.
J. W. DAVIS.

(— Fla. —, 52 So. 139.)

Usury — sale — difference between cash and credit.

Usury can only attach to a loan of money or to the forbearance of a debt. On a contract to secure the price or value of work

Headnote by TAYLOR, J.

Note. — Increasing price upon sale on credit as usury.

The cases are generally uniform in holding that there may be a cash and an increased credit price, and that a bona fide sale for the latter is not usurious, irrespective of whether it is made up of the cash price plus a rate of increase which would exceed the legal rate, or whether a note is given and the increase put in the form of interest thereon.

Thus, on a sale of property the parties may make such a bargain as they can agree upon, and usury cannot be charged simply because the price is fixed at one sum if paid at one time, and at another sum if paid at another time. *Primley v. Shirk*, 60 Ill. App. 312, affirmed in 163 Ill. 389, 45 N. E. 247; *West v. Belches*, 5 Munf. 187; *Tousey v. Robinson*, 1 Met. (Ky.) 663.

And in *Hogg v. Ruffner*, 1 Black, 115, 17 L. ed. 38, the court, in holding that there is no loan of money or forbearance of a debt within the usury laws, when, in order to gain time for the payment of the purchase price of property, the purchaser agrees to pay a sum in excess of the cash price which has been asked for the property, says that a vendor may prefer \$100 in hand to double that sum in expectancy, and a purchaser may prefer the greater price with the longer credit; and one who will not distinguish between things that differ may say with apparent truth that B pays a hundred per cent for forbearance, and may assert that such a contract is usurious; but whatever truth there may be in the premises the conclusion is manifestly erroneous.

In *Ford v. Hancock*, 36 Ark. 248, in holding that it was not usury for one who sells a piece of property on credit, to contract for a higher price than he would have sold it for cash, the court said: "If the intention be, in fact, to sell on credit, he has the right to fix a price greater than the cash price with legal interest added; but if the sale be really made on a cash estimate, and time be given to pay the same, and an amount is assumed to be paid greater than the cash price with legal interest would amount to, this is an agreement for forbearance that is usurious." *Irvin v. Mathews*, 75 Ga. 739; *Bird v. Benton*, 127 Ga. 371, 56 S. E. 450; *Borum v. Fouts*, 15 Ind. 50; *Newkirk v. Burson*, 21 Ind. 129; and *Mit-*

and labor done, or to be done, or of property sold, the contracting parties may agree upon one price if cash be paid, and upon as large an addition to the cash price as may suit themselves if credit be given; and it is wholly immaterial whether the enhanced price be ascertained by the simple addition of a lumping sum to the cash price, or by a percentage thereon. In neither case is the transaction usurious. It is neither a loan nor the forbearance of a debt, but simply the contract price of work and labor done, or of property sold; and the difference between cash and credit in such cases, whether 6, 10, or 20 per cent, must be left exclusively to

chell v. Griffith, 22 Mo. 515, are to the same effect.

But this is true only where there was a cash price fixed, and the usurious rate was taken upon that, and not where the interest represents the difference between the cash and credit price of the subject of the sale. *Newkirk v. Burson*, 28 Ind. 435; *Casady v. Scallen*, 15 Iowa, 93.

And the following cases hold that a contract for the sale of property on a credit of time, for a sum equal to the amount of the original cash price asked and a per cent thereon in excess of the legal rate of interest, is not usurious, where the increased rate is not intended as interest on the cash price asked: *Casady v. Scallen*, supra; *Gruell v. Smalley*, 1 Duv. 358; *Bass v. Patterson*, 68 Miss. 310, 24 Am. St. Rep. 279, 8 So. 849; *Churchhill v. Turnage*, 122 N. C. 428, 30 S. E. 122; *Wheeler v. Marchbanks*, 32 S. C. 594, 10 S. E. 1011; *Swayne v. Riddle*, 37 W. Va. 291, 16 S. E. 512.

And where a contract of sale is made upon a certain cash price, and the purchaser is unable to procure the money, and the vendor agrees to deliver the deed upon the execution of notes for an amount 15 per cent above the cash price, the transaction is not usurious. *Dykes v. Bottoms*, 101 Ala. 390, 13 So. 582.

And in *Rushing v. Worsham*, 102 Ga. 825, 30 S. E. 541, where the increase for which notes were given was 18 per cent, the same conclusion was reached.

And in *Brooks v. Avery*, 4 N. Y. 225, it was held that a mortgage given for lands is not rendered usurious by the fact that the purchaser, not being able to comply with the terms of the owner of the land, requiring a certain amount of cash, agrees to give a mortgage for a greater amount, in consideration of which the vendor agrees to execute a deed in case the mortgage can be disposed of in the market for the amount of cash demanded by him.

But in *Thompson v. Nesbit*, 2 Rich. L. 73, where the defendant was willing to give \$1,000, the price asked for a share, but could not pay cash, and plaintiff was willing to give any desired time if he could have the price increased by 10 per cent per annum until paid, and a bill of sale was drawn expressing the consideration to be \$1,000, and a note was given in the following words: "Three years after date I promise

the contract of the parties, and no amount of difference, fairly agreed upon, can be considered illegal. The difference between the cash and the credit price on a sale of property may be put into the form of interest on a note given for the purchase price, without violating the usury law, although the per cent agreed is greater than the lawful rate of interest.

(April 2, 1910.)

A PPEAL by defendants from a decree of the Circuit Court for Santa Rosa County foreclosing a mortgage on certain real estate. Affirmed.

to pay . . . \$1,300, to be paid at such times as I please, and to deduct 10 per cent per annum off of the amount paid at each payment,"—it was held that the contract was usurious, the decision being on the ground that the transaction was a mere artifice to avoid the usury law.

That the credit price is made up of the cash price plus interest at an illegal rate will not make the contract usurious. *Brown v. Gardner*, 4 Lea, 145.

And, as held in *DAVIDSON v. DAVIS*, the difference between the cash and the credit price on a sale of property may be put in the form of interest on a note given for the purchase price, without violating the usury law, although the per cent agreed upon is greater than the lawful rate of interest. *First Nat. Bank v. Mann*, 94 Tenn. 17, 27 L.R.A. 565, 27 S. W. 1015, cited in *DAVIDSON v. DAVIS*; *Garrity v. Cripp*, 4 Baxt. 86; *Reger v. O'Neal*, 33 W. Va. 159, 6 L.R.A. 427, 10 S. E. 375.

An advance to the usual time price for merchandise sold of 10 per cent over the cash price without interest is not usurious. *Churchill v. Turnage*, supra.

And in *Floyer v. Edwards*, Cowp. pt. 1, p. 112, where goods were sold on credit, with a stipulation that, in case the purchase price was not paid at the expiration of the period of credit, a customary monthly rate above the legal interest should be paid till the debt was discharged, it was held that the contract, if a bona fide sale, was not usurious, but otherwise, if the transaction was merely colorable to cover a loan and evade the statute.

In *Béete v. Bidgood*, 7 Barn. & C. 453, where a contract was made for the sale of an estate at a certain price, to be paid in instalments at future dates with interest, and promissory notes were given for such sums, in holding the transaction valid, Lord Tenterden said: "The agreement was founded partly upon what was considered the present price of the estate, and partly upon what was considered its price if paid for at a future day. The only difficulty has been occasioned by calling the difference between these two prices interest; but it is our duty to look not at the form and words, but at the substance of the transaction; and as, on the one hand, we should not pay attention to the words of the contract, if the substance of it went to defeat the provision of the 28 L.R.A. (N.S.)

The facts are stated in the opinion.

Mr. T. F. West for appellants.

Messrs. Daniel Campbell & Son, for appellee:

The fact that \$1,687.50, the credit price, may have been the cash price plus 12½ per cent interest for a year, would not make the note usurious, as there was no loan or forbearance of a debt involved.

Hogg v. Ruffner, 1 Black, 115, 17 L. ed. 38; *First Nat. Bank v. Mann*, 74 Tenn. 17, 27 L.R.A. 565, 27 S. W. 1015; *Reger v. O'Neal*, 37 W. Va. 159, 6 L.R.A. 427, 10 S. E. 375; 29 Am. & Eng. Enc. Law, pp. 465, 478; Gar-

statute of 12 Anne, chap. 16, so, on the other hand, we ought not to rely upon the words so as to defeat the contract, if in substance the transaction was legal." (In *Rushing v. Worsham*, supra, the Bute Case is quoted with approval, and a similar rule of construction announced.)

And a note for the purchase money of land payable in instalments of a certain amount each is valid, and cannot be defeated for usury, although it purports to draw "interest" at a rate in excess of the legal rate. *Selden, J.*, in *Cutler v. Wright*, 22 N. Y. 472.

And the fact that the contract price for houses is to be paid in instalments with interest at a higher than the legal rate does not render it usurious, if the interest is a part of the contract price of the houses. *Graeme v. Adams*, 23 Gratt. 225, 14 Am. Rep. 130.

And this is true where the increased price is a reservation of a part of the product of the thing sold, to be delivered to the vendor at stated intervals, which reserved product would greatly exceed in value the legal rate of interest allowed by statute. *First Nat. Bank v. Owen*, 23 Iowa, 185; *Gilmore v. Ferguson*, 28 Iowa, 220.

But if the price is payable at any time, and the additional amount is to be paid as long as the principal sum remains due, and to cease when it is paid, it is a cover for usury, and is illegal. *Hartman v. Uhlinger*, 115 Pa. 270, 8 Atl. 244.

And where a price is agreed upon, but time is given the vendee to pay a part thereof, or all, and, to compensate the vendor for waiting, a rate of interest is agreed upon in excess of the amount allowed by law, the contract will be usurious, although the excessive interest may be added to and appear in the obligation as principal. However, the court here recognized the right of one to have two prices for his property,—one for a cash sale, and as much larger a one as he chooses for a sale on time, but said that the increase could not be put in the form of interest on the obligation, although it was intended as a part of the purchase price. *Fisher v. Hoover*, 3 Tex. Civ. App. 81, 21 S. W. 930.

As to the validity of a contract to resell at an advance property purchased, see note to *Rogers v. Blouenstein*, 3 L.R.A. (N.S.) 213.

rity v. Cripp, 4 Baxt. 86; Brown v. Gardner, 4 Lea, 157; Graeme v. Adams, 23 Gratt. 225, 14 Am. Rep. 130; Cutler v. Wright, 22 N. Y. 472; Hansbrough v. Peck, 5 Wall. 509, 18 L. ed. 524; Hogg v. Ruffner, supra; Nichols v. Fearson, 7 Pet. 103, 7 L. ed. 623; Struthers v. Drexel, 122 U. S. 487, 30 L. ed. 1216, 7 Sup. Ct. Rep. 1293.

Taylor, J., delivered the opinion of the court:

The appellee filed his bill for the foreclosure of a mortgage in the circuit court of Santa Rosa county, the mortgage being given to secure the payment of a note for \$1,687.50, payable twelve months after date, to bear interest after maturity at the rate of 12½ per cent per annum. The defendants answered the bill, alleging that the said note was usurious in this: That the amount really due by them to the original payee in said note was the sum of \$1,500, and that the excess of \$187.50 over said sum of \$1,500 was added to said note as interest thereon from the date of said note for one year thence next ensuing, which they aver was at the rate of 12½ per cent per annum, and was usurious. Testimony was taken, and upon the testimony the court below rendered a decree for the principal sum of \$1,687.50, without any interest after maturity of said note, and for attorney's fees for the foreclosure of the mortgage, and for costs. From this decree the defendants below have taken their appeal, and assign the said decree as error.

The evidence in the case shows that there was no loan of money by the mortgagee to the mortgagors, and that no indebtedness between them existed at the time of the giving of said note and mortgage, but that, the original mortgagee being the owner of a tract of land in Santa Rosa county that the mortgagor desired to purchase, the said vendor was willing to sell the same for cash at the sum of \$1,500; but the vendee not being able to pay said sum of \$1,500 in cash, and desiring twelve months' time within which to make payment for said land, the vendor agreed to give him such extension of time, provided he would, at the end of said twelve months, pay him \$1,687.50, instead of \$1,500 (the cash price asked),—the said excess in the price agreed to be paid over the cash price asked being equivalent to interest on the cash price asked at the rate of 12½ per cent per annum.

The law is well settled that usury can only attach to a loan of money, or to the forbearance of a debt, and that, on a contract to secure the price or value of work and labor done, or to be done, or of property sold, the contracting parties may agree upon one price if cash be paid, and upon as large an

addition to the cash price as may suit themselves, if credit be given; and it is wholly immaterial whether the enhanced price be ascertained by the simple addition of a lumping sum to the cash price, or by a percentage thereon. In neither case is the transaction usurious. It is neither a loan nor the forbearance of a debt, but simply the contract price of work and labor done and property sold; and the difference between cash and credit in such cases, whether 6, 10, or 20 per cent, must be left exclusively to the contract of the parties, and no amount of difference fairly agreed upon can be considered illegal. Webb, Usury, ¶ 72; West v. Belches, 5 Munf. 187; Garrity v. Cripp, 4 Baxt. 86; Brown v. Gardner, 4 Lea, 145; Hogg v. Ruffner, 1 Black, 115, 17 L. ed. 38. Or, as the rule is stated in First Nat. Bank v. Mann, 94 Tenn. 17, 27 L.R.A. 565, 27 S. W. 1015: "The difference between the cash and the credit price on a sale of property may be put into the form of interest on a note given for the purchase price, without violating the usury law, although the per cent agreed upon is greater than the lawful rate of interest." Reger v. O'Neal, 33 W. Va. 159, 6 L.R.A. 427, 10 S. E. 375; Graeme v. Adams, 23 Gratt. 225, 14 Am. Rep. 130.

Under the law as stated there was no usurious taint in the note herein sued upon, and the court below committed no error in the decree rendered, and the same is hereby affirmed, at the cost of the appellants.

Hocker and Parkhill, JJ., concur.

Whitfield, Ch. J., and Shackelford and Cockrell, JJ., concur in the opinion.

KANSAS SUPREME COURT.

GERMAN-AMERICAN INSURANCE COMPANY, Appt.,

v.

E. W. JERRILS.

(82 Kan. 320, 108 Pac. 114.)

Insurance — appraisers — failure to agree — action — condition precedent.

1. Under a fire insurance policy providing that, in the event of a disagreement as to

Headnotes by PORTER, J.

Note. — Arbitration as condition precedent to action on insurance policy.

The standard form of fire insurance policy in general use in this country provides that where the insurer and insured are unable

the amount of the loss, each party shall appoint an appraiser, and the two appraisers shall select an umpire, and appraise the loss, and that no action shall be maintained on the policy until such appraisalment has been made, the insured discharges his obligation in that respect when he appoints an appraiser in good faith; and where the two appraisers fail to agree upon an umpire, and the appraisalment fails without the fault of the insured, he is not required to propose the selection of other appraisers, but may maintain an action upon the policy.

to agree as to the amount of loss, it shall be determined by arbitration, and that no action shall be maintained on the policy until an award has been made by the arbitrators; and the question often arises as to the effect of a failure to carry out this provision. This subject is exhaustively treated in the note to *Graham v. German American Ins. Co.* 15 L.R.A. (N.S.) 1055. A few later cases in point have been reported.

In *Shawnee F. Ins. Co. v. Pontfield*, 110 Md. 353, 132 Am. St. Rep. 449, 72 Atl. 835, it was declared to be the established rule in that state, that unless the insured was responsible for the failure of the arbitration, he was entitled to recover upon his policy, even in the absence of an award. To quote from the opinion: "It is the duty of both parties to a contract of insurance which provides, in case the insured and insurer cannot agree as to the amount of loss, for the submission of the question of loss to arbitration, to act in good faith, and to make a fair effort to carry out such provision and accomplish its object; and . . . where the failure to secure an award after submission to arbitration is due to the fault of the insured, the absence of an award is a bar to an action on the policy, where it is due to the fault of the insurance company or its appraiser, the insured may bring suit on his policy without an award."

So, in *Spring Garden Ins. Co. v. Amusement Syndicate Co.* 178 Fed. 519, it was held that where the appraisers appointed by the parties were unable to agree upon an umpire, and no further steps were taken by either party thereafter, the appraisalment feature of the policy was waived and abandoned, and the assured was entitled to bring an action on the policy.

And in *Lancashire Ins. Co. v. Lyon*, 124 Ill. App. 491, it was held that where the appraisers first appointed failed to agree upon the amount of the loss, through no fault of the assured, the assured could maintain an action on the policy without proposing the selection of new arbitrators.

And in *Slepski v. German F. Ins. Co.* 141 Ill. App. 614, it was held that where the failure to secure an appraisalment was not due to the fault of the appraiser selected by the insurer, who so conducted himself in the interest of the insurer that he might be regarded as its agent, the fact that no appraisalment of the loss was ever made was no defense to an action on the policy.
28 L.R.A. (N.S.)

Same—pleadings — proof permissible under.

2. In an action upon a fire insurance policy, the petition, after alleging the issuance of the policy, the payment of the premium, and a loss by fire, alleged due performance of the conditions of the policy on the part of the insured. The answer alleged that, after the fire occurred, a disagreement arose as to the amount of the loss, and that the same had never been ascertained by appraisers, as provided by the policy. The reply was a general denial. Held, that under the

So, in *Retail Merchants Asso. Mut. F. Ins. Co. v. Cox*, 138 Ill. App. 14, it was held that it was unnecessary for the assured to make any effort to comply with the provisions as to arbitration, where the insurer denied any liability whatever under the policy.

But in *Southern Home Ins. Co. v. Faulkner*, 57 Fla. 194, 131 Am. St. Rep. 1098, 49 So. 542, it was held that such arbitration and award were conditions precedent to the right of the insured to an action upon such policy, and that where the insurer made prompt demand upon the insured that the amount of loss should be submitted to arbitration, and the assured declined, without any valid reason, to submit to such arbitration, no recovery could be had upon the policy.

In *Coffin v. German F. Ins. Co.* (Mo. App.) 126 S. W. 253, where it appeared that there was an award of arbitrators following an appraisalment, which the insurer claimed was valid, and which the insured claimed was void, the trial court sustaining the latter's contention, it was held that the insurer could not insist that the insured was bound to proceed to have a valid award made before commencing suit.

In *Wilson v. Central Ins. Co.* 135 App. Div. 649, 119 N. Y. Supp. 955, it appeared that the policy in suit, which was one of accident insurance, and which was issued in Great Britain, provided that any dispute as to liability of the insurer should be referred to arbitrators, pursuant to a certain British act of arbitration, and that an award of such arbitrators should be a condition precedent to the enforcement of the liability of the insurer. It further appeared that the arbitration act referred to in the policy provided that the court might on application appoint an arbitrator who should have like powers to act as if he had been appointed by consent of the parties. It was held that the insured, in order to recover after repudiation of liability by the insurer, must have his rights determined by arbitrators appointed either by agreement of the parties or under said foreign statute. It was also held that a mere refusal of the insurer to agree to the arbitrators named by the insured did not waive the condition of the policy, nor excuse the insured from instituting compulsory arbitration by application to English court

pleadings it was proper for the plaintiff to show that he appointed an appraiser in good faith, and that the two appraisers were unable to agree upon an umpire, for which reason no appraisal was made.

(April 9, 1910.)

APPEAL by defendant from a judgment of the District Court for Chautauqua County in plaintiff's favor in an action brought to recover the amount alleged to be due on a certain fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. M. A. Fyke and E. L. Sulder for appellant.

Mr. S. H. Piper, for appellee:

It was not incumbent upon the insured to appoint a second appraiser as a condition precedent to suit on the policy, after a failure of the first appraiser, through no fault of the insured, to make an award.

Braddy v. New York Bowery F. Ins. Co. 115 N. C. 354, 20 S. E. 477; Harrison v. German-American F. Ins. Co. 67 Fed. 577; Hickerson v. Royal Ins. Co. 96 Tenn. 193, 32 L.R.A. 172, 33 S. W. 1041; Niagara F. Ins. Co. v. Bishop, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102; Connecticut F. Ins. Co. v. Cohen, 97 Md. 294, 99 Am. St. Rep. 445, 55 Atl. 675; Western Assur. Co. v. Decker, 39 C. C. A. 383, 98 Fed. 381; Brock v. Dwelling House Ins. Co. 102 Mich. 583, 28 L.R.A. 623, 47 Am. St. Rep. 562, 61 N. W. 67; Davis v. Atlas Assur. Co. 16 Wash. 232, 47 Pac. 436, 885; Capitol Ins. Co. v. Wallace, 50 Kan. 454, 31 Pac. 1070; McCullough v. Phoenix Ins. Co. 113 Mo. 606, 21 S. W. 207; Braddy v. New York Bowery F. Ins. Co. 115 N. C. 354, 20 S. E. 477; Chapman v. Rockford Ins. Co. 89 Wis. 572, 28 L.R.A. 405, 62 N. W. 422; Uhrig v. Williamsburg City F. Ins. Co. 101 N. Y. 362, 4 N. E. 745; Davenport v. Long Island Ins. Co. 10 Daly, 538; Bishop v. Agricultural Ins. Co. 130 N. Y. 488, 29 N. E. 844; Randall v. Phoenix Ins. Co. 10 Mont. 362, 25 Pac. 960; Liverpool & L. & G. Ins. Co. v. Hall, 1 Kan. App. 18, 41 Pac. 65; Nurney v. Fireman's Fund Ins. Co. 63 Mich. 633, 6 Am. St. Rep. 338, 30 N. W. 350; Phoenix Ins. Co. v. Badger, 53 Wis. 283, 10 N. W. 504; Wright v. Susquehanna Mut. F. Ins. Co. 110 Pa. 29, 20 Atl. 716; Wallace v. German American Ins. Co. 4 McCrary, 123, 41 Fed. 742; Kahnweiler v. Phenix Ins. Co. 14 C. C. A. 485, 32 U. S. App. 230, 67 Fed. 483; Isnard v. Edgar Zinc Co. 81 Kan. 765, 106 Pac. 1003.

Porter, J., delivered the opinion of the court:

This was an action on a fire insurance policy. The plaintiff recovered judgment, and the defendant appeals.
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The policy covered a stock of merchandise in the town of Elgin. The petition alleged that the stock was destroyed by fire July 31, 1907, that plaintiff had performed all the requirements and conditions of the policy on his part, and that the defendant refused to pay. The answer set up as a defense that, after the fire occurred, a disagreement arose between the insured and the company as to the amount of the loss, and that the amount had never been determined by appraisers, as provided by the policy. The reply was a general denial. On the trial the plaintiff was permitted, over the objections of the defendant, to offer evidence showing that, following the disagreement as to the amount of the loss, appraisers were appointed, the company and the insured each selecting one appraiser as provided by the terms of the policy, and that the two appraisers were unable to agree upon an umpire, for which reason no appraisal was ever made. The errors complained of are the admission of this testimony, and the giving of an instruction to the effect that, if appraisers were appointed as the policy provided, and they were unable to agree upon an umpire, the plaintiff had complied with the terms and conditions of the policy respecting appraisal, and could recover without showing an award by appraisers. The policy was of the ordinary, standard form, and the provision with respect to appraisal reads as follows: "In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required, have been received by this company, including an award by appraisers when appraisal has been required."

The plaintiff's evidence which was admitted over the objections of the defendant was in substance that, after the fire occurred, an adjuster of the company visited him, and a disagreement arose respecting the amount of the loss; that appraisers were then appointed, the company selecting Mr. Warren, and the insured selecting Mr. Meeker. When

the two appraisers met for the purpose of agreeing upon an umpire, Mr. Warren suggested a Mr. Potts, who had been the first choice of the adjuster for appraiser, and also handed to Mr. Meeker a list of persons, one of whom resided at Kansas City, another at Newton, and another at Wagoner, Oklahoma. Mr. Meeker stated to him that, on account of the expense, it would be better to take someone nearer home, and suggested the names of half a dozen merchants living in towns in the same county. The appraiser for the company objected to anyone who lived in the vicinity, on account of local influence. On three separate days the appraisers met and attempted to agree upon an umpire, but, being unable to do so, the matter was dropped. On the trial the plaintiff introduced in evidence two letters received from the adjuster of the company after the failure of the appraisers to agree, which stated that the company was ready to select another appraiser in place of Mr. Warren, and suggested that the plaintiff appoint someone else to take the place of Mr. Meeker. In these letters the insured was informed that the company would not waive its right to an appraisal.

There are cases holding that where there is a failure of appraisers acting in good faith to agree, it is incumbent on the parties to appoint other appraisers. *Vernon Ins. & T. Co. v. Maitlen*, 158 Ind. 393, 63 N. E. 755; *Westenhaver Bros. v. German American Ins. Co.* 113 Iowa, 726, 84 N. W. 717. On the other hand, it has been held, on what seems to be the better reasoning, that where the insured has appointed an appraiser, and without his fault the appraisers fail to agree, he may maintain an action. In *Western Assur. Co. v. Decker*, 39 C. C. A. 383, 98 Fed. 381, Judge Caldwell said in the opinion: "The contention of the company is that, when the arbitrators failed to agree, it was the duty of the insured to propose a new selection of arbitrators, and that, not having done so, and not having appointed an arbitrator the second time, he cannot maintain this action. The terms of the policy are satisfied when the insured, acting in good faith, appoints an appraiser. If the appraisal falls through by disagreement of the appraisers, without any fault of the insured, he has discharged his covenant, and satisfied the requirements of the policy, and may then resort to the courts to have his damages assessed." In the opinion in *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102, the court, after referring to cases holding that, upon the failure of the appraisers to agree upon an umpire, it is the duty of the insured at least to propose the selection of new ap-

praisers, said: "We are unable to subscribe to this doctrine, so far as the policy upon which the present suit has been brought is concerned. The contract here only requires the parties to choose appraisers once, and not twice." In that case it appeared that the appraiser nominated by the company insisted upon the appointment of an umpire living at a great distance from the scene of the loss, and refused without excuse to agree to any umpire named by the other appraiser, and it was said that his conduct amounted to a refusal to proceed with the appraisal, and the insured was not required to wait longer before bringing his action. The same doctrine is declared in the following cases: *Hickerson v. German-American Ins. Co.* 96 Tenn. 193, 32 L.R.A. 172, 33 S. W. 1041; *Bishop v. Agricultural Ins. Co.* 130 N. Y. 488, 29 N. E. 844; *Chapman v. Rockford Ins. Co.* 89 Wis. 572, 28 L.R.A. 405, 62 N. W. 422; *Uhrig v. Williamsburgh City F. Ins. Co.* 101 N. Y. 362, 4 N. E. 745; *McCullough v. Phoenix Ins. Co.* 113 Mo. 606, 21 S. W. 207; *Connecticut F. Ins. Co. v. Cohen*, 97 Md. 294, 99 Am. St. Rep. 445, 55 Atl. 675; *Broek v. Dwelling House Ins. Co.* 102 Mich. 583, 26 L.R.A. 623, 47 Am. St. Rep. 562, 61 N. W. 67.

These are the principal authorities relied upon by the plaintiff in support of the judgment. It will be observed that none of them touches the precise question involved here, since we are not called upon to determine merely whether the conduct of the company or its appraiser in failing to agree upon an umpire rendered it unnecessary that any further steps be taken towards procuring an appraisal. Conceding, for the purpose of argument, that, since the appraisers had failed to agree, the plaintiff could maintain the action without showing an award, the defendant contends that the pleadings should have set up the facts which avoided the necessity of an award. The whole claim of error concerns the pleadings. The contention is that, having alleged full performance of all the conditions and requirements of the policy on his part, the plaintiff offered proof showing facts which rendered performance unnecessary, in other words, a waiver on the part of the defendant of certain conditions and requirements; that under the pleadings it was error to admit the testimony, and that, for the same reason, the instruction referred to was erroneous. In support of this contention the defendant relies upon the doctrine of *Dwelling-House Ins. Co. v. Johnson*, 47 Kan. 1, 27 Pac. 100. There the petition set forth the contract of insurance, payment of premium, destruction of the property by fire, and that the com-

pany had refused to pay the loss, although the plaintiffs had performed all the conditions of the policy incumbent upon them. The defendant answered, alleging a breach of the condition of the policy in regard to encumbrances. The reply was a general denial. On the trial the plaintiffs were permitted to offer proof tending to establish a waiver of the condition of the policy respecting encumbrances, and facts in the nature of an estoppel against the company urging the forfeiture. A judgment against the company was reversed. It was held that there was sufficient testimony produced by plaintiffs to warrant the instructions given by the court, if the acts of waiver and estoppel had been pleaded; but it was also held that "neither the evidence introduced, nor the instructions based thereon, are warranted under the pleadings as they exist, and, before they can be properly received, the reply must be amended." To the same effect are *Western Home Ins. Co. v. Thorp*, 48 Kan. 239, 28 Pac. 991; *Gillett v. Burlington Ins. Co.* 53 Kan. 108, 36 Pac. 52; *Westchester F. Ins. Co. v. Coverdale*, 9 Kan. App. 651, 58 Pac. 1029.

The question resolves itself in its final analysis to this: What were the conditions of the policy which the insured was required to perform in order to entitle him to maintain the action? True, the terms of the policy contemplated that, in case a difference arose respecting the amount of the loss, it should be determined by an award of appraisers, but all the policy required the insured to do in case such a disagreement arose was to join with the company in the selection of appraisers. Of course, the insured cannot avoid the conditions of the policy by naming an appraiser who acts in bad faith, and who refuses without excuse to agree with the other appraiser. Nor, on the other hand, can the company gain any advantage where the failure to agree upon an umpire is occasioned by bad faith or misconduct of its appraiser. We agree with the plaintiff that there was and is no question of waiver in the case. While it would not be inaccurate to say that, where the failure of the appraisers to agree upon an award is caused by the bad faith of the appraiser appointed by the company, the latter would be estopped from setting up the lack of an award as a ground of forfeiture of the right to maintain the action, still the plaintiff does not rely upon either waiver or estoppel. On the contrary, he relies upon due performance of all the terms and conditions of the policy on his part. Since the policy only required him to appoint an appraiser in case a difference arose as to the amount of the loss, it follows that he has shown due performance when he shows that

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he has appointed an appraiser. There was no error in the admission of testimony, or in giving the instruction.

The judgment will be affirmed.

All the Justices concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

THACKER COAL & COKE COMPANY.

Appt.,

v.

NORFOLK & WESTERN RAILWAY COMPANY.

(— W. Va. —, 68 S. E. 107.)

Interstate commerce — rates — power of state court.

1. A court of equity of this state has no jurisdiction to enjoin a railroad company engaged in interstate transportation from filing with the Interstate Commerce Commission a schedule of its rates for transportation of coal from a point in this state to a point in another state, on the ground that such rates are unreasonable, unfair, and discriminatory.

Same — reasonableness — Interstate Commerce Commission.

2. It is the exclusive power of the Interstate Commerce Commission, in the first instance, to pass on the fairness and reasonableness of rates contained in the schedule of the rates fixed by an interstate carrier on articles transported in interstate commerce.

(May 3, 1910.)

Headnotes by BRANNON, J.

Note. — Power of state court to pass upon interstate rates.

The specific conclusion reached in the above decision, that a state court has no power to pass upon the reasonableness, fairness, or justice of interstate rates, is supported by *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075, reversing 38 Tex. Civ. App. 366, 85 S. W. 1052; *Swift & Co. v. Philadelphia & R. R. Co.* 4 Inters. Com. Rep. 633, 58 Fed. 858; *Sheldon v. Wabash R. Co.* 105 Fed. 785; *Kalispell Lumber Co. v. Great Northern R. Co.* 157 Fed. 845; *Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Assn.* 91 C. C. A. 39, 165 Fed. 1; *Baltimore & O. R. Co. v. La Due*, 128 App. Div. 594, 112 N. Y. Supp. 964; *Great Northern R. Co. v. Loonan Lumber Co.* (S. D.) 125 N. W. 644; *Robinson v. Baltimore & O. R. Co.* 64 W. Va. 406, 63 S. E. 323.

Indeed, the only case to disagree with this proposition of law is *Halliday Mill Co. v. Louisiana & N. W. R. Co.* 80 Ark.

APPEAL by plaintiff from a decree of the Circuit Court for Mingo County dissolving a temporary injunction restraining defendant from filing with the Interstate Commerce Commission a schedule increasing certain freight rates. Affirmed.

The facts are stated in the opinion.

Messrs. Vinson & Thompson for appellant.

Messrs. Joseph I. Doran, Theodore W. Beath, and Holt & Duncan, for appellee:

Under the interstate commerce act, as construed by the Federal courts, the Interstate Commerce Commission has exclusive jurisdiction in the first instance, to pass upon the reasonableness of an interstate rate, and no court, whether state or Federal, has original jurisdiction of that question.

Swift & Co. v. Philadelphia & R. R. Co. 4 Inters. Com. Rep. 633, 58 Fed. 858; Sheldon v. Wabash R. Co. 105 Fed. 785; Sherlock v. Alling, 93 U. S. 103, 36 L. ed. 820; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 334, 52 L. ed. 234, 28 Sup. Ct. Rep. 121; Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 64 L.R.A. 501, 94 Am. St. Rep. 948, 44 S. E. 294; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. 64 W. Va. 406, 63 S. E. 323; Norfolk Cold Storage & Ice Co. v. Norfolk & W. R. Co. 93 C. C. A. 672, 168 Fed. 1022; Atlantic Coast Line R. Co. v. Macon Grocery Co. 92 C. C. A. 114, 166 Fed. 206; Meeker v. Lehigh Valley R. Co. 162 Fed. 354; Howard Supply Co. v. Chesapeake & O. R. Co. 162 Fed. 188; American Union Coal Co. v. Pennsylvania R. Co. 159 Fed. 278; Potlatch Lumber Co. v. Spokane Falls & N. R. Co. 157 Fed. 588; Central Stock Yards Co. v. Louisville & N. R. Co. 112 Fed. 823.

The government alone may have injunctive relief based upon an alleged violation of the anti-trust act.

Minnesota v. Northern Securities Co. 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598; Southern Indiana Exp. Co. v. United States Exp. Co. 88 Fed. 659, 35 C. C. A. 172, 92 Fed. 1022; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; Greer, M. & Co. v.

Stoller, 77 Fed. 1; Pidcock v. Harrington, 64 Fed. 821; Hagan v. Blindell, 6 C. C. A. 86, 13 U. S. App. 354, 56 Fed. 696, 54 Fed. 40; Meeker v. Lehigh Valley R. Co. supra; United States v. Atchison, T. & S. F. R. Co. 142 Fed. 176.

Brannon, J., delivered the opinion of the court:

The Thacker Coal & Coke Company brought a suit in equity in the circuit court of Mingo county against the Norfolk & Western Railway Company, to enjoin the railroad company from filing with the Interstate Commerce Commission a schedule of rate charges for transportation of coal from the mines of the coal company, in the state of West Virginia, to points on the lakes in the state of Ohio and other states, which schedule increased the rates over those existing; the coal company alleging that lower rates were accorded to other railroad carriers carrying coal from Pennsylvania and Ohio in competition with West Virginia coal, and that the rates proposed by such schedule were discriminatory, unjust, and unreasonable, and would entail irreparable injury and probable ruin upon the Thacker Coal Company. Upon its bill a temporary injunction was granted, and, this injunction having been dissolved, the Thacker Coal Company appeals.

The case is one purely of interstate commerce. Its solution rests upon that act of Congress known as the "interstate commerce act." 24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3153. We must follow Federal decision upon this act. We know that the great subject of interstate commerce has been committed to the power, the vast power, of Congress, by that provision of the national Constitution declaring that "the Congress shall have power . . . to regulate commerce with foreign nations and among the several states." Under this grant of power was passed the interstate commerce act, touching, controlling, and regulating, to large extent, and in material respects, commerce passing state lines. A leading feature of that act, one controlling this case, is that it establishes a commission of weighty jurisdiction, over interstate commerce, a jurisdiction to supervise, regulate, we may say, dictate, interstate com-

536, 98 S. W. 374, in which it was held that, inasmuch as the interstate commerce act, while providing that the Federal courts should have jurisdiction of actions brought under it, also provided that nothing in the act should in any way abridge or alter common-law or statutory remedies existing at the time of its passage, but that the provisions of the act were in addition to such remedies, such act did not deprive a state court of jurisdiction of an action by a ship-

per to recover the amount paid for freight rates, upon the ground that such rates were excessive, unreasonable, and unjust. The court commended the position of the court of civil appeals of Texas in Abilene Cotton Oil Co. v. Texas & P. R. Co. 38 Tex. Civ. App. 366, 85 S. W. 1052, but, as this case has been reversed by the United States Supreme Court since the decision in the Arkansas case, the latter can hardly now be deemed of much authority.

merce, called in the act the "Interstate Commerce Commission;" and it gives carriers engaged in such commerce right to fix rates in the first instance, and requires them to do so, and to print schedules of such rates, and file the schedules with the Interstate Commerce Commission, and requires the carrier to conform to the rates fixed in such schedule, under severe penalties for over or discriminative charge. The act, in § 13, gives any one complaining of anything done or omitted by a carrier to his injury, in contravention of the act, right to file a complaint with the Commission stating the wrong, and provides for notice to the carrier, and a full hearing of the complaint; and § 15 provides that if upon such hearing the Commission shall be of opinion that the rates demanded or collected, or any act, regulation, or practice by the carrier touching such rates, are unjust, unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of the act, the Commission shall determine what will be the just or reasonable rates to be thereafter observed, and what regulation or practice in respect to transportation is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier shall cease and desist from such violation. 34 Stat. at L. 589, chap. 3591, U. S. Comp. Stat. Supp. 1907, § 15, amended page 900, Supp. 1909, p. 1158. As stated, § 13 of the original interstate commerce act gives a party injured right to complain to the Commission, and § 14 gives power to investigate and make order in the premises, and § 16 as amended in 1887 gives power to the Commission to render judgment that the carrier pay the party injured damages, and in case of nonpayment the party may file a bill in the United States circuit court to enforce the order or judgment of the Commission. 24 Stat. at L. 384, chap. 104, U. S. Comp. Stat. 1901, p. 3165, 34 Stat. at L. 590, chap. 3591, Supp. 1907, p. 902. Section 12 gives the Commission latitudinous authority to inquire into the business of carriers, and keep itself informed of their conduct, and demand information of the carriers, and commands it to enforce all the provisions of the act, and it is given authority itself to institute legal proceedings, and call upon district attorneys to prosecute proceedings under the direction of the attorney general, for the enforcement of the act and for punishment for its violation.

In this statement of some of the provisions of this voluminous act, we see that Congress has assumed jurisdiction over interstate commerce; that it has made regulations as to it, particularly as to the matter in hand,—rates of transportation; that

it has created a tribunal for testing the character and fairness of such rates, with wide powers to judge them, and with power to modify them so as to conform to right and reasonableness. We see that there is nothing more distinctly committed to the jurisdiction of this tribunal than the matter of rates,—the schedule of rates. This schedule must go at once to this Commission, the only authority to deal with it, at least in the first instance, if the act is obeyed,—a tribunal created by Congress under its exclusive power over interstate commerce, and given a subject-matter for its action. Yet a state court is asked to grant a perpetual injunction to debar a great interstate railroad from fixing rates and filing them with the Commission. A state court is asked to say that this schedule shall never reach that Commission. It does seem to me that the very statement of the proposition is its own refutation. But we are not without authority to support this position. I consider that a decision of the United States Supreme Court, in principle, does so. *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075. The Abilene Company sued the railroad company for charges claimed to be unreasonable and unjust rates, though they did not exceed the rates specified in a schedule filed with the Interstate Commerce Commission. It was held that such schedule was final until changed by the Commission. This was so, because it rested with the Commission to say, and the schedule was the rule until its action deprived the schedule of force. The court held that "the interstate commerce act was intended to afford an effective and comprehensive means for redressing wrongs resulting from unjust discriminations and undue preference, and to that end placed upon carriers the duty of publishing schedules of reasonable and uniform rates; and, consistently with the provisions of that law, a shipper cannot maintain an action at common law in a state court for excessive and unreasonable freight rates exacted on interstate shipments, where the rates charged were those which had been duly fixed by the carrier according to the act, and had not been found to be unreasonable by the Interstate Commerce Commission." This court followed the Abilene Case in *Robinson v. Baltimore & O. R. Co.* 64 W. Va. 406, 63 S. E. 323. Its principle decides this case.

As will be suggested to the mind at once, and as pointed out in those cases, if such action could be maintained, then a jury and state court would hold one rate to be proper, and the Commission another. Which shall prevail? If the state court's rate, then of what force the act of Congress and the

judgment of the Commission under it? The Federal power in a matter which nobody will deny to be within its constitutional jurisdiction would be nullified. One state one rate, another another, the Federal tribunal another, and confusion worse confounded! Just the same may be said in our case. If we stop that schedule on its way, and thus prevent any action on it by the Commission, do we not nullify the act of Congress, and render the jurisdiction of the Commission abortive? In *Central Stock Yards Co. v. Louisville & N. R. Co.* (C. C.) 112 Fed. 823, it is held that a complaining shipper must go to the Commission for relief, as the remedy given by the act through it is exclusive. So in *American Union Coal Co. v. Pennsylvania R. Co.* (C. C.) 159 Fed. 278, and *Great Northern R. Co. v. Kalispell Lumber Co.* 91 C. C. A. 63, 165 Fed. 25. Counsel refer to *Kalispell Lumber Co. v. Great Northern R. Co.* (C. C.) 157 Fed. 845. That was not a suit to enjoin the filing of a schedule, but against enforcement of one filed pending a decision by the Commission. The cases *M. C. Kiser Co. v. Central R. Co.* (C. C.) 158 Fed. 193, and *Macon Grocery Co. v. Atlantic Coast Line R. Co.* (C. C.) 163 Fed. 738, cannot be regarded, as they were circuit court decisions, and contrary to the decision in the same circuit in the circuit court of appeals in *Atlantic Coast Line R. Co. v. Macon Grocery Co.* 92 C. C. A. 114, 166 Fed. 206, above. In *Jewett Bros. & Jewett v. Chicago, M. & St. P. R. Co.* (C. C.) 156 Fed. 160, it is held that no injunction lies, as a court cannot pass on a rate in advance of action of the Commission. This denies our right to pass on the rates involved in this case.

Counsel for the coal company say that the *Abilene Case* does not apply in this case; their theory being that that case was to recover damages for unfair rates imposed under established rates; that is, to recover for charges as unfair, though rates had been established by a schedule on file with the Commission, and had not yet been condemned by it; whereas, this suit is to prevent the filing of a schedule of unfair rates, to arrest these rates on their way, and thus prevent their establishment. But such injunction would be for the state court to fix rates by condemning them as unjust; that would be for the state court to exercise a jurisdiction not vested in it, to pass on rates; that would be to deny the national tribunal its functions under the interstate commerce act. Judge McCormick, in delivering the opinion in *Atlantic Coast Line R. Co. v. Macon Grocery Co.* 92 C. C. A. 114, 166 Fed. 217, thought that there would be less reason, if possible, for entertaining an injunction than an action to recover back

charges. So I think, and for the reason that action to recover back is not to prevent establishment of rates, not stopping the Commission from action; whereas, an injunction would forestall all action by the Commission, and deprive the public and carrier of the benefit of the schedule. It would be a tedious, protracted litigation, a barrier to urgent commerce. But we are not without authority for the particular question of this case, that no injunction lies to arrest a carrier from filing its rate schedule with the Commission. The case just mentioned is one wherein the circuit court of appeals held that shippers cannot maintain a suit in equity to prevent the filing or enforcement of a schedule of rates. The case of *Columbus Iron & Steel Co. v. Kanawha & M. R. Co.* (C. C.) 171 Fed. 713, is a case in which the circuit court of the United States for the southern district of West Virginia denied a shipper an injunction to prevent a railroad company from filing with the Commission its schedule of rates, on the principle that it must first go before that Commission for its action. I shall only refer to the able and laborious opinion filed in that case by Judge Keller, as a strong support for the position which we hold. Judge Keller's decree was affirmed by the circuit court of appeals of the fourth circuit, February 14, 1910. An advance opinion written by Judge Pritchard is before me, in which he approves strongly the following conclusion enunciated in Judge Keller's opinion: "I conclude, therefore, that a proper construction of the act of February 4, 1887, forbids the exercise of jurisdiction in a case like the present, because it is inconsistent with the purposes of that act as expressed therein, and as construed and expounded by the Supreme Court of the United States in the leading cases of *Texas & P. R. Co. v. Abilene Cotton Oil Co.* supra; *Southern R. Co. v. Tift*, 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. Rep. 709." And Judge Pritchard says: "This is a clear and concise statement of the question to be determined. In other words, is the relief sought by the appellant compatible with the act to regulate commerce? Does the interstate commerce act, . . . as it now stands, contemplate that the Interstate Commerce Commission shall have, primarily, exclusive jurisdiction over matters pertaining to fixing rates, and determining as to whether the rates filed by the railroads are fair and just? From an examination of the interstate commerce act it is apparent that the carrier alone can initiate the proposed rate. A rate thus proposed, after having been filed in the office of the Interstate Com-

merce Commission for the term of thirty days, becomes effective, and at that time the Interstate Commerce Commission assumes complete jurisdiction over the subject-matter. It has been repeatedly held that the fixing of rates is a legislative, and not a judicial, function, and, in this instance, Congress has provided that the carrier shall, in the first instance, establish the rate. In the case of *Southern P. Co. v. Colorado Fuel & Iron Co.* 42 C. C. A. 12, 101 Fed. 779, the circuit court of appeals for the eighth circuit passed upon this question. The 4th section of the syllabus in that case reads as follows: 'It is not within the legitimate province of a court of equity, in a controversy between interstate carriers and shippers, to interpose and fix a maximum freight rate, either upon an independent consideration of what is a reasonable charge, or by relation to some other rate then or theretofore in force, and thereupon enjoin the carrier from demanding more than the rate so established, inasmuch as such an order effectually deprives an interstate carrier of the right to fix its rates in the first instance, and to change the same, which power, as it seems, is conceded to the carrier by the interstate commerce act.' [178 Fed. 261.] The judge then made an extensive extract from the case of *Baltimore & O. R. Co. v. United States* (decided by the Supreme Court January 10, 1910) 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164, as supporting the decisions.

The circuit court of appeals on the same date, in two other cases, held the same. *Houston Coal & Coke Co. v. Norfolk & W. R. Co.* 178 Fed. 266, and *Powhatan Coal & Coke Co. v. Norfolk & W. R. Co.* 178 Fed. 266. I here refer to *Baltimore & O. R. Co. v. United States* (decided by the Supreme Court of the United States January 10, 1910), supra, holding the same doctrine. Great reliance is placed by counsel for the coal company upon the case of *Southern R. Co. v. Tift*, supra. We find in its syllabus that, "although an action at law for damages to recover unreasonable railroad rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the interstate commerce act (*Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350), the circuit court may entertain jurisdiction of a bill in equity to restrain the filing or enforcement of a schedule of unreasonable rates, or a change to unjust or unreasonable rates." The question presented in this case was not before the court, and the matter contained in that syllabus was not decided, and the proposition is erroneous. The opinion said, after referring to the *Abilene Case*: 28 L.R.A. (N.S.)

"We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the interstate commerce act, a suit in equity is also forbidden, to prevent a filing or enforcement . . . of unreasonable rates, or a change to unjust or unreasonable rates." That was no express decision that an injunction would lie to prevent the filing of the schedule. It was not necessary to decide it in the case. It will be seen in Judge Keller's opinion in the *Columbus Coal Company Case*, supra, that he regards this *Tift Case* as supporting the proposition that an injunction will not lie to arrest the filing of a schedule with the Commission. I so regard the *Tift Case* when properly construed. The force attributed to the *Tift Case* cannot be sustained in view of the comment upon it by the United States Supreme Court in *Baltimore & O. R. Co. v. United States* (January 10, 1910), supra, the opinion saying: "Nor is there anything in the contention that the decision in *Southern R. Co. v. Tift*, supra, qualifies the ruling in the *Abilene Case*, and is an authority supporting the right to resort to the courts in advance of action by the Commission, for relief against unreasonable rates or unjust discriminatory practices which, from their nature, primarily require action by the Commission." I would also refer to the case of *Interstate Commerce Commission v. Illinois C. R. Co.* (decided by the United States Supreme Court January 10, 1910) 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155, as supporting our position. It is useless to prolong this opinion by further reference to these cases, as they are accessible to all.

Brief of counsel relies upon the claim of unlawful combination between the *Norfolk & Western Company* and other railroads, as contrary to the *Sherman anti-trust law*; but we do not think that that act will sustain this injunction bill. It seems that a person injured by a conspiracy contrary to that act may recover damages; but he cannot have an injunction, as that is a remedy to be used only by the government. *Minnesota v. Northern Securities Co.* 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598. This principle will be sustained by *Southern Indiana Exp. Co. v. United States Exp. Co.* (C. C.) 88 Fed. 659, affirmed by the circuit court of appeals, 35 C. C. A. 172, 92 Fed. 1022. See also *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407, and *Greer, M. & Co. v. Stoller* (C. C.) 77 Fed. 1.

Decree affirmed.

NORTH CAROLINA SUPREME COURT.

J. B. SMITHWICK

v.

W. H. WHITLEY, Appt.

(152 N. C. 368, 67 S. E. 914.)

Usury — unearned interest.

Exacting payment of the legal interest which will accrue, prior to the maturity of the debt, as a condition to accepting payment of the principal and releasing purchase-money notes secured by mortgage on real estate, does not constitute usury.

(April 20, 1910.)

APPPEAL by defendant from a judgment of the Superior Court for Beaufort County in plaintiff's favor in an action brought to recover damages for alleged usury practised on plaintiff. Reversed.

The facts sufficiently appear in the opinion.

Messrs. Small, MacLean, & McMullan for appellant.

Messrs. Ward & Grimes, for appellee:

The charging of interest until maturity constituted usury.

Taylor v. Parker, 137 N. C. 418, 49 S. E. 921; Moore v. Cameron, 93 N. C. 51; State v. Voight, 90 N. C. 741; Burwell v.

Burgwyn, 100 N. C. 339, 6 S. E. 409; Gore v. Lewis, 109 N. C. 539, 13 S. E. 909; Miller v. Life Ins. Co. 118 N. C. 612, 54 Am. St. Rep. 741, 24 S. E. 484.

Brown, J., delivered the opinion of the court:

The plaintiff testified that the ten notes secured by mortgage and dated December 30, 1900, were given for the purchase money of a tract of land purchased by plaintiff from defendant, and bore 6 per cent interest from date. Each note was in sum of \$46.99, and one matured January 1st each year. On December 3, 1905, the notes due January 1, 1902, 1903, 1904, and 1905 were due and unpaid. The remaining notes were not due. The plaintiff then sold the land to Tilman Paul, and on December 5, 1905, they both went to Whitley to pay the purchase-money debt and have the notes and mortgage surrendered and canceled. The defendant refused to accept payment for the notes not due, and refused to surrender the mortgage unless plaintiff paid the notes not yet due in full. In order to procure the surrender of his notes and mortgage, plaintiff paid the entire debt in full, including the \$44.62 called in the record "unearned interest" on the notes not due. Whereupon defendant surrendered the notes and mortgage.

Note. — Usury: exacting payment of interest for full term upon payment of debt before maturity.

The case of Savannah Sav. Bank v. Logan, 99 Ga. 291, 25 S. E. 692, is sufficiently set out in the foregoing opinion.

It was said in Keckley v. Union Bank, 79 Va. 458, that a case of paying a debt before it was due, and therefore no usury, was involved where a note was given for the aggregate amount of several notes one of which was not due, and the former was discounted at the highest rate, with the result that interest was twice charged upon the undue note for the time it still had to run.

Other cases have been found in which the general question of accelerating the maturity of an obligation is involved, the difference between those and the foregoing cases being that in those cases provision for the acceleration of maturity was made at the time the debt was contracted. This difference would seem to go to the intention of the parties, which is the true test of usury.

It was held in Kilpatrick v. Germania L. Ins. Co. 95 App. Div. 287, 88 N. Y. Supp. 628, that a stipulation in a bond and mortgage for \$80,000, that the obligor should have the privilege of paying the principal sum, with accrued interest, before the maturity of the debt, upon payment in addition thereto of the sum of \$1,000, did not constitute a corrupt and usurious agree-

ment, but merely provided an indemnity to the mortgagee for the relinquishment of the investment.

And it was held in Kornegay v. Georgia State Bldg. & L. Asso. 91 Miss. 551, 44 So. 783, that the objection of usury could not prevail where the by-laws of a building association provided that a borrower could pay the debt before maturity, but only at annual periods from the date of the contract, and a borrower whose bond and mortgage had such provision incorporated into them expressly agreed, before the maturity of the debt and between annual periods, that, if the company would then accept payment, she would pay on the basis of 10 per cent at the end of the next annual period after date of payment.

In McCrary v. Woodard, 122 Ga. 793, 50 S. E. 941, it was held that there was no usury where, before the maturity of some of several notes which were payable at different times, and each of which included interest to its maturity, an action was brought on all of them, under a stipulation that if any of them should not be paid at maturity, all should become due, but the judgment was not rendered until after the maturity of the last note. The court said, however, that if the judgment had been rendered before the maturity of one or more of the notes, the debtor would have been entitled to a reduction in an amount representing the interest unearned at the time of the rendition of the judgment. In answer-

Our statute entitled "Penalty for Usury" (Revisal 1905, § 1951), prohibits "the taking, receiving, reserving, or charging a greater rate of interest than 6 per centum per annum, either before or after the interest may accrue, when knowingly done." In this respect it is similar to many of the usury statutes of this country. While usury laws differ in some respects, there are certain principles which are universal in their application to all. The object of the law is to save borrowers from oppression, and to prevent extortion on them when money is loaned or credit is otherwise extended. Therefore it is universally held that, "in order that a transaction shall fall within the prohibition of the statutes against usury, it is essential that it should be a contract for the forbearance of an existing indebtedness or a loan of money." See 29 Am. & Eng. Enc. Law, 2d ed. p. 464, § 4, and note 5, where a large number of cases are cited in support of the text. *Struthers v. Drexel*, 122 U. S. 487, 30 L. ed. 1216, 7 Sup. Ct. Rep. 1293. There is no exception to this universal rule that there must be an extension of credit, and an illegal compensation for it knowingly taken, in order to constitute usury. This is recognized in the earliest cases on the subject up to the present time.

In *Spurrier v. Mayoss*, 1 Ves. Jr. 527, in 1792, Lord Commissioner Eyre said: "Usury is taking more than the law allows upon a loan, or, as I read it, for forbearance of a debt." *Berkley v. Walmsley*, 5 Esp. 11;

Barclay v. Walmsley, 4 East, 55. In this last case Lord Ellenborough said: "To constitute usury, there must either be a direct loan and a taking of more than legal interest for the forbearance of repayment. . . . Here [there] was no loan or forbearance, only a mere anticipation of the payment of a debt by the party before the time when by law he could be called upon for it." Webb on Usury lays it down as universally held that usury cannot be established unless it is shown that a loan of money or its equivalent was contemplated by the parties. Section 20, citing an array of cases. To same effect is Tyler on Usury, p. 92: "Where there is no right to demand payment, there can be no forbearance, and, if no forbearance, no usury." Lloyd v. Scott, 4 Cranch, C. C. 206, Fed. Cas. No. 8,434; *Lesley v. Johnson*, 41 Barb. 359. In 47 American Edition of Century Digest, title Usury, are to be found innumerable cases sustaining this proposition, and that "anticipation of payment by paying a debt in full before due is not usury." 29 Am. & Eng. Enc. Law, 2d ed. p. 465, says: "The payment of an indebtedness by the debtor before maturity is not a loan or forbearance." It is essential to constitute usury that the lender shall at all events be entitled to demand repayment of the money loaned. 29 Am. & Eng. Enc. Law, supra, citing many cases in notes; 22 Cyc. Law & Proc. p. 1483. Where the transaction shows it is not for the loan of money or goods, nor for the forbearance of an existing debt,

ing the objection that such an agreement as here presented constituted usury, because the whole sum, with interest, might have become due upon default in payment of any note, the court in *Goodale v. Wallace*, 19 S. D. 405, 117 Am. St. Rep. 962, 103 N. W. 651, 9 A. & E. Ann. Cas. 545, said that such stipulation imposed a penalty which the mortgagors could avoid by prompt payment of the notes when due.

In *Moore v. Cameron*, 93 N. C. 51, where the debtor gave his bond for a sum for five years, and other bonds for the instalments of interest, and there was a provision that, upon default in payment of any bond, those remaining should become due, the court said that it preferred to construe the agreement so as not to ascribe to the parties an intention to violate the usury laws, and held that it was intended that upon such default the obligee should be entitled to collect the principal sum with accrued interest, and that the remaining bonds should be surrendered.

So, it was held in *Dugan v. Lewis*, 70 Tex. 246, 12 L.R.A. 93, 23 Am. St. Rep. 332, 14 S. W. 1024, that a stipulation in a deed of trust to secure notes and interest coupons, that, in default of any payment, the whole sum of money secured should be-

come due at the lender's option, was to be construed as a penalty, and should not be enforced except upon the cancellation of the unearned interest notes, and that it therefore did not make the contract usurious.

On the other hand it was said in *Seymour Opera House Co. v. Thurston*, 18 Tex. Civ. App. 417, 45 S. W. 815: "Where the right to declare the debt due in case of default on the part of the maker of the note is contained in the contract, the time of maturity should not be reckoned only to the day on which the maturity was afterwards declared, as contended for by appellant, but to the day fixed in the written contract in good faith for the maturity, with grace added, unless it is waived. This rule may sometimes result in requiring the maker to pay more for the use of money than the rate fixed and limited by law would permit, but it would be on account of the subsequent default of the maker, for which the holder of the note ought not to be held responsible, unless such provision was made as a device to cover usury."

As to inclusion of days of grace in computing interest as usury, see the note to *Sullins v. Farmers' Exch. Bank*, 10 L.R.A. (N.S.) 839.

it cannot be usurious. *Stockwell v. Holmes*, 33 N. Y. 53.

The identical question presented by this appeal has been determined by the supreme court of Georgia as follows (*Savannah Sav. Bank v. Logan*, 99 Ga. 291, 25 S. E. 692): "Where a debt, including both principal and interest, and due by instalments, is paid according to the terms of the contract, is free from usury, the transaction is not rendered usurious by the voluntary payment of the debt in full before some of the instalments matured, although as a result the creditor would receive in the aggregate a sum amounting to more than the principal and the maximum legal rate of interest." In reference to this question, Webb says (§ 29): "The test of usury in a contract is whether it would, if [fully] performed, result in securing a greater rate of profit on the subject-matter than is allowed by law,"—citing a number of cases.

Tested by these principles, the defendant cannot be held to have taken usury for either a loan or a forbearance. Lord Ellenborough said in a similar case, *supra*: "The defendant's conduct may not be liberal or praiseworthy, but it is not usury." It is not claimed that the original transaction when the defendant sold the land to plaintiff was usurious, or that defendant would have received more than 6 per cent interest had the notes run to maturity. It is admitted that the defendant was not required by law to accept payment of the unmatured notes before maturity, or to surrender the mortgage. If defendant had a good investment, he had the right to hold on to it, and, if plaintiff desired to be released from his lawful and binding contract to pay interest until maturity of the debt, defendant had a right to exact payment of the \$44 as compensation for such release. Defendant had as much right to sell his solvent debt at a premium to the plaintiff as to anyone else. The defendant was called upon to surrender a perfectly good investment, untainted with usury, and not for an extension of credit or forbearance on an obligation the debtor could not meet. The transaction, as stated by plaintiff, is the very reverse of a loan, an extension of credit or a forbearance, without which there can be no usury. It put an end to credit, instead of giving it.

There is no case in our Reports sustaining the contention of the plaintiff. In *Taylor v. Parker*, 137 N. C. 418, 49 S. E. 921, cited by plaintiff, there was a bonus of \$35 paid for further extension of the debt. It was the reverse of the transaction under consideration. We are of opinion that his 28 L.R.A. (N.S.)

Honor erred in rendering judgment against defendant.

Reversed.

NORTH CAROLINA SUPREME COURT.

J. H. HUDSON et al.

v.

V. J. McARTHUR et al., Impleaded, etc.,
Appts.

(152 N. C. 445, 67 S. E. 995.)

Officer — failure to settle account — liability to sureties.

1. Failure of county commissioners to effect a proper settlement with a tax collector, and require him to exhibit the necessary receipts for one term before entering upon the duties of a succeeding one, is not the cause of injury to persons signing his bond for the succeeding term, through losses occasioned by his embezzlement during such term and afterwards, so as to give the sureties a cause of action against the commissioners for their negligence.

Same — embezzlement — negligence — liability.

2. The failure of county commissioners to effect a settlement with the tax collector, and require him to exhibit the necessary receipts for one year before placing the duplicates of the next year in his hands, as required under penalty by statute, does not render them liable to the sureties on his bond, who are compelled to make good money which he collects and fails to account for under the new duplicates.

(Brown and Walker, JJ., dissent.)

(May 4, 1910.)

Note. — Liability of public officer to sureties of another public officer for loss sustained by them through former's neglect to require proper settlement of accounts.

The little authority disclosed upon this question is in harmony with *HUDSON v. McARTHUR*.

In *Held v. Bagwell*, 58 Iowa, 139, 12 N. W. 226, it was held that the fact that county supervisors failed to require one re-elected county treasurer to produce and account for the funds and property in his hands at the expiration of his previous term, and the approval of his bond, in violation of law, without any accounting by him, did not render the commissioners individually liable to the sureties on the treasurer's bond. The court said: "The defendant, as a public officer, was charged with the duty of approving the bond of the treasurer. This was a duty to be discharged for the benefit of the public. He was required, in approving the bond, to act

A PPEAL by defendants, V. J. McArthur et al., from a judgment of the Superior Court for Sampson County overruling as to them a demurrer to the complaint in an action brought to recover the sum paid on a certain surety bond, which losses were alleged to have been caused by the negligent performance by them of certain of their duties as county commissioners. Reversed.

Statement by Manning, J.:

The action was originally brought by J. H. Hudson, "on behalf of himself and all other bondsmen of A. W. Aman, who will come in and aid in the prosecution." Later, by an order made at February term, 1908, Levett Warren, J. H. Turlington, and C. H. Fisher were made parties plaintiff, and A. W. Aman was made a party defendant. V. J. McArthur, A. T. Herring, and George Highsmith composed the board of commissioners of Sampson county, and George E. Butler was the county attorney. A. W. Aman, the other defendant, was the sheriff of the county and acting treasurer. The plaintiffs were the sureties on his official bond. They alleged that Aman, while sheriff, embezzled the county funds, and each of the plaintiffs was compelled to pay \$418.50, except J. H. Turlington, who paid \$94 additional. The particular breaches of duty by the defendant commissioners, for which the plaintiffs seek in this action to recover from them, as individuals, the several sums paid by them as

sureties on the sheriff's bond, are thus stated in the complaint:

"(a) The plaintiffs are informed and believe, and upon such information and belief aver, that the defendant commissioners negligently failed to require of said A. W. Aman, sheriff and treasurer as aforesaid, the settlements required by statute in February, May, and September, for the years A. D. 1905 and 1906, respectively.

"(b) The plaintiffs are informed and believe, and upon such information and belief aver, that the said defendants, V. J. McArthur, A. T. Herring, and George Highsmith, the board of county commissioners, as aforesaid, of Sampson county, were required to demand of the said sheriff and treasurer, A. W. Aman, the first Monday in December, 1904, before they allowed him to re-enter the duties of his said office, his receipts in full for the taxes which he had collected, and which he should have collected, for Sampson county for previous years, as set out in Revisal 1905, § 2812, and that they failed to do so, but, on the contrary, allowed said A. W. Aman, sheriff and treasurer as aforesaid, to re-enter upon the duties of his said office, and to renew his said bond, before he had produced before the said board the receipt in full for taxes which he had, or should have, collected.

"(c) That said A. W. Aman, sheriff and treasurer as aforesaid, failed to collect and settle the taxes of said county, placed in his hands to collect, for the year 1905, or produce his receipts for the same, before he received his tax list from the said board

for the interest of the county to the end that the public money of the county would be secured to its treasury. He was not required to look after the interest of the sureties upon the bond, or to protect them from liability which they might incur by signing the bond of an unfaithful public officer. If the defendant approved the bond when the treasurer was in default, he violated his duty to the public. The plaintiff has no remedy against defendant for losses sustained by reason of this violation of public duty, for the reason he violated no duty he owed to plaintiff. . . . The allegations that defendant's act in approving the bond was done 'wilfully' and 'maliciously,' and 'to oppress' plaintiff, do not show that it was done in the violation of a duty owed by defendant to plaintiff. In the absence of such an allegation, the plaintiff's petition fails to present a cause of action against defendant."

It has been held in actions on the bonds of tax collectors and county treasurers that the county commissioners, as the representatives of the county, owed no duty to inform sureties on the bonds of the former officers that such officers were in default at the time of the execution of the bond. 28 L.R.A. (N.S.)

Frownfelter v. State, 66 Md. 80, 5 Atl. 410; Cawley v. People, 95 Ill. 249. The question of the commissioners' individual liability, however, was not decided.

It has been held that it is not the duty of a county treasurer to examine the accounts of a tax collector, and report to the one intending to become surety for the latter, and that, if he does so, he is the agent of the surety, and the latter is not relieved from liability by reason of false answers made in the report. Com. use of Montgomery Ct. v. American Bonding & T. Co. 205 Pa. 372, 54 Atl. 1034. It is, however, implied in this case that the treasurer would be liable for the damage caused to the surety by his false answers. The court said: "The treasurer was not bound to answer the questions at all. When Godschall did undertake to answer them, he was bound as a man of veracity to tell the truth; a public officer may not be bound to give information or answer questions, but when as a man he voluntarily does so, the moral obligation on him as a man to tell the truth remains in full force. In his answers to the questions he did not tell the truth; Loper was a defaulter for every year he had been collector."

to collect the taxes for the year 1906, and the said defendant board permitted said Aman to receive and collect the taxes for the year 1906 for said county before the said A. W. Aman, sheriff and treasurer as aforesaid, had settled the taxes for the previous year, or had produced his receipts for the same, as provided by § 5241 of the Revisal of 1905 of North Carolina; and the said board of commissioners and the defendants V. J. McArthur, A. T. Herring, and George Highsmith as members thereof, failed and neglected to appoint a tax collector as provided for by said § 5241 of the Revisal of 1905 of North Carolina, and permitted said A. W. Aman to receive the tax list for said Sampson county for the year 1906, and to collect the taxes for said county for that year, without requiring him to perform his duties as aforesaid, as required by law; and failed and neglected to appoint a tax collector, as set out above.

"(7) That some time prior to the first Monday in September, 1906, one O. F. Herring, one of the sureties on said Aman's bond with these plaintiffs, warned the defendants V. J. McArthur, A. T. Herring, and George Highsmith, the board of county commissioners, through their chairman, V. J. McArthur, not to turn over the tax books for Sampson county for the year 1906 to said A. W. Aman, until a full and complete settlement was had by said commissioners with said defendant, A. W. Aman, for all arrears of taxes; that he had heard that A. W. Aman was financially embarrassed and behind in his accounts with the county, and that, as one of the bondsmen, he objected to the tax books of said county for the year 1906 being turned over to said A. W. Aman before a full settlement was had.

"(8) That, notwithstanding said warning, the defendant commissioners negligently failed to make a proper or full settlement with said A. W. Aman on the first Monday in September, 1906, and carelessly and negligently, and contrary to their duty as required of them by law, as the plaintiffs are informed and believe, and upon such information and belief aver, turned over the tax books of Sampson county for the year 1906 to said A. W. Aman, sheriff and treasurer as aforesaid, and allowed him to collect said taxes without requiring of him a full settlement for the taxes of the previous year, and when he was at that time behind in his accounts with the said county, as the plaintiffs are informed and believe. Plaintiffs allege, upon information and belief, that, at the said meeting of the board of commissioners of the defendants V. J. McArthur, A. T. Herring, and George Highsmith, the first Monday in September, 1906, 28 L.R.A. (N.S.)

to settle with the said A. W. Aman, sheriff and treasurer as aforesaid, the said defendant commissioners ascertained the amounts that said A. W. Aman was behind and was due the county, and did not require him to exhibit the money received from the collection of taxes, but looked at the tax books in his hands then uncollected, and received those uncollected tax receipts then in said Aman's hands, in settlement of the balances said Aman was then due the county as sheriff and treasurer as aforesaid, and left those said uncollected tax receipts for previous years in the hands of said A. W. Aman, sheriff and treasurer as aforesaid, and upon that kind of alleged settlement, which the plaintiffs say was negligent and careless, turned over to said Aman for collection the tax books for Sampson county for the next succeeding year, to wit, the year 1906."

The defendant commissioners and Butler demurred to the complaint upon various grounds, and the demurrer was sustained as to Butler, from which there was no appeal. It was overruled as to the commissioners, and they appealed.

Messrs. John D. Kerr and F. R. Cooper, for appellants:

The defendants, in relation to the acts of omission alleged against them, were judicial officers, and not liable except perhaps for gross negligence or wilful misconduct.

State v. Powers, 75 N. C. 281; State v. Sneed, 84 N. C. 816, Hannon v. Grizzard, 96 N. C. 293, 2 S. E. 600; Board of Education v. Bladen, 113 N. C. 381, 18 S. E. 661; 23 Am. & Eng. Enc. Law, 2d ed. p. 379; State v. Snuggs, 85 N. C. 541; Otis v. Watkins, 9 Cranch, 339, 3 L. ed. 752; Crowell v. M'Fadon, 8 Cranch, 94, 3 L. ed. 499.

An ordinary action for damages, on the ground of simple negligence of the board of commissioners as a corporate body against the individual members, without alleging individual acts of negligence, cannot be sustained.

Bray v. Barnard, 109 N. C. 44, 13 S. E. 729; State ex rel. Hewlett v. Nutt, 79 N. C. 263; Bassett v. Fish, 75 N. Y. 314; Hydraulic Press Brick Co. v. School Dist. 79 Mo. App. 665; 23 Am. & Eng. Enc. Law, p. 379; Strong v. Campbell, 11 Barb. 135.

A breach of a duty owing to the public, even if it resulted in injury to the plaintiffs, is not sufficient.

Throop, Pub. Off. §§ 708, 725; State ex rel. Travellers' Ins. Co. v. Harris, 89 Ind. 363, 46 Am. Rep. 169.

A public officer, in approving the bond of another officer, must discharge that duty

for the benefit of the public. He is not required to protect the sureties from liability, and a surety who suffers loss has no remedy against such officer, for the reason that, if the officer was negligent, he violated a public duty, and not a duty owed to the surety.

Held v. Bagwell, 58 Iowa, 139, 12 N. W. 226.

The acts of the defendant officers did not cause direct, but only consequential, injury.

East River Gaslight Co. v. Donnelly, 93 N. Y. 557.

Plaintiff, in order to recover, must show that he had a direct interest in the performance of the duty, and that the duty was imposed for his benefit.

Strong v. Campbell and State ex rel. Travellers' Ins. Co. v. Harris, supra; *Cooley*, Torts, 394, note 1; *Shearm. & Redf. Neg.* 174; *Harrington v. Ward*, 9 Mass. 251.

If the position of the injured party would have been just the same if the alleged misconduct had not occurred, he has no legal ground of complaint.

Mechem, Pub. Off. § 680.

The rule of nonliability applies to county commissioners in passing upon the sufficiency of a bond of an officer, and upon the question whether, by failing to file a new bond, he had forfeited his office.

People ex rel. De Fries v. Marin County, 10 Cal. 346.

The commissioners are not responsible in civil actions, to citizens.

Kinsey v. Jones County Magistrates, 53 N. C. (8 Jones, L.) 186; *White v. Chowan County*, 90 N. C. 440, 47 Am. Rep. 534; *Prichard v. Morganton*, 126 N. C. 912, 78 Am. St. Rep. 679, 36 S. E. 353; *Bell v. Johnson County*, 127 N. C. 85, 37 S. E. 136.

Messrs. Falson & Wright for appellees.

Manning, J., delivered the opinion of the court:

Passing the question as to the misjoinder of the parties plaintiff, and the joinder of defendant Aman as a party defendant,—the plaintiffs having each a separate, and not a joint, cause of action against the defendant commissioners, if they have any cause of action at all, and the cause of action against Aman being distinct from, and arising from, totally different facts from that alleged against the defendant commissioners,—we proceed to consider if the complaint states facts sufficient to constitute a cause of action in favor of any one, or all, of the plaintiffs against the defendant commissioners. The argument addressed to us in support of his Honor's ruling is rested upon §§ 2812, 5241, 5250, Revisal 1905,—that these sections impose mandatory duties upon the boards of county commis-

sioners, and that defendants violated these duties in the manner of making the settlement with Aman, the sheriff, and these violations of duty directly caused the loss to plaintiffs, to recover which they have brought this action against the defendants. The liability of the board of commissioners for a failure to comply in good faith with §§ 2812, 2813, Revisal 1905, is declared by § 2814, Revisal 1905, to be "for all loss sustained in the collection of taxes, on motion to be made by the solicitor of the district." The evident purpose of the section is to further protect and safeguard the public revenue, and to further assure its honest collection and application, by subjecting the commissioners to liability if they fail to require the proper bonds from the collecting officer, and this is further enforced and somewhat extended by § 313, Revisal 1905, which provides that "every commissioner who approves an official bond which he knows to be, or which by reasonable diligence he could have discovered to have been, insufficient in the penal sum, or in the security thereof, shall be liable as if he were a surety thereto, and may be sued accordingly by any person having a cause of action on said bond." The bond of the defaulting sheriff in the present case was not deficient either in the penal sum, or in the security thereof; the plaintiffs, as his sureties, have made good his default, and paid the money to the proper authorities. The obligation of the bond has been met, and the bond has been discharged. This action is not on the bond. If any one of the defendants permitted the defendant Aman, on the first Monday of December, 1902, or on the first Monday of December, 1904, these being the first Mondays in December next after his election, and he being a former sheriff, to give his bonds, or re-enter upon the duties of his office, until he had produced before the board the receipt in full of every such officer for taxes which he had or should have collected, then such commissioner, under § 3590, Revisal 1905, was guilty of a misdemeanor, and also liable to the penalty of \$200 for each offense, "to be paid to any person who shall sue for the same." *Bray v. Barnard*, 109 N. C. 44, 13 S. E. 729; *State ex rel. Lee v. Dunn*, 73 N. C. 595. If the defendants failed to require such receipts on the first Monday in December, 1904, the plaintiffs were not undamaged in the particulars alleged, for they only became sureties on the bond then given, and the default of their principal, for which they allege they were compelled to answer on that bond, occurred afterwards in his failure to honestly account for the taxes for the fiscal years of 1905 and 1906. So that, if the commissioners failed to observe

the requirements of § 2812, Revisal 1905, such failure did not injure plaintiffs in the manner alleged by them, though such failure might have subjected them to indictment, and to an action for the penalty prescribed by the statute.

Coming now to the consideration of §§ 5241, 5250, Revisal 1905, and the particulars in which it is alleged these sections were violated by the defendant commissioners in their settlement September 1, 1906, with Sheriff Aman, we quote the pertinent provisions of them: Section 5241 provides: "Provided, the sheriff or tax collector shall not collect the taxes for any years until he shall have settled in full with the state and county for the taxes of the previous year (if he was sheriff or tax collector), and given the bond required by law; and if upon examination, the commissioners are not satisfied with the solvency of the surety to said bonds, they may require new bonds to be given. Before receiving the tax duplicate, he shall produce the receipts of the state and county, if he was the sheriff or tax collector for the previous year, to the clerk of the board of commissioners, and in the event the sheriff fails to produce the aforesaid receipts or give the required bond, the board of commissioners shall appoint a tax collector, who shall give bond," etc. And § 5250, Revisal 1905, provides: "Provided, further, that it shall be unlawful for any sheriff or tax collector, in accounting with the board of county commissioners for either the state or county taxes, to exhibit or present in said county any money not actually derived from the collection of taxes, and any such sheriff or tax collector so offending shall forfeit a penalty of \$500, one half of which shall belong to any person who shall sue for the same, and the other half to the county in which the sheriff resides." It is alleged as a fact, and the demurrer admits the fact, that the settlement by the county commissioners with Sheriff Aman in September, 1906, was not made in the manner directed by these two sections. It is contended that the statutes are mandatory, and the acts of the county commissioners were ministerial, leaving in them the exercise of no discretion, and that the delivery of the tax duplicates to the sheriff enabled him to embezzle the funds, to the injury of the plaintiffs, and therefore the defendants are liable. If we concede the mandatory character of the statutes, and the ministerial character of the acts to be done by the commissioners, involving the exercise of no discretion, we do not think the injury to plaintiffs complained of necessarily or by direct connection follows.

In *State ex rel. Travellers' Ins. Co. v. Harris*, 89 Ind. 363, 46 Am. Rep. 169 (in 28 L.R.A. (N.S.)

which case the doctrine stated by Judge Cooley in *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189, 5 N. W. 403, is disapproved as not in harmony with the weight of authority and reason), the supreme court of Indiana says: "It is not enough in any case for a plaintiff who seeks to recover for an injury caused by the negligence of another, to show simply injury and negligence; he must also show that there was a breach of duty owing to him. This general rule applies with peculiar force to persons who sue for injuries caused by official misconduct. It is not every person who sustains an injury from the negligence of a public officer that can maintain an action on the officer's bond. In general, a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shows the breach of a particular duty owing to him. It is not sufficient to show a general public duty, or a duty to some other person directly interested. Judge Cooley says: 'But the sheriff can only be liable to the person to whom the particular duty was owing; the party to whom he is bound by the duty of his office.'" In *Shearman & Redfield on Negligence*, 3d ed. § 174, it is said: "It is a general rule that, whenever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he has an interest in the performance of the duty, and that the duty was imposed for his benefit." In this connection the same learned writers, at § 166, observe: "In speaking of the liability of nonjudicial public officers to a civil action by private persons, it will be found convenient, if not indeed necessary to a proper understanding of the decided cases, to make a distinction between those officers whose duties are of a general public nature, and who act for the profit of the public at large, and that other class of officers who are appointed to act, not for the public in general, but for such individuals as may have occasion to employ them for a specific fee paid." It is clear, at least, that the county commissioners belong to the first of the two classes,— "officers whose duties are of a general public nature, and who act for the profit of the public at large."

The above authorities state the doctrine upon which plaintiffs must depend to maintain this action as strongly in their favor as the decided cases and text writers warrant; but, even so stated, we do not think the action can be maintained against the defendant commissioners. The acts complained of were public acts, done by the commissioners in their corporate capacity. The clear purpose of these statutory re-

quirements was to impose duties for the benefit and protection of the public revenue, to provide more vigilant measures for its safety for the public good and benefit. They prescribe public duties to be discharged by the commissioners. The protection of the plaintiffs, as sureties upon the sheriff's bond, is clearly not within the purview of the statutes; the taking of a bond with approved security was itself to further assure the public. To make good the default of the sheriff was the express obligation of the bond signed by the plaintiffs; it was the guaranty of his honesty and fidelity. By the statutes, to enforce promptness, accuracy, and completeness of settlements, penalties are imposed both upon the commissioners and the sheriff. The commissioners are made liable also to indictment. These liabilities are imposed by express statutes. The legislature has not yet deemed it wise or proper to impose the additional liability upon the commissioners contended for by plaintiffs, and, in the absence of express statutory enactment, or of some well-settled principle of law constraining us to so hold, we do not think the commissioners are liable to the plaintiffs. In addition, we do not think the injury suffered by plaintiffs, and the loss sustained by them, was the necessary, direct, or immediate result of the defendants' acts. They do not stand in the relation of cause and effect; the turning over the tax books was simply a condition, the injury was a *post hoc*, but not an *ergo propter hoc*. The direct and immediate and only cause of the loss sustained by plaintiffs was the dishonesty and embezzlement of the sheriff, their principal, whose honesty and fidelity was the express obligation of their undertaking. The defendant commissioners could have done all they did, and yet no injury to the plaintiffs resulted; they could have observed the statutes to their very letter, and the loss to the plaintiffs have been the same. The sheriff could have embezzled the county funds with or without a strict settlement. There is therefore no causal connection between the acts alleged and the loss sustained. In addition to the authorities cited, the following sustain the conclusion we have reached: 2 Abbott. Mun. Corp. §§ 672, 673; McConnell v. Dewey, 5 Neb. 385; School Dist. No. 80 v. Burress, 2 Neb. (Unof.) 554, 89 N. W. 609; Mechem, Pub. Off. §§ 598, 599; Hydraulic Press Brick Co. v. School Dist. 79 Mo. App. 665; Bassett v. Fish, 75 N. Y. 303; Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 502; 1 Sutherland, Damages, 56; Nelson County v. Northote, 6 Dak. 378, 6 L.R.A. 230, 43 N. W. 897. In its final analysis, to sustain the contentions of the plaintiffs would 28 L.R.A. (N.S.)

be to make the members of the board of county commissioners liable to the sureties on the official bonds of the sheriffs and other officers, whose performance of duty they are required by statutes to supervise, if the commissioners fail to discharge their statutory duties in the manner prescribed by law, and this to be held regardless of whether a particular duty was owing to the particular person complaining, and whether there was any causal connection between the violation of the statute and the injury complained of. We cannot so hold.

In our opinion, the demurrer filed by the defendant commissioners should have been sustained, and the order of his Honor overruling it is reversed.

Brown, J., dissenting:

In discussing this question it must be borne in mind that every allegation of the complaint is admitted in manner and form as stated. Among other allegations the plaintiffs aver that after they had become sureties on the official bonds of the sheriff, the defendants knowingly and illegally permitted the tax books to be delivered to the sheriff in direct violation of the statute of the state. Revisal 1905, vol. 2, § 5241. And plaintiffs aver that, in addition to the tax lists of 1905, those of 1906 were delivered to the sheriff, while they were his bondsmen, in violation of the same law. They further aver that prior to September, 1906, before those lists had been placed in Sheriff Aman's hands for collection, the defendants were notified by plaintiffs not to turn over the tax books for the year 1906 to Aman, until a full settlement was had by the commissioners with Aman for all arrears of taxes; that Aman was financially embarrassed and behind in his accounts with the county, and that the bondsmen objected to the tax books of the county for the year 1906 being turned over before a full settlement was had; that, notwithstanding said warning, the defendant commissioners negligently failed to make a proper or full settlement with Aman on the first Monday in September, 1906, and negligently, and contrary to their duty as required of them by law, delivered the tax books of Sampson county for the year 1906 to Aman, and allowed him to collect said taxes, without requiring of him a full settlement for the taxes of the previous year, and when he was at that time behind in his accounts with the said county. The plaintiffs further aver that, in consequence of such violation of law, they have been compelled to pay considerable sums of money recovered of them by legal process on said tax bonds.

The statute declares in express terms that the sheriff shall not be permitted to

collect the taxes for any years until he shall have settled in full with the state and county for the taxes of the previous year. A pretended and fraudulent settlement, such as is alleged in the complaint to have taken place, will not meet the demands of the law. The complaint expressly charges a wilful violation of the statute by the defendants, and upon demurrer that fact is admitted. The statute is mandatory, and expressly forbids the very act the defendants are charged with committing. In my opinion this intentional violation of a positive statute forbidding the act renders the defendants not only liable to penalty and indictment, but also to such damages as may be directly sustained by those bondsmen of the sheriff who had previously assumed such obligation and must per force bear the loss. The board of commissioners possesses quasi judicial, legislative, and administrative powers. A wilful or negligent disregard of any of their duties of whatever character by its members subjects the culpable individual to the pains and penalties of the statute (Revisal 1905, § 3590); but personal liability for damages will not generally be incurred in the absence of malice, unless the wrongful act be purely ministerial in its nature. The wrongful and negligent acts complained of involve no exercise of judgment and discretion. Official action is judicial only when it is the result of judgment and discretion. A judicial inquiry is one which investigates, declares, and carries out existing law, and when performed in good faith, however erroneously done, the officer is immune so far as legal liability is concerned. Official action is ministerial when it is the result of performing a duty imposed by law, the details of which are defined and prescribed with such certainty that nothing is left to the judgment or discretion of the officer. Therefore a wilful violation of a statute prohibiting the doing of an act can never be seriously regarded as a judicial function. It is plain that, if the allegations of the complaint be true, the defendants, in delivering the tax lists to the sheriff, were not performing a quasi judicial function, and cannot be clothed with the immunity of a judicial officer. They were given no discretion in the matter, but were expressly forbidden by the statute to turn over the lists, unless the sheriff had settled in full for the previous year.

It is alleged that the defendants in performing this purely ministerial duty were guilty of gross negligence and violation of law. A ministerial officer is not liable for performing a duty imposed by statute, if done with due care. But he is answerable
 ✕ L.R.A. (N.S.)

in damages for nonfeasance, misfeasance, or malfeasance. He is liable in a civil action for a failure or refusal to perform his duty, as well as for its negligent or illegal performance. *Ferguson v. Kinnoull*, 9 Clark & F. 251; *Brassey v. MacLean*, L. R. 6 P. C. 398; *Dow v. Humbert*, 91 U. S. 294, 23 L. ed. 368; *Throop*, Pub. Off. § 726; *Mechem*, Pub. Off. § 664, and cases cited in notes.

A public official owes to every individual the duty of performing his official acts with reasonable care, and he is consequently liable to any individual having a special and direct interest, who is injured in person or in property by reason of his negligence in performing a ministerial act. This subject is discussed elaborately by Judge Cooley in *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189, 5 N. W. 403, who says: "It is immaterial that the duty is one primarily imposed on public grounds, and therefore primarily a duty owing to the public; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance, which it was in part the purpose of the law to protect him against. It is also immaterial that a failure in performance is made by the law a penal offense." This principle was settled in Great Britain as far back as the reports of Blackstone (*Rowning v. Goodchild*, 2 W. Bl. 906), wherein it is held that a public officer charged with ministerial duties to perform, in which a private individual has a special interest, is liable to such individual for any injury sustained by him in consequence of the failure to perform such duties. This decision has been approved in this country in the case cited from Michigan. *Teall v. Felton*, 1 N. Y. 537, 49 Am. Dec. 352, Id. 12 How. 284, 13 L. ed. 990; *Lincoln v. Hapgood*, 11 Mass. 350; *Hayes v. Porter*, 22 Me. 371; *Jeffries v. Ankeny*, 11 Ohio, 372; *Brown v. Lester*, 21 Miss. 392. The principle is undoubtedly sound, and is not unfamiliar learning in this state. With us it has long been held that a ministerial officer is personally liable for the nonperformance of every duty prescribed by statute, to the party injured, and to the extent of the damage received, and he is also liable criminally to the public. *Dunn v. Stone*, 4 N. C. (2 Car. Law Repos. 261); *Hathaway v. Hinton*, 46 N. C. (1 Jones, L.) 247; *Holt v. McLean*, 75 N. C. 347; *Moretz v. Ray*, 75 N. C. 170.

The plaintiffs in this case had assumed heavy obligations for the sheriff on his official bonds, and had a direct and personal interest that those officials to whom he was directly accountable should obey the law prescribed for the protection of sureties, as

well as the public generally. The defendants were vested in this matter with no discretionary powers. They acted in defiance of the law, and disobeyed the express words of the statute by placing the tax lists in his hands when the sheriff had not fully settled the taxes for the previous year.

But it is said that, although the defendants may have committed a tort in violating the statute, it is not the proximate cause of plaintiffs' loss. It is generally held that the proximate cause of an injury is one that produces the result, and without which it would not occur, and one from which any man of ordinary prudence could foresee that such result was probable under all of the facts as they existed. This is the idea so well expressed by Mr. Justice Hoke in the often cited case of *Ramsbottom v. Atlantic Coast Line R. Co.* 138 N. C. 41, 50 S. E. 448, in support of which he cites recognized authority. Tested by this definition it is apparent that the wrongful act of the defendants was the proximate cause of plaintiffs' loss.

(1) If the defendants had obeyed the statute and refused to deliver the tax lists of 1906 to the sheriff, unless he settled in full with money collected from taxes for the year 1905, it is impossible that the sheriff could have embezzled the taxes for 1906. That is a self-evident proposition, and need not be discussed.

(2) A man of ordinary prudence could easily foresee that such result was probable under all the facts as they existed. As alleged in the complaint, the defendants had been notified by the sheriff's bondsmen that the sheriff was a defaulter, and had embezzled the tax money of 1905, and they were notified not to place the lists of 1906 in his hands until the law was complied with and a full and complete settlement made for the previous year. A person of ordinary prudence, having the knowledge of the defendants, could easily foresee that if the sheriff had embezzled the taxes for 1905, he would probably embezzle those of 1906. Suppose a merchant forbids his bookkeeper to send money to the bank by a certain messenger because he suspect his honesty, the bookkeeper violates instructions, and the messenger embezzles the money, is not the disobedience of the bookkeeper the direct or proximate cause of the merchant's loss, and can it be maintained that the bookkeeper would not be liable in consequence of his act?

I am of opinion that the duty imposed by the statute was mandatory; that a violation of it was necessarily a ministerial act; that it was the proximate cause of plaintiffs' loss; and that they had such direct

interest that they can maintain an action for the culpable negligence of defendants.

I am authorized to state that Mr. Justice Walker concurs in this opinion.

SOUTH DAKOTA SUPREME COURT.

TOWN OF COLTON, Resp.,
v.

SOUTH DAKOTA CENTRAL LAND COMPANY et al., Appts.

(— S. D. —, 126 N. W. 507.)

Municipal corporation — nuisance — cattle yards — right to prohibit.

A municipal corporation having authority to declare what shall constitute a nuisance, and abate the same, may prevent the maintenance of ordinary railway cattle yards in its residence district.

(April 5, 1910.)

APPEAL by defendants from a judgment of the Circuit Court for Minnehaha County in plaintiff's favor in a suit to enjoin the maintenance of certain stock yards which were alleged to constitute a nuisance. Affirmed.

The facts are stated in the opinion.

Mr. Robert F. Riemer, with Mr. S. H. Wright, for appellants:

Nothing can be made a public nuisance by the declaration of a municipal ordinance that it is a public nuisance, if it is not so in fact.

Boyd v. Frankfort, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 669; *Laugel v. Bushnell*, 197 Ill. 20, 58 L.R.A. 266, 63 N. E. 1088.

The term police power is not so broad and extensive that a state or a municipality has authority to declare that a thing con-

Note. — Power of municipal corporation to prevent stock yards within city limits.

A careful search discloses but scant authority on this question, no other case having been found directly presenting the point as to whether the power ordinarily vested in municipal corporations of declaring what shall constitute a nuisance, and abating the same, will authorize the municipality to prohibit stock yards within its limits, regardless of the condition in which they are kept. In the reported case the court considered that the trustees of the town, in anticipating the annoying and injurious effects ordinarily produced by such yards, and passing an ordinance against them, were well within their statutory power to declare and abate nuisance.

In the case of *Burlington v. Stockwell*, 5

stitutes a public nuisance which is not such in fact.

Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693; *Grossman v. Oakland*, 30 Or. 478, 36 L.R.A. 593, 60 Am. St. Rep. 832, 41 Pac. 5; *Ex parte Robinson*, 30 Tex. App. 493, 17 S. W. 1057; *Boyd v. Frankfort*, supra; *Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105.

Messrs. Bates & Parlliman and J. E. McMahon, for respondent:

The state, in the valid exercise of the police power, has the right to define a nuisance, and adopt such measures as may be necessary to prevent, remove, and abate any public nuisance; and can also authorize and empower the proper authorities of any town or city to do the same.

Dill. Mun. Corp. 4th ed. § 379; *Abbott, Mun. Corp.* §§ 126, 137, 138; *McQuillin, Mun. Ord.* §§ 422, et seq.; *Tiedeman, Pol. Power*, §§ 122, et seq.; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *State ex rel. Cedar Rapids v. Holcomb*, 68 Iowa, 107, 56 Am. Rep. 853, 26 N. W. 33; *Rochester v. West*, 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 673; *Darlington v. Ward*, 48 S. C. 570, 38 L.R.A. 326, 26 S. E. 906; *State v. Hord*, 122 N. C. 1092, 65 Am. St. Rep. 743, 29 S. E. 952; *Newton v. Joyce*, 166 Mass. 83, 55 Am. St. Rep. 385, 44 N. E. 116; *Chicago v. Stratton*, 162 Ill. 494, 35 L.R.A. 84, 53 Am. St. Rep. 325, 44 N. E. 853; *Portland v. Meyer*, 32 Or. 368, 67 Am. St. Rep. 538, 52 Pac. 21; *Com. v. Alger*, 7 Cush. 53; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Meigs v. Lister*, 23 N. J. Eq. 199; *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625.

Under the exercise of the police power, cities or towns may pass ordinances either prohibiting entirely, or limiting to certain districts, the carrying on of certain lines of

business, and erection of certain classes of buildings.

Re Linehan, 72 Cal. 114, 13 Pac. 170; *Re Hang Kie*, 69 Cal. 149, 10 Pac. 327; *Cronin v. People*, 82 N. Y. 318, 37 Am. Rep. 564; *St. Louis v. Fischer*, 167 Mo. 654, 64 L.R.A. 679, 99 Am. St. Rep. 614, 67 S. W. 872; *St. Louis v. Russell*, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; *Chicago v. Stratton*, supra; *Re Rolfs*, 30 Kan. 758, 1 Pac. 523; *McKnight v. Toronto*, 3 Ont. Rep. 284.

Haney, J., delivered the opinion of the court:

In this action the decision of the learned circuit court was substantially as follows:

(1) That plaintiff is, and at all of the times herein mentioned was, a municipal corporation organized and existing as an incorporated town under and by virtue of the laws of the state of South Dakota.

(2) That the defendants South Dakota Central Land Company and South Dakota Central Railway Company and the Farmers' Elevator Company of Colton each is, and at all of the times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the state of South Dakota.

(3) That on January 15, 1907, the board of trustees of said town established an ordinance containing these provisions:

"Section 1. It shall be unlawful for any person, persons, firm, or corporation to keep or maintain within the district hereinafter described, in the town of Colton, any pen, building, yard, shed, or inclosure wherein any cattle, sheep, or swine are collected, kept, or fed, by the owner, lessee, or occupant of any property therein.

"Sec. 2. It shall be unlawful for any person, persons, firm, or corporation to collect, keep, or feed any cattle, sheep, or swine within any pen, building, yard, shed, or inclosure within said district.

"Sec. 3. Said district shall comprise all that part of the town of Colton within the following boundaries, to wit: Bounded on the east by a line 780 feet east of Iowa

Kan. App. 569, 47 Pac. 988, an ordinance passed by the city authorities defining as a punishable nuisance the keeping of any yard or pen for cattle, swine, or other animals, in such a manner as to become offensive to any person residing in the vicinity, or annoying to the public, was held a valid enactment under a legislative grant of power to the city "to prevent and remove nuisances." The contention that the city had no power to enact the ordinance in question was based upon the fact that while cities of both the first and second class were granted the right to prevent and remove nuisances, only those of the first class (*Burlington* being of the second class) were allowed to regulate stock

yards. Upon this point the court said: "The legal principle claimed will be admitted, but the application is not correct. Under these statutes, a city of either the first or second class has the power to prevent and remove nuisances. This will include everything that comes within the legal definition of a public nuisance. A city of the first class also has the power to suppress hogpens or to regulate them, although they may not be legally a nuisance. A city of the second class has no such power." This view, while opposed to the holding in *COLTON v. SOUTH DAKOTA CENTRAL LAND CO.*, would probably be considered as binding only where there were such statutes as in the *Burlington* Case.

avenue, on the south by a line 158 feet south of Sixth street, on the west by a line 450 feet west of Glenn avenue, and on the north by a line 680 feet north of First street.

"Sec. 4. Any person, persons, firm, or corporation violating any of the provisions of this ordinance shall, upon conviction thereof, be fined in a sum not to exceed fifty dollars (\$50), and each and every day that any such pens, buildings, yards, sheds, or inclosures shall be kept or maintained, or that any cattle, sheep, or swine shall be collected, kept, or fed therein, within said district, shall be deemed a separate and distinct offense.

"Sec. 5. The keeping or maintenance within the district aforesaid, of any such pens, buildings, yards, sheds, or inclosures, or the collecting, keeping, or feeding of any cattle, sheep, or swine therein, shall constitute, and is hereby declared, to be a nuisance."

(4) That prior to January 15, 1907, the said defendants South Dakota Central Land Company and South Dakota Central Railway Company located, built, and erected on land belonging to said South Dakota Central Land Company, and adjacent to the railroad tracks of the defendant South Dakota Central Railway Company, certain pens, yards, buildings, and sheds, at the corner of Sherman avenue and Sixth street, within said town of Colton, for general stock-yard purposes, and for the purpose of collecting, keeping, and feeding cattle, sheep, and swine therein by the patrons of said defendant South Dakota Central Railway Company, and all persons who desired to ship stock over said defendant's railroad, which said pens, buildings, yards, and sheds are located within the said town of Colton and within the district or territory described in § 3 of said ordinance set out in finding No. 3; and that, ever since the building and erection of said pens, buildings, yards, and sheds, and until the commencement of this action, the said defendants South Dakota Central Land Company and South Dakota Central Railway Company kept and maintained said pens, yards, buildings, and sheds for the purposes aforesaid.

(5) That after the passage of said ordinance, and until the commencement of this action, the defendants Farmers' Elevator Company of Colton, L. L. Willard, John C. Smith, and various other persons, used and occupied said pens, buildings, yards, and sheds, and collected, kept, and fed cattle and swine within the same, with the full knowledge and consent of the said defendants South Dakota Central Land Company and South Dakota Central Railway Company.

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(6) That the said defendants South Dakota Central Land Company and South Dakota Central Railway Company intend to keep and maintain said pens, buildings, yards, and sheds for general stock-yard purposes in connection with the business of the said South Dakota Central Railway Company, and wherein cattle, sheep, and swine are to be collected, kept, and fed by the patrons of said South Dakota Central Railway Company and by persons who desire to ship cattle, sheep, and swine over its railroad.

(7) That said pens, buildings, yards, and sheds are located within from 450 to 600 feet of the principal business portion of said town of Colton, and are located about 180 feet from the nearest residence in said town. From the foregoing findings of fact, the court now makes and finds the following conclusions of law: (1) That the keeping and maintenance of said pens, buildings, yards, and sheds by the said defendants South Dakota Central Land Company and South Dakota Central Railway Company, for the purposes set out in the fourth and fifth findings of fact, constitutes and is a public nuisance. (2) That the collecting, keeping, and feeding of cattle, sheep, and swine in said pens, buildings, yards, and sheds, as set forth in the foregoing findings of fact, constitutes and is a public nuisance. (3) That the plaintiff is entitled to a judgment against the defendants South Dakota Central Land Company and South Dakota Central Railway Company, perpetually enjoining said defendants from keeping, maintaining, using, or permitting to be used the said pens, buildings, yards, and sheds for the collecting, keeping, or feeding of cattle, sheep, or swine therein, and for costs.

The only question, if any, properly presented by the record, is whether an incorporated town is authorized to prohibit the erection and maintaining of such cattle, sheep, and swine pens as are described in the circuit court decision, within the defined district, regardless of the condition in which such pens may be maintained; in other words, whether the ordinary railway cattle yard in an incorporated town is *prima facie* a nuisance when located in the residence district. Among the powers expressly conferred by the statute upon the board of trustees of an incorporated town are these: "To declare what shall constitute a nuisance, and to prevent, abate, and remove the same, and take such other measures for the preservation of the public health as they shall deem necessary." Rev. Pol. Code, § 1438. Where a municipal corporation is thus clothed with express power to declare what shall constitute a nuisance, its deci-

sion, if reviewable by the courts, should be sustained, unless palpably unreasonable. As applicable to this action, a nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures, or endangers the comfort, repose, health, or safety of others. A public nuisance is one which affects at the same time any considerable number of persons, although the extent of the nuisance or injury inflicted upon the individuals may be unequal. Rev. Civ. Code, §§ 2393, 2394. Within the broad grant of power conferred by the statute, the trustees of the plaintiff town were entitled and required to exercise a sound and sane discretion; to be guided by their knowledge and experience as men; to consider the condition in which railway stock pens or yards usually are maintained; to anticipate the annoying, injurious, and dangerous effects ordinarily produced by such places; to consider the rights of all concerned; and to determine whether, in the usual course of affairs, such pens or yards would constitute a nuisance if located within the district defined by the ordinance. It should be presumed that this important duty was properly and faithfully performed. The phrase "nuisance *per se*" is misleading. It often has been inappropriately employed. Strictly speaking, no act or omission is a nuisance regardless of surrounding conditions. No one can create a nuisance in the absence of someone affected by the former's act or omission. A slaughterhouse that would annoy no one if situated in an uninhabited gulch might be an intolerable menace to health when located in the residence sections of a city or town. The circumstances may be such as to render the most exquisite music both annoying and injurious. "Since there must be some place where every lawful business or erection may be lawfully located or carried on, the better rule would seem to be that a lawful business or erection is never a nuisance *per se*, but may become a nuisance by reason of extraneous circumstances, such as being located in an inappropriate place, or being conducted or kept in an improper manner. It may be said, however, that some lawful businesses and erections are *prima facie* nuisances in certain localities." 21 Am. & Eng. Enc. Law, 2d ed. p. 684. The business of keeping, feeding, shipping, and dealing in cattle, sheep, and swine is in itself entirely legitimate. It required such pens or yards as are described in the circuit court decision. It involves substantial property rights which should not be capriciously ignored. Nevertheless, as everyone "must so use his own rights as not to infringe upon the rights of others" (Rev. Civ. Code, § 2413),

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and as the business in question is one which as usually conducted causes a large amount of manure, offal, garbage, and other offensive substances to accumulate where it is conducted, and causes noxious, annoying, and injurious smells which taint the atmosphere in the vicinity where it is carried on, to the annoyance, injury, and discomfort of persons residing or transacting business in the neighborhood of its location, this court cannot say that an ordinance which excludes such business from defined districts, instead of attempting to preserve the public health by regulation within such districts, is so clearly unreasonable as to demand its annulment; on the contrary, the inappropriateness of an urban residence district as a location for an ordinary railway stock yard is too apparent for argument. No function of civil government is more deserving of serious consideration than is the conservation of the public health. The subject of sanitation in cities and towns is everywhere receiving earnest and thoughtful attention. Pure air and pure water are coming to be universally recognized as matters of paramount importance,—matters to which the selfishness of commerce should be compelled to make reasonable concessions.

So we conclude that the ordinance involved is not invalid, and that the judgment of the Circuit Court should be affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

JOHN M. G. BROWN, Appt.,

v.

ROBERT L. BROWN et al.

(— W. Va. —, 67 S. E. 596.)

Partition — right to — remainderman.

One of several remaindermen in land after a life estate cannot have partition during the continuance of the life estate, even though he has acquired that life estate, unless he waives that life estate.

(March 15, 1910.)

Headnote by BRANNON, J.

Note — Right to partition among remaindermen pending life estate.

In absence of statute.

In the absence of statutory provisions authorizing it, remaindermen cannot maintain an action for the partition of land during the existence of the life estate, when the life estate extends to all the premises involved. Culver v. Culver, 2 Root, 278; Berry v. Lewis, 118 Ky. 652, 82 S. W. 252, 84 S. W. 526; Savage v. Savage, 19 Or. 112, 20 Am. St.

A PPEAL by plaintiff from a decree of the Circuit court for Monongalia County in defendants' favor in a suit to compel partition of certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Moreland, Moreland, & Guy and Cox & Baker for appellant.

Messrs. Donley & Hatfield, for appellees:

A remainderman cannot maintain a suit for partition until the expiration of the life or other precedent estate upon which the estate in remainder is supported, unless the life tenant or other exclusive occupying tenant appears and consents to the partition.

Bice v. Nixon, 34 W. Va. 107, 11 S. E. 1004; Merritt v. Hughes, 36 W. Va. 356, 15 S. E. 66; Seibel v. Rapp, 85 Va. 28, 6 S. E. 478.

Brannon, J., delivered the opinion of the court:

John J. Brown died in August, 1905, having made a will by which he devised real estate in the city of Morgantown to his wife, Mary Ellen Brown, during her life, with remainder to his children, John M. G. Brown, Robert L. Brown, Margaret A. Stoetzer, and three infant grandchildren, children of a dead son, Zalmon Kent Brown. The widow conveyed her life estate to one

of said devisees, John M. G. Brown, and he brought a suit in the circuit court of Monongalia county to compel a partition of the land among those entitled. The court dismissed the bill, and John M. G. Brown appeals.

Has John M. G. Brown right to enforce partition? He owns an undivided fourth in remainder subject to the life estate under the will, and he owns that life estate. He cannot maintain a suit for partition by virtue of his remainder. Nor can he have partition unless entitled to immediate possession. A remainderman is not so entitled. This court has decided that a reversioner or remainderman cannot compel partition during the continuance of a particular estate. Merritt v. Hughes, 36 W. Va. 356, 15 S. E. 56; Croston v. Male, 56 W. Va. 205, 107 Am. St. Rep. 918, 49 S. E. 136. That is abundantly established by the authorities there given. If any further authorities were needed, a pile of them will be found in 113 Am. St. Rep. 55, note. But the plaintiff has the life estate of his mother in addition to his undivided fourth in remainder as devisee. Does that life estate give him any additional right that he can add to his estate in remainder? Surely not, because a life tenant cannot compel a partition among remaindermen. A life tenant has not a par-

Rep. 795, 23 Pac. 890; Pabst Brewing Co. v. Melms, 105 Wis. 441, 75 Am. St. Rep. 919, 81 N. W. 882. The reason was that in the absence of statute only one in possession or entitled to present possession could maintain partition.

This is the rule where the life estate is created by will. Schori v. Stephens, 62 Ind. 441; Coon v. Bean, 69 Ind. 474; Lawson v. Bonner, 88 Miss. 235, 117 Am. St. Rep. 738, 40 So. 488; Striker v. Mott, 2 Paige, 387, 22 Am. Dec. 646; Sullivan v. Sullivan, 66 N. Y. 37; Wood v. Sugg, 91 N. C. 93, 49 Am. Rep. 639; Elrod v. Bass, 1 Ohio C. D. 23; Smith's Estate, 2 Del. Co. Rep. 423; Norment v. Wilson, 5 Humph. 310; Smith v. Smith (Tenn.) 57 S. W. 198; Rutherford v. Rutherford, 116 Tenn. 383, 115 Am. St. Rep. 799, 92 S. W. 1112; McKnight v. McKnight (Tenn.) 107 S. W. 682.

Or by deed. Stout v. Dunning, 72 Ind. 343; Nichols v. Nichols, 28 Vt. 228, 67 Am. Dec. 699; Seibel v. Rapp, 85 Va. 28, 6 S. E. 478.

So, it applies where the life estate is an estate by the curtesy. Barrett v. Byrne, 21 D. C. 274; Hughes v. Hughes, 30 Hun, 349; Mersereau v. Camp, 42 Misc. 253, 86 N. Y. Supp. 568; Wolfe's Estate, 22 Pa. Co. Ct. 340; Merritt v. Hughes, 36 W. Va. 356, 15 S. E. 56.

The rule also applies to that portion of a deceased husband's lands which has been assigned to the wife for life as and for her dower. Wilkinson v. Stuart, 74 Ala. 198; Hamby v. Hamby (Ala.) 51 So. 732; Moore 28 L.R.A. (N.S.)

v. Shannon, 6 Mackey, 157; Hardy v. Gregg (Miss.) 2 So. 358; Wood v. Bryant, 68 Miss. 198, 8 So. 518; Alexander v. Alexander, 26 Neb. 68, 41 N. W. 1065; Brown v. Brown, 8 N. H. 93; Tabler v. Wiseman, 2 Ohio St. 207; Lee's Estate, 13 Phila. 291; Robertson v. Robertson, 2 Swan, 197.

But the rule is otherwise where dower has been assigned, not by metes and bounds, but by giving to the widow one third of the net profits, thus leaving possession and seizure of all the lands in the plaintiffs. Hassell v. Mizell, 41 N. C. (6 Ired. Eq.) 392.

Under statute.

Under statute in Illinois the joint owners of a vested remainder may compel partition among themselves, leaving the life-estate intact, the remainder to be sold and the proceeds divided. Scoville v. Hilliard, 48 Ill. 453; Drake v. Merkle, 153 Ill. 318, 38 N. E. 654; Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115; Deadman v. Yantis, 230 Ill. 243, 120 Am. St. Rep. 291, 82 N. E. 592; Garwood v. Garwood, 244 Ill. 580, 91 N. E. 672.

However, under this statute no partition can be had by the remaindermen until after the death of the life tenant, where the life estate was created by a will which provided for a division of the estate after the decease of the life tenant. Dee v. Dee, 212 Ill. 338, 72 N. E. 420.

Nor are remaindermen entitled to partition, subject to the life estate, where such estate was created by a deed which vested

title of interest in estates in remainder, not a cotenant with remaindermen, and nobody can have partition unless he have title to the thing to be partitioned. 21 Am. & Eng. Enc. Law, 2d ed. p. 1146. A life tenant owning with one or more others a life estate can have that estate divided between himself and co-owners of the life estate; but what colorable right has he to demand a partition among the remaindermen? He already has possession and right to enjoy the estate during his life, and could get no more by partition. It is well settled on authority and the nature of things that a tenant for life has no power to maintain suit for partition against remaindermen entitled in fee subject to the life estate. The well-considered case of *Seiders v. Giles*, 141 Pa. 93, 21 Atl. 514; 30 Cyc. Law & Proc. pp. 181, 200. We find in 21 Am. & Eng. Enc. Law, 2d ed. p. 1155, this: Where a married woman dies seised with an undivided interest in land leaving her husband entitled to curtesy, he becomes a life tenant of an undivided moiety, and may maintain partition against his wife's cotenant. "Where, however, the wife was seised of the entire tract, the tenant by the curtesy becomes a life tenant of the entire tract, and hence is not a cotenant with the remaindermen, and has no such estate as

will support partition." Also, page 1153. Freeman on Partition, § 455, says that "a tenant for life or for years could, both at law and in equity, compel partition. [Of course, he means between himself and cotenant of the mere life estate.] He could not compel the reversioner to join with him; nor could he occasion a compulsory partition which would be binding after the termination of his estate." The plaintiff in this case, neither upon his title as remainderman nor on his title as owner of the life estate, could compel partition. His mother could not compel partition on the strength of her life estate, and her conveyance to the plaintiff of her life estate added nothing to his estate to enable him to compel partition. We acknowledge that the case of *Otley v. McAlpine*, 2 Gratt. 340, seems to be the other way, as it allowed a tenant by the curtesy who acquired an undivided interest in the remainder to enforce partition. If that case is reported properly, it is against all authority and reason. The court does not give any reason for the holding, or cite a particle of authority, and the opinion is wholly a short and unsatisfactory one. A life tenant cannot have partition unless he waives his life estate, and thus gets it out of the way, destroys it, and lets the remainder-

the remainder in the survivor or survivors of a class, since the present rights or interests of the respective parties cannot be determined because one or more of them may die without issue before the termination of the life estate. *Seymour v. Bowles*, 172 Ill. 521, 60 N. E. 122.

Under the Minnesota statute remaindermen may have partition, but the judgment and partition cannot affect the life tenant. *Cook v. Webb*, 19 Minn. 173, Gil. 129; *Snalley v. Isaacson*, 40 Minn. 450, 42 N. W. 352; *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702.

Under statute in Missouri a vested estate in remainder may be partitioned, leaving the unexpired life estate intact. *Preston v. Brant*, 96 Mo. 552, 10 S. W. 78; *Atkinson v. Brady*, 114 Mo. 200, 35 Am. St. Rep. 744, 21 S. W. 480; *Hayes v. McReynolds*, 144 Mo. 348, 46 S. W. 161.

This is the rule fixed by statute in New Jersey. *Smith v. Gaines*, 38 N. J. Eq. 65.

In New York, by statute, the joint owners of a vested estate in remainder may maintain an action for the partition of such estate subject to the life estate; in such an action the entire estate cannot be sold, merely the remainder is sold and the proceeds divided. *Garvey v. Union Trust Co.* 29 App. Div. 513, 52 N. Y. Supp. 260; *Prior v. Hall*, 13 N. Y. Civ. Proc. Rep. 83.

The right of remaindermen to partition was affirmed in *Howell v. Mills*, 7 Lans. 193, and *McGlone v. Goodwin*, 3 Daly, 185, under a statute which impliedly provided that a

constructive possession of the plaintiff in such an action should be sufficient.

In *Chism v. Keith*, 1 Hun, 589, without setting out the statute, it was said that partition among joint owners of a vested remainder was a matter of right, although the life tenant was still alive and in possession.

Partition among remaindermen is permitted by statute in North Carolina, but neither the remainder nor the life estate must be contingent on any uncertainty. *Gillespie v. Allison*, 117 N. C. 512, 23 S. E. 438.

Under the Oregon statute a remainderman cannot maintain partition unless he holds, and is in possession of, a vested remainder as a tenant in common with the defendants. *Sterling v. Sterling*, 43 Or. 200, 72 Pac. 741.

Under a statute in Tennessee remaindermen may have partition, and with the consent of the life tenant the entire estate may be sold. *Bierce v. James*, 87 Tenn. 538, 11 S. W. 788.

But where the remainder interests are not fixed or ascertainable, but are contingent, partition cannot be had. *Muldoon v. Trehitt* (Tenn.) 38 S. W. 109; *Smith v. Smith* (Tenn.) 57 S. W. 198.

An amendment to this statute, which purported to give the life tenant the right to partition and sell the land of the remainderman without the assent of the latter, was held unconstitutional in *McConnell v. Bell*, 121 Tenn. 198, 130 Am. St. Rep. 770, 114 S. W. 203.

men at once come in. Had the plaintiff done this, he could as remainderman have sustained his case; but he did not do so. When he does that, he removes the particular estate out of the way of the remainder. The case of *Bice v. Nixon*, 34 W. Va. 107, 11 S. E. 1004, makes that waiver a condition precedent to enable a life tenant to have partition. The case thus decides that a life tenant cannot otherwise have partition. The remaindermen could not ask partition pending the life estate. That is settled, and can the life tenant demand it against the remainder? The right ought to be mutual.

For these reasons we affirm the decree.

ILLINOIS SUPREME COURT.

JOSEPH P. WULLER, by Next Friend,
v.

CHUSE GROCERY COMPANY, Appt.

(241 Ill. 398, 89 N. E. 796.)

Infant — stock subscription — rescission.

1. An infant who has paid for and received stock for which he subscribed in a corporation may, during minority, rescind the contract and recover the money paid, upon tendering back the stock which still remains in his possession.

Same — cancellation of certificate.

2. The return to a corporation of stock which has been purchased by an infant is effected upon his rescission of his contract, by the cancellation of the certificate which was issued to him.

(October 26, 1909.)

APPPEAL by defendant from a decree of the Appellate Court, Fourth District,

Note. — Right of infant to rescind sale of corporate stock.

WULLER v. CHUSE GROCERY Co., holding that an infant who has paid for and received corporate stock may, during minority, rescind the contract and recover the money paid therefor, upon tendering back the stock remaining in his hands, is supported by the authorities.

Thus, in *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.* [1894] 3 Ch. 589, it was held that an infant who had derived no advantage or benefit from the purchase of company stock might repudiate her contract during infancy, and recover back the money paid by her for the stock, since, as she had derived no benefit from the transaction, the consideration had wholly failed.

In *North Western R. Co. v. McMichael*, 5 Exch. 114, in discussing the rights and liabilities of an infant owner of railway shares, the court said: "An infant is not absolute-

ly bound, but is in the same position as an infant acquiring real estate or any other permanent interest; he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due."

The facts are stated in the opinion.

Messrs. L. D. Turner and L. D. Turner, Jr., for appellant:

If an infant performs the conditions prescribed in the certificate, he, the same as an adult, becomes entitled to the benefits thereby secured, and cannot recover back the trusts and acknowledgments he may have already paid.

Chicago Mut. Life Indemnity Assn. v. Hunt, 127 Ill. 257, 2 L.R.A. 549, 20 N. E. 55; 1 *Parsons, Contr.* 332; 1 *Rohrer, Railroads*, p. 185, 186, § 21.

He cannot disaffirm while a minor, nor can he repudiate the contract of subscription whilst in his minority, to such an extent as will bind him when he comes of age.

1 *Rohrer, Railroads*, § 21, p. 186; *Birkenhead, L. & C. Junction R. Co. v. Pilcher*, 5 Exch. 121.

An infant can bind himself by fraud; and if an infant had applied for the shares with the intention of keeping them if the company succeeded, and repudiating them on the ground of infancy if it should not succeed, he would be fixed with the same liabilities as if he had been of age when he applied for them.

Thompson, Liability of Stockholders, § 232, p. 209; *Re Huntenberg*, 163 Fed. 768; *Marion Trust Co. v. Blish* (Ind. App.) 79 N. E. 415; *Page v. Morse*, 128 Mass. 99.

There is a great practical difference between protecting an infant defendant against his improvident promises to pay, on the one hand, and, on the other, en-

ly bound, but is in the same position as an infant acquiring real estate or any other permanent interest; he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due."

In *Newry & E. R. Co. v. Coombe*, 3 Exch. 565, it was held that an infant who has contracted and subscribed for shares of railway stock may, during infancy, repudiate such contract and subscription, so as to relieve him from liability for calls, at least where he has not enjoyed any profits from the contract and subscription.

In *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429, cited in *WULLER v. CHUSE GROCERY Co.*, an infant who had purchased of his employer, an incorporated company, certain shares of its capital stock, to be paid for

couraging him to act as the aggressor in demolishing completed transactions; and public policy and the best interests of minors themselves have recognized this distinction.

Rice v. Butler, 160 N. Y. 578, 47 L.R.A. 303, 73 Am. St. Rep. 703, 55 N. E. 275.

The infant can call on his partner for an accounting and a share of the profits, but the adult partner has a right to insist that the assets of the firm be applied to the debts, and the infant's right to rescind is subordinate to this equity of the adult.

1 Bates, Partn. § 144, p. 154; Page v. Morse, supra; Moley v. Brine, 120 Mass. 324; Dunton v. Brown, 31 Mich. 182.

Messrs. Dill & Pfingsten, Schaefer, Farmer, & Kruger, for appellee:

An infant's personal contracts, whether executed or executory, may be disaffirmed by him either before or after his majority.

Lawson, Contr. § 147; Moore, Civil Justice, 3d ed. § 122; 16 Am. & Eng. Enc. Law, 2d ed. pp. 288, 298; Story, Contr. § 107; 1 Addison, Contr. p. 251; Cook, Corp. § 67; Beach, Priv. Corp. § 138; Craig v. Van Beber, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906; Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429; Bennett v. McLaughlin, 13 Ill. App. 349; Morton v. Steward, 5 Ill. App. 533; Mead v. Stegall, 77 Ill. App. 679.

An infant is incompetent to purchase shares of stock, and he may disaffirm while still an infant, and is then not liable on calls.

1 Cook, Corp. 5th ed. § 318; Newry & E. R. Co. v. Coombe, 3 Exch. 565; 1 Beach, Priv. Corp. § 138.

An infant who has subscribed for and paid money on stock may repudiate and recover back the money so paid, if no benefit has been received.

1 Cook, Corp. 5th ed. §§ 67, 250.

by the crediting of a certain portion of his weekly wages on a promissory note which he had executed to the employer therefor, was held entitled, during minority, to avoid the contract and recover the amount which he had deducted from his wages and credited on the note, the father having relinquished to the infant all claim to his services, although before rescission of the contract one dividend had been declared on the stock.

And in *White v. New Bedford Cotton Waste Corp.* 178 Mass. 20, 59 N. E. 642, also cited in *WULLER v. CHUSE GROCERY CO.*, it was held that an infant could rescind a purchase of corporate stock and recover the amount which he had paid therefor, although he could not put the other party to the contract *in statu quo*, because he had surrendered his certificate of stock to another corporation which had taken over the affairs and property of the defendant corporation, and had accepted shares thereof in lieu of
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Dunn, J., delivered the opinion of the court:

The appellee filed a bill for relief against the appellant, and the circuit court decreed the payment of \$1,500 by the appellant to the appellee, and the cancellation of a certificate for fifteen shares of the capital stock of appellant held by the appellee. This decree having been affirmed by the appellate court, an appeal is prosecuted to reverse the judgment of the latter court.

The appellee was a minor when the bill was filed and when the cause was heard. In May, 1905, the appellant corporation was organized to carry on a mercantile business, with a capital stock of \$4,500, of which the appellee subscribed and paid for fifteen shares of \$100 each. He acted as secretary and treasurer of the corporation, and was a salesman and bookkeeper thereof at \$12 a week during the first year, and at \$15 a week thereafter until after he began this suit in December, 1908. Having become dissatisfied with the conduct of the business, appellee filed a bill charging mismanagement thereof, repudiating, on account of his minority, his contract for said stock, and refusing to be bound thereby, offering to return the certificate for said stock, and praying for an accounting, the appointment of a receiver, and general relief.

The position of the appellant is that an infant, having advanced money upon a contract voidable because of his infancy, cannot rescind the contract and recover the money, and that he cannot elect to avoid the contract during his infancy. The contract of an infant is, in general, voidable by him, and gains no additional force from the fact that he is engaged in business for himself, or is emancipated. The exercise of his right to disaffirm his contract may operate injuriously and unjustly against

the shares for which he had subscribed and paid in the defendant corporation.

An infant's subscription for stock is voidable either during infancy or within a reasonable time thereafter. *Re Nassau Phosphate Co. L. R. 2 Ch. Div. 610*; *Baker's Case, L. R. 7 Ch. 115*.

And in *Robinson v. Weeks*, 56 Me. 102, it was held that money paid by an infant for capital stock of a corporation could be recovered back by him, where the purchase had been rescinded within a reasonable time after he attained his majority.

The following cases hold that a transfer of stock to or by, or a contract of, an infant for the purchase of shares of corporate stock, is voidable, but not absolutely void: *Lumsden's Case, L. R. 4 Ch. 31*; *Smith v. Nashville & D. R. Co.* 91 Tenn. 221, 18 S. W. 546.

But in *Mann's Case, L. R. 3 Ch. 459*, note, a transfer of corporate stock to an infant was held to be a mere nullity.

the other party; but the right exists for the protection of the infant against his own improvidence, and may be exercised entirely in his discretion. The fact that the contract has been executed is immaterial. There is no distinction between executed and executory contracts, so far as the right of disaffirmance is concerned.

The appellant has cited the case of *Chicago Mut. Life Indemnity Assn. v. Hunt*, 127 Ill. 257, 277, 2 L.R.A. 549, 20 N. E. 55, 60, in which the court, in determining the right of the association to admit minors to membership, used the following language: "If an infant performs the conditions prescribed in the certificate, he, the same as an adult, becomes entitled to the benefits thereby secured. If he fails to perform, his membership ceases, and that is all. We do not assent to the view that, as a further consequence of his disability, he may recover back the dues and assessments he may have already paid. 'If an infant advances money on a voidable contract, which he afterwards rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money, unless it was obtained by fraud.' 1 Parsons, Contr. 322." This language of the court used in argument was not essential to the decision, and the quotation from Parsons is at variance with authority and the doctrine now accepted. If the fact that the payment of money upon his contract was voluntary precluded its recovery, the right to avoid the contract would be no protection to an infant against his inexperience and the wiles of swindlers and cheats. Such voluntary payment may be recovered upon the avoidance of the contract. *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640; *Robinson v. Weeks*, 56 Me. 102; *Ruchizky v. De Haven*, 97 Pa. 202.

The consideration, or such part of it as remains in the possession or control of the minor, must be returned; but if he has lost or expended it, so that he cannot restore it, he is not obliged to make restitution. *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906; *Reynolds v. McCurry*, 609 Ill. 356. Contracts concerning personal property and executory agreements may be avoided by the infant, either during or after his minority. *Childs v. Dobbins*, 55 Iowa, 205, 7 N. W. 496; *Chapin v. Shafer*, 49 N. Y. 407; *Robinson v. Weeks*, supra. The shares of capital stock of a corporation are personal property, the same as promissory notes or bonds. *Cooper v. Corbin*, 105 Ill. 224. An infant's purchase of such stock is voidable, and he may, at his election, avoid it, and recover the purchase money. *Indianapolis Chair Mfg. Co. v. Wil-* 28 L.R.A. (N.S.)

cox, 59 Ind. 429; *White v. New Bedford Cotton Waste Corp.* 178 Mass. 20, 59 N. E. 642. The appellee, having offered to return the stock which he had received under the contract, was entitled to the return of the purchase money he had paid.

The certificate of stock held by the appellee was merely the evidence of his rights as a stockholder. The contract by which he became a stockholder having been avoided, the decree properly provided for the cancellation of the certificate, which amounted, in effect, to the surrender of the stock by appellee, and its restoration to appellant.

The judgment is affirmed.

OHIO SUPREME COURT:

TOLEDO RAILWAYS & LIGHT COMPANY, Plff. in Err.,

ELLEN J. MASON.

(81 Ohio St. 463, 91 N. E. 292.)

New trial — inadequate damages.

1. In an action to recover damages for personal injuries, a new trial may be granted on the ground of the inadequacy of the damages found by the jury, when it appears upon the facts proved that the jury must have omitted to take into consideration some of the elements of damage properly involved in the plaintiff's claim.

Appeal — inadequate damages — reversal.

2. On error in the circuit court to the overruling of a motion for a new trial on the ground of the inadequacy of the damages found by the jury in an action for personal injuries, the circuit court may reverse the judgment of the court of common pleas and grant a new trial, on the ground that the verdict is not sustained by sufficient evidence.

(February 23, 1910.)

Headnotes by the COURT.

Note. — Review by appellate court of ruling of the trial court on motion to grant a new trial in action for bodily injuries on ground of inadequacy of damages awarded.

Upon the general question as to inadequacy of damages as a ground for setting aside a verdict, see note to *Benton v. Collins*, 47 L.R.A. 33.

The general rule, in the absence of a statute to the contrary, that a motion for a new trial is addressed to the discretion of the trial court, and is not reviewable unless the record shows a clear abuse of such discretion, applies to orders granting or refusing to grant a motion for new trial made upon the ground of inadequate damages.

ERROR to the Circuit Court for Lucas County to review a judgment reversing a judgment of the Court of Common Pleas in plaintiff's favor for a less sum than was demanded in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Summers, Ch. J.:

The defendant in error, Ellen J. Mason, sued the plaintiff in error to recover damages for personal injuries sustained by her in alighting from a street car, operated by plaintiff in error, on which she was a passenger. She avers that she was seriously and permanently injured, and prays for \$10,000 as damages. The defendant admits

that she was a passenger, and that she was, to some extent, injured. The plaintiff testified that she was sixty-two years of age; that prior to her injuries she was continuously employed in nursing, and earned from \$10 to \$14 per week; that she was confined to her bed for three weeks after the accident, and that for two months she was unable to do anything, and that she had earned but \$10 in the year following the accident; and that her eyesight and her heart are affected. The jury returned a verdict for \$25.05. The plaintiff moved for a new trial on the ground, among others, that "the verdict is so inadequate and insufficient as to show bias and prejudice on the part of the jury," that the verdict is contrary to the weight of the evidence, and that the

Affirming order granting new trial.

In *Lee v. Publishers George Knapp & Co.* 137 Mo. 385, 38 S. W. 1107, it was held that the supreme court would not interfere with the discretion of the trial court in awarding a new trial because the verdict was inadequate as the result of prejudice, partiality, or misapprehension of the evidence, unless it plainly appeared that such discretion was arbitrarily or unreasonably exercised.

To the same effect are *Chouquette v. Southern Electric R. Co.* 152 Mo. 257, 53 S. W. 897; and *Loevenhart v. Lindell R. Co.* 190 Mo. 342, 88 S. W. 757.

In *Tathwell v. Cedar Rapids*, 122 Iowa, 50, 97 N. W. 96, the supreme court said that it interferes reluctantly with the action of the lower court in ruling on motions for a new trial on the ground of the inadequacy of the damages awarded, and especially where a new trial has been granted.

In *Noble v. Kansas City*, 222 Mo. 121, 120 S. W. 779, the court held that it is peculiarly within the discretion of the trial court to pass upon the weight of the evidence when considered in connection with a motion for a new trial on the ground that the damages awarded were inadequate; and when the record fails to show that the trial court has abused its discretion, the appellate court should not substitute its discretion for that of the trial court.

In *Ft. Wayne & B. I. R. Co. v. Wayne Circuit Judge*, 110 Mich. 173, 68 N. W. 115, it was held that the trial court has discretionary power in a personal injury case to set aside the verdict rendered, and order a new trial of its own motion, if it deems the award insufficient, and that such action will not be interfered with on appeal except in a case of clear abuse of such discretion. In that case the defendant asked for a writ of mandamus to compel the trial judge to vacate the order granting a new trial of his own motion.

In *Clements v. Fitt*, 63 Ga. 158, it was held that the first grant of a new trial on the ground that the verdict was inadequate and 28 L.R.A. (N.S.)

decidedly against the weight of the evidence, in the opinion of the presiding judge, would not be reversed by the supreme court unless it appeared that the trial judge had abused the discretion with which the law invested him.

And in the following cases the appellate courts have affirmed the order of the trial court which set aside the verdict for inadequacy of the damages awarded and granted a new trial: *Hubbard v. Mason City*, 64 Iowa, 245, 20 N. W. 172; *Ward v. Marshalltown Light, P. & R. Co.* 132 Iowa, 578, 108 N. W. 323; *Haven v. Missouri R. Co.* 155 Mo. 216, 55 S. W. 1035; *Richardson v. Missouri Fire Brick Co.* 122 Mo. App. 529, 99 S. W. 778; *Bartlett v. Helmbacher Forge & Rolling Mills Co.* (Mo. App.) 122 S. W. 351; *Ford v. Minneapolis Street R. Co.* 98 Minn. 96, 107 N. W. 817, 8 A. & E. Ann. Cas. 902; *Kelly v. Rochester*, 38 N. Y. S. 797, 15 N. Y. Supp. 29; *Brown v. Foster*, 1 App. Div. 578, 37 N. Y. Supp. 502; *De la Torre v. Metropolitan Street R. Co.* 48 App. Div. 126, 62 N. Y. Supp. 601; *Morris v. Metropolitan Street R. Co.* 51 App. Div. 512, 64 N. Y. Supp. 878; *McCormick v. Missouri, K. & T. R. Co.* 25 Tex. Civ. App. 321, 61 S. W. 983; *Barrette v. Carr*, 75 Vt. 425, 56 Atl. 93; *Emmons v. Sheldon*, 26 Wis. 648.

In North Carolina it is held that the discretion of the trial court in setting aside a verdict for inadequacy of damages is not reviewable on appeal. *Benton v. Collins*, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242. The court said that the power to correct prejudiced and grossly unfair verdicts must be vested somewhere, and that it is best that such power be confided to the judges who preside over the trials.

Affirming decision of lower court refusing new trial.

In *Woodward v. Consolidated Traction Co.* 17 Pa. Super. Ct. 576, it was said that the power of the appellate court to review the discretionary act of the trial court in refusing to grant a new trial because of the alleged inadequacy of the verdict was

verdict is contrary to law. The trial court overruled the motion, and entered judgment on the verdict. The plaintiff prosecuted error in the circuit court, and that court reversed the judgment and remanded the case for a new trial, on the ground that the trial court erred in not granting a new trial on the ground that the verdict was so inadequate that it was not sustained by sufficient evidence. Error is prosecuted in this court.

Messrs. Smith & Baker for plaintiff in error.

Mr. Stephen Brophy, for defendant in error:

A verdict for a grossly inadequate amount stands upon no higher ground in

exceptional in character, and only to be exercised in very clear cases of wrong or injustice, which the court below should have remedied; that the appellate court would not reverse unless it clearly appeared that the verdict was wholly inadequate, that the result was clear injustice, and that the jury was influenced by partiality, passion, or prejudice, or by some plain misconception of the law or the evidence.

To the same effect are *Donoghue v. Consolidated Traction Co.* 17 Pa. Super. Ct. 582; *Leahy v. Davis*, 121 Mo. 227, 25 S. W. 941; *Dowd v. Westinghouse Air Brake Co.* 132 Mo. 579, 34 S. W. 493; *Nagle v. Old Colony Street R. Co.* (R. I.) 76 Atl. 118.

In *Harper v. Black Diamond Coal Co.* 142 Ill. App. 594, the court said that while the damages awarded the plaintiff in that case for the injuries sustained were apparently small, and less than are usually awarded by a jury to a plaintiff injured under like circumstances, it would not be disturbed on review, in the absence of any indication that the jury in rendering such verdict were influenced by passion, by prejudice, or by errors of law. To the same effect is *Harby v. Florida East Coast Hotel Co.* (Fla.) 52 So. 193.

In *Lovett v. Chicago*, 35 Ill. App. 570, it was held that the refusal of the trial court to grant a new trial upon the ground that the verdict was inadequate will not be disturbed by the appellate court merely on the strength of the inconsistency of the verdict. The court said the evidence in that case would have warranted a much larger verdict, but as the trial judge evidently thought the plaintiff had been awarded all he was entitled to on the merits of the case, the judgment would be affirmed.

To the same effect is *O'Malley v. Chicago City R. Co.* 33 Ill. App. 354. And see *Hackett v. Pratt*, 52 Ill. App. 346.

So, also, in the following cases, the order of the trial court refusing a new trial because of the smallness of the damages awarded was affirmed by the appellate court after a review of the evidence: *Hackett v. Pratt*, supra; *Hamilton v. Pittsburgh*, 28 L.R.A. (N.S.)

legal principle, nor in the rules of law or justice, than a verdict for an excessive or extravagant amount, and a new trial may be granted upon that ground.

McDonald v. Walter, 40 N. Y. 551; *Smith v. Dittman*, 16 Daly, 427, 11 N. Y. Supp. 769; *Benton v. Collins*, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242; *Lee v. Publishers George Knapp & Co.* 137 Mo. 385, 38 S. W. 1107; *Beattie v. Moore*, Ir. L. R. 2 C. L. 28; *Bailey v. Cincinnati*, 1 Handy (Ohio) 438; *Kelly v. Rochester*, 38 N. Y. S. R. 797, 15 N. Y. Supp. 29; *Saperstone v. Rochester R. Co.* 25 App. Div. 285, 49 N. Y. Supp. 486; *Justice v. Lange*, 52 N. Y. 331; *Hart v. Hudson River Bridge Co.* 80 N. Y. 622; *Littlefield v. Lawrence*, 83 App. Div. 329, 82 N. Y. Supp. 25; *Hurley v. Metropolitan*

C. C. & St. L. R. Co. 104 Ill. App. 207; *Bolles v. Bloomington & N. R. Electric & Heating Co.* 130 Ill. App. 263; *Ray v. Jeffries*, 86 Ky. 367, 5 S. W. 867; *Muscarelli v. Hodge Fence & Lumber Co.* 120 La. 335, 45 So. 268; *Young v. Great Northern R. Co.* 80 Minn. 123, 83 N. W. 32; *Pritchard v. Hewitt*, 91 Mo. 547, 60 Am. Rep. 265, 4 S. W. 437; *Weinberg v. Metropolitan Street R. Co.* 139 Mo. 286, 40 S. W. 882; *Overholt v. Vieths*, 93 Mo. 426, 3 Am. St. Rep. 557, 6 S. W. 74; *Locke v. Independence*, 192 Mo. 570, 91 S. W. 61; *Brown v. Union R. Co.* 51 Mo. App. 192; *Brooks v. Ludin*, 25 Jones & S. 145, 6 N. Y. Supp. 510, affirming 1 N. Y. Supp. 338; *Robinson v. Waupaca*, 77 Wis. 544, 46 N. W. 809.

In *Kinser v. Soap Creek Coal Co.* 85 Iowa, 26, 51 N. W. 1151, it was held that the appellate court will not review the order of the trial court refusing to grant a new trial for inadequacy of damages, where the record does not purport to contain all of the evidence in the cause.

In North Carolina it is held that the refusal of the trial court to set aside the verdict and award a new trial upon the ground that the damages awarded are inadequate is not reviewable on appeal. *Burns v. Ashboro & M. R. Co.* 125 N. C. 304, 34 S. E. 495.

And in *Jung v. Keuffel*, 144 N. Y. 381, 39 N. E. 340, it was held by the court of appeals that a motion for a new trial was a matter addressed to the discretion of the courts below, and was not reviewable in that court on appeal, although the verdict might appear grossly inadequate.

In *Benjamin v. Stewart*, 61 Cal. 605, it was pointed out by the court that the whole matter of granting a new trial in that state was statutory, and that a new trial could not be granted on the ground of inadequacy of damages awarded, unless upon the statutory ground, for "insufficiency of the evidence to justify the verdict." The court also said that in such case the statement must specify the particulars in which the evidence is alleged to be insufficient, and that as in the case before the court no

Street R. Co. 87 App. Div. 67, 83 N. Y. Supp. 1082; McDonald v. Walter, 40 N. Y. 551; Townsend v. Briggs, 88 Cal. 230, 26 Pac. 108; Church v. Ottawa, 25 Ont. Rep. 298; Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473; Phillips v. London & S. W. R. Co. 29 Moak, Eng. Rep. 177; Hackett v. Pratt, 52 Ill. App. 346; Mariana v. Dougherty, 46 Cal. 26; Hall v. The Emily Banning, 33 Cal. 522; State ex rel. Scott County v. Wilson, 90 Ind. 114; Collins v. Albany & S. R. Co. 12 Barb. 492; Clapp v. Hudson River R. Co. 19 Barb. 461; Whitney v. Milwaukee, 65 Wis. 409, 27 N. W. 39; Wilson v. Morgan, 58 N. J. L. 426, 34 Atl. 752; Phillips v. South Western R. Co. L. R. 4 Q. B. Div. 406; Gaither v. Kansas City, etc., R. Co. 27 Fed. 545; Miller v. Delaware, L. & W. R.

Co. 58 N. J. L. 428, 33 Atl. 950; Usher v. Scranton R. Co. 132 Fed. 405; Carter v. Wells, F. & Co. 64 Fed. 1005; 14 Enc. Pl. & Pr. p. 932.

Mr. Orville S. Brumback also for defendant in error.

Summers, Ch. J., delivered the opinion of the court:

It seems to have been assumed in some cases that at common law, in an action for damages sounding in tort, a court might set aside the verdict of a jury when it was so excessive that it appeared to have been influenced by passion or prejudice, but that it was powerless to disturb one that was inadequate. The fact was, however, and the doctrine now generally accepted is, that

specifications had been made, the question would not be considered by the appellate court.

Reversing order of trial court granting a new trial.

In Jenkins v. Hawkins, 98 Tenn. 545, 41 S. W. 1028, it was held that where the objection to the verdict for damages was as to the amount, and not the fact of the verdict, the supreme court would not sustain the action of the lower court in setting it aside as being insufficient and against the evidence, unless upon its own independent investigation of the facts it should conclude that the jury acted from passion, prejudice, partiality, or corruption.

In Chesapeake, O. & S. W. R. Co. v. Higgins, 85 Tenn. 620, 4 S. W. 47, it was held error for the trial judge to set aside the verdict and grant a new trial in an action for damages for death of plaintiff's husband on the ground that the amount awarded (\$500) was insufficient and inadequate. After reviewing the evidence the supreme court said that the facts did not make a strong case for the plaintiff, and that the verdict of the jury for \$500 did not evince passion, prejudice, or corruption, authorizing the trial court to set it aside.

In Edwards v. Missouri R. Co. 82 Mo. App. 478, the court on appeal reversed the order of the trial court for setting aside the verdict and granting a new trial, because it said the order could not be sustained either upon the ground that it was against the evidence or that the amount of the damages was too small, without sanctioning an invasion by the court of the province of the jury, which, the court said, they were not at liberty to do.

And in Flanders v. Meath, 27 Ga. 358, the order of the trial court granting the motion for a new trial because of the inadequacy of the damages awarded was reversed on appeal. The record in the case, however, disclosed facts going to show that the conduct of the plaintiff was such as to have been the proximate cause of the injury, and for that reason the plaintiff was not

entitled to recover anything whatever. Under those conditions, the court said that the plaintiff was not in a condition to complain for getting more than he was entitled to.

In Metropolitan Street R. Co. v. O'Neill, 68 Kan. 252, 74 Pac. 1105, the trial court granted a new trial, and assigned as the reason that the verdict did not equal the amount of the actual pecuniary injury to the plaintiff as shown by the evidence; but the supreme court held that the amount of pecuniary injury was not clearly shown by the evidence, and reversed the judgment and ordered that judgment be entered upon the verdict. The decision in that case was influenced by the statute which provided that a new trial should not be granted where the damages were equal to the actual pecuniary injury sustained.

Reversal for refusal to grant new trial.

In Taylor v. Howser, 12 Bush, 465, it was said that where the action of the jury was such as to demonstrate that as to the damages the proof was disregarded, and the law of the case as embodied in the instructions of the court disobeyed, then a new trial may and ought to be granted. In that case it was held reversible error for the court below to overrule a motion for a new trial where the jury found a verdict for one cent, and the actual pecuniary damages resulting directly from the wrong were such as could be measured, and the proof was clear and conclusive.

In Milliken v. New York, 82 App. Div. 471, 81 N. Y. Supp. 866, the order of the trial court denying a motion for a new trial was reversed although the verdict was for a substantial amount. In that case the trial court agreed that the verdict was inadequate and illogical, but suggested that the verdict was the result of a compromise, and, though illogical, it was of the opinion that the verdict should stand and that the litigation should be ended. The court on appeal said that denial of the plaintiff's motion for a new trial operated to the prejudice of both litigants by perpetuating

the verdict of a jury is subject to the supervision of the court, whether too large or too small. A leading case is *Phillips v. London & S. W. R. Co.* (1879) L. R. 5 Q. B. Div. 78, 8 Eng. Rul. Cas. 447. That was a suit for personal injuries. On the trial before Field, J., and a special jury the jury gave the plaintiff £7,000. The plaintiff moved for a new trial, which was granted by the Queen's bench division on the ground that the amount of damages given by the jury was so small as to show that they must have left out of consideration some of the circumstances which ought to have been taken into account. The defendants appealed. James, L. J., in the court of appeal said (85): "We agree that judges have no right to overrule the verdict of a jury as to the amount of damages merely because they take a different view, and think that if they had been the jury they would have given more or would have given less, still the verdicts of juries as to the amount of damages are subject, and must for the sake of justice be subject, to the supervision of a court of first instance, and, if necessary, of a court of appeal in this way; that is to say, if in the judgment of the court the damages are unreasonably large or unreasonably small, then the court is bound to send the matter for reconsideration by another jury." He also says that they are of the opinion that the damages were unrea-

sonably small, on the grounds and reasons stated by the chief justice in the Queen's bench division. The case (*Phillips v. South Western R. Co.*) in the Queen's bench division is reported in (1879) L. R. 4 Q. B. Div. 406. On page 408 Cockburn, Ch. J., says: "It was contended on behalf of the defendants that, even assuming the damages to be inadequate, the court ought not on that account to set aside the verdict and direct a new trial, inadequacy of damages not being a sufficient ground for granting a new trial in an action of tort, unless there has been misdirection or misconduct in the jury, or miscalculation, in support of which position the cases of *Rendall v. Hayward*, 5 Bing. N. C. 424, and *Forsdike v. Stone*, L. R. 3 C. P. 607, were relied on. But in both those cases the action was for slander, in which, as was observed by the judges in the latter case, the jury may consider not only what the plaintiff ought to receive, but what the defendant ought to pay. We think the rule contended for has no application in a case of personal injury, and that it is perfectly competent to us, if we think the damages unreasonably small, to order a new trial at the instance of the plaintiff. There can be no doubt of the power of the court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply where they are insufficient to

a result which was strictly just to neither of them.

So, also, in the following cases the appellate court, after a review of the evidence, reversed the order of the trial court for refusing to grant a new trial because of the smallness of the damages awarded: *Anglin v. Columbus*, 128 Ga. 469, 57 S. E. 780; *Kilmer v. Parrish*, 144 Ill. App. 270; *Henderson v. St. Paul & D. R. Co.* 52 Minn. 479, 55 N. W. 53; *Moseley v. Jamison*, 68 Miss. 336, 8 So. 744; *Fischer v. St. Louis*, 189 Mo. 567, 105 Am. St. Rep. 380, 88 S. W. 82; *Robbins v. Hudson River R. Co.* 7 Bosw. 1; *Meyer v. Hart*, 23 App. Div. 131, 48 N. Y. Supp. 904; *Saperstone v. Rochester R. Co.* 25 App. Div. 285, 49 N. Y. Supp. 486; *Tourtlotte v. Westchester Electric R. Co.* 120 App. Div. 417, 105 N. Y. Supp. 50; *Michalke v. Galveston, H. & S. A. R. Co.* (Tex. Civ. App.) 27 S. W. 164; *May v. Hahn*, 22 Tex. Civ. App. 365, 54 S. W. 416, s. c. subsequent appeal (Tex. Civ. App.) 64 S. W. 942; *Burns v. Merchants' & P. Oil Co.* 26 Tex. Civ. App. 223, 63 S. W. 1061; *Whitney v. Milwaukee*, 65 Wis. 409, 27 N. W. 39.

Miscellaneous.

In *Bradwell v. Pittsburgh & W. E. Pass. R. Co.* 139 Pa. 404, 20 Atl. 1046, it was held that a new trial cannot be refused on condition that the defendant pay a sum fixed by the court, for the reason that the plain-

tiff has a right to have his damages assessed by a jury.

But in *Marsh v. Minneapolis Brewing Co.* 92 Minn. 182, 99 N. W. 630, where the verdict was for \$50, it was held that a condition that the defendant may avoid a new trial by payment of a sum fixed by the court—\$175 in that case—was not prejudicial to the defendant and within the reasonable discretion of the trial court.

To the same effect is *Ford v. Minneapolis Street R. Co.* 98 Minn. 96, 107 N. W. 817, 8 A. & E. Ann. Cas. 902, where it was said that such orders are discretionary with the trial court, and will not be set aside unless it affirmatively appears that they constitute an abuse of discretion.

In *Scheen v. Poland*, 34 La. Ann. 1107, the supreme court on appeal awarded exemplary damages in case of assault and battery.

And in *Sullivan v. Vicksburg, S. & P. R. Co.* 39 La. Ann. 800, 4 Am. St. Rep. 239, 2 So. 586, the amount of the damages was increased by the supreme court on appeal.

In *Richardson v. Zuntz*, 26 La. Ann. 313, the appellate court reversed the order of the lower court which denied a new trial, where the verdict had been rendered for the defendant, and ordered that the plaintiff recover from the defendant \$500 as damages, and that defendant pay the costs in both courts.

meet the justice of the case." The case was tried the second time before Lord Coleridge, Ch. J., and a jury, and resulted in verdict and judgment for £16,000, which was affirmed both in the Queen's bench division and in the court of appeal (1879) L. R. 5 C. P. Div. 280. The statement of the law by James, L. J. (1879) L. R. 5 Q. B. Div. 78-85, 8 Eng. Rul. Cas. 447, is cited with approval by Lord Davy in *Watt v. Watt* [1905] A. C. 115-121, 2 A. & E. Ann. Cas. 672.

The following American cases may be cited as taking the same view: *Fischer v. St. Louis*, 189 Mo. 567, 107 Am. St. Rep. 380, 88 S. W. 82; *Benton v. Collins*, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242; *Tathwell v. Cedar Rapids*, 122 Iowa, 50, 97 N. W. 96; *Miller v. Delaware*, L. & W. R. Co. 58 N. J. L. 428, 33 Atl. 950; *Ellsworth v. Fairbury*, 41 Neb. 881, 60 N. W. 336; *McDonald v. Walter*, 40 N. Y. 551; *Henderson v. St. Paul & D. R. Co.* 52 Minn. 479, 55 N. W. 53; *Robinson v. Waupaca*, 77 Wis. 544, 46 N. W. 809; *Whitney v. Milwaukee*, 65 Wis. 409, 27 N. W. 39.

Among the grounds for a new trial enumerated in § 5305, Rev. Stat., are these: "(4) Excessive damages, appearing to have been given under the influence of passion or prejudice. (5) Error in the assessment of the amount of recovery, whether too large or too small, when the action is upon a contract, or for the injury or detention of property. (6) That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law." And prior to its repeal in 1898 (93 Ohio Laws, p. 217), § 5306, Rev. Stat., provided: "A new trial shall not be granted on account of the smallness of damages, in an action for an injury to the person or reputation, nor in any other action where the damages equal the actual pecuniary injury sustained." Counsel for plaintiff in error concede that the repeal of the section restores to the trial court its common-law power to set aside a verdict on the ground that it is inadequate, but contend that it is discretionary with the trial court, and that the circuit court, the reviewing court, has not power to reverse the judgment of the trial court overruling a motion for a new trial on that ground, and, upon such ground, grant a new trial, and that to hold that it may is to add to the cases specified in subdivision 5, § 5305. There are cases holding that it is discretionary (*Ft. Wayne & B. I. R. Co. v. Wayne Circuit Judge*, 110 Mich. 173, 68 N. W. 115; *Benton v. Collins*, *supra*); but in *Tathwell v. Cedar Rapids*, *supra*, under Code provisions substantially identical with those of this state, and where there had been a repeal of a similar provi-

sion that "a new trial shall not be granted on account of the smallness of damages, in an action for an injury to the person or reputation, where the damages equal the actual pecuniary injury sustained," it is held: "(1) At common law the court had the same power to grant a new trial where the verdict was inadequate as where it was excessive, and the provisions of the Code supersede the common-law rules only so far as the same are inconsistent. (2) Code, § 3755, when liberally construed, as it should be, authorizes a new trial where the verdict is inadequate, notwithstanding the omission from the present Code of the provision contained in § 2839 of the Code 1873. (3) Where the trial judge finds that the jury failed to allow the amount of damages shown by the uncontradicted testimony, he may set the verdict aside as in conflict with the evidence, and grant a new trial."

In the well-considered opinion by McClain, J., in answer to the contention in that case that the repeal had taken away all power to grant new trials on the ground of inadequacy of the verdict, excepting in actions upon contract, or for the injury or detention of property, he said it was more reasonable to infer that the repeal "indicates an intention to abolish the limitation found in that section on the right to grant new trials for inadequacy of damages, and that the legislature understood that, after this section was omitted, the general power to set aside verdicts because not supported by the evidence would extend to verdicts which were inadequate, as well as those which are not only partially, but entirely, contrary to the evidence." He also said that the power to set aside a verdict that is manifestly inadequate under the evidence is expressly given by the sixth subdivision, "that the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law."

The limitation in subdivision 5, § 5305, was made probably in view of the denial of a new trial on account of the smallness of the damages, in an action for injury to a person or reputation; and, conceding that the repeal of § 5306, whatever may have been the supposition of the legislature, cannot under any known rule of construction be held to add actions for an injury to the person or reputation to the actions enumerated in subdivision 5, § 5305, yet in view of the repeal of original § 5306, § 5305 must be construed as not depriving the court of power to grant new trials in the actions mentioned in original § 5306 when the verdict is inadequate.

The granting of a new trial on the ground that the damages are inadequate is held discretionary in the trial court, and

not reviewable, in *Benton v. Collins*, and in *Ft. Wayne & B. I. R. Co. v. Wayne Circuit Judge*, supra, discretionary, but reviewable in case of abuse of discretion. *Jung v. Keuffel*, 144 N. Y. 381, 39 N. E. 340, does not hold that the matter is not reviewable, but that it is reviewable in the general term of the supreme court, and not in the court of appeals. In most of the cases cited the matter is reviewed, and in *Fischer v. St. Louis*, and in *Miller v. Delaware, L. & W. R. Co.* supra, a new trial was granted in the supreme court.

But while we hold that a new trial may be granted on the ground that the verdict is inadequate, yet attention should be given to the circumstances under which it is held proper that it should be granted.

The present case falls clearly within the principles applied in *Phillips v. London & S. W. R. Co.* (1879) L. R. 5 Q. B. Div. 78, 8 Eng. Rul. Cas. 447, and *Tathwell v. Cedar Rapids*, 122 Iowa, 50, 97 N. W. 96. If the plaintiff is entitled to recover, then the amount assessed did not cover the time actually lost, and the judgment is affirmed.

Crew, Spear, Davis, and Price, J.J.,
concur.

COLORADO SUPREME COURT.

WILLIAM M. BONNET, Plff. in Err.,
v.
EMMA E. FOOTE.

(47 Colo. 282, 107 Pac. 252.)

Physician — malpractice — fractured thigh.

1. A surgeon is guilty of malpractice in treating as a mere bruise a fracture of the neck of the femur, where, when patient is placed on his back, his foot lies over on one side, without power on his part to control it.

Evidence — fractured bone — remote examination.

2. Evidence of the result of an examination of a hip, made five years after defendant was called upon to treat it, is admissible in an action against him for malpractice in failing to discover that it was fractured, in corroboration of evidence that its condition immediately after the injury tended to show a fracture.

Same — photograph — remoteness.

3. That a sciagraph of an injured hip was taken five years after the injury does not render it inadmissible in evidence upon the question of the character of the injury.

Same — damages — fractured bone — shortened limb.

4. Evidence of the shortening of the leg is admissible upon the question of damages in an action against a surgeon for negligent

failure properly to diagnose a fracture of the neck of the femur, where there is sufficient evidence in the case to establish the negligence.

(February 7, 1910.)

ERROR to the District Court for the City and County of Denver to review a judgment in plaintiff's favor in an action brought to recover damages for alleged malpractice. Affirmed.

The facts are stated in the opinion.

Messrs. George W. Taylor and H. L. Noble for plaintiff in error.

Gabbert, J., delivered the opinion of the court:

Defendant in error commenced suit against plaintiff in error to recover damages for the alleged malpractice of the latter. In her complaint plaintiff alleged that while walk-

Note. — Liability of physician or surgeon for failure to diagnose fracture or dislocation.

The terms "physician" and "surgeon" herein are used interchangeably, the courts making apparently no attempt, so far as this point is concerned, to distinguish their respective liabilities.

In *Champion v. Kieth*, 17 Okla. 204, 87 Pac. 846, a judgment for plaintiff in an action against a physician and surgeon for failure to diagnose a fracture of the neck of the femur was reversed as not sustained by the evidence, it being shown that the defendant was a reputable surgeon, possessing the ordinary skill and ability required, that he took the precaution of calling in an assistant of perhaps even greater skill, and that their examination was very thorough, that all precautions and appliances at their command were used, and there being evidence that a fracture of the neck of the femur is sometimes impossible to detect and distinguish from a dislocation.

It was held in *English v. Free*, 205 Pa. 624, 55 Atl. 777, that a physician was not liable for failing to diagnose correctly a dislocation of the hip joint, where it appeared that the defendant was a skilful surgeon in good repute, that he gave attention to the case, and called in to aid him two other competent surgeons, and the testimony of all the reputable physicians called agreed that the injury was such that it was very difficult and sometimes impossible to detect its exact character.

A physician and surgeon who makes three examinations with the X-ray of an injured wrist to ascertain whether the wrist is fractured uses reasonable skill and care, and is not liable for failure to detect the fracture through negligence in not taking an X-ray photograph to make certain his diagnosis. *Wells v. Ferry-Baker Lumber Co.* (Wash.) post, —, 107 Pac. 869.

Where an injured arm was so swollen that

ing on Sixteenth street, in the city of Denver, she slipped and fell on the pavement, and injured her right hip; that she employed the defendant, a physician and surgeon, to treat the injury; that he examined her, and announced that she had only sustained a severe bruise, which time and keeping quiet would heal; that he called and treated her twice a day for about two weeks, and thereafter once a day for about one month, and after this period occasionally for about two months. She then alleges that the injury she received from her fall was a fracture of the neck of the right femur, with a displacement of the outer fragment, which eventually caused a shortening of the right limb from 2 to 3 inches. The negligence charged is (1) neglect and inattention of defendant in his examination of the plaintiff; (2) failing to set the bones in proper position and to keep them in place; (3) failing to use proper appliances at the proper time. The trial on the issues made by the answer of the defendant to this complaint and the replication of plaintiff resulted in a verdict and judgment for plaintiff in the sum of \$1,500. The de-

fendant brings the case here for review on error.

The first question we shall consider is the sufficiency of the evidence to establish the negligence of the defendant as charged. The testimony is not voluminous, and, so far as material to that question, is substantially as follows: Plaintiff fell upon the sidewalk in the evening. She was at once removed to her room, and requested that the defendant be called. He arrived within a few minutes, found that she was suffering severe pain, and told her he was afraid she had suffered a fracture, and advised her that he would not make an examination until morning. The next morning he called, and examined her hip by feeling it with his hands, and concluded that the injury was a severe bruise, and not a fracture. It further appears from the testimony that he continued to treat her for the periods as alleged in her complaint as for a bruise, and not a fracture; that he made frequent examinations of the injured limb, and measurements for the purpose of ascertaining whether or not it was shortening, but at no time regarded the injury as anything more

the complete extent of the injury could not be discovered by a careful and skilful examination, and a subsequent examination was prevented by the patient, the attending surgeon was not liable for failure to discover a fracture. *Gedney v. Kingsley*, 41 N. Y. S. R. 794, 16 N. Y. Supp. 792.

It was said in *James v. Crockett*, 34 N. B. 540, that it does not follow that a physician was negligent because he was unable to discover a dislocation; and it appearing that the defendant, against whom negligence was charged, gave the patient careful attention, made more than one careful examination, and, not content with his own diagnosis, called in another physician for consultation, a nonsuit was affirmed.

Where the discovery of a fracture is a matter of extreme difficulty, and a surgeon uses ordinary skill and diligence in his examination, negligence may not be imputed to him for failing to detect the fracture. *Stamper v. Rhindress*, 41 N. S. 45 (fracture of rim of hip joint).

It has been held that a physician is not liable for erroneously diagnosing a dislocation as a fracture, unless treatment improper for a dislocation followed; and in the case of a dislocated clavicle, that if the treatment was such as reasonable skill and care exacted for the cure of a dislocated clavicle, a physician was not liable, regardless of what his diagnosis may have been. *Tomer v. Aiken*, 126 Iowa, 114, 101 N. W. 769.

And so in *Fowler v. Sergeant*, 1 Grant, Cas. 355, where the plaintiff had suffered a fracture of the neck of the thigh bone, and the testimony established that such a fracture was difficult of detection and cure,

it was held that the physician was not chargeable for his ignorance if he prescribed for it rightly, and it appeared that the treatment given by the defendant was the proper remedy for the conditions then existing.

But a physician is answerable in damages for failing to discover a dislocation of the shoulder and fracture of an arm when he had a reasonable opportunity to make an examination, and the dislocation and fracture could have been ascertained by the exercise of ordinary care. *Manser v. Collins*, 69 Kan. 290, 76 Pac. 851.

And a physician is guilty of negligence for which there may be a recovery where he omits to reduce a swelling, and thus fails to discover that the real nature of an injury is a broken patella instead of a rupture of the ligaments. *Pike v. Honsinger*, 155 N. Y. 201, 63 Am. St. Rep. 655, 49 N. E. 760.

So, one who suffers injury through the failure of his physician to discover and reduce a dislocation which could have been readily discovered is entitled to recover damages resulting from the physician's negligence. *Burton v. Neill*, 140 Iowa, 141, 118 N. W. 302.

In *Burk v. Foster*, 114 Ky. 20, 59 L.R.A. 277, 69 S. W. 1096, 1 A. & E. Ann. Cas. 304, where the physician failed to discover a dislocated shoulder, the court, in reversing a judgment for the defendant, said that the patient was entitled to an ordinarily careful and thorough examination of his injuries, such as the circumstances attending their infliction, the condition of the patient, and the surgeon's opportunities for proper examination, suggested and allowed.

than a severe bruise. Plaintiff was confined to her bed for about four weeks. At the end of that time she was able to sit up a short time each day, gradually increasing it. In a few weeks she was able to walk with crutches, and about four months after her injury was sufficiently recovered so that she was able to go to Santa Fé, where she remained for several months. She used crutches or a crutch and cane for about eighteen months after her injury. After that period she used a cane only. She suffered more or less pain for something like two years, at the end of which time it passed away, but occasionally would return. It appears from the testimony that the injured limb was shortened, that it is not as strong as before the injury, and that plaintiff cannot use it with the same degree of facility she could before it was injured.

A physician and surgeon called on behalf of the plaintiff testified that about five years after her injury he made an examination of her right limb, and found from such examination, aided by an X-ray photograph of her right hip, that she had sustained a fracture of the neck of the femur of the right limb. He also stated that, in case of a fracture of the neck of the femur, it is often difficult to ascertain whether there is a fracture or not. He further stated that a severe bruise in the vicinity of the neck of the femur would produce practically the same pain as a fracture. He also detailed the method usually adopted by surgeons for the purpose of ascertaining whether or not, when the hip is injured, a fracture exists. It appears from the testimony that the defendant did not adopt this method or do anything more in the way of examining the injured limb than already stated.

During the course of his examination the witness was asked:

Q. Doctor, if a patient with an injured hip lie on the back and her foot turns over to one side, what is the indication?

A. Might be a fracture; might be a dislocation.

Q. It would be one or the other?

A. One or the other.

Q. The indication would be that it was either a dislocation or fracture?

A. Yes; that is, if there was inability to put it back again in place.

Plaintiff was recalled as a witness, and asked:

Q. You may state to the jury what position your foot—the right foot—assumed after this injury, when you were lying there on your back?

A. It laid over on the side.

Q. Did Dr. Bonnet ever see it lying over on the side?

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A. Yes, sir. He said he did not like it, although he could not understand why it did that.

Q. Did he straighten it?

A. He straightened it up, and it fell back again.

Q. Did you have any control over it to keep it up from falling back.

A. None whatever.

The defendant did not testify, and there was no testimony offered on his behalf controverting the facts and testimony as above narrated. From these facts and evidence it is clear that the injury to plaintiff's hip was a fracture instead of a mere bruise, and the question to determine is whether or not it appears that defendant was guilty of negligence in diagnosing and treating her injury.

In the absence of a special contract, the law implies that a surgeon employed to treat an injury contracts with his patient, first, that he possesses that reasonable degree of learning and skill which is ordinarily possessed by others of the profession; second, that he will use reasonable and ordinary care and diligence in the exercise of skill and the application of his knowledge to accomplish the purpose for which he is employed; and, third, that he will use his best judgment in the application of his skill in deciding upon the nature of the injury and the best mode of treatment. *Burnham v. Jackson*, 1 Colo. App. 237, 28 Pac. 250; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Winner v. Lathrop*, 67 Hun, 511, 22 N. Y. Supp. 516; *Carpenter v. Blake*, 10 Hun, 358. He is not responsible for want of success unless it results from a failure to exercise ordinary care or from want of ordinary skill. *Burnham v. Jackson* and *Leighton v. Sargent*, *supra*; *Williams v. Poppleton*, 3 Or. 139. And if he possesses ordinary skill, and exercises ordinary care in applying it, he is not responsible for a mistake of judgment. *Fisher v. Niccolls*, 2 Ill. App. 484; *Heath v. Glisan*, 3 Or. 64; *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064.

Applying these well-settled principles of law governing the liability of surgeons, it is at once apparent from the facts that the failure of the defendant to properly diagnose and treat the injury to plaintiff's hip was inexcusable. That the bone was fractured cannot be doubted. The evidence of such fracture was plain from the fact that plaintiff's foot lay over on one side, to which the attention of defendant was directed; so that one of two conclusions is inevitable: Either defendant did not possess that degree of learning and skill which the law requires of surgeons, or, if he did,

he failed to exercise ordinary care in applying it.

It is urged that the court erred in admitting the evidence of the doctor above referred to, for the reason that his examination of the plaintiff was made some five years after the injury, and that the condition of the injured limb at that time was not competent to prove that it was the result of the defendant's treatment, or failure to properly diagnose her injury. Unskillfulness cannot be established by proof of the result of treatment alone. Improper treatment must be shown by other evidence. *Sims v. Parker*, 41 Ill. App. 284. This rule is satisfied in the case at bar. There was other testimony with respect to the condition of the limb shortly after the injury and during the period the defendant was treating it, which at least tended to prove that the bone had been fractured, and the evidence of the doctor to the effect that from his examination he found that it had been fractured was competent as tending to corroborate the testimony on the part of plaintiff that its condition immediately after the injury was such as would be caused by a fracture. In this connection we notice the claim that the court erred in admitting the photograph of the injured limb, the "sciagraph," as it is termed, for the reason that it was taken several years after the accident. That it was taken long after the injury would be proper to consider in determining the weight which should be given it; but that would not affect its competency.

It is next claimed that the court erred in admitting testimony of the shortness of the injured limb. A surgeon is only required to restore an injured limb to that degree of perfection which would result from the exercise of that degree of skill in treating the injury which is ordinarily possessed by members of the profession. As previously stated, a surgeon is not responsible for want of success unless it is the result of a failure to exercise ordinary care. Neither is he responsible for a mistake of judgment if he possesses ordinary skill, and uses reasonable care in exercising it. The fact that an injured limb is defective after the patient has recovered is proper to consider in an action for malpractice, although it is not *prima facie* evidence of negligence of the surgeon treating it (*Piles v. Hughes*, 10 Iowa, 579), or, as some authorities state in substance, the mere fact that an injured limb is imperfectly healed does not of itself establish that the surgeon treating it was guilty of negligence (*Wood v. Barker*, 49 Mich. 295, 13 N. W. 597). However, neither of these rules of law, in the circumstances of this case, rendered the evidence 28 L.R.A. (N.S.)

under consideration incompetent. The claim of the plaintiff, and as the evidence establishes, was that the defendant did not treat her for a fractured bone, but for a severe bruise, and that he improperly diagnosed her injury. The bone was fractured. From the evidence it appears that defendant should have discovered this fact. So that the result which would follow his failure to properly diagnose and treat the injury was competent for the purpose of establishing the damages sustained.

It is also urged that the plaintiff was guilty of contributory negligence which should preclude a recovery. We fail to find that the record discloses any act on the part of the plaintiff which contributed to her injury or retarded the healing of her injured limb.

Error is also assigned upon the refusal of the court to give instructions requested. Those requested were substantially embraced in the instructions given by the court. It is not error to refuse instructions embraced in those given.

The judgment of the District Court is affirmed.

Steele, Ch. J., and Bailey, J., concur.

GEORGIA SUPREME COURT.

SOUTHERN EXPRESS COMPANY, Plff.
in Err.,
v.

SOTILLE BROTHERS.

(— Ga. —, 67 S. E. 414.)

Carrier — seizure of freight — Liability to shipper.

Where, after arrival at destination, an interstate shipment of intoxicating liquors stored in the warehouse of a common carrier is, over his protest and without fraud, collusion, or connivance on his part, seized by public officials acting under warrant is—

Headnote by HOLDEN, J.

Note. — *Action of public authorities under police power as defense to carrier for delay or non-delivery of freight.*

This question was discussed in the note accompanying the case of *Alabama & V. R. Co. v. Tirelli Bros.* 21 L.R.A. (N.S.) 731, and but one other case in addition to *SOUTHERN EXP. Co. v. SOTILLE BROS.* has since been reported.

In *New York C. & H. R. R. Co. v. Neil*, 65 Misc. 179, 119 N. Y. Supp. 676, the question arose in an action by a carrier to recover transportation charges upon a shipment of cattle. A counterclaim interposed for damages suffered through the delay of

sued in conformity to a law authorizing such seizures by such officials in enumerated instances, which law provides for the keeping of such liquors for thirty days before they shall be destroyed or become forfeited to the state, and authorizes the bringing of an action by any person to recover the same, and the carrier notifies the consignor, or the consignor has actual notice, of such seizure in time to bring an action to recover the goods under the provision of such law, the carrier is relieved from liability to the consignor for nondelivery to the consignee, even though such law may be unconstitutional, it never having been judicially declared so.

(February 18, 1910.)

ERROR to the Superior Court for Richmond County to review a judgment in plaintiffs' favor in an action brought to recover the value of certain goods which had been seized under process of law while in defendant's possession for transportation. Reversed.

The facts are stated in the opinion.

Mr. William K. Miller, for plaintiff in error:

The carrier is not required to resist a seizure, and the carrier may submit thereto without incurring liability.

New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 45, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; American Exp. Co. v. Mullins, 212 U. S. 311, 53 L. ed. 525, 29 Sup. Ct. Rep. 381, 15 A. & E. Ann. Cas. 536; Stiles v. Davis, 1 Black, 101, 17 L. ed. 33; Wells v. Maine S. S. Co. 4 Cliff. 228, Fed. Cas. No. 17,401; Savannah, G. & N. A. R. Co. v. Wilcox, 48 Ga. 432; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; Ex parte Young, 209 U. S. 128, 52 L. ed. 716, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441; Hunter v. Wood, 209 U. S. 205, 52 L. ed. 747, 28 Sup. Ct. Rep. 472; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; 25 Am. & Eng. Enc. Law, pp. 151, 152; 17 Am. & Eng. Enc. Law, p. 304; Moore, Carr. pp. 229, 233; 2

Hutchinson, Carr. §§ 738, 740, 743, 755; 4 Elliott, Railroads, § 1538; The Asiatic Prince, 47 C. C. A. 325, 108 Fed. 287; State v. United States Exp. Co. 70 Iowa, 271, 30 N. W. 568; Smith v. Frost, 51 Ga. 339; Nicholas v. Tanner, 117 Ga. 227, 43 S. E. 489; Merz v. Chicago & N. W. R. Co. 86 Minn. 33, 90 N. W. 7.

If the shipper does not follow the property seized, the carrier may assume that he has abandoned it as subject to the process of seizure.

Savannah, G. & N. A. R. Co. v. Wilcox, 48 Ga. 432; Smith v. Frost, supra; Southern R. Co. v. Heymann, 118 Ga. 616, 45 S. E. 491.

If it becomes unlawful or impossible for a contract of carriage to be performed by act of the state, the contract is dissolved.

Gates v. Goodloe, 101 U. S. 621, 25 L. ed. 898; 3 Kent, Com. 248; Macon & B. R. Co. v. Gibson, 85 Ga. 17, 21 Am. St. Rep. 135, 11 S. E. 442; Hutchinson, Carr. §§ 322, 819, 836; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Floyd v. Cook, 118 Ga. 529, 63 L.R.A. 450, 45 S. E. 441; Savannah, G. & N. A. R. Co. v. Wilcox, 48 Ga. 437; Kohn v. Richmond & D. R. Co. 37 S. C. 1, 24 L.R.A. 100, 34 Am. St. Rep. 726, 16 S. E. 377; 4 Elliott, Railroads, § 1537; Hale, Bailm. p. 182; Story, Bailm. §§ 124, 1235.

Messrs. McDaniel, Alston, & Black also for plaintiff in error.

Messrs. Samuel H. Myers and Archibald Blackshear, for defendants in error:

The transportation of merchandise from one state into and across another was interstate commerce, and was protected from the operation of state laws from the moment of shipment, whilst in transit, and up to the ending of the journey by the delivery of the goods to the consignee at the place to which they were consigned.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Rhodes v. Iowa, 170 U. S. 415, 42 L. ed. 1092, 18 Sup. Ct. Rep. 664; Vance v. W. A. Vandercook Co. 170 U. S. 439, 42 L. ed. 1101, 18 Sup. Ct. Rep. 674.

A state statute which conflicts with the actual exercise of powers of Congress over

the cattle *en route*, due to their detention in a quarantined district through which they had to pass, was rejected by the court because the delay was the result of the action of the public authorities taken in the exercise of the police power, and could not be justly attributed to the carrier, it appearing that there was no failure properly to care for the cattle during the time they were thus detained.

See also American Exp. Co. v. Mullins, 28 L.R.A.(N.S.)

212 U. S. 311, 53 L. ed. 525, 29 Sup. Ct. Rep. 381, 15 A. & E. Ann. Cas. 536, where the decision of a lower court holding an express company liable to the consignor of a shipment of intoxicating liquors which were seized and destroyed under a default judgment rendered in a court of another state in a proceeding in the nature of one *in rem* was reversed because it denied to the judgment of the sister state the full faith and credit due it under the Constitution.

commerce must give way before the supremacy of national authority.

Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Bowman v. Chicago & N. W. R. Co. 125 U. S. 515, 31 L. ed. 717, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; State v. Holleyman, 55 S. C. 207, 45 L.R.A. 567, 31 S. E. 362, 33 S. E. 369.

Liquor purchased in another state and shipped to the purchaser in this state is not contraband, being protected as an article of interstate commerce until it is delivered to the purchaser.

State v. Holleyman, *supra*; Smith v. La-far, 67 S. C. 491, 46 S. E. 333; American Exp. Co. v. Iowa, 196 U. S. 143, 144, 49 L. ed. 422, 423, 25 Sup. Ct. Rep. 182; Foppiano v. Speed, 199 U. S. 517, 50 L. ed. 291, 26 Sup. Ct. Rep. 138.

In case of loss the presumption of law is against the common carrier, and no excuse avails him unless it was occasioned by the act of God or the public enemy.

Georgia R. Co. v. Beatie, 66 Ga. 441, 42 Am. Rep. 75; Falvey v. Georgia R. Co. 76 Ga. 597, 2 Am. St. Rep. 58; Central R. Co. v. Lippman, 110 Ga. 665, 50 L.R.A. 673, 36 S. E. 202.

Seizure under process is a defense to the carrier only in cases where the process is legal and regular; seizure under void process is no defense.

Southern R. Co. v. Heymann, 118 Ga. 618, 45 S. E. 491; 5 Am. & Eng. Enc. Law, 2d ed. p. 238; Edwards v. White Line Transit Co. 104 Mass. 159, 6 Am. Rep. 213; Kiff v. Old Colony & N. R. Co. 117 Mass. 591, 19 Am. Rep. 429; Ohio & M. R. Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727; Mortimore v. Ragdale, 62 Miss. 86; Bennett v. American Exp. Co. 83 Me. 236, 13 L.R.A. 33, 23 Am. St. Rep. 774, 22 Atl. 159; Merriman v. Great Northern Exp. Co. 63 Minn. 543, 65 N. W. 1080; Hutchinson, Carr. § 400.

Holden, J., delivered the opinion of the court:

Sotille Brothers (hereinafter called the plaintiffs) brought suit in the superior court of Richmond county against the Southern Express Company for the value of certain cases and casks of liquor alleged to have been delivered to it by the plaintiffs at Augusta, Georgia, for shipment from that point to named consignees at Charleston and Middendorf, South Carolina. It was alleged 28 L.R.A. (N.S.)

that the liquors were ordered by the consignees for their personal use. To the petition a general demurrer was filed, and to an order overruling the same the defendant excepted. A copy of portions of the law of South Carolina known as the "dispensary law," approved February 16, 1907, was attached to the petition. It made it unlawful for any common carrier or its agents or servants or any person to carry or transport liquors for unlawful use to any county or place where the sale of liquor was prohibited. The act prohibited the sale of liquors in that state, except in a dispensary. The law set forth as an exhibit with the petition was in part an inspection law. The 1st section declared certain liquors which had not been tested "as hereinafter provided" to be contraband. The only provision appearing in the record before us which could relate to inspection is set out in these words: "Sec. 8. It shall be the duty of the board to cause an analysis of the liquors to be made," etc. Hence we cannot say from the record before us whether or not the law in question did, or did not, by its terms attempt to subject liquors under the conditions dealt with in the present case to any inspection. The law invoked being statutory law of a sister state, we take no judicial cognizance thereof, but can only deal with it as pleaded. No contention is made by counsel that there was no provision requiring the inspection of liquors under the circumstances presented by this case. One of the provisions contained therein was as follows: "All alcoholic liquors in possession of any person for unlawful use shall be seized without warrant; and if no action to recover same is begun within thirty days from such seizure, or if such action be begun and the judgment of the court be adverse to the plaintiff, then such liquors shall be forfeited to the county in which the same is seized, if there be a dispensary in said county, and disposed of as the county dispensary board may deem best; but if there be no dispensary therein, such liquors shall be destroyed publicly by the sheriff of the county." This law also provided that upon affidavit made, stating that contraband liquor was being "unlawfully concealed, kept, or stored in any place, search warrant may be issued by any magistrate of the county, empowering any officer or person who may be deputized to enter the said place," and to search the premises for the purpose of seizing the contraband liquors, "which said liquor, when so seized, shall be disposed of as hereinbefore provided for the disposition of unlawful liquors." To the petition was attached a copy of the warrant and the affidavit upon which it issued. under which the shipments

to Charleston were seized. The affidavit prayed "that such contraband liquors may be brought before this court, and such action taken concerning the same as is authorized by law." The magistrate before whom the affidavit was made issued a warrant commanding the officer, "with necessary and proper assistance, to enter" upon the designated premises of the defendant "and parties unknown," and to bring the liquors found "and deposit the same with the sheriff, which said articles are there to remain, to be disposed of as required by the provisions of the dispensary laws." The petition alleges: "After seizure the whiskeys were deposited by the officer with the tribunal pointed out by the laws of South Carolina, to be disposed of as provided by law," and the liquors shipped to Middendorf, South Carolina, were seized "under a similar warrant" by the sheriff, who destroyed the same. The presumption is that, in obedience to the mandate of the warrant, the sheriff carried the liquors seized at Middendorf before the court, and, if they were destroyed after the expiration of thirty days, it was because no action to recover the same was begun within thirty days from the seizure, or, if begun, the judgment of the court was adverse to the party bringing the action, and there was no dispensary in the county in which Middendorf was situated. The seizure of the liquors at Charleston was made on September 12th, and the defendant between September 12th and 15th notified the plaintiffs of such seizure, but they did nothing except to demand the value of the shipments from the defendant. It is not expressly alleged that the plaintiffs had notice of the seizure made at Middendorf, but, under all the allegations of the petition, we think a proper construction thereof is that the plaintiffs had notice of this seizure. The liquors seized in each instance were in the warehouse of the Southern Express Company at the place of destination.

The plaintiffs contend that any law providing for the warrant under which the seizures were made, before the interstate shipment of liquors was actually delivered to the consignees, was unconstitutional, because of the commerce clause of the Constitution of the United States, and for other reasons, and that the loss of the liquors by reason of a seizure under such law did not relieve the defendant from liability to the plaintiffs for failure to deliver to the consignees. One of the contentions of the defendant is that, even if such law is unconstitutional, the liquors were seized by officers designated by the law under process issued in conformity to the law, and, as the consignors had notice of the seizures in

time to assert their claim to the goods before they were destroyed in the county in which Middendorf is situated, and before they were destroyed or forfeited in the county in which Charleston is situated, that there can be no recovery by the plaintiffs. It was held by this court in the case of *Southern R. Co. v. Heymann*, 118 Ga. 616, 45 S. E. 491: "Intoxicating liquors which have been shipped from Augusta, Georgia, to persons in Charleston, South Carolina, and which have reached Charleston and been placed in a freight warehouse of the railroad company in that city, to await the call of the consignees, have 'arrived' in the state of South Carolina within the meaning of the act of Congress of August 8, 1890 [chapter 728, 26 Stat. at L. 313, U. S. Comp. Stat. 1901, p. 3177], known as the Wilson act." It was further held: "A railroad company is not liable for loss of property intrusted to it for shipment, occasioned by seizure of the property by an officer of the law under a prima facie valid authority." The decision in this case was reversed by the Supreme Court of the United States in the case of *Heyman v. Southern R. Co.* 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130. On page 277 of 203 U. S., that court said: "The conclusion that the court below erred in declining to follow the prior rulings of this court construing the Wilson act disposes of the entire controversy arising on the record before us, for the following reasons: In its answer filed in the trial court the railroad company substantially defended alone upon the ground that the seizure was rightful. And the supreme court of Georgia treated the liability of the defendant as depending solely upon the validity of the seizure. . . . Moreover, in this court, counsel in their brief on behalf of the defendant in error rely exclusively upon the correctness of the construction given to the Wilson act by the court below, and do not urge, in the event such construction be not sustained, that it was exempt for any reason whatever from liability." It was only the ruling made in the supreme court of this state first above quoted that was passed on and reversed by the Supreme Court of the United States. Its ruling in the *Heyman Case*, therefore, does not cover the questions to be decided in this case.

It is provided by our statute, and it was also the common law, that, in case of loss of goods intrusted to a common carrier for transportation, the presumption of law is against him, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state. This rule, however, is recognized by all the authori-

ties as being subject to certain limitations. In *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 Ga. 432, 437, it was declared that the liability of a common carrier was at an end "if the owner of the goods himself receives them short of the place of destination, or if they are not delivered by the fault of the owner, or that they have been taken from the carrier by title paramount, and, lastly, that they have been taken from him by legal process. He has not lost the goods, they have not been stolen or been destroyed; but his undertaking as a carrier has been determined." It has been held that, where the property was taken from the carrier under a process in favor of a third person who claimed title thereto, proof of paramount title in such third person discharged the carrier from liability for failure to deliver to the consignee, whether or not the consignor or consignee had notice of such seizure. *Robinson v. Memphis & C. R. Co.* (C. C.) 16 Fed. 57; *Hutchinson*, Carr. § 749; *Van Zile*, Bailm. & Carr. 2d ed. § 62. It is likewise true that a seizure of the property in the hands of the carrier by duly constituted authorities, under a valid process issued under a valid police law under which the property was liable to seizure, would relieve the carrier from any liability for failure to deliver to the consignee. When property is seized under process valid on its face, in favor of one claiming title thereto, the carrier is liable to the consignee for failure to deliver, unless he can show paramount title in such third person, or unless he can show notice of such seizure to the consignor. In the case of *Savannah, G. & N. A. R. Co. v. Wilcox*, supra, it was held: "It is not the duty of a common carrier to keep his doors locked and to refuse entrance to a sheriff who comes to seize property in the possession of the carrier, if the sheriff have legal process. When goods delivered to a common carrier for transportation were seized by legal process and taken out of his possession by the sheriff, and the carrier forthwith gave notice to the consignor and consignee, and they made no reply and took no further notice of the proceedings, held, that the carrier had a right to presume that they had abandoned the property, as subject to the legal process which had seized it." In the case of *Robinson v. Memphis & C. R. Co.* supra, it was ruled: "However the law may be elsewhere, the rule of the Supreme Court of the United States is that a seizure under legal process is a defense to the carrier in an action for nondelivery. But the mere seizure under valid process is not enough to excuse the carrier, for he must give immediate notice to the consignee. Failing this, he becomes liable as in any other case 28 L.R.A. (N.S.)

of delivery to another person than his own bailee, and assumes the burden of showing that the party seizing the goods under the process has the paramount title, unless he can show that the consignee had actual knowledge from other sources in due time, to be equivalent to that notice he would have received if the carrier had not been negligent in this regard."

In the present case, the shipments had arrived at destination, and had been stored in the warehouse of the carrier. Notice of the Charleston shipments had been mailed to the consignees. The arrival of the Mid-dendorf shipment was known to the consignee. The warrants under which the goods were seized were issued upon affidavits duly made before the proper officers, and the affidavit and the warrant conformed to the law under which the former was made and the latter was issued. The law provided for the storage of the property seized with the sheriff of the county for thirty days, within which any person claiming to own the same had a right to bring suit and recover. The consignors knew of the seizure, and, if they had brought suit within the thirty days named, they could have recovered the goods, if the seizure was unlawful because of the fact that the law under which the seizure was made was unconstitutional. The consignor did nothing except demand the value of the shipments from the express company.

The seizures were made over the protest of the carrier, which "in no way brought about or connived at the seizures," and the goods were forcibly taken from it. The law provided that the police officers executing the warrant had authority to summon assistance for that purpose, and the agent of the express company, under the law, was liable to a fine for resisting the officers in the execution of the warrant. Conceding, without deciding, that the law under which the warrants were issued is unconstitutional, we think under the facts above recited, which appear in the petition, that the carrier had a right to presume that the consignor had abandoned the property as subject to the process which seized it, and that the carrier was not liable to them for its failure to do more than it did. In the case of *Alabama & V. R. Co. v. Tirelli*, 93 Miss. 797, 21 L.R.A. (N.S.) 731, 48 So. 962, it was held: "A carrier is not liable for failure to deliver to the consignee a car load of fruit which it is forbidden by the municipal authorities to deliver, where the police department is at hand to enforce the order, although the fruit was not within the operation of an ordinance quarantining against shipments from certain ports." In the concluding part of the opin-

ion, after quoting from the decision of another court, it was said: "It is no answer to this language to say that no ordinance of the city prohibited the importation of bananas from Mobile. This is true; but the company is not bound to maintain an armed force to resist and overpower the marshaled hosts of the city police, acting under instructions from the executive department of the city government." In the present case the law under which the warrants were issued and the seizure made became effective February 17, 1907, and we know of no decision of any court holding this particular law to be unconstitutional. In the case of *McAlister v. Chicago*, R. I. & P. R. Co. 74 Mo. 351, the fifth headnote is as follows: "It seems that a bailee will not be held liable in damages for permitting the property of his bailor to be taken out of his custody upon a writ issued under a statute which is subsequently decided to be unconstitutional. He is not bound to know that it is unconstitutional." The status of an unconstitutional law is ably discussed by Mr. Dowling in an article appearing in 55 Cent. L. J. 25, in the concluding part of which he advances very cogent reasons why the burden of determining whether or not a law is unconstitutional should not be imposed upon an officer executing judicial process based on such law. In 5 Cyc. Law & Proc. p. 463, the following text is employed: "Where the carrier surrenders the goods under legal process, he should, to relieve himself from liability, at once notify the owner of the fact." In the case of *American Exp. Co. v. Mullins*, 212 U. S. 311, 53 L. ed. 525, 29 Sup. Ct. Rep. 381, 15 A. & E. Ann. Cas. 536, it was ruled by the Supreme Court of the United States: "The duty of the carrier to safely carry and promptly deliver to the consignee the goods intrusted to it does not require it to forcibly resist judicial proceedings in the courts of the state into or through which the goods are carried. While the carrier may appear and contest the validity of a seizure, under judicial process, of goods in its custody, if it seasonably notify the owner and call upon him to defend, it is relieved from further responsibility; and in absence of fraud or connivance on its part, it may plead the judgment rendered against it as a bar in an action brought by the owner." On page 313 of 212 U. S., Justice Brewer said: "The company carried the goods [liquors] to Kansas in obedience to the terms of the shipment. On arrival in that state they were taken by judicial process out of its possession and destroyed; the process being issued in a proceeding in the nature of one *in rem*. Undoubtedly it was authorized to 28 L.R.A. (N.S.)

appear in the Kansas court and contest for the rightfulness of its possession, but it might also notify the owner of the property and call upon him to carry on the litigation." The proceedings in the case we are considering were in the nature of proceedings *in rem*. On the general subject of liability of a carrier in cases where shipments in his charge are seized under judicial process, see the following authorities: *Stiles v. Davis*, 1 Black, 101, 17 L. ed. 33; 4 *Elliott, Railroads*, §§ 1461, 1537; 1 *Hutchinson, Carr.* § 327; 2 *Hutchinson, Carr.* §§ 738 et seq.; *Moore, Carr.* 233; *Van Zile, Bailm. & Carr.* 2d ed. § 62; 5 *Thomp. Neg.* §§ 6474, 6475; 6 *Cyc. Law & Proc.* pp. 462, 463; *Ray, Negligence of Imposed Duties*, p. 928.

The court committed error in overruling the demurrer to the petition.

Judgment reversed.

All concur.

ARKANSAS SUPREME COURT.

LUE HENDERSON, Admr., etc., of Vinson Henderson, Deceased, Appt.,
v.

DONIPHAN LUMBER COMPANY.

(— Ark. —, 127 S. W. 459.)

Navigable water — negligent use — log jam.

The placing of loose logs in a stream in such quantities that they form a jam which is likely to be broken at any time by the rising water, without taking any precautions to prevent injury by their movement to persons navigating the river, or to warn them of danger, may be found to be negligence which will render the owner of the logs liable for the death of one drowned by the overturning of his boat through the moving of the logs.

(April 4, 1910.)

Note. — Relative rights and duties of those using stream for floating logs or maintaining boom, and those navigating vessels thereon.

Owners of logs have the same right to use a navigable river as the owners of a steamboat. *Castner v. The Dr. Franklin*, 1 Minn. 73, Gil. 51; *United States v. Martinson*, 58 Fed. 765; *The Mary*, 123 Fed. 609.

Each must leave to the other all the space which the necessities of the case require. *Canfield v. The City of Erie*, 1 Mich. N. P. 105.

The right to run rafts in navigable waters must be exercised with due regard to the rights of others, and to the general usages and customs of navigation and commerce. The proprietor of a raft, while so exercising

A PPEAL by plaintiff from a judgment of the Circuit Court for White County sustaining a demurrer to the complaint in an action brought to recover damages for the death of plaintiff's intestate which was alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Rachels & Robinson, for appellant:

A river of sufficient size to float logs in large quantities is a public highway, governed by the same rule as highways on land.

Little Rock, M. R. & T. R. Co. v. Brooks, 39 Ark. 408, 43 Am. Rep. 277; Page v. Mille Laes Lumber Co. 53 Minn. 493, 55 N. W. 608, 1119; Gerrish v. Brown, 51 Me. 256, 81 Am. Dec. 569; Thompson v. Androsco-

gin River Improv. Co. 54 N. H. 545; Bucki v. Cone, 25 Fla. 1, 6 So. 160; Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58; Olson v. Merrill, 42 Wis. 203, U. S. Rev. Stat. § 5251, U. S. Comp. Stat. 1901, p. 3522.

The placing of so many logs upon the waters of the river as to occupy the whole surface of the water from bank to bank constituted an unlawful obstruction to navigation.

North Shore Boom & Driving Co. v. Nicomen Boom Co. 212 U. S. 406, 53 L. ed. 574, 29 Sup. Ct. Rep. 355.

Persons running logs in a navigable river, who negligently cause same to accumulate in vast packs, and rush down such river, destroying shipping in their path, are liable for the damage so done to shipping.

Gifford v. McArthur, 55 Mich. 535, 22 N.

his rights, is entitled to claim from others due observance of the fundamental principle of navigation, that the craft having the best facilities for its own management is charged with the corresponding duty to employ those facilities so as to avoid collision and injury. The Athabasca, 45 Fed. 651.

In Heerman v. Beef Slough Mfg. Boom. Log Driving, & Transp. Co. 8 Biss. 334, 1 Fed. 145, it was said that there is nothing peculiar about steamboat navigation that should give it any preference or superiority over other forms of commerce upon a stream adapted in a greater or less degree to both.

In The City of Erie v. Canfield, 27 Mich. 482, it was said that it was just and reasonable and conducive to the best interests of commerce that the right of navigating a river more valuable for floatage than for any other navigation should be exercised with due regard to the necessity for booming facilities, and the former is not so far paramount as to render the latter a nuisance whenever it encroaches upon waters navigable by the large vessels which enter the stream.

However, in Cincinnati Cooperage Co. v. Com. 11 Ky. L. Rep. 629, it was held that the mere fact that a stream is more useful for floating logs than for any other one business, or for all others combined, does not authorize the floaters to increase its facility for that purpose, if thereby they exclude other users; and that therefore a boom across a stream is a nuisance if, at times, it interferes with the use of the stream by those who have the right to navigate it, although the principal use of the stream may be for floating logs, and the boom may greatly facilitate the logging business.

Log owners maintaining a boom across a navigable stream for an unreasonable period are therefore liable in damages to the owner of a tug which was unable to pass. Gifford v. McArthur, 55 Mich. 535, 22 N. W. 28.

So, in Enos v. Hamilton, 24 Wis. 658, one obstructing a navigable stream by means of booms for six weeks was held liable to the owner of a tannery who, because thereof, was unable to ply his scows on the stream, 28 L.R.A. (N.S.)

and secure the bark needed in the operation of his tannery. This was reaffirmed in 27 Wis. 256.

To the same effect is Drake v. Sault Ste. Marie Pulp & Paper Co. 25 Ont. App. Rep. 251, where a boom was kept at the mouth of a river during a whole summer, to the injury of one who used such river to gain access to a lake, for the purpose of fishing and getting supplies for himself and neighbors.

In Smart v. Aroostook Lumber Co. 103 Me. 37, 14 L.R.A. (N.S.) 1083, 68 Atl. 527, it was held that a lumber company, although it has monopolized the commercial business on a navigable river and its tributaries, cannot fill the channel with logs for an unreasonable time, so as to prevent persons from using the stream in the summer months for floating boats and transporting goods to their cottages on its banks, or so as to stop sportsmen from passing up and down the stream.

So, it has been held that a pier erected in the Mississippi river as part of a boom for logs, with no other authority than that arising from the ownership of the adjacent shore, is an unlawful structure, and that the owner will be liable for the sinking of a boat which runs against it in the dark. Atlee v. Northwestern Union Packet Co. 21 Wall. 389, 22 L. ed. 619.

So, it has been held that a person throwing a boom across a stream in order to catch logs coming down will be liable for the injury caused thereby to the owner of a steamboat which is prevented by the boom from reaching its destination. Crandell v. Mooney, 23 U. C. C. P. 212. In this case the relative rights of logs and vessels were not involved, as the boom was stretched in mere anticipation, no logs having reached it at the time of the injury.

In Pierreville Steam Mills Co. v. Martineau, 20 Lower Can. Jur. 225, the owner of a boom was also held liable for damages caused to a navigating vessel, although, in accordance with a statute which authorized the construction of booms in such a way as not to obstruct the river, and which re-

W. 28; *Field v. Apple River Log Driving Co.* 67 Wis. 569, 31 N. W. 17.

One who for his own purposes puts in motion anything which, according to the ordinary course of nature, is likely to do injury to one upon a highway, is charged with the highest degree of care thereabout, and, failing to exercise such care, is liable to one injured as the proximate result of putting such thing in motion.

Tarry v. Ashton, L. R. 1 Q. B. Div. 314; *St. Louis, I. M. & S. R. Co. v. Hopkins*, 54 Ark. 209, 12 L.R.A. 189, 15 S. W. 610; *City Electric Street R. Co. v. Conery*, 61 Ark. 381, 31 L.R.A. 570, 54 Am. St. Rep. 262, 33 S. W. 426; *Texarkana Gas & Electric Light Co. v. Orr*, 59 Ark. 215, 43 Am. St. Rep. 30, 27 S. W. 66.

Messrs. S. Brundidge, Jr., and H. Neelly, for appellee:

Before the defendant can be held liable for the accident, the complaint must allege such a state of facts as shows that the putting of its logs into the river not only caused the injury, but that such injury was the natural and probable consequence thereof.

St. Louis, I. M. & S. R. Co. v. Bragg, 69 Ark. 405, 86 Am. St. Rep. 206, 64 S. W. 236; *Texas & P. R. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416; *Montgomery*

v. Wright, 72 Ala. 411, 47 Am. Rep. 422; *American Exp. Co. v. Risley*, 179 Ill. 295, 53 N. E. 558; *Missouri, K. & T. R. Co. v. Byrne*, 40 C. C. A. 402, 100 Fed. 359; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Holwerson v. St. Louis & Suburban R. Co.* 157 Mo. 216, 50 L.R.A. 850, 57 S. W. 770; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Illinois C. R. Co. v. Woolley*, 77 Miss. 927, 28 So. 26; *Lake Erie & W. R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923; *Consolidated Electric Light & P. Co. v. Koepp*, 64 Kan. 735, 68 Pac. 608.

McCulloch, Ch. J., delivered the opinion of the court:

This is an action at law instituted by the administratrix of the estate of Vinson Henderson, deceased, to recover damages sustained by the widow and next of kin of said decedent by reason of his death, which is alleged to have resulted from drowning in Little Red river on account of the overturning and sinking of a ferryboat on which he was a passenger. It is alleged that the boat was overturned by loose floating logs which had been placed in the river by defendant, and that the accident

quired the submission of the plan and site to the governor in council, the latter had actually approved of the plan and site. It appeared, however, that the boom actually did form an obstruction to the navigation of the river.

Custom cannot give log owners the right to place booms across a navigable stream so as completely to obstruct persons entitled to the free use thereof. *Gifford v. McArthur*, *supra*.

While all persons have an equal right to a reasonable use of navigable streams, as they have in a public highway, the legislature may determine the manner in which this reasonable use may be exercised, and prevent by legislation the obstruction of a navigable stream by floating loose logs upon it in such a way as to destroy its use to the public for the purpose of navigation. *Evans v. Com.* 10 Ky. L. Rep. 29, 7 S. W. 925; *Harrigan v. Connecticut River Lumber Co.* 129 Mass. 580, 37 Am. Rep. 387.

The mere floating of logs is not within the meaning of the provisions of a river and harbor appropriation act prohibiting the obstruction of a navigable stream. *United States v. Marthinson*, 58 Fed. 765; *United States v. Burns*, 54 Fed. 351.

In *Heerman v. Beef Slough Mfg. Boom. Log Driving, & Transp. Co.* 8 Bias. 334, 1 Fed. 145, it was held that an owner of steamboats plying on a river wholly within the territory of a single state cannot complain of booms and piers placed in such river with the consent of the legislature, for the purpose of aiding in the floatage of logs 28 L.R.A. (N.S.)

therein, although they hinder the steamboat navigation of the river.

However, in *United States v. Bellingham Bay Boom Co.* 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343, reversing 26 C. C. A. 547, 48 U. S. App. 443, 81 Fed. 658, it was held that a log boom which completely blocks up the channel of a navigable river, leaving no space for the free passage of boats and vessels, although it has what is known as a "trip," which may be opened for the passage of vessels, is not authorized by a statute providing that a boom shall be so constructed as to allow a free passage between it and the opposite shore for all vessels, or for ordinary purposes of navigation; and such boom is therefore not exempted from the prohibition in the river and harbor act of 1890, § 10, of obstructions to navigation not affirmatively authorized by law.

While, as appears from the above cases, the rights of one using a stream for the floatage of logs or for booming purposes must be exercised with due regard to the existence and preservation of the rights of those navigating vessels thereon; it will appear from the following cases that the converse is equally true:

Thus, in *John Spry Lumber Co. v. The C. H. Green*, 76 Mich. 320, 43 N. W. 576, it was held that the owner of a storage boom may recover from the owner of a boat which, through negligent management, strikes and breaks the boom, and permits the logs to escape. To the same effect is *Castner v. The Dr. Franklin*, 1 Minn. 73, Gil. 51.

resulted from defendant's negligence in "placing logs loose in said river in such quantities and in such manner, and with such lack of aftercare and oversight, as that the ordinary action of the current in said river caused them to occupy exclusively the surface thereof, and to accumulate in jams, and completely occupy the river from bank to bank." The court sustained a demurrer to the complaint, on the alleged ground that it stated no cause of action, and plaintiff appealed.

The complaint is unnecessarily long, and contains many repetitions and immaterial statements. The court should have required plaintiff to recast the complaint so as to make it conform to the statute, which directs that it shall contain "a statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action." Kirby's Dig. § 6091, subd. 3. The question now before us for decision is whether or not the complaint stated facts sufficient to constitute a cause of action against defendant. Purged of its surplusage, the complaint sets forth, in substance, the following state of facts: That defendant on and immediately prior to November 29, 1908, was engaged in the business of transporting logs in large

quantities down Little Red river, by placing them loose in the water and floating or driving them downstream; and that in so doing on the occasion specified it placed loose logs in the river in such quantities that the ordinary action of the current caused them to accumulate in large jams, and completely occupy the river from bank to bank, to the exclusion of all other navigation; that this occurred at a point in the river above a road crossing where there was being operated a public ferry, known as Faulkner's Ferry, which was located just below a bend in the river, so that persons operating the ferryboat could not foresee the approach of dangerous objects above the bend; that defendant was negligent in permitting the loose logs to accumulate in such quantities, and in failing to exercise ordinary care to protect persons and property rightfully on the river from the danger thus created; that the defendant set no watch over the pile or jam of logs, and took no steps to warn other persons of the danger, although it knew, or by the exercise of ordinary care could have known, that the jam was likely to be broken at any time by the ordinary current of the river, and rush down upon and injure other property in the river, and persons navigating the

In *Lallande v. The C. D. Jr. Newberry*, Adm. 501, Fed. Cas. No. 8,000, it was held that the master of a steamboat who desires to enter a bayou, the mouth of which is obstructed by a raft driven therein from the river by the force of the wind, is not justified in cutting loose the raft as an obstruction to navigation, whereby most of the logs are carried away and lost, when the raft has occupied such position but a short time, and the one in charge is endeavoring to obtain the services of a boat to take it in tow.

In *The Mary*, 123 Fed. 609, it was held that a vessel coming down a stream has no right to run against and destroy as a nuisance a raft which has become accidentally grounded, until those in charge of the raft have been given a reasonable time to remove it. The court in this case said that, even assuming that those in charge of the raft did not exercise proper skill and reasonable diligence and despatch to remove the obstruction, and the raft thereby became a nuisance which the vessel had the right to remove, the master failed to use ordinary care to avoid unnecessary injury to the raft, since, instead of running over the raft and destroying it, a line could have been fastened to it, and the raft thus pulled away, or, if that was unsuccessful, it could have been cut open and removed sufficiently to make a passage.

In *McCord v. The Tiber*, 6 Biss. 409, Fed. Cas. No. 8,715, a vessel was held liable for personal injuries to a pilot of a passing raft, occasioned by a line stretched from the vessel, which was aground, to the shore.

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But when a raft put up in such shape as to be difficult to handle is floated down a river, and permitted in a narrow part of such river to crowd so near the shore that a vessel coming up, to which warning was not given, had not sufficient room to pass in safety, the vessel is not liable for driving through the raft and scattering its contents. *The Athabasca*, 45 Fed. 651.

So, in *Brace v. Union Forwarding Co.* 32 U. C. Q. B. 43, it was held that one who uses a government boom for the purpose of running logs into a private boom, in such a way as to interfere with the passage of a steamboat, will not be entitled to recover for injury in case the steamer fouls and breaks the boom, causing the logs to escape and be lost.

The general question of right to use stream for floating logs is discussed in a note to *Carlson v. St. Louis River Dam & Improv. Co.* 41 L.R.A. 371. Cases dealing with the liability for injuries caused by floating logs may also be found in a note to *Crookston Waterworks, Power, & Light Co. v. Sprague*, 64 L.R.A. 983.

The right to construct log booms is discussed in a note to *Miller v. Hare*, 39 L.R.A. 491.

A note to *Trullinger v. Howe*, 22 L.R.A. (N.S.) 545, discusses the question of relative rights and duties between those maintaining a dam in a floatable stream, and those using the stream for floating logs and timber therein.

river at points below the jam; that defendant knew that the river was rising at that time, and that it would render the jam of logs more dangerous to other navigation, and took no steps to avoid the danger and prevent injury; that defendant knew that below said jam there was the public ferryboat customarily plying the river back and forth from bank to bank, at frequent intervals, and knew, or by the exercise of ordinary care might have known, that the great mass of logs accumulated above the ferry was rushing down, and had almost reached the ferrying place, and took no steps to warn those operating the ferry of the approaching danger; that on account of such negligence, the ferryboat on which Henderson was a passenger was struck amid stream and overturned by the downrushing mass of logs, and Henderson was drowned.

We are of the opinion that the complaint stated a cause of action, and that the demurrer should have been overruled. Mr. Farnham in his work on *Waters & Water Rights*, vol. 1, § 27, says that "the rules which govern the use of a body of water for purposes of navigation are similar to those governing the use of highways in general," and that all who use a stream or body of water for purposes of navigation must do so in such a way as not to unreasonably interfere with the rights of others. What constitutes reasonable use depends on the circumstances of each particular case. The same author in another place (§ 33) says: "A person attempting to exercise his right to navigate a public body of water must exercise due care not to injure the property of other persons which may be found upon the water or along the shores." And on the subject of floating logs on navigable waters, he makes the following statement of the law (§ 34): "The floating of logs being one of the uses to which navigable water ways may be put, there is no liability for the result of a careful and reasonable exercise of such use. . . . In the presence of concurrent rights, one to float timber, and the other to have property free from injury by the displacement of water and contact with floating timber, the former must be exercised with ordinary care that injury should not be done to the latter." By way of illustration of the above-announced rule, the author says (§ 31): "A slow-sailing tow may not occupy unreasonably the entire channel of the river, and thus impede its navigation by all other vessels. A leviathan may not rush through the water with a speed that will overwhelm in its surges all the craft ordinarily to be found on a river. . . . The navigator of a public river must conduct his

craft with ordinary care and caution, and with the same circumspection and in that careful, prudent manner which would seem to be dictated by common sense, and with due regard to the rights, property, and lives of others." The Kentucky court of appeals, in a case involving the question of liability for damage caused by floating logs in a stream, said: "Those lawfully using the stream as a highway for transporting their commodities to market must do so with care, and due regard for those whose rights are at least of equal dignity with their own. In this way all may fully enjoy the benefits offered by this highway of nature." *James v. Carter*, 96 Ky. 378, 29 S. W. 19. See also *Sullivan v. Jernigan*, 21 Fla. 264; *The Athabasca* (D. C.) 45 Fed. 651; *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 So. 374; *Outtersen v. Gould*, 77 Hun, 429, 28 N. Y. Supp. 798; *Field v. Apple River Log Driving Co.* 67 Wis. 569, 31 N. W. 17.

Now, applying the principles above stated to the facts set forth above in the complaint, we think a cause of liability for damages is made out. Little Red river is a navigable stream, used mainly for floating logs. Defendant and others had the right to use it for that purpose, even without rafting the logs; but in doing so they must exercise ordinary care to avoid injuring others who rightfully use the river for purposes of navigation. Those who use the river must take notice of defendant's use in floating logs in the usual way, and must exercise care to avoid contact with the logs. The question whether defendant made use of the stream in a careful manner,—that is to say, free from negligence under the circumstances of the case,—and whether the injured party exercised care under the circumstances for his own safety, are questions for a jury to pass on. According to the allegations of the complaint, defendant placed a large quantity of the logs in the river, and, without protection or warning to others, allowed them to accumulate in a great mass or jam, under circumstances which it should have known would, in the ordinary course of events, result in injury to others, when it was broken by the rising waters and carried down the stream, filling it from bank to bank. If these facts are proved, the question should be submitted to a jury to determine whether or not it constituted negligence under the circumstances. The fact that Congress, which possesses the power, or the Secretary of War, to whom Congress has delegated the power, has not prescribed regulations for floating loose timber on streams in which that is the principal method of navigation, does not leave entirely unrestricted the rights of one using

such navigable stream. One so using it must exercise care in so doing, even where no regulations are prescribed governing the use.

The judgment is therefore reversed, and the cause is remanded, with directions to overrule the demurrer to the complaint.

IDAHO SUPREME COURT.

M. E. LEWIS et al.

v.

JAMES H. BRADY, Governor, et al.

(17 Idaho, 251, 104 Pac. 900.)

State debt — constitutional limitation — construction.

1. The words "debt" and "liability," as used in § 1, art. 8, of the Constitution, are not employed in a technical sense, but have special reference to the basic warrant and legislative authority on which a state contract must rest, and on which alone a public debt must find its sanction in order to obligate the state to pay.

Same — computation — assessed value.

2. Under the provisions of § 1, art. 8, of the Constitution, the basis for computation by the legislature in creating public indebtedness is "the assessed value of the taxable property of the state," and this is a present standard for the guidance of the legislature, and has reference to existing facts and conditions at the time the legislature acts on such legislation.

Same — constitutional requirement.

3. Under the provisions of § 1, art. 8, of the Constitution, the legislature, in the passage of an act creating public indebtedness, must be governed by the assessed value of the taxable property of the state, as the same has been ascertained and then exists, and such legislation cannot anticipate the future, and leave the ascertainment of the assessed valuation to the future acts of ministerial and executive officers.

(November 12, 1909.)

APPPLICATION for a writ of mandamus to compel the issuance and sale of certain state bonds, in pursuance of a statute providing therefor. Denied.

The facts are stated in the opinion.

Messrs. Richards & Haga for plaintiffs.
Messrs. D. C. McDougall, Attorney General, and J. H. Peterson, for defendants.

Allshie, J., delivered the opinion of the court:

This is an original application for a writ of mandate. It is prosecuted by the board of regents of the state university against

the governor, secretary of state, attorney general, and treasurer of the state of Idaho, officers composing a board for the purpose of the issuance and sale of certain bonds of the state of Idaho, to be known as "University of Idaho Rebuilding and Equipment Bonds of 1909, Series A." It is alleged that under the provisions of an act of the legislature approved March 17, 1909 (Sess. Laws 1909, p. 407), entitled, "An Act Providing for the Issuance and Sale of State Bonds in the Aggregate Sum of Seventy-three Thousand Dollars (\$73,000), and Appropriating the Proceeds Thereof to the University of Idaho for Completing the Main or Administration Building, the Central Heating Plant, for the Purchase of

Note. — As of what time is the assessed valuation to be taken for purposes of determining the debt limit of a state or municipality.

In Rathbone v. Kiowa County, 27 C. C. A. 477, 49 U. S. App. 577, 83 Fed. 125; Board of Education v. National L. Ins. Co. 36 C. C. A. 278, 94 Fed. 324; Lake County v. Standley, 24 Colo. 1, 49 Pac. 23; and Germania Sav. Bank v. Darlington, 50 S. C. 337, 27 S. E. 846, it was held that where the debt of a municipality was limited to a certain percentage of the "assessed valuation" of the property therein, the computation of the debt permitted should be based on the last completed assessment before the debt was incurred.

So, in State ex rel. Marinette, T. & W. R. Co. v. Tomahawk, 96 Wis. 73, 71 N. W. 86, involving the validity of railroad aid bonds issued by a city, it was held, under a constitutional provision limiting municipal indebtedness to a certain percentage based upon the value of the taxable property therein, to be ascertained by the "last assessment for state and county taxes previous to the incurring of the indebtedness," that the computation must be based upon the last assessment next before the time fixed for the completion of the road and the delivery of the bonds.

Upon the same principle, it was held in Johnston v. Becker County, 27 Minn. 64, 6 N. W. 411, under a statute providing that taxes should be levied annually upon the taxable property in the state "as valued and entered on the grand list of taxable property," and prohibiting any county from contracting any debt which would make it necessary to levy upon the taxable property of such county a higher rate of tax than the statute permitted, that in considering whether a debt could be incurred, the county was bound to inquire whether a sufficient sum to discharge it could be raised by a levy within the statute on the taxable property of the county, as the same appeared upon the subsisting "grand list" of the county, and not upon any future "grand list."

In Lake County v. Sutliff, 38 C. C. A. 167, 97 Fed. 270, and Corning v. Meade County,

Lands, and for Other Equipment and Improvements, and Authorizing the Levy of an Annual Ad Valorem Tax for Providing a Sinking Fund for the Payment of Such Bonds at Maturity and the Interest Thereon," the defendants are empowered and directed to issue and sell thirty bonds of the state of Idaho of the par value of \$1,000 each, payable in two years after date of their issuance, and bearing interest at a rate not to exceed 6 per cent per annum, the receipts from such sale to be available for the use of the state university, as specified and designated in the act. An examination of the act itself discloses that it authorizes the issuance and sale of bonds in the aggregate amount of \$73,000, that the first \$30,000 of the issue should be made on September 1, 1909, and the remainder of \$43,000 should be made on September 1, 1910. The reason which prompted the legislature to defer the issuance of these bonds was that, at the time of the passage of this act, the state indebtedness was within about \$1,300 of the constitutional limit, as prescribed by § 1, art. 8, of the state Constitution. The purpose of deferring the issuance of these bonds is very clearly and

forcibly indicated by a proviso added to § 2 of the act. It reads as follows: "Provided, always, that in the issue of the bonds provided for by this act, the constitutional limit of state indebtedness be not exceeded, and that the retirement of outstanding bonds, or the increase of the assessed valuation of the state, or both, occurring between the date of the passage of this act and the dates of issuance of said bonds, be sufficient to bring the issues of bonds provided for in this act within the constitutional limit of state indebtedness." It is alleged in the petition that the state treasurer and the other state officers, acting in conjunction with him, decline and refuse to issue and negotiate the bonds provided to be issued on September 1, 1909, and the petitioners pray that a writ of mandate issue against them, requiring and compelling them to proceed in conformity with the act of March 17, 1909, and issue and negotiate \$30,000 worth of bonds.

Defendants demurred to the petition, and among other grounds alleged that the act of March 17, 1909, which purports to authorize and direct the issuance of these bonds, is unconstitutional and void as being

42 C. C. A. 154, 102 Fed. 57, writ of certiorari denied 180 U. S. 638, 35 L. ed. 710, 21 Sup. Ct. Rep. 921, it was held that the assessed valuation by which the constitutional or statutory limit of municipal indebtedness was to be measured was the last assessed valuation of the property before the bonds creating the debt were issued, and not the last one before they were voted.

But in *Wilkinson v. Van Orman*, 70 Iowa, 230, 30 N. W. 495, it was held under a provision limiting the indebtedness to a certain amount, to "be ascertained by the last state and county tax lists previous to incurring such indebtedness," that the computation should be based upon the tax lists which were completed before the bonds were voted by the electors of the district, and not upon assessment rolls not yet equalized for the year in which the election was had.

And in *State ex rel. Sutton v. Babcock*, 24 Neb. 640, 39 N. W. 783, it was held that the amount of bonds which could be issued by a city was to be measured by the assessed valuation at the time of the election.

In *State ex rel. Morse v. Cornwell*, 40 S. C. 26, 18 S. E. 184, it was held under a constitutional limitation of municipal indebtedness to a certain percentage "of the assessed value of all the taxable property" in the municipality, that the assessed value meant the assessment made by the proper authorities, completed and of record at the time the debt was created, and not an assessment made within the same fiscal year, but not completed until after the creation of such debt.

In *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781, overruling *People ex rel. Stander*, 28 L.R.A. (N.S.)

fer v. Hamill, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280 (an earlier case, though published later), it was held that where a city entered into a contract for the construction of a system of waterworks, the validity of the debt incurred thereby was to be determined by the assessment made prior to the execution of such contract, and not by a subsequent assessment of the same year in which the contract was entered into, though the later assessment was made before the time stipulated in the contract for the completion of the work.

In *West v. Chehalis*, 12 Wash. 369, 50 Am. St. Rep. 896, 41 Pac. 171, it was held that where municipal indebtedness at the date of its incurring was within the constitutional limitation, as shown by the last previous assessment, the indebtedness might be validated by the subsequent vote of the citizens, irrespective of the value of the taxable property, as shown by the assessment in force at the time of the validating election.

In *Prickett v. Marceline*, 65 Fed. 469, affirmed in 15 C. C. A. 700, 32 U. S. App. 767, 69 Fed. 462, it appeared that the Constitution of Missouri explicitly declared that the value of taxable property in a municipality, for the purpose of ascertaining the limit of indebtedness, was to be determined "by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness," and the specific holding of the court was that the act of extending the assessment by taxation by the city officers for city purposes did not constitute an "assessment," within the meaning of the Constitution.

in violation of § 1, art. 8, of the state Constitution. The portion of that section involved in this case reads as follows: "The legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate, exclusive of the debt of the territory at the date of its admission as a state, exceed the sum of one and one half per centum upon the assessed value of the taxable property in the state, except," etc. It is first contended by the attorney general that this act is unconstitutional for the reason that the title is insufficient, and does not comply with the requirements of § 16, art. 3, of the Constitution. The conclusion we have reached, however, on the other question raised, renders it unnecessary for us to consider the title to this act. It is admitted that, at the time of the passage of the act authorizing this bond issue, it would not have been constitutional to authorize the immediate issue and sale of such bonds for a sum exceeding \$1,362. It is claimed, however, that the act must be read and construed as if passed and approved on September 1, 1909, the date on which it authorizes the sale of the bonds. On the latter date this bond issue was not in excess of the constitutional limit. The assessed valuation of the taxable property of the state for 1908, and at the time of the passage of the act in question, was \$119,724,181. The aggregate indebtedness of the state, exclusive of the debt of the territory, and also exclusive of the debt authorized by this act, was \$1,794,500. The assessed valuation of the taxable property of the state on September 1, 1909, was \$120,815,434, and the total indebtedness of the state on that date, exclusive of the territorial debt, and exclusive of the debt authorized by the act in question, was \$1,754,250. It will be observed that between the time of the approval of this act and September 1, 1909, the indebtedness of the state was reduced \$40,250, while the assessed valuation of the state during the same period increased \$1,091,253. The question, therefore, to be answered, is simply this: Does § 1 of article 8 of the Constitution, above quoted, limit the legislature to the assessed valuation at the time the legislature is enacting and the governor is approving the act, or does it apply to the date at and after which the legislative act authorizes the sale of the bonds? If it refers to the former date, this act is void; if to the latter, it is valid.

Counsel for plaintiffs lay considerable stress on the words "debt" and "liability" as they appear in § 1, art. 8, and reason from the definitions of these words that the

legislative act does not "create" the debt, but that the "debt" therein mentioned arises only when bonds are sold and the money is received therefor. It is true that the ordinary meaning of the word "debt" is that which one person is liable to pay or render to another *in presenti*, or at some future date. But it must have been used in this instance in a less technical sense, and with more special reference to the basic warrant and legislative authority on which the contract must rest, and on which alone the debt must find its sanction in order to obligate the state to pay. The framers of the Constitution, in drafting this section, evidently used the words "debt" and "liability" in the sense that they are "created" by the legislative act, and that the preparation and sale of bonds or warrants is only a ministerial act, prescribed and directed by the law itself. The real "creative" act in such an indebtedness is the legislative authority for the transaction. But there is other language used in this section of the Constitution which is, to our minds, more persuasive and convincing than that just considered. The basis of computation by the legislature in creating indebtedness is "the assessed value of the taxable property in the state." This is a present standard for the guidance of the legislature. It is to guide them in the passage of any measure looking to the creation of a debt, and it must exist when they are acting. It has reference to facts that already exist,—to an existing condition. They cannot act upon the basis of an "assessed value" which does not exist when they act. The "assessed value," as here used, is a present, existing, ascertained amount, and the legislature is not left to make choice among several valuations or sundry assessments. Neither can it, in our judgment, anticipate the future, and leave it to the will and pleasure of ministerial and executive officers, acting as a board of equalization, to so swell the total assessed valuation of the state, as returned by the various counties, that they may, in any given year, sell state bonds or not, at their pleasure. It so happened in this case that sufficient bonds were retired to permit the sale of this issue on September 1, 1909, and still be within the debt limit, even though the assessed valuation for 1909 had not increased over that for 1908; but this can make no difference with the principle involved. It might have depended entirely on a raise of the total assessed valuation, and the same officers who are to negotiate and sell these bonds are members of the

board of equalization. There is no vice in this fact alone, but it illustrates the danger of such a rule, and the improbability that the framers of the Constitution ever intended an interpretation to be placed on this section that would make such a thing possible.

No authorities have been called to our attention that are directly in point. The case nearest in point is that of *Law v. People*, 87 Ill. 385, in which the supreme court of Illinois construed the debt limitation section of the Constitution of that state, and arrived at a conclusion analogous to the view we have here expressed. The case of *James v. State University*, 131 Ky. 156, 114 S. W. 767, is cited by plaintiffs as supporting their position, but we do not think it can be so construed. That was the case of an appropriation to defray the current expenses of maintaining the State University of Kentucky and other educational institutions. A certain amount of the appropriation was made available each year, and was payable out of the annual revenues and income of the state. The court of appeals held in effect that such an appropriation would not amount to a "debt" within the meaning of the Constitution. That is in line with the decision of this court in *Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246, wherein it was held that an appropriation of the public revenues in anticipation of their receipt for the current expenses of state government does not amount to a "debt" within the purview of § 1, art. 8, of the Constitution. This provision of the Constitution was adopted for the protection of the people against the pressure that might be brought to bear on the members of the legislature for excessive appropriation for the various state institutions, internal improvements, and various other objects and purposes. It was intended to protect the new state from oppressive taxation and bankruptcy such as had befallen other states that had no such protection as a debt limitation in their Constitutions. It is a wholesome and salutary safeguard, and no other provision of the Constitution should appeal more forcibly to the courts than this. The act in question is unconstitutional and void in so far as it authorizes the issuance of bonds in excess of the limitation fixed by § 1, art. 8, of the state Constitution, and based upon the assessed valuation of the year 1908.

The demurrer to the petition is sustained, and the action is dismissed. No costs will be taxed.

Sullivan, Ch. J., and Stewart, J., concur.
28 L.R.A. (N.S.)

MINNESOTA SUPREME COURT.

DANIEL G. COLE, Appt.,

v.

FRANK R. MILLSPAUGH, Respt.

(— Minn. —, 126 N. W. 626.)

Libel — words defamatory of clergyman.

1. It is libelous *per se* to write of a clergyman, an applicant for a pulpit, "I would not have anything to do with him, or touch him with a 10-foot pole," if under the circumstances the words used would expose the person written of to hatred or contempt, or injury in his business or occupation.

Same — pleading — complaint — sufficiency.

2. Complaint held to state a cause of action, and presenting the question of fact whether the words used were intended to and might be understood to charge conduct or characteristics inconsistent with good character or plaintiff's profession.

(May 27, 1910.)

Headnotes by O'BRIEN, J.

Note. — What words uttered concerning clergyman are actionable *per se*.

Where derogatory words are uttered concerning clergymen, which tend to prove them unfit to continue their calling, the authorities are agreed that they are actionable in themselves, without proof of damage.

This accepted rule is well stated as follows in *Newell on Defamation*, 2d ed. p. 186, which section is cited in *Potter v. New York Evening Journal Pub. Co.* 68 App. Div. 95, 74 N. Y. Supp. 317: "Words are often actionable when spoken of clergymen which would not be so if spoken of others. But it does not follow that all words tend to bring a clergyman into disrepute, or which merely impute that he has done something wrong, are actionable without proof of special damage. The reason always assigned for this distinction between clergymen and others is that the charge, if true, would be ground of degradation or deprivation. The imputation, therefore, must be such as, if true, would tend to prove him unfit to continue his calling, and, therefore, tend more or less directly to proceedings by the proper authorities to silence him."

In the following cases the several written words concerning clergymen were held actionable *per se*: *Bidwell v. Rademacher*, 11 Ind. App. 218, 38 N. E. 879 (publishing in paper of bishop who as such was superintendent of an orphan asylum, that a young girl therein was confined in a dungeon for refusing to submit to desires of priest who was instructor in the asylum); *Bailey v. Kalamazoo Pub. Co.* 40 Mich. 251 (publishing of candidate for Congress, who was a minister, "There was that Iowa Beecher business of his, which beat him of a station

A PPEAL by plaintiff from an order of the District Court for Hennepin County sustaining a demurrer to the complaint in an action brought to recover damages for alleged libel. Reversed.

The facts are stated in the opinion.

Mr. Thomas Kneeland, with Mr. Thomas D. Schall, for appellant:

The language, "I would not have anything to do with him, or touch him with a 10-foot pole," is libelous *per se*.

Wilkes v. Shields, 62 Minn. 426, 64 N. W. 921; Byram v. Aiken, 65 Minn. 87, 67 N. W. 807; Davis v. Hamilton, 85 Minn. 209, 88 N. W. 744; Townshend, Slander & Libel, § 176; Newell Defamation, 2d ed. pp. 43, 78; Solverson v. Peterson, 64 Wis. 198, 54 Am. Rep. 607, 25 N. W. 14; Cooper v. Gree-

ley, 1 Denio, 347; Hake v. Brames, 95 Ind. 161; Crocker v. Hadley, 102 Ind. 416, 1 N. E. 734; Over v. Hildebrand, 92 Ind. 19; Duncan v. Brown, 15 B. Mon. 186; Stewart v. Swift Specific Co. 76 Ga. 280, 2 Am. St. Rep. 40; Villers v. Monsley, 2 Wils. 403; Thorley v. Kerry, 4 Taunt. 355, 9 Eng. Rul. Cas. 1; Digby v. Thompson, 4 Barn. & Ad. 821; Cox v. Lee, L. R. 4 Exch. 284; Eaton v. Johns, 1 Dowl. N. S. 602; Robbins v. Treadway, 2 J. J. Marsh. 540, 19 Am. Dec. 152; Colvard v. Black, 110 Ga. 642, 36 S. E. 80; Adams v. Lawson, 17 Gratt. 250, 94 Am. Dec. 455; Cooper v. Stone, 24 Wend. 434; Tawney v. Simonson, W. & H. Co. 109 Minn. 341, 27 L.R.A. (N.S.) 1035, 124 N. W. 229; 13 Am. & Eng. Enc. Law, p. 299.

The imputation to be naturally inferred

at Grass lake," meaning that he had lost a position on a charge of adultery); Knox v. Meehan, 64 Minn. 280, 66 N. W. 1140 (publishing of minister that he endeavored to rob his neighbor, and was a religious hypocrite); Piper v. Woolman, 43 Neb. 280, 61 N. W. 588 (publishing writing charging minister with uttering false statements, giving way to unchristian temper, and defaming the good name of members of church); Johnson v. Synett, 80 Hun, 192, 35 N. Y. Supp. 79, affirmed in 157 N. Y. 684, 51 N. E. 1091 (publishing statement that minister was arrested, it being claimed that he was too much of a family man); Potter v. New York Evening Journal Pub. Co. supra (publishing of minister that, on trial of judicial proceeding, he said of another, "You're a skunk," "I'd like to punch that

skunk in the head"); O'Donaghue v. McGovern, 23 Wend. 26 (charging in writing to bishop that priest collected money from members of parish, putting it in his pocket, keeping no account thereof, and adding that "this is the last we heard of our priest," impliedly held actionable); Remsen v. Bryant, 36 App. Div. 240, 56 N. Y. Supp. 728 (publishing of revivalist lay preacher that he conducted his services in an unseemly and boisterous manner, that he was pelted with eggs and lemons, that he made his name notorious and hated, and that his language and actions became more and more reprehensible, impliedly held actionable); Porter v. Post Pub. Co. 20 R. I. 88, 37 Atl. 535 (publishing matter capable of being construed to charge that the vestrymen of a church had found the minister guilty of immoral, improper, and unbecoming conduct, actionable, if jury found that it was used in that sense); Williams v. Karnes, 4 Humph. 9 (writing of a minister that he altered the earmarks of the writer's hogs "from my mark to his," and "I look upon him as a rascal, and have watched him for many years"); Cranfill v. Hayden, 97 Tex. 544, 80 S. W. 609 (challenge to right of minister to seat in convention, charging, among other matter, that he had rendered himself unworthy of a seat on moral

grounds, that he had assailed the character of the officers of missions by falsely accusing them of dishonorable practices in the use of mission money, that he falsely accused them of conspiracy to thwart the will of the Baptists of the state, that he was a breeder of strife, and had convicted himself of dishonorable conduct); Coles v. Thompson, 7 Tex. Civ. App. 666, 27 S. W. 46 (*dicta* to the effect that defamatory words applied to an established minister, calculated directly to affect his professional standing and occupation, are liable *per se*); Jones v. Roberts, 73 Vt. 201, 50 Atl. 1071 (publishing letter charging minister with conduct with woman entirely unbecoming him as married man and minister); Gregory v. Atkins, 42 Vt. 237 (charging in writing that he is a false minister, regardless of truth and decency, with traitorously turning his back upon his own church, and with inventing and publishing the greatest slanders against that church); Adams v. Lawson, 17 Gratt. 250, 94 Am. Dec. 455 (charging preacher in letter with killing wild hogs belonging to others, and advising him to pay therefor, and also advising him to stop lying or preaching); Monson v. Lathrop, 96 Wis. 386, 65 Am. St. Rep. 54, 71 N. W. 596 (telegram sent minister after election. "The citizens of Wisconsin demonstrated you are an unscrupulous liar"); Sans v. Joeris, 14 Wis. 864 (writing of minister statements received from others accusing him of arson, church burning, and sodomy); Pfizinger v. Dubs, 12 C. C. A. 399, 24 U. S. App. 376, 64 Fed. 696 (publishing in newspaper of minister, "You cannot get P. down any lower than he is; he is low enough; you can't get him down any lower; you can't spoil a rotten egg"); Walker v. Brogden, 11 Jur. N. S. 671 (publishing of clergyman that he came to the performance of Divine service in a towering passion, and that his conduct was calculated to make infidels of his congregation); Tuam v. Robeson, 5 Bing. 17 (publishing of Protestant archbishop that he attempted to convert Catholic priests by offers of money and preferment); Bowers v. Hutchinson, 5 N. S. 679 (printing notice, "All persons who have paid a minis-

from the libel as ascribed by the innuendo, in connection with the allegations constituting the inducement, is such as to touch plaintiff in his profession as a minister of the Gospel, and hence render the words actionable.

Tawney v. Simonson, W. & H. Co. supra; *Bailey v. Kalamazoo Pub. Co.* 40 Mich. 251; *Starkie, Slander & Libel*, § 188; *Moore v. Francis*, 121 N. Y. 206, 8 L.R.A. 214, 18 Am. St. Rep. 810, 23 N. E. 1127; *McMillan v. Birch*, 1 Binn. 178, 2 Am. Dec. 426; *Hayner v. Cowden*, 27 Ohio St. 296, 22 Am. Rep. 303; *Lewis v. Clement*, 3 Barn. & Ald. 702; *Bishop v. Latimer*, 4 L. T. N. S. 775; *Homer v. Taunton*, 5 Hurlst. & N. 661; 18 Am. & Eng. Enc. Law, 2d ed. p. 946; *Williams v. Davenport*, 42 Minn. 393, 18 Am. St. Rep. 519, 44 N. W. 311.

Messrs. Savage & Purdy, for respondent:

To make a case of libel, some actual imputation upon the plaintiff is necessary.

Rice v. Simmons, 2 Harr. (Del.) 417, 31 Am. Dec. 766; *McDermott v. Union Credit Co.* 76 Minn. 84, 78 N. W. 967, 79 N. W. 673; *Herringer v. Ingberg*, 91 Minn. 71, 97 N. W. 460.

It is essential, in case of words which are not of themselves libelous, that facts be stated showing how or why the language acquired and represented a defamatory meaning.

ter, as a member of a certain denomination, for funeral services, will confer a favor on the public generally by notifying the publisher," held actionable where innuendoes alleged that the meaning was that the plaintiff was falsely pretending to be a minister of that denomination).

In the following cases, where the matter was uttered orally, the several statements were held actionable *per se*: *Elsas v. Browne*, 68 Ga. 117 (charging minister with collecting money to print a paper, and embezzling it for his own use); *Flanders v. Daley*, 120 Ga. 885, 48 S. E. 327, s. c. on subsequent appeal, 124 Ga. 714, 52 S. E. 687 (stating, "I have always known he was unfit for the ministry, and an improper person to be allowed to preach, and was too dangerous and indiscreet"); *Franklin v. Browne*, 67 Ga. 272 (saying that minister collected money for a particular purpose and embezzled it, and that he is unfit to be a minister); *Mitchell v. Mullholland*, 106 Ill. 175 (saying, "He perjured himself," "You swore to a lie"); *Chaddock v. Briggs*, 13 Mass. 248, 7 Am. Dec. 137; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *McMillan v. Birch*, 1 Binn. 178, 2 Am. Dec. 426; *Dod v. Robinson*, Aleyn, 63 (charging minister with drunkenness); *Harding v. Brooks*, 5 Pick. 244 (saying of clergyman that he was a liar, a knave, and a rascal, not expressly discussed, but recovery allowed); *Shurtleff v. Parker*, 130 Mass. 28 L.R.A. (N.S.)

Tappan v. Wilson, 7 Ohio, pt. 1, p. 190; *Herringer v. Ingberg*, supra; *Smith v. Coe*, 22 Minn. 276; *Newell v. How*, 31 Minn. 235, 17 N. W. 383; *Richmond v. Post*, 69 Minn. 457, 72 N. W. 704; *Goldstein v. Foss*, 4 Bing. 489; *Barham v. Netherlands*, 4 Coke, 20a; *Caldwell v. Raymond*, 2 Abb. Pr. 193; *Fry v. Bennett*, 5 Sandf. 54; *Stone v. Cooper*, 2 Denio, 293; *Cole v. Neustadter*, 22 Or. 191, 29 Pac. 550.

The facts justifying a defamatory interpretation are equally indispensable in charging a libel, as touching the plaintiff in his profession.

Robinson v. Germyn, 1 Price, 11; *Goldstein v. Foss*, supra; *Gillan v. State Journal Printing Co.* 96 Wis. 460, 71 N. W. 892; *Divens v. Meredith*, 147 Ind. 693, 47 N. E. 143; *Purdy v. Rochester Printing Co.* 96 N. Y. 372, 48 Am. Rep. 632; *Ayre v. Craven*, 2 Ad. & El. 2; *Newell v. How*, supra.

O'Brien, J., delivered the opinion of the court:

Action for libel. According to the complaint, a demurrer to which was sustained upon the ground of no cause of action, the Universalist Church in Minnesota has what is known as a "fellowship committee," to which applications for pastorates are addressed. The recommendation of the committee is necessary to the obtaining of any such pastorate. Plaintiff, a duly ordained

293, 39 Am. Rep. 454 (impliedly held actionable to say of minister that he was connected with no association of ministers, and was sent away from societies of which he had been pastor without the usual recommendations); *Ritchie v. Widdemer*, 59 N. J. L. 290, 35 Atl. 825 (saying that wherever minister had previously exercised ministerial functions, he had had trouble with the female sex, in one instance such that his wife threatened to leave him); *Cummin v. Smith*, 2 Serg. & R. 440 (statement that minister had committed perjury); *Skinner v. Grant*, 12 Vt. 456 (saying of clergyman that he said the blood of Christ had nothing to do with our salvation, more than the blood of a hog, impliedly held actionable); *Hellstern v. Katzer*, 103 Wis. 391, 79 N. W. 429 (archbishop stating to a priest's congregation that he was not of sound mind, that he was no more the priest of the church, since the archbishop had taken all rights away from him, that a blind or dazed priest has given the offense of ecclesiastical disobedience); *Musgrave v. Bovey*, 2 Strange. 946 (saying of minister, "You are an old rogue and a rascal and a contemptible fellow, despised and hated by everybody"); *Pocock v. Nash*, Comb. 253 (saying of minister that he is a rogue and a dog, and will never be good until he is 3 feet under ground, and that defendant would rather his son should make hay on Sunday than hear plaintiff preach); *Cranden v. Walden*, 3 Lev. 17

minister of the Gospel, had applied to the committee for a position, and, while his application was pending, "defendant falsely and maliciously, for the purpose of preventing plaintiff from securing the pastorship of any such vacant churches, and of injuring plaintiff in his profession as a minister, wrote and published of and concerning plaintiff, and of and concerning him in his profession as a minister, to said Rev. Thomas S. Robjont and others of said fellowship committee, the following false, malicious, defamatory, and libelous words and language, to wit: 'I (meaning defendant) would not have anything to do with him, or touch him (meaning plaintiff) with a 10-foot pole' (thereby meaning to charge, and intending to mean and charge, that plaintiff was unfit and unqualified morally and intellectually to fill the pastorship of any church, and particularly of any of said vacant pastorships of the Universalist Church aforesaid, and unfit and unsafe to fill any position of employment or place of trust, and that he was a man of bad character and poor intellectual qualifications, and untrustworthy in any place or position)."

Defendant insists that the words, "I would not have anything to do with him, or touch him with a 10-foot pole," are not libelous *per se*, for the reason that they neither assert nor imply anything against the plaintiff, but merely state what the de-

fendant himself would not do. Libel, as defined by § 4916, Rev. Laws 1905, is a malicious writing which exposes one "to hatred, contempt, ridicule, or obloquy, or which shall cause, or tend to cause, any person to be shunned or avoided, or which shall have a tendency to injure any person, corporation, or association of persons in his or their business or occupation." If a written statement is intended to, and may, as the words used are ordinarily understood, produce that result, the statute is violated, and a cause of action for general damages exists in favor of the person as to whom the statement is made.

This case is not free from difficulty. In themselves the words used do not charge the plaintiff with the commission of any crime, nor the possession by him of any characteristics which would necessarily expose him to hatred, contempt, or ridicule upon the part of any person other than the defendant, who is, of course, free to enjoy his own likes and dislikes and select his own company. Upon the other hand, the statement is one which might, under certain circumstances, imply, and be understood as charging, the possession by the plaintiff of habits and qualities which would render him entirely unfit to be the pastor of a church congregation. The considerations governing such a case are fully discussed in *McDermott v. Union Credit Co.*

(charging that minister preaches nothing but lies and malice in the pulpit); *Townsend v. Hughes*, 2 Mod. 159 (saying of bishop, "He is a wicked man"); *Nicholson v. Lyne*, Cro. Eliz. pt. 1, p. 94 (saying of minister that he had two wives); *Starr v. Gardner*, 6 U. C. Q. B. O. S. 512 (saying of paid preacher that he has committed incest with his sister); *Pemberton v. Colla*, 10 Q. B. 461 (stating that clergyman had drugged defendant and then fraudulently procured his signature to a bill).

In *Demarest v. Haring*, 6 Cow. 76, it was held that a statement by defendant that plaintiff had solicited him to make away with a bastard child was actionable, irrespective of plaintiff's character as a clergyman; and that words conveying a direct charge of incontinency were actionable in respect of the plaintiff's profession as a clergyman, though they would not be if spoken of individuals generally.

In *Gallwey v. Marshall*, 9 Exch. 295, the court said they would have no doubt of a minister's right to recover for a verbal imputation of incontinence, if it had been alleged that he was at the time in receipt of professional temporary emolument.

But it has been held unnecessary that the minister defamed should be receiving compensation for his services at the time the words are spoken. *Flanders v. Daley*, 120 Ga. 885, 48 S. E. 327.

There has been some difference of opinion 28 L.R.A. (N.S.)

ion, however, as to what words touch a minister in his profession.

Thus, the following oral imputations have been held not actionable *per se*, since they were held not to have been spoken of him with reference to his office of minister: *Tighe v. Wicks*, 33 U. C. Q. B. 479 (saying of minister, "He will get drunk; I have seen him drunk"); *Breeze v. Sails*, 23 U. C. Q. B. 94 (saying of preacher that he kept company with a prostitute); *Hopwood v. Thorn*, 8 C. B. 291 (saying of minister that he was a rogue, and that he had outgeneraled his former partner in regard to the accounts, that he had cheated his partner, and expressing a wonder how respectable persons could countenance such a man in their presence); *McDowell v. Bowles*, 53 N. C. (8 Jones, L.) 184 (charging white man who was minister, with being a free negro).

It was held in *Klos v. Zahorik*, 113 Iowa, 161, 53 L.R.A. 235, 84 N. W. 1046, that sending an article to a paper, stating that if certain accounts which had appeared in the newspapers with reference to the acts of a priest in soliciting contributions from his congregation for the Spaniards were true, the priest had acted in an improper manner, and should be condemned by the public, did not render the person liable. The decision, however, rests on the ground that it was not a false statement of fact, but rather a criticism of the priest's supposed acts.

76 Minn. 84, 78 N. W. 967, 79 N. W. 673. On the reargument of that case it was held that to charge one with being "slow" in the payment of his debts was not libelous *per se*; but that was only because of the particular circumstances there existing and the connection in which the statement was made. That decision was to the effect that a discommendatory statement general in its terms, and which charges neither the commission of crime nor the possession of specific offensive characteristics, may or may not be libelous *per se*, depending upon the circumstances and conditions under which the statement is made. It seems clear that such is the correct conclusion; otherwise, a skilful writer might destroy the reputation of another, and yet avoid all legal responsibility for his conduct. It is not necessary to descend to vulgar abuse, or to make specific charges of crime, in order to expose one to hatred, contempt, or ridicule, or to injure him in his business or occupation.

The plaintiff is a clergyman, and must, if he is to be successful in the practice of his profession, maintain a spotless reputation. He had submitted his application to be placed in charge of a church to the committee, whose recommendation was necessary, and who, before making it, were required to determine his qualifications for the position, which necessarily included not only his integrity and education, but those refined and personal qualifications so necessary to a successful performance of the many and complex duties falling to the lot of a clergyman. While it is true that the plain meaning of the words cannot be changed by any allegations of the complaint, it is also true that the circumstances under which the statement was made and the motive of the person making it may determine the meaning with which the words were used, and how they were intended to be and were understood. The complaint alleges that the words quoted were written by the defendant maliciously to the members of the committee for the purpose of preventing the committee from giving its recommendation to the plaintiff. We cannot avoid the conclusion that such a statement so made, and emanating from a responsible source, might tend to expose a clergyman situated as was the plaintiff, to contempt and injury in his profession. Therefore, under the allegations of the complaint, evidence might properly be received which would justify a jury in so finding. In the absence of any denial, explanation, or justification upon the part of the defendant, it must be held that the statement

was libelous and actionable *per se*, and the demurrer improperly sustained.
Order reversed.

Petition for rehearing denied.

KANSAS SUPREME COURT.

BROADWAY MANUFACTURING COMPANY, Appt.,

v.
LEAVENWORTH TERMINAL RAILWAY
& BRIDGE COMPANY et al.

(81 Kan. 616, 106 Pac. 1034.)

Jury — Interested taxpayer — qualification.

1. Where there is no difficulty in procuring jurors whose impartiality is unquestioned, it is material error to retain upon the trial panel resident taxpayers of a city against whom a judgment is sought, and the

Headnotes by MASON, J.

Note. — Liability for damming back water of stream by bridge.

The earlier cases on this question are included in a note to Avery v. Vermont Electric Co. 59 L.R.A. 817.

That a railroad company or other corporation or person constructing or maintaining a bridge, trestle, or culvert over a stream must exercise care to provide for the flow of the water in the stream, and that for a failure to do so the one maintaining the bridge is liable in damages, is supported by the following cases, in addition to those set out in the earlier note: Graham v. Chicago, I. & L. R. Co. 39 Ind. App. 294, 77 N. E. 57, 1055; Wallingford v. Maysville & B. S. R. Co. 32 Ky. L. Rep. 1049, 107 S. W. 781; Howard v. Buffalo, 122 N. Y. Supp. 1095; Miller v. Buffalo & S. R. Co. 29 Pa. Super. Ct. 515; Dutton v. Philadelphia, B. & W. R. Co. 32 Pa. Super. Ct. 630; St. Louis Southwestern R. Co. v. Rollins (Tex. Civ. App.) 89 S. W. 1099; Houston & T. C. R. Co. v. Buchanan, 48 Tex. Civ. App. 129, 107 S. W. 595; Missouri, K. & T. R. Co. v. Cannon (Tex. Civ. App.) 111 S. W. 661; Missouri, K. & T. R. Co. v. Macon (Tex. Civ. App.) 115 S. W. 847; Ft. Worth & D. C. R. Co. v. Suter (Tex. Civ. App.) 118 S. W. 215.

And so long as the flood is not an extraordinary or unprecedented one, that is, one that could not reasonably have been foreseen, but is merely such a flood as is characteristic of the water course, and might reasonably have been anticipated, the railroad company, or, as is the case in some instances, the municipal corporation, is liable for the damages resulting from the negligent construction of the bridge which caused the overflow.

In addition to the many cases cited in the earlier note for this proposition, the follow-

fact that other corporations, whose liability depends upon the same state of facts, are joined as defendants, does not change the rule.

Instructions — waters — obstruction by bridge — duty of builder.

2. An instruction that the builder of a bridge over a stream is required to leave openings for the passage of all the water reasonably to be expected to flow therein gives the proper measure of his duty. To add thereto a statement that no liability can attach for the results of an unusual rain or an extraordinary freshet, without further explanation, tends to mislead the jury.

Flood waters — obstruction by bridge — duty of builder.

3. The duty of the builder of a bridge over a water course to avoid obstructing it does not end with making provision for the escape of so much water as can be carried within the channel. If there is reason to an-

ticipate that the stream will at times overflow its banks, he must also, if practicable, provide an outlet for the flood water.

Appeal — reversal — nonprejudicial error — statute.

4. The provision of the new Code (Laws 1909, chap. 182, § 581) that reversal shall not be ordered for errors which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, when it appears that substantial justice has been done, does not authorize the affirmation of a judgment upon the ground that it is in accordance with the view of the facts which the reviewing court itself might derive from the conflicting evidence, where it is based on a verdict rendered under the apparent influence of a materially erroneous instruction, or by a jury made up in part of persons disqualified on account of interest.

(February 12, 1910.)

ing may also be cited: *Chicago, M. & St. P. R. Co. v. Carpenter*, 125 Ill. App. 308; *Houghtaling v. Chicago G. W. R. Co.* 117 Iowa, 540, 91 N. W. 811; *Blunck v. Chicago & N. W. R. Co.* (Iowa) 115 N. W. 1013; *Crook v. Chicago, R. I. & P. R. Co.* (Iowa) 119 N. W. 696; *Atchison, T. & S. F. R. Co. v. Herman*, 74 Kan. 77, 85 Pac. 817; *Richards v. Ann Arbor*, 152 Mich. 15, 115 N. W. 1047; *Edwards v. Missouri, K. & T. R. Co.* 97 Mo. App. 103, 71 S. W. 386; *Fairbury Brick Co. v. Chicago, R. I. & P. R. Co.* 79 Neb. 854, 13 L.R.A.(N.S.) 542, 113 N. W. 535; *Wilson v. Pennsylvania R. Co.* 129 App. Div. 821, 113 N. Y. Supp. 1101; *Matteson v. New York C. & H. R. R. Co.* 40 Pa. Super. Ct. 234; *Goddard v. Chicago, B. & Q. R. Co.* (Wis.) 126 N. W. 666.

Although such bridge or culvert may be constructed according to approved principles of engineering. *Chicago, M. & St. P. R. Co. v. Carpenter* and *Houghtaling v. Chicago G. W. R. Co.* supra.

But a railway company is not liable for injuries to the property of a riparian owner by water thrown thereon by the overflow of a stream, the water of which cannot, because of a storm so extraordinary in character that it has had but one precedent in forty years, escape through its culvert. *Eagan v. Central Vermont R. Co.* 81 Vt. 141, 16 L.R.A.(N.S.) 928, 130 Am. St. Rep. 1031, 69 Atl. 732.

Similar cases, and holding to the same effect, are *Southern R. Co. v. A. M. E. Church* (Ky.) 121 S. W. 972, and *American Locomotive Co. v. Hoffman*, 105 Va. 343, 6 L.R.A.(N.S.) 252, 54 S. E. 25, 8 A. & E. Ann. Cas. 773.

This was also recognized in *Bell v. Missouri, K. & T. R. Co.* 36 Tex. Civ. App. 569, 82 S. W. 1073.

In *Southern R. Co. v. A. M. E. Church*, supra, it was held that the liability of a railroad company for obstructing the water in a stream by means of a new bridge could not be made to depend upon whether the new bridge obstructed the water to a

greater extent than the old bridge, since, as the court said, the railroad was liable only in the event that the new bridge obstructed the passage of the water that accumulated from such ordinary and usual rainfalls in that vicinity as might have been anticipated by persons of ordinary experience and prudence, and it was not liable for overflow caused by extraordinary rains or floods, i. e., such floods or rains as were of such unusual occurrence in that vicinity that they could not have been anticipated by persons of ordinary experience and prudence.

But even if the flood were of such an extraordinary character that the one maintaining the bridge would ordinarily not be held for the obstruction of the water, yet, where there is negligence concurring with the flood, resulting in injury that would not otherwise have occurred, the one maintaining the bridge, although not liable for the action of the extraordinary flood, is liable for the damages which, but for the negligence in the maintenance of the bridge, would not have occurred. *Standley v. Atchison, T. & S. F. R. Co.* 121 Mo. App. 537, 97 S. W. 244.

It will be noted that in *BROADWAY MFG. CO. v. LEAVENWORTH TERMINAL R. & BRIDGE CO.* it was held that not only must the one maintaining a bridge over a stream make provision for the escape of so much water as can be carried within the channel, but he must also, if practicable, provide sufficient passageway for the flood water.

A case similar to *BROADWAY MFG. CO. v. LEAVENWORTH TERMINAL R. & BRIDGE CO.*, and holding to the same effect, is *Roland v. St. Joseph & G. I. R. Co.* 82 Kan. 546, 108 Pac. 808.

This proposition is also supported by *Howard v. Buffalo*, supra, holding that those maintaining bridges over a stream must provide sufficient openings to permit, during ordinary floods, the passage of water outside the ordinary banks of the stream, but confined within the flood banks.

In *Wilson v. Pennsylvania R. Co.* supra, it seems to have been held that a railroad com-

A PPEAL by plaintiff from a judgment of the District Court for Leavenworth County in defendants' favor in an action brought to recover damages alleged to have been caused by the unlawful obstruction of a certain stream. Reversed.

The facts are stated in the opinion.

Messrs. Charles Hayden, Arthur M. Jackson, and J. C. Petherbridge for appellant.

Messrs. F. P. Fitzwilliams, O. J. Wood, John H. Atwood, W. Littlefield, and W. W. Hooper, for appellees:

Waters which have overflowed the banks of a stream during a freshet, in consequence of the insufficiency of the channel to hold and carry them off, are surface waters, to be treated as a common enemy, against which any landowner affected may protect himself.

Missouri P. R. Co. v. Keys, 55 Kan. 205, 49 Am. St. Rep. 249, 40 Pac. 275; Missouri P. R. Co. v. Renfro, 52 Kan. 237, 39 Am. St. Rep. 344, 34 Pac. 802; Atchison, T. & S. F. R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; Chicago, K. & N. R. Co. v. Steck, 51 Kan. 737, 33 Pac. 601; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Darlington v. Cloud County, 75 Kan. 810, 88 Pac. 529.

pany maintaining a bridge over a stream must provide sufficient passageway even for the flood waters coming from another stream, which, as appears, was also bridged by the railroad company.

In Atchison, T. & S. F. R. Co. v. Herman, supra, there was a suggestion that the overflow of the stream was to be treated as surface water, and that the company could not be held liable for injury resulting therefrom. The court, however, said that if the water was thrown back upon the riparian owner because of the obstruction of the channel of the stream, it is immaterial by what name it is designated. The party who obstructs the flow and causes the injury is responsible.

So, in Edwards v. Missouri, K. & T. R. Co. and Standley v. Atchison, T. & S. F. R. Co. supra, it was held that if the overflow of the stream was caused by the obstruction of the stream, the defense cannot be interposed that such water is surface water.

In San Antonio & A. P. R. Co. v. Kiersey (Tex. Civ. App.) 81 S. W. 1045, an instruction, in an action against a railroad company for damages to land, caused by the overflow of water, resulting from the alleged negligent construction of a trestle, to the effect that although the overflow was extraordinary, yet, if such overflow could have been reasonably anticipated by railroad engineers of ordinary prudence and skill, who, in the building of the embankments and trestle, "could have constructed them so as not to have caused the damage complained of," then the railroad company would be 28 L.R.A. (N.S.)

The overflow was the result of temporary causes not usually existing, and for which defendants are not responsible.

Taylor v. Fickes, 64 Ind. 167, 31 Am. Rep. 114; Atchison, T. & S. F. R. Co. v. Herman, 74 Kan. 77, 85 Pac. 817.

Mason, J., delivered the opinion of the court:

Property of the Broadway Manufacturing Company was injured by water overflowing from Three Mile creek, in Leavenworth, on the night of July 5, 1904. The company claimed that the overflow was caused by two bridges over the stream, one belonging to the city and the other to the Leavenworth Terminal Railway & Bridge Company, and by a trestlework viaduct of the Leavenworth & Topeka Railway Company, extending along the bed of the stream between the two bridges. It sued the owners of the three structures for substantially \$20,000, alleging that all were negligently constructed. A general verdict was rendered for the defendants, and the plaintiff appeals from the judgment rendered thereon.

One hundred and ninety assignments of error are made, mainly relating to the admission and rejection of evidence and to

guilty of negligence, was held not erroneous as imposing upon the defendant a degree of care greater than ordinary, and the necessity of erecting a construction beyond reason, or beyond what a person of ordinary prudence would have constructed under similar circumstances.

The question of prescriptive right to maintain a bridge in a certain manner or condition over a stream has been expressly excluded from this note, as well as all cases dealing with the question whether a municipal corporation or a railroad company should be held liable for damages caused by the construction of a bridge used by both.

Cases dealing with the obstruction of water, not in connection with the obstruction of a natural stream by a bridge, are, of course, not within the scope of this note.

The question, What are extraordinary floods, which one obstructing a water course need not anticipate? is discussed in a note to American Locomotive Co. v. Hoffman, 6 L.R.A. (N.S.) 252. And see, in this connection, Fairbury Brick Co. v. Chicago, R. I. & P. R. Co. 13 L.R.A. (N.S.) 542.

Liability of county for injuries caused by construction or maintenance of bridge to property thereto adjoining—see note to Shawnee County v. Jacobs, 21 L.R.A. (N.S.) 209.

The right of an owner of a lower tenement, as against the rights of the upper landowner, to obstruct surface water in a natural drainage channel, is discussed in a note to Quinn v. Chicago, M. & S. P. R. Co. 22 L.R.A. (N.S.) 789.

the giving and refusal of instructions. We think it unnecessary to examine them in detail, since some are of doubtful importance, and others relate to matters not likely to arise again. A number of instructions asked covered substantially the same ground, presenting in slightly different language the plaintiff's theory of the law. The only questions thought to require determination are whether certain jurors were competent, and whether the trial court gave a correct measure of the duty of the defendants with respect to the quantity of water for the passage of which they should have provided in bridging the stream. Several of the jurors who served in the case were residents and taxpayers of the city, and were retained over the challenge of the plaintiff, based upon that ground. Here, as in most other jurisdictions where the question has been passed upon, such persons are held to be disqualified to try an action against the municipality. *Gibson v. Wyandotte*, 20 Kan. 156; 24 Cyc. Law & Proc. p. 271; 17 Am. & Eng. Enc. Law, p. 1133; *Com. v. Brown*, 147 Mass. 585, 1 L.R.A. 620, 9 Am. St. Rep. 750, 18 N. E. 587. In this state the rule has almost the force of a statute, since, after being announced by the supreme court, it has stood unchallenged for thirty years. There would be much less reason for holding that, in an action against a county, residents thereof are incompetent as jurors, because then a practical difficulty would be encountered, since this would necessitate a change of venue. But all question in that connection has been set at rest by the statute making them eligible. Gen. Stat. 1901, § 1609. True, an individual taxpayer is but slightly affected by the rendition of a particular judgment against a city, but, so far as it may serve to encourage other actions, his indirect interest may be considerable. At all events, the propriety of a change in the practice in this regard is a matter for legislative, not for judicial, inquiry. The joinder of the three defendants in one action was not capricious or vexatious on the part of the plaintiff, but natural and commendable. Inasmuch as the claims against the other defendants were substantially the same as that against the city, any bias in its favor was a reasonable ground for at least a challenge "to the favor" upon the issue between them and the plaintiff. They had no right to insist upon the retention of jurors open to suspicion of prejudice, and the fact that they were made parties could not change the rule as to the municipality. No reason is suggested for supposing that the smallest difficulty would have been experienced in obtaining a jury from other parts of the county, whose im-

partiality would have been beyond question. The retention of the challenged jurors must be regarded as material error.

One instruction defining the duty of the defendants read in part as follows: "I instruct you that it was the duty of the defendants, in the construction of the bridges or culverts across Three Mile creek, to provide and maintain an opening or openings for the natural flow of the waters of said creek, sufficient to afford an outlet for all of the waters that might reasonably have been expected to flow from this water course, and this with reference to such freshets as might reasonably have been expected." This is substantially the test which has been recently approved by this court. *Atchison, T. & S. F. R. Co. v. Herman*, 74 Kan. 77, 85 Pac. 817.

But these instructions were added:

"Where a city, under the superintendence of a competent engineer, builds a culvert or bridge sufficient to discharge the ordinary quantity of water during low and high water, flowing through a definite channel between defined banks, it is not liable when, because of a flow caused by an unusually heavy rain, the banks of said stream are overflowed."

"If you believe from the evidence that the storm of July 5, 1904, was an extraordinary storm, and that such bridge of the city of Leavenworth at Seventh street was suitably constructed, so as to let the waters of Three Mile creek pass with reasonable freedom at all times, except in case of extraordinary freshets, then you should find for the defendants."

"Nor was said company [referring to each of the defendants, other than the city] required to anticipate extraordinary and unusual storms."

These additional instructions are open to criticism because they seem to be a limitation upon that already given. They convey a correct or an erroneous idea according to the meaning attached to the words "unusual" and "extraordinary." If an "extraordinary" freshet is understood to be one so outside of ordinary experience that its occurrence was not reasonably to have been anticipated, that word is not misleading. It is often so used by the courts and text writers (30 Am. & Eng. Enc. Law, pp. 375, 376; 3 Words & Phrases, 2628; *Avery v. Vermont Electric Co.* 75 Vt. 235, 59 L.R.A. 877, 98 Am. St. Rep. 818, 54 Atl. 179; *American Locomotive Co. v. Hoffman*, 105 Va. 343, 6 L.R.A.(N.S.) 252, 54 S. E. 25, 8 A. & E. Ann. Cas. 773); but in the absence of a specific direction to do so, a jury might easily fail to give it that force. "Unusual" is hardly a strong enough expression to carry the same significance.

Both words are so vague that, as used in the instructions quoted, they serve to obscure rather than to illuminate the preceding statement of the proper test. The statement of the rule as to the quantity of water for the passage of which provision must be made was still further limited by the addition of these words in the same instruction: "Not, however, beyond the capacity of the stream; that is, the volume of water that could be confined within its banks." And in this connection the jury were further told that "the channel of a river, creek, or stream is that part of such river, creek, or stream which has on either side of said channel well-defined marks, evidencing the ordinary flowing of water therein; that is, the banks on either side of a channel are those which show evidence of being worn by the constant or frequent flowing of water in said channel, and it does not include any part of said banks upon which ordinary vegetation, such as grass and weeds, grow. If the bridges in question are of sufficient capacity to carry all the water which can flow within the ordinary well-defined channel of said Three Mile creek, then and in that case the defendants would not be liable for any damage caused by water which overflowed the banks thereof. The defendants nor either of them were in law required to construct any of the bridges in question of such size or dimensions as would accommodate and permit the flow of surface water, and, with this question in mind, I instruct you that waters which have overflowed the banks of a stream during high water or a freshet, in consequence of the insufficiency of the channel to hold and carry them off, are surface waters." These instructions seem open to the interpretation that the defendants, in building their bridges, were bound to allow room for the passage of only so much water as could be contained within that part of the water course where the flow was so nearly constant as to prevent the growth of vegetation. So construed, they are inaccurate and misleading. The defendants were required to provide for the passage of at least so much water as could be carried between the banks of the stream, whether they were denuded of vegetation or not, if the flow of such an amount was reasonably to have been anticipated. Evidence was introduced tending to show that Three Mile creek had a well-defined channel, the banks of which were bare only up to a certain point. The verdict may therefore have been influenced by this narrow view of the defendants' obligation. But we conclude that in this respect the charge was erroneous and probably prejudicial, even assuming that, taken as a whole, it means 28 L.R.A. (N.S.)

that the defendants were required to allow for the passage of so much water as could be contained between the banks of the stream to their full height, regardless of the growth of vegetation thereon, but for no more. There are cases intimating, and even expressly holding, that whenever the banks of a stream are overflowed the surplus becomes at once surface water,—a "common enemy,"—against which anyone may protect himself. The great weight of authority, however, supports the view that it is to be so regarded only in case it has ceased to be a part of a general current following the channel; that if it continues to flow in the same direction while outside of the banks, returning thereto upon the subsidence of the flood, it is to be deemed a part of a running stream; and that it only loses its character as such when it spreads out over the open country, and settles in stagnant pools, or finds some other outlet. The question is fully discussed in Farnham's Water & Water Courses, §§ 879, 880, and the cases bearing upon it are collected in a note by that author in 25 L.R.A. 527, 531. More recent cases are Fordham v. Northern P. R. Co. 30 Mont. 421, 66 L.R.A. 556, 104 Am. St. Rep. 729, 76 Pac. 1040; Uhl v. Ohio River R. Co. 56 W. Va. 494, 68 L.R.A. 138, 108 Am. St. Rep. 968, 49 S. E. 378, 3 A. & E. Ann. Cas. 201; and Clark v. Patapasco Guano Co. 144 N. C. 64, 119 Am. St. Rep. 931, 56 S. E. 858. See also Gould, Waters, 3d ed. § 264. A full note upon a related subject appears in 22 L.R.A. (N.S.) 789, which contains references to earlier notes in the same series. It is not necessary, however, to decide how the term "surface water" should be used, nor what are the respective rights of persons affected with reference to waters properly so designated. As was said by Mr. Farnham in the note referred to: "To make the rights with reference to flood water of a river depend upon whether or not it is surface water is useless. The only safe course is to treat flood water as a class by itself, and then determine the respective rights according to the character of the flood." 25 L.R.A. 530. Much the same thing has already been said by this court: "There is a suggestion that the overflow of the stream is to be treated as surface water, and that the company cannot be held liable for injury resulting from such water. If the water was thrown back upon the riparian owner because of the obstruction of the channel of the stream, it is immaterial by what name it is designated." Atchison, T. & S. F. R. Co. v. Herman, 74 Kan. 77, 81, 85 Pac. 817, 818.

Cases on the duty of one building a bridge over a water course are collected in

a note in 59 L.R.A. 862. The duty is thus stated in *Union Trust Co. v. Cuppy*, 26 Kan. 754: "A railroad company, in constructing its road over a natural water course, is required to leave such openings as are sufficient to afford an outlet for all water (from whatever source it may come, and in times of floods and freshets, as well as at other times) which may reasonably be expected to flow through such water course." Syllabus, p. 756. This duty springs from an obligation to refrain from inflicting any needless injury upon another. If, when a bridge is about to be constructed, the probabilities are that the stream to be crossed will at times overflow its banks, there is as much occasion to provide an outlet for the surplus water as for that which is confined within the channel. Where the adjacent lands are no higher than the banks, it may be impractical to provide an opening any larger than the channel itself, or to avoid presenting some obstruction to the passage of flood water. But where the ground rises as it recedes from the stream, and especially where there are secondary banks, the capacity of the wider channel so formed must be taken into account. The record does not disclose the precise conditions in this regard in the present case.

The defendants invoke the provisions of the new Code relating to appellate practice (*Laws 1909*, chap. 182, § 581), and maintain that, even if errors were committed in the impaneling of the jury and the giving of instructions, they do not warrant a reversal, because they do not affirmatively appear to have prejudicially affected the substantial rights of the plaintiff, and upon the whole record the judgment appears to have done substantial justice. To whatever extent the Revised Code may have changed the former procedure, it has not deprived litigants of the right of trial by jury, and this implies the right to have conflicts in the evidence resolved by impartial jurors under proper instructions. If the jurors are prejudiced against one of the parties, or are erroneously directed to disregard his theory of the law in a material matter, and a verdict is returned against him upon conflicting evidence, his substantial rights have necessarily been prejudiced. He has been denied a fair hearing before the tribunal provided by the Constitution. For this court to undertake, under such circumstances, to say what verdict unbiased jurors would have reached under instructions correctly defining the question they were to pass upon, would be to substitute its own judgment for that of a jury,—a result we cannot believe to have been contemplated by the framers of the recent legislation.

28 L.R.A. (N.S.)

In discussions of the need of reform in judicial procedure, it has often been said that a judgment should not be reversed unless the reviewing court can affirmatively say that, except for the error complained of, a different decision would have been reached at the trial. It has been suggested that the new Code should be interpreted as adopting this criterion. The practical difficulty with such a view is that it is seldom possible to say with confidence what influence a particular ruling upon a vital matter may have had upon a verdict. When a jury is informed that certain facts constitute a defense to an action, a general finding for the defendant ordinarily gives no clue to what its decision would have been if it had been instructed to the contrary. It is sometimes assumed that the test proposed is practically that of the English courts in administering the statutes which provide that new trials shall only be granted for error which has occasioned some substantial wrong or miscarriage (36 & 37 Vict. chap. 66, § 48; *Law Jour.* 1873, p. 221), and that criminal appeals may be dismissed when, notwithstanding trial errors, no substantial miscarriage of justice has actually occurred (7 *Edw. VII.* chap. 23, § 4, subd. 1). That the fact is otherwise is illustrated by the language of several recent cases. In *Hunt v. Star Newspaper Co.* [1908] 2 K. B. 309, a new trial was ordered on account of an erroneous instruction; the reason being thus stated: "The direction . . . was so expressed as to bear a meaning which might have misled the jury and affected their verdict, and as it was a general verdict, . . . we have no alternative but to send the case back for a new trial, because it is impossible to say to what extent the verdict may have been influenced by such misdirection." Page 321. In a similar case (*Dakhyl v. Labouchere*), printed as a note to that just cited, it was said: "In all cases it [the ordering of a new trial] is a most deplorable result, not to be entertained upon any but the most solid grounds, as the only means of redressing a clear miscarriage. In the present case I regret it all the more, because the amount of the verdict seems to indicate that the jury took the plaintiff's view of the facts. But I cannot reconcile myself to allowing a verdict to stand when I am convinced that the opinion of the jury was not really taken on two vital points on which the defendant was in law entitled to insist and did insist." Page 327. A criminal case reported in the same volume (*R. v. Dyson*, page 454) states these grounds for a reversal: "There having been a misdirection, the question arises whether the court can nevertheless dismiss the appeal . . . upon the

ground that no substantial miscarriage of justice has actually occurred by reason of the conviction. The proper question to have been submitted to the jury was whether the prisoner accelerated the child's death by the injuries which he inflicted in December, 1907. . . . And, if that question had been left to the jury, they would in all probability have found the prisoner guilty on that ground. . . . But it is one thing to say that the jury, on a proper direction, would probably have so convicted. It is another to say positively that there has been no substantial miscarriage of justice. . . . We cannot substitute ourselves for the jury, and find the facts which are necessary to support the conviction. The proviso is intended to apply to a case in which the evidence is such that the jury must have found the prisoner guilty if they had been properly directed. It does not apply where the evidence leaves it in doubt whether they would have so found." Page 456. Of course, rulings upon matters of minor importance, even although technically incorrect, may well be disregarded when it is reasonably clear that no serious prejudice has in fact resulted. But where it appears probable that a misdirection upon a vital matter has affected the verdict, there seems no course open but to order a new trial, although it cannot be said with absolute certainty that, had proper instructions been given, a different decision would have been reached. It is true that here the evidence fairly established that the high water of July 5, 1904, was almost without precedent,—that no greater flood had occurred since 1865. To hold the defendants responsible for failing to foresee and provide against such an unusual volume of water would be undeniably rigorous. But there was testimony fairly tending to show that the bridges did not provide an outlet for all the water at times of more usual freshets. A natural conclusion from all the evidence would be that the volume of water was so great that, even if there had been no bridges, all the ground in the vicinity would have been flooded. But the jury found that the defendants' bridges did not adequately provide for the passage of the waters of the creek at the time of the freshet that occasioned the damage complained of, and that their inadequacy in this respect caused or materially contributed to the injury to the plaintiff's property. This finding makes it seem probable that the general verdict resulted from the narrow view taken by the trial court of the duty of the defendants.

The defendants suggest that the statute of limitations began to run against the plaintiff's claim when the bridges were 28 L.R.A.(N.S.)

built, and that therefore the bar had fallen before proceedings were begun. The cause of action here sued upon did not accrue until the flooding of the plaintiff's property. *Union Trust Co. v. Cuppy*, 26 Kan. 754; 5 L.R.A.(N.S.) 381, note; 25 Cyc. Law & Proc. p. 1146.

The judgment is reversed, and a new trial ordered.

All the Justices concur.

OKLAHOMA CRIMINAL COURT OF APPEALS.

WEB HIGH et al., Pliffs. in Err.,
v.
STATE OF OKLAHOMA.

(2 Okla. Crim. Rep. 161, 101 Pac. 115.)

Criminal law — presumption of innocence — joint information.

1. The presumption of innocence of one on trial for a crime is one of fact and of law, and no person can be convicted, even under a joint information, without proof of his individual guilt.

Same — burden of proof — directing acquittal.

2. Where a defendant pleads not guilty and admits nothing against himself, the burden of proof is on the state to make a case against him which will entitle it to go to a jury; and where the evidence only raises a mere suspicion of the guilt of the accused, it is insufficient to warrant a conviction, and the court should direct a verdict of acquittal, when requested by defendant.

Interstate commerce — regulation — intoxicating liquors.

3. Under subdivision 3 of § 8, art. 1, of the Constitution of the United States, a resident of this state has a lawful right to order and receive a shipment of whisky by interstate commerce from another state, and to convey the same from the depot at which the shipment may arrive, in the original package, to his home.

Same — state Constitution — application.

4. The clause in the prohibition ordinance of the Constitution of the state of Oklahoma (§ 499, Bunn's ed.), while prohibiting the conveyance of intoxicating liquors from one place within this state to another place therein, has no application to interstate shipments until there has been a delivery of an interstate shipment of said liquors.

Headnotes by DOYLE, J.

Note. — The question what is sufficient to terminate interstate transportation of intoxicating liquors is discussed in the notes to *State v. Intoxicating Liquors*, 11 L.R.A.(N.S.) 550, and *State v. Intoxicating Liquors*, 23 L.R.A.(N.S.) 1020.

Same — destination.

5. Carrying or conveying intoxicating liquors from the railroad station to the home of the consignee is a part of the interstate commerce transportation, when they were shipped from another state, and is not a violation of the constitutional clause making the conveyance of such liquors from one place within this state to another place therein an offense.

Same — Federal laws — scope — operation.

6. The constitutional clause prohibiting the conveyance of intoxicating liquors from one place within this state to another place therein, in the absence of prohibitory legislation by the state, is not within the scope and operation of the act of Congress of August 8, 1890, chap. 728, 26 Stat. at L. 313, U. S. Comp. Stat. 1901, p. 3177, commonly known as the "Wilson act."

(March 29, 1909.)

ERROR to the Kiowa County Court to review a judgment convicting defendants of having unlawfully conveyed intoxicating liquors from one place within the state of Oklahoma to another place therein. Reversed.

Statement by Doyle, J.:

The plaintiffs in error (hereinafter designated as defendants) were, on March 31, 1908, convicted in the county court of Kiowa county on an information, the charging part of which reads as follows: "That on the 18th day of March, A. D. 1908, at and within the said county and within the jurisdiction of said court, Web High, Curley Bradley, Harry Whittemore, and George Broughton, then and there being, did then and there unlawfully convey intoxicating liquors, to wit, 100 pints of whisky from one place within the state of Oklahoma to another place within the state of Oklahoma, to wit, from the Rock Island depot at Mountain View, said county and state, to a point near the Chickasha Mill and Elevator Company's elevator at Mountain View, said county and state. Said conveyance of intoxicating liquor, as aforesaid, not being then and there the conveyance of a lawful purchase of intoxicating liquor as provided by law." The information was filed before the enactment of the prohibitory law, and was based upon that clause of the Constitution (§ 499, Bunn's ed.) which provides: "Or who shall ship or in any way convey such liquors from one place within this state to another place therein, except the conveyance of a lawful purchase as hereinafter authorized, shall be punished, on conviction thereof, by fine not less than \$50 and by imprisonment not less than thirty days, for each offense." 28 L.R.A. (N.S.)

Three witnesses testified on behalf of the prosecution. Bob Allen, a deputy sheriff, testified that he arrested the defendants and made the seizure on the evening of March 18, 1908, on the public road, about 150 feet from the Rock Island depot, at Mountain View, without any warrant or other process, asserting his right to do so by virtue of the foregoing clause of the Constitution, at which time all of said defendants were riding on a delivery wagon from the depot towards the town; that in said delivery wagon was a barrel which looked like a sugar barrel; that he had seen said barrel at the depot and examined it, and it smelled like whisky; that said barrel, when opened, was found to contain 100 pints of whisky. The testimony of F. W. Fanson, railroad and express agent at Mountain View, shows that the defendant Whittemore, on March 14, 1908, purchased an express money order for the sum of \$36, payable to Casey & Swasey, of Ft. Worth, Texas; that on the 18th day of March, 1908, he received said barrel as railroad agent, the same having been shipped from Ft. Worth, Texas, to the name of W. M. Silvers, and was received by the defendant Whittemore, he signing the name of W. M. Silvers to the express receipt and paying express charges of \$3.40; that the defendant Broughton (drayman) was standing by when he delivered the barrel to said defendant Whittemore. The testimony of D. George Jones is not material to any issue in the case.

The defendants testified in their own behalf, in substance, as follows: The defendant Harry Whittemore testified that he purchased an express money order for the sum of \$36, payable to Casey & Swasey, of Ft. Worth, Texas, from the agent of the Rock Island Railroad & Express Company at Mountain View, Oklahoma, on the 14th day of March, 1908; that said money order was by said defendant forwarded to the payee at Ft. Worth, Texas, together with an order for 48 quarts of whisky; that said whisky was shipped from Ft. Worth to Mountain View packed in a barrel, and was there received on the 18th day of March, 1908; that he paid the express charges thereon, and hired the defendant Broughton (a drayman) to haul it to his home; and that he purchased said whisky for his own use, and no other person had any interest in it. The defendant Broughton testified that he was running a delivery wagon at Mountain View, and was hired by the defendant Whittemore to haul said barrel from the depot to his home, and that he did not know at that time what said barrel contained. The defendants Web High and Curley Bradley testified that they were

at the depot and caught a ride to town in the delivery wagon; that Deputy Sheriff Allen, about 150 feet from the depot, stopped the wagon, arrested the defendants, and seized a barrel that was in the wagon; that they in no way assisted to load or convey the barrel, and that they knew nothing about the barrel or its contents.

The testimony shows that there was nothing to indicate the contents of the barrel, and that it resembled a sugar barrel. The defendants were placed in jail, and the next day were taken to Hobart, and the information in this case was filed. Defendants were arraigned, and entered pleas of not guilty. The petition in error and case made was filed in the supreme court July 30, 1908, and said cause was, upon the organization of the criminal court of appeals, duly transferred by the supreme court, as by law provided, and is now before the court for review.

Messrs. Thomas W. Conner and O. J. Logan for plaintiffs in error.

Mr. Fred S. Caldwell for defendant in error.

Doyle, J., delivered the opinion of the court:

It is contended by counsel for defendants "that the verdict and judgment of guilty in said case is not sustained by the evidence, and is contrary to law."

At the close of taking of the testimony, defendants, and each of them, requested the court to direct a verdict of acquittal as to each of said defendants, on the ground that the evidence was insufficient to support a conviction. The court refused to so direct the jury, and allowed exceptions. Under the facts which the evidence in this case proved, or tended to prove, we believe the court should have directed an acquittal as requested. The record clearly shows that the defendants Web High and Curley Bradley were only riding on the wagon in which the whisky was being conveyed; that they had no interest or ownership in the whisky, no knowledge that it was whisky, and that they took no part in the conveyance. It further shows that the defendant George Broughton (a drayman) was conveying the barrel that contained the whisky as he would any other article for hire. His testimony that he did not know its contents is undisputed.

As to the defendant Harry Whittemore, the record presents a question involving the construction of that clause of the Constitution (§ 499, Bunn's ed.) which is set forth in the statement of facts, as affecting interstate commerce in shipments of intoxicating liquor. The question is, Was the de-

fendant Whittemore, in the removal of the whisky from the depot to his home, engaged in conveying it, within the purport and meaning of said clause of our Constitution?

In construing the language of said clause, it is well to remember that it was framed to meet the requirements of the prohibition paragraph of the enabling act (Bunn's ed. p. 144, § 507). Reference to said paragraph shows that the only language therein regarding the conveyance of intoxicating liquors is as follows: "507. Second, that the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said state now known as the Indian territory and the Osage Indian Reservation, and within any other parts of said state which existed as Indian reservations, on the 1st day of January, 1906, is prohibited for a period of twenty-one years from the date of the admission of said state into the Union, and thereafter until the people of said state shall otherwise provide by amendment of said Constitution and proper state legislation. Any person, individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of this section, or who shall, within the above-described portions of said state, advertise for sale or solicit the purchase of any such liquors, or who shall ship or in any way convey such liquors from other parts of said state into the portions hereinbefore described, shall be punished, on conviction thereof, by fine not less than \$50 and by imprisonment not less than thirty days, for each offense." Thus we see the prohibition requirement of the enabling act entirely omitted the question of interstate conveyance, and was drawn so as not to be repugnant to the interstate commerce clause of the Federal Constitution.

In view of the fact that at the time of the alleged offense there had been no prohibitory legislation enacted, we do not deem it necessary to the decision of this case that we should enter upon the discussion of the existence and extent of the police power residing in the several states of the Union. It is quite as unnecessary to argue that the power of Congress to regulate commerce between the citizens of the different states was not intended to abridge the lawful exercise of the police power by the state governments. However, if judicial decisions can be said to settle a question, the question decisive of this case has been clearly and properly settled by the highest court of our country.

In 1886 the legislature of the state of Iowa passed an act (Acts 21st Gen. Assem.

chap. 66, p. 81), forbidding any common carrier from bringing into that state any intoxicating liquors from any other state or territory of the United States, without first having been furnished with a certificate under the seal of the county auditor of the county of which said liquor is to be transported, or is consigned for transportation, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell intoxicating liquor in said county. This statute was declared invalid by the Supreme Court of the United States in the case of *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062. The opinion of the court was delivered by Mr. Justice Matthews, who, in part, says: "The statute of Iowa under consideration falls within this prohibition. It is not an inspection law; it is not a quarantine or sanitary law. It is essentially a regulation of commerce among the states, within any definition heretofore given to that term, or which can be given; and, although its motive and purpose are to perfect the policy of the state of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit the introduction into the state, from foreign countries, of all importations of intoxicating liquors produced abroad, no one would doubt the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the states." "And here is the limit between the sovereign power of the state and the Federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States. . . . The same process of legislation and reasoning adopted by the state and its courts could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drunk or to food and clothing."

In *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, it was recognized that ardent spirits, distilled liquors, ale, and beer are subject to exchange, barter, and traffic like any other commodity in which a right of traffic exists, and that, being thus articles of commerce, a state cannot, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister state, nor, when imported, prohibit their sale by the importer; and, accordingly, it was held that a statute of the state of

Iowa prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical, or sacramental purposes, and under a license from a county court of the state, is, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several states." *

Following closely upon this decision, and probably in consequence of it, Congress, upon August 8th of the same year, enacted what is commonly known as the "Wilson bill," which provides: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." [26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177.]

This so-called "Wilson bill" has been construed by several decisions of the Supreme Court of the United States. In the case of *Scott v. Donald*, 165 U. S. 66, 41 L. ed. 633, 17 Sup. Ct. Rep. 269,—this being a case wherein the plaintiff sought to recover damages caused by the action of the defendants, who were state constables of the state of South Carolina, in seizing and carrying away several packages of wines and liquors belonging to plaintiffs and, at the time of the seizure, in the possession of the railroad company which, as common carriers, had brought the packages within the state,—Mr. Justice Shiras, who delivered the opinion of the court, in part says: "The evils attending the vice of intemperance in the use of spirituous liquors are so great that a natural reluctance is felt in appearing to interfere, even on constitutional grounds, with any law whose avowed purpose is to restrict or prevent the mischief. So long, however, as state legislation continues to recognize wines, beer, and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal court to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles."

"We cheerfully concede that the law in question was passed in the bona fide exercise of the police power. We disclaim any imputation to the lawmakers of South Carolina of a design, under the guise of a domestic regulation, to interfere with the rights and privileges of either her own citizens or those of her sister states, which are secured to them by the Constitution and laws of the United States. But, as we have had more than one occasion to observe, our willingness to believe that this statute was enacted in good faith, and to protect the people of the state from the evils of unrestricted importation, manufacture, and sale of ardent spirits, cannot control the final determination whether the statute, in some of its provisions, is not repugnant to the Constitution of the United States. As was said in *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; 'If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.'"

After reviewing numerous decisions, the court, at page 99 of 165 U. S., concludes as follows: "In the light of these cases the act of South Carolina of January 2, 1895, must, as to those of its provisions which affect the plaintiff in the present suits, stand condemned. It is not an inspection law. The prohibition of the importation of the wines and liquors of other states by citizens of South Carolina for their own use is made absolute, and does not depend on the purity or impurity of the articles. Only the state functionaries are permitted to import into the state, and thus those citizens who wish to use foreign wines and liquors are deprived of the exercise of their own judgment and taste in the selection of commodities. To empower a state chemist to pass upon what the law calls the 'alcoholic purity' of such importations, by chemical analysis, can scarcely come within any definition of a reasonable inspection law. It is not a law purporting to forbid the importation, manufacture, sale, and use of intoxicating liquors, as articles detrimental to the welfare of the state and to the health of the inhabitants, and hence it is not within the scope and operation of the act of Congress of August, 1890. That law was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are therefore the sub-

ject of legitimate commerce. When that law provided that 'all fermented, distilled, or intoxicating liquors transported into any state or territory, remaining therein for use, consumption, sale, or storage therein, should, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise,' evidently equality or uniformity of treatment under state laws was intended. The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors, and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors, and be valid. But the state cannot, under the congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

In the case of *Rhodes v. Iowa*, 170 U. S. 426, 42 L. ed. 1096, 18 Sup. Ct. Rep. 664, the court in part says: "Interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee." And as a result of this ascertainment of the meaning of the Wilson act it was held that, as the act of moving the goods preceded the period affixed by the Wilson act, at which the state power could attach, the conviction was erroneous.

In *Vance v. W. A. Vandercook Co.* 170 U. S. 439, 42 L. ed. 1101, 18 Sup. Ct. Rep. 676, Mr. Justice White, in delivering the opinion of the court, in part says: "In the inception it is necessary to bear in mind a few elementary propositions which are so entirely concluded by the previous adjudications of this court that they need only to be briefly recapitulated.

"(a) Beyond dispute, the respective states have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the lawmaking power of the states; provided always they do not transcend the limits of state authority by invading rights which are secured by the Constitution of the United

States, and provided, further, that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other states of the Union.

"(b) Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.

"(c) It is also certain that the settled doctrine is that the power to ship merchandise from one state into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until, by a sale in the original package, they have been commingled with the general mass of property in the state.

"This last proposition, however, whilst generally true, is no longer applicable to intoxicating liquors, since Congress, in the exercise of its lawful authority, has recognized the power of the several states to control the incidental right of sale in the original packages of intoxicating liquors shipped into one state from another, so as to enable the states to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in original packages except in conformity to lawful state regulations. In other words, by virtue of the act of Congress, the receiver of intoxicating liquors in one state, sent from another, can no longer assert a right to sell in defiance of the state law in the original packages, because Congress has recognized to the contrary. The act of Congress referred to, chap. 728, was approved August 8, 1890, 26 Stat. at L. 313, U. S. Comp. Stat. 1901, p. 3177, and is entitled, 'An Act to Limit the Effect of the Regulations of Commerce between the Several States and with Foreign Countries in Certain Cases.'

The scope and effect of this act of Congress have been settled. *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Rhodes v. Iowa*, 170, U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Scott v. Donald*, 165 U. S. 68, 41 L. ed. 633, 17 Sup. Ct. Rep. 265.

Further on, the court says: "But the right of persons in one state to ship liquor into another state, to a resident for his own use, is derived from the Constitution of the United States, and does not rest on the grant of the state law. Either the conditions attached by the state law unlawfully restrain the right, or they do not. If they do,—and we shall hereafter examine this contention,—then they are void. If they do not, then there is no lawful ground of complaint on the subject. We are thus brought to examine whether the regulations imposed by the state law on the right of the residents of other states to ship into the state of South Carolina alcoholic liquor, to the residents of that state, when ordered by them for their use, are so onerous and burdensome in their nature as to substantially impair the right; that is, whether they so hamper and restrict the exercise of the right as to materially interfere with, or, in effect, prevent, its enjoyment."

In the case of *Heyman v. Southern R. Co.* 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130, Mr. Justice White, delivering the opinion of the court, in part says: "As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce by allowing the state power to attach after delivery and before sale, we are not concerned with whether, under the law of any particular state, the liability of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination, before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several states concerning the precise time when the liability of a carrier, as such, in respect to the carriage of goods, ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the commerce clause of the Constitution, and thereby comes under the control of the state authority.

"Of course, we are not called upon in this case, and do not decide, if goods of the character referred to in the Wilson act, moving in interstate commerce, arrive at the point of destination, and, after notice and full opportunity to receive them, are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson act, because constructively delivered. We say we

are not called upon to consider this question, for the reason that no facts are shown by the record justifying the passing on such a proposition. And as in this case we deal only with the power of the state to enforce its police regulations against goods of the character of those enumerated in the Wilson act, the subject of interstate commerce, before delivery, we must not be understood as in any way limiting or restricting the ruling made in *Vance v. W. A. Vandercook Co.* 170 U. S. 439, 42 L. ed. 1101, 18 Sup. Ct. Rep. 676, upholding the right of a citizen of one state to bring from another state into the state of his residence, and keep therein, for his personal use, the merchandise referred to in the Wilson act. In other words, as in the case at bar, delivery had not taken place when the seizures were made, and the control of the state over the goods had not attached. We are not called upon to consider whether, if the power of the state had attached by delivery, the state might not have levied upon the goods, on the charge that they had not been bona fide brought into the state, and were not held by the consignees for their personal use, and, therefore, were not within the ruling in *Vance v. W. A. Vandercook Co.* supra."

See also: *American Exp. Co. v. Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; *Adams Exp. Co. v. Iowa*, 196 U. S. 147, 49 L. ed. 424, 25 Sup. Ct. Rep. 185; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552; *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 A. & E. Ann. Cas. 733; *Foppiano v. Speed*, 199 U. S. 501, 50 L. ed. 288, 26 Sup. Ct. Rep. 138.

In the foregoing cases quoted and cited, the various liquor laws of the respective states were considered and construed, and said laws were held repugnant to subdivision 3 of § 8, art. 1, of the Constitution of the United States, which provides that "the Congress shall have power to regulate commerce with foreign nations and among the several states and with Indian tribes,"—commonly called the "interstate commerce clause" of the Federal Constitution.

These repeated and deliberate declarations of the Supreme Court of the United States establish two propositions: First, that the act of Congress commonly known as the "Wilson bill" permits the states, in the exercise of their police power, to enact laws prohibiting the sale, and making interstate shipments, of intoxicating liquors upon their arrival in the state subject to the operation of the police powers of the state. However, the state legislatures are not authorized to declare when such im-

portations shall become subject to state control, nor can the state in any manner change or affect the enactment made by Congress upon the subject. Under the Constitution Congress has exclusive power. Second, that the right to ship intoxicating liquors from one state into another, and the shipment of the same, is interstate commerce, and any citizen has a right to ship intoxicating liquors from one state into another, and a state law, organic or legislative, which denies or diminishes this right, or substantially abridges, interferes, or hampers the same, is in conflict with the Constitution of the United States, and this court is concluded by the decisions of the Supreme Court of the United States on this question.

The seizure of the shipment in this case before it reached its destination denied to the consignee his constitutional right to receive the shipment.

Before the enactment of the law making the criminal court of appeals the court of exclusive appellate jurisdiction in all criminal cases, this question was before this court, and, under the first act, requiring constitutional questions to be certified to the supreme court, the question was certified to said court for its final decision, and a decision was by said court rendered in said cause. *Schwedes v. State*, 1 Okla. Crim. Rep. 245, 99 Pac. 804. The syllabus reads as follows: "Under subdivision 3, § 8, art. 1, of the Constitution of the United States, commonly referred to as the 'interstate commerce clause' of the Constitution, a resident of one state has the right to have shipped to him from another state alcoholic liquors, when ordered by him for his and his family's use, and to keep the same for such use; and the state cannot, under its police power, enact laws so as to substantially hamper or burden such constitutional right to have such shipment made, and to receive and retain the same, for personal use."

The foregoing authorities settle the question that conveying an unbroken original package containing intoxicating liquors from the railroad depot to the home of the consignee is a part of the interstate commerce transportation; and in this case the interstate shipment was not completed until the same was delivered at the home of the defendant Whitemore. In this case we are not called upon to decide, and we do not attempt to construe, the prohibitory law enacted subsequent to the filing of the information. We have only construed the clause of the prohibitory ordinance of the Constitution, upon which this prosecution is predicated.

We are of the opinion that the arrest and

seizure by the deputy sheriff was unwarranted and without authority of law, as no offense had been committed: First, because said clause of the prohibition ordinance of the Constitution of the state of Oklahoma does not purport to abrogate the right to receive an interstate commerce shipment of intoxicating liquors; second, because said constitutional clause could not abrogate or in any manner diminish the protection conferred by the interstate commerce clause of the Federal Constitution.

For the reasons hereinbefore stated, the judgment is reversed, and the case remanded with directions to the County Court of Kiowa County to dismiss the case.

Furman, P. J., and Baker, J., concur.

OREGON SUPREME COURT.

W. M. KAISER et al., Exrs., etc., of Tilmon Ford, Deceased, Appts.,
v.

C. M. IDLEMAN et al., Resp'ts.

(— Or. —, 108 Pac. 193.)

Limitation of actions — payment — mortgage.

1. A mortgage is embraced by a statute providing that whenever any payment shall be made upon any existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness, the limitation shall commence from the time it is made.

Same — assignment of mortgage — payment by mortgagor.

2. The running of the statute of limitations upon a mortgage debt will be arrested by a payment by the mortgagor before the action is barred; although he has transferred the property to a stranger, where, under the statute, a payment continues and keeps alive the original promise.

(April 27, 1910.)

APPEAL by plaintiffs from a decree of the Circuit Court for Marion County dismissing a suit to foreclose a mortgage on certain real estate. Reversed.

Statement by McBride, J.:

On March 26, 1892, Tilmon Ford, plaintiffs' testator, loaned to C. M. Idleman \$4,000, taking therefor his promissory note, payable two years after date, secured by a mortgage on certain real estate in Marion county. The mortgage contained the following covenant: "And the said C. M. Idleman does hereby covenant and agree to and with the said Tilmon Ford, his heirs and assigns, that he will pay the said prin-

cipal and interest as the same become due according to the terms of said instrument of writing, to the owner or holder thereof, and will also pay or cause to be paid to the proper authorities, before the same become delinquent, all taxes of every kind that may be lawfully levied or assessed upon said instrument of writing or this mortgage, to the owner or holder thereof." The mortgage was duly recorded on the day of its execution. Idleman conveyed the land, on September 15, 1892, to Elenor A. Black, by a warranty deed, and in January, 1906, she conveyed the same to W. H. Black, her husband, who has ever since held the legal title. The complaint alleged that there had been paid, by Idleman, on the note and mortgage, various sums, which—with the date of each payment—are specifically set out in the complaint, the pay-

Note. — Effect of payment or acknowledgment by mortgagor to toll statute of limitations as against his grantee or other person holding interest in property through him.

It seems to be universally accepted that a new promise, part payment, or acknowledgment of the debt on the part of a mortgagor, before a conveyance by him of the property, or before the attachment of a lien, will have the effect of tolling the statute of limitations not only as against himself, but also as against his grantee, or other person holding an interest in the property through him, whether such part payment or new promise is made before or after the debt is barred.

This proposition is supported by the following cases: Cook v. Union Trust Co. (Cook v. Bramel) 106 Ky. 803, 45 L.R.A. 212, 51 S. W. 600; Clift v. Williams, 105 Ky. 559, 49 S. W. 328, 51 S. W. 821; Palmer v. Butler, 36 Iowa, 581; Du Bois v. First Nat. Bank, 43 Colo. 400, 96 Pac. 169; Heyer v. Pruyn, 7 Paige, 465, 34 Am. Dec. 355; Clark v. Grant (Okla.) post, —, 109 Pac. 234; Plant v. Shryock, 62 Miss. 821; Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142.

In Hughes v. Edwards, supra, the dates of the conveyances by the mortgagor are not stated, but it was said: "A purchaser with notice can be in no better situation than the person from whom he derives the title, and is bound by the same equity which would affect his rights. The mortgagor, after forfeiture, has no title at law and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can, no more than the mortgagor, assert that equity against the mortgagee, without paying the debt or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts or one of them."

In Cook v. Union Trust Co. supra, the court said: "In this case the notes given, if

ments having been made in 1896, 1897, 1898, 1901, and 1907, respectively, each having been made before a period of six years had elapsed after the date of the preceding payment. The defendants, appearing separately, demurred to the complaint, on the ground that the suit was barred by the statute of limitations. The circuit court sustained the demurrer and dismissed the suit. Plaintiffs appeal.

Messrs. W. M. Kaiser and M. E. Pogue, for appellants:

Payment on a debt evidenced by a note and secured by a mortgage is a payment on the latter as well as the former, and marks the point of time in one case as well

as the other from which the statute of limitations runs.

Allen v. O'Donald, 28 Fed. 346; Cross v. Allen, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67; Dundee Invest. Co. v. Horner, 30 Or. 562, 48 Pac. 175; Ewell v. Daggs, 108 U. S. 147, 148, 27 L. ed. 683, 684, 2 Sup. Ct. Rep. 408.

And payment by any person liable, directly or in a representative capacity, will keep the debt alive as to all persons liable thereon, whether such payment was made by their authority or not.

Dundee Invest. Co. v. Horner, *supra*; Partlow v. Singer, 2 Or. 307; Sutherlin v. Roberts, 4 Or. 378; Allen v. O'Donald, *supra*.

no payments had been made, were not barred by limitation at the date of the mortgage to appellee trust company, and any inspection of the record would have put it on notice concerning appellant's debt. At the date of the mortgage to appellee, the appellant, by reason of the annual payments made by Bramel, had fourteen years in which she could collect her notes and enforce her lien, and it cannot be said that, by reason of the fact that Bramel executed a mortgage to appellee trust company, this right to enforce collection and her lien was reduced to fifteen years from the original date of maturity. To so hold would allow a debtor to defeat the collection altogether of a debt, if by payments he had been indulged beyond the period of limitation, on the idea that, being the payor and owner of the property, he could by payments elongate both note and lien. For after the lapse of fifteen years from the date of maturity, when it would be barred, except for the payments, the debtor could sell the property free of liens. This cannot be the law. The vendee or mortgagee accepts the position as it is when his conveyance is executed. The holder of the lien has all the time to enforce the lien as the facts of the case at that time give him, and no more. It follows that the appellant's lien for purchase money is not barred by limitation, and she is entitled to have same enforced, even as against the mortgagee trust company. Being a vendor's lien, it is prior to the mortgage lien."

In *First Nat. Bank v. Woodman*, 93 Iowa, 668, 57 Am. St. Rep. 287, 62 N. W. 28, where it appeared that the second mortgage was given after the first mortgage had in fact been revived, it was held that notwithstanding the second mortgage was given when, by the records, the first mortgage seemed to be barred, such second mortgage did not take precedence over the first mortgage, since a second mortgagee, where a prior mortgage is uncanceled, must take notice of the fact, whether or not the cause of action thereon has been revived. In this case there were no controlling equities in behalf of the second mortgagee, as the second mortgage was taken mostly for antecedent debt, and nothing was parted with on the strength of the 28 L.R.A. (N.S.)

seeming bar of the statute against the first mortgage.

So, in *Plant v. Shryock*, *supra*, the purchasers based their defense on the ground that they had no actual knowledge of the mortgagee's claim upon the land, and that the records showed that the trust deed was barred long before they purchased the land, and that the record did not disclose any new promise of the grantors. The court, however, said that the deed of trust was recorded and there was no entry of satisfaction on the record; and although, at the date of the purchase of the land, the note appeared on its face to be barred by the statute of limitations, it was incumbent upon the purchasers to pursue the inquiry suggested by the record, and ascertain if, notwithstanding the apparent bar of the note, it was in truth still a valid subsisting debt.

The above case was cited in *Bowmar v. Peine*, 64 Miss. 99, 8 So. 166, as being conclusive that the lien of the mortgage must prevail, both as against the mortgagor and all parties claiming his title. The various dates given in this case, although the court makes no note of it, reveal that the buyer of the property purchased at execution sale more than three years before the mortgagor waived the statute of limitations, and that the waiver was made after the debt in fact had become barred.

Revival after conveyance.

Coming to the other class of cases, that is, where a new promise or part payment or acknowledgment was made after conveyance of the property or the attachment of a lien, it would seem to follow from the above cases that payment under such circumstances could not have the effect of tolling the statute of limitations as against the grantee, and this would seem to be especially true in those cases where not only the conveyance was prior to the attempted revival, but such revival was after the debt was barred.

A case so holding is *Cason v. Chambers*, 62 Tex. 305, where it was held that while the subsequent renewal of a debt by a new note given by the mortgagor to the mortgagee as

The mortgagor's grantee has no greater rights against the mortgagee than the mortgagor himself.

2 Jones, *Mortg.* 6th ed. § 1202; *Medley v. Elliott*, 62 Ill. 532; *Grether v. Clark*, 75 Iowa, 383, 9 Am. St. Rep. 491, 39 N. W. 655; *Kendall v. Tracy*, 64 Vt. 522, 24 Atl. 1118.

The purchaser is bound by the acts and declarations of the mortgagor in respect to the mortgage while he retains the equity of redemption or any part of it.

Jones, *Mortg.* 6th ed. § 1202; *Heyer v. Pruyn*, 7 Paige, 465, 34 Am. Dec. 355; *Hughes v. Edwards*, 9 Wheat. 489, 6 L. ed. 142.

A payment made by a mortgagor after

between them would operate a renewal of the mortgage given to secure it originally, yet such renewal could not affect the purchaser of the mortgaged property, whose right accrued prior to the renewal, and while the original debt was barred by the statute of limitations.

In *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765, also cited in the KAISER CASE, it was said: "When the note is barred, the mortgage is also barred, and no subsequent payment, promise, or acknowledgment can revive the mortgage as to property which the mortgagor has, prior thereto, conveyed to a third party. Whenever the mortgage is barred, the property is free from the lien. It is, as respects the mortgage, as though the latter had never existed. If, therefore, the mortgagor no longer owns the property, he cannot impose a burden upon it,—his power to bind the property has ceased. He is as powerless over it as though he had never owned it. He can revive the note, as he could give a new note, for no rights but his own are involved. He can revive the old mortgage just so far, and so far only, as he could give a new mortgage; and that is, to bind his own property."

That one who executes a note and mortgage cannot revive such note and mortgage by part payment or otherwise after they have become barred, as against a third person to whom he has theretofore sold the mortgaged property, was also held in *Hubbard v. Missouri Valley L. Ins. Co.* 25 Kan. 172.

To the same effect are *Lord v. Morris*, 18 Cal. 482, and *Day v. Baldwin*, 34 Iowa, 380, both set out in KAISER v. IDLEMAN.

That a mortgagor, after the debt has become barred, and subsequent to purchase at execution sale of the land by another, cannot revive the mortgage as against such purchaser, seems also to have been held in *Damon v. Leque*, 17 Wash. 573, 61 Am. St. Rep. 927, 50 Pac. 485, although the opinion is so vague that it is difficult to determine the weight to be granted the case.

In *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754, it was also held that the acknowledgment of a debt after it and a mortgage on an undivided interest in certain property, 28 L.R.A. (N.S.)

he has sold the premises to another will repel the presumption of satisfaction arising after the lapse of twenty years from the time when the mortgage became due, so far as the subsequent purchaser is concerned.

Barrett v. Prentiss, 57 Vt. 297; *Hughes v. Edwards*, supra; *New York L. Ins. & T. Co. v. Covert*, 6 Abb. Pr. N. S. 154; *Mack v. Anderson*, 165 N. Y. 529, 59 N. E. 289.

The running of the statute of limitations against the foreclosure of a mortgage will be arrested by a partial payment of either principal or interest.

27 Cyc. Law & Proc. p 1561; *California Sav. & L. Soc. v. Culver*, 127 Cal. 107, 59 Pac. 292; *Schifferstein v. Allison*, 123 Ill.

securing the debt, were barred by the statute of limitations, did not have the effect of tolling the statute as against the debtor's joint tenant, who previously had become purchaser of that part of the property. The court in this case said: "It was formerly held that statutes of this nature proceeded upon a presumption of payment, and that the effect of an acknowledgment was to rebut this presumption, and place the debt upon its original footing. This view is now exploded, and the statute is universally regarded as one of repose, the benefit of which may be relinquished by the party interested, but cannot be taken from him without his consent."

It is clear, therefore, that the plaintiff cannot avail himself of the acknowledgment as against Kelley unless the circumstances of the case are such as to preclude Kelley from relying upon the agreement. It appears that the plaintiff was ignorant of its existence, but, as he parted with nothing in consideration of the acknowledgment, he is not in a position to complain on that ground. It is not enough that he acted in good faith and without notice. The acknowledgment cost him nothing, and his rights under it are not those of an encumbrancer for value. If the debt had not been barred, the position of the plaintiff would be different; having no notice of the agreement, if he had suffered the statute to run, relying upon the acknowledgment, he would be entitled to protection. As the debt was barred, however, he cannot claim that his rights have been prejudiced by the want of notice, for the acknowledgment gave him none which could possibly be affected by it."

An interesting case on this question is *Cook v. Prindle*, 97 Iowa, 464, 59 Am. St. Rep. 424, 66 N. W. 781, overruling (*Iowa*) 63 N. W. 187, where it was held that a new promise on the part of a mortgagor after the debt was barred did not have the effect of reviving the mortgage lien on property which, although sold by the mortgagor to a grantee before the debt was barred, was sold by the latter to a third person after the debt was barred, neither grantee having knowledge of the new promise. The court, after reviewing *First Nat. Bank v. Woodman*, supra, said: "The question involved in

662, 15 N. E. 275; Kreitz v. Hamilton, 28 Ill. App. 566; Teegarden v. Burton, 62 Neb. 639, 87 N. W. 337; Longstreet v. Brown (N. J. Eq.) 37 Atl. 56; Leach v. Curtin, 123 N. C. 85, 31 S. E. 269.

A mortgage lives as long as the note it was given to secure.

Perry v. Horack, 63 Kan. 88, 88 Am. St. Rep. 225, 64 Pac. 990; Kraft v. Holzmänn, 206 Ill. 548, 69 N. E. 574; Freeburg v. Eksell, 123 Iowa, 464, 99 N. W. 118.

Messrs. A. E. Clark, L. H. McMahan, and C. M. Idleman for respondents.

McBride, J., delivered the opinion of the court:

This appeal involves but one question: Did the payments made by Idleman upon

that case, the right of a subsequent mortgagee to avail himself of the statute, as against a claim apparently barred, is not the question we have to deal with. We have a case where one purchased the mortgaged premises at a time when the debt, as appeared from the mortgage, was barred, and without any notice that, after his grantor purchased the premises, the mortgagors had, by written promise, undertaken to revive the debt. We do not think that there is any decision of this court which has determined this question against the conclusion reached by the lower court. The doctrine of Day's Case, supra, which we have shown has been recognized in at least two subsequent cases, is in harmony with the thought that one who purchases the mortgaged real estate at a time when the mortgage appears to be barred may successfully interpose a plea of the statute of limitations to the foreclosure of such a mortgage, which the mortgagors have attempted to revive after they have parted with their title, he having no notice of said revivor. We are not disposed to extend the doctrine of First Nat. Bank v. Woodman to a case where the facts are like those at bar. We are aware that this court has often said that the lien of the mortgage will continue so long as the debt exists; and, as a rule, that is so; but the language thus used is to be construed in view of the facts then under consideration."

But see Bowmar v. Peine, 64 Miss. 99, 8 So. 166, supra, and New York L. Ins. & T. Co. v. Covert, and the immediately following cases, infra.

In Kerndt v. Porterfield, 56 Iowa, 412, 9 N. W. 322, it was held that a note and mortgage which have become barred by the statute of limitations may be revived by an admission of indebtedness by the mortgagor, and secure priority over a subsequent mortgage taken before the first mortgage became barred, although not foreclosed until it was revived. It was said in this case: "It may be, but the point we do not decide, that one acquiring an interest in mortgaged property after foreclosure of the mortgage is barred by the statute, and before a new promise is made, would hold by a right superior to the 28 L.R.A. (N.S.)

the debt after he had conveyed the property to Mrs. Black operate to prevent the statute of limitations from running in her favor? By the provisions of § 5, title 1, Bellinger & C. Anno. Codes & Statutes, the limitation for the commencement of suits upon a sealed instrument is declared to be ten years, and the limitation for an action upon a promissory note is fixed at six years by the succeeding section. Section 24 of the same title is as follows: "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby; but this section shall not alter the effect of any payment of

mortgagee after his debt is revived by a new promise. But the case is different where one acquires such an interest before the action upon the mortgage is barred and after the period of limitation has run, the debt is revived by a new promise. In such a case the debt was enforceable when the interest of the adverse claimant was acquired with full notice of the mortgage lien. When his interest was acquired, he took it subject to the mortgage, with the knowledge that the debt could be revived by a new promise, and the mortgage lien would stand as long as the debt existed. When the mortgage is foreclosed under a new promise removing the bar of the statute, he is in no different condition than he was in when he acquired his interest. If he was satisfied to acquire his interest while it was subject to the mortgage, he ought to be content to hold it in that condition. He can urge no equity which will relieve his property from the lien of the mortgage." The court, in distinguishing Day v. Baldwin, 34 Iowa, 380, supra, continued: "In that case the mortgagee [the maker of the notes], by his admissions in his answer to the action to foreclose, removed the bar of the statute. This we held he could not do so as to affect the interest of his codefendant, for the reason that he had no interest in the property, and was not a necessary party to the action, and by his pleadings did not show that he was even a proper party. It further appears that the admissions in the pleadings which removed the bar of the statute were made after the adverse title had been fully perfected and vested in the claimant. In the case before us it is not disputed that the mortgagees were authorized to make the written admission of the debt, and it is shown that Howard's title under which he claims was perfected after the admissions were made. The equities which, in that case, we held would not permit the removal of the bar of the statute, are not found in the record before us."

However, the rule that, after conveyance or attachment of the lien, the mortgagor cannot, by part payment, a new promise, or acknowledgment of the debt, revive the debt

principal or interest." Section 25 reads: "Whenever any payment of principal or interest has been or shall be made upon any existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made." With the foregoing provisions of the statute in view, we will not proceed to examine the question, which, for the first time, comes before this court for decision. It is of far-reaching importance, and there is much diversity of opinion found in the decisions of various courts in regard to it, and before discussing them, perhaps it is well to consider the question upon principle. Primari-

ly a contract of this kind is an agreement to repay a sum of money borrowed. The note did not constitute the debt; neither did the mortgage. The first was evidence of the debt, and the second—in addition to being evidence of its existence—furnished a security for its payment. As a legal colloquialism, we speak of owing a sum of money on a note or a mortgage. But what in fact is meant by this phrase is that we owe a debt evidenced by a note or secured by a mortgage. Hence, when money is borrowed and a note and mortgage given as security for its repayment, or as evidence of the terms and duration of the contract, for many purposes the note and mortgage constitute but one contract,—a contract to repay money. It is true that there may be

as against the grantee or lienor, has also been applied in cases where, from the facts, it appeared that the attempted revival was made before the debt was barred.

Such cases are *Kendall v. Clarke*, 90 Ky. 178, 13 S. W. 583 (set out in the KAISER CASE); *Benedict v. Griffith*, 92 Ark. 105, 122 S. W. 479; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271; *Raymond v. Bales*, 26 Wash. 493, 67 Pac. 269.

In *Zoll v. Carnahan*, 83 Mo. 35, there is also language to the effect that a mortgagor, after he has parted with his interest, cannot, by part payment or promise to pay, stop the running of the statute of limitations in favor of his grantee. But see the review of this case in KAISER v. IDLEMAN.

In *Tate v. Hawkins*, 81 Ky. 577, 50 Am. Rep. 181, it was held that while partial payments made by the original vendee on a note for the purchase money, one within fifteen years and the other after the lapse of that period, would have the effect as to him to suspend the operation of the statute of limitations, the rule could not be applied to the prejudice of one whose immediate grantor, it appears from the facts in the case, had secured the property from the original vendee long before the partial payments were made, and who himself, as also appears from the facts, acquired the property before the debt was barred, and thus before the last partial payment, although in fact after the first-named partial payment. The court in this case said: "If appellee Milner is now to be deprived of the safeguard provided by law, and upon the faith of which he purchased and paid for the land, it is to be done by an obstruction to the running of the statute, and a recognition of the cause of action after it had by law ceased to exist, made by Hawkins without his consent or notice to him. This court has, in the two cases referred to, held that Hawkins could, by his own act, elongate the statute, and continue his liability upon the note beyond fifteen years from the time it fell due; but it was not, nor ought to be, determined that Milner should thereby suffer. The lien is a charge upon the land which it is not the policy of the law, nor in accordance with the 28 L.R.A. (N.S.)

analogy of the law, should exist longer than the statutory existence of the note; and if reasons were necessary to justify this salutary and necessary principle, they are afforded by the circumstances of this case. Appellant is shown to have known of the purchase by Basket, and of the sale by him to Milner, and from his relation to Hawkins, being a brother-in-law, must have known that Hawkins was paid in full for the land, yet he continued to indulge him for more than fifteen years and until he became insolvent, and then attempted to subject the land to the payment of his debt. The consideration for this indulgence, whether friendship for Hawkins or his agreement to pay usurious interest, did not benefit Milner. In our opinion the statute should not be thus perverted in letter and spirit for the benefit of a creditor guilty of such laches."

Although the above cases for their decision relied solely upon the fact that the part payment or new promise was made after conveyance or attachment of the lien, and took no note of the fact that, at the time of part payment or new promise, the statute of limitations had not yet run against the debt, the facts make them in all respects similar to the KAISER CASE, and they are therefore clearly in conflict with that case.

Opposed to the above cases, and thus in line with the KAISER CASE, are such as *New York L. Ins. & T. Co. v. Covert*, 3 Abb. App. Dec. 350, reversing 29 Barb. 435, where it was held that payments upon a bond and mortgage by the mortgagor, which, from the facts, it appeared were made within the statutory period, will rebut the presumption of payment arising from the lapse of time, even as against a purchaser from such mortgagor.

It appeared in this case that the mortgagor, long before he made the payments, had conveyed the land in fee. As a reason for its decision, the court said: "These defendants purchased the premises pledged for the payment of that debt with full knowledge of its existence, and we are authorized to assume that either the amount due at the time of their purchase was deducted from their purchase money, or, in lieu thereof, they

two remedies open to the creditor for the recovery of his money, but both arise out of the breach of one duty, which the law imposes upon the debtor; namely, to pay his debt according to the terms of his agreement. The law has wisely provided, in effect, that a promissory note upon which no payments have been made for a period of six years shall cease to be valid as evidence of a debt, by providing that, after such lapse of time, it may not be declared upon as a substantive cause of action. The right is not extinguished, but the remedy—the efficient means of enforcing the right—is taken away. But if a mortgage has been given to secure the payment of the same debt, being a higher and more formally executed evidence of it, the law, notwithstanding it has taken away the remedy upon the note, has provided that the mortgage shall be evidence of the original obligation for a longer period; that is, ten years. The note being by the law merchant readily transferable by indorsement and de-

livery, the courts, to facilitate the transaction of business, have held that, for certain purposes, the mortgage is an incident of the note, and passes with it; but it is no less true that both the note and mortgage are incidents of the original debt, and, taken together, they constitute the evidence provided by law to prove and render certain performance of the original contract of borrowing, and from the terms of a note and contemporaneous mortgage we get the complete contract between the parties. A partial payment upon a contract for the payment of money has always been held to toll the statute of limitations. In some jurisdictions this is held to be upon the theory that a new promise is thereby implied, and that a new period of limitations begins from the date of such promise; but in this state it is held that such result does not ensue by reason of a new promise, but that such part payment operates to continue and keep in force the original prom-

ise, and the courts, to facilitate the transaction of business, have held that, for certain purposes, the mortgage is an incident of the note, and passes with it; but it is no less true that both the note and mortgage are incidents of the original debt, and, taken together, they constitute the evidence provided by law to prove and render certain performance of the original contract of borrowing, and from the terms of a note and contemporaneous mortgage we get the complete contract between the parties. A partial payment upon a contract for the payment of money has always been held to toll the statute of limitations. In some jurisdictions this is held to be upon the theory that a new promise is thereby implied, and that a new period of limitations begins from the date of such promise; but in this state it is held that such result does not ensue by reason of a new promise, but that such part payment operates to continue and keep in force the original prom-

elect to rely upon the personal covenant of their grantors to save them harmless therefrom."

And see *Kendall v. Tracy, Hathaway, & Hathaway*, 64 Vt. 522, 24 Atl. 1118; and *Barrett v. Prentiss*, 57 Vt. 297, sufficiently set out in the KAISER CASE. So, in *Mack v. Anderson*, 165 N. Y. 529, 59 N. E. 289, in which the question was raised whether payments made by grantees of a mortgagor, who have assumed the debt, will arrest the operation of the statute of limitations in favor of the grantee of another parcel, *obiter* statements were made to the effect that the mortgagor himself could have kept alive the bond and mortgage by making payments thereon within the twenty years, even after he had conveyed the premises. The court remarked that such payment would have bound the grantees, not upon the theory that the mortgagor was their agent, but because the latter would have been simply paying his own debt with which the land of the former was burdened.

In *Stein v. Kaun*, 244 Ill. 32, 91 N. E. 77, it was held that payment of interest on a note secured by a mortgage after the note was due, but, as the facts showed, before it was barred, arrested the running of the statute of limitations as well as to persons who, subsequent to the giving of the note, had secured an estate in remainder in the property, as to the person himself who paid the interest. The court said that any act of the mortgagor which arrests the running of the statute is equally binding upon his grantee with actual or constructive notice of the mortgage.

It should be noted here that, although it clearly appears in the immediately above cases that the part payment or new promise was made before the debt was barred, it is 28 L.R.A. (N.S.)

difficult to say how much that fact affected the court in its decision, and it is probably safe to say that there is nothing in these cases from which it might be intimated that the result would have been different had the attempted revival been made after the debt was barred.

Aside from the KAISER CASE it does, however, appear in a couple of cases that the court had in mind the fact that part payment was made before the debt was barred.

Thus, in *McLaughlin v. Senne*, 78 Neb. 631, 111 N. W. 377, where it was held that a payment by the owner of the equity of redemption on a mortgage debt before the statute has run is binding on the property, and tolls the statute of limitations as against a subsequent mortgagee with notice of the prior mortgage, the court took occasion to say: "Whether a payment on a mortgage debt after its enforcement in *rem* has become barred would revive it as against a subsequent mortgage in existence at any time after the statute had run and before such payment was made is a question not necessarily involved in this case, and not decided."

In *Hastie v. Burrage*, 69 Kan. 560, 77 Pac. 268, where it was contended that payment on the part of the mortgagor would not toll the statute of limitations as against his son, the holder of the legal title, the court said that this question had been settled against this contention by the case of *Jackson v. Longwell*, 63 Kan. 93, 64 Pac. 991. In the *Jackson* Case it was held that part payments made by the husband on a note executed jointly by him and his wife, and secured by a mortgage on real estate belonging to the wife, would have the effect of tolling the statute of limitations, so as to make the land subject to foreclosure, although the note had become barred as to the wife, and

ise. Dundee Invest. Co. v. Horner, 30 Or. 558, 48 Pac. 175.

Applying these rules to the case at bar, it would seem that a payment by the debtor upon the note and mortgage,—i. e., upon the mortgage debt,—as alleged here, or a payment upon either, would serve to toll the statute as to both. Indeed, there would be no room for contention to the contrary had Idleman, the original mortgagor, retained the legal title to the mortgaged premises, unless, as contended by defendants, the provisions of § 25 do not embrace mortgage debts. It is contended that the words, "bill of exchange, promissory note, bond, or other evidence of indebtedness," do not, under the rule of *ejusdem generis*, include mortgages, but are limited to instruments not under seal, and of like character to those specified. The rule is stated by a leading author as follows: "When general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the

same kind as those specifically enumerated." 2 Lewis's Sutherland, Stat. Constr. 2d ed. § 422. "The doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining the meaning of the legislature, and does not warrant a court in confining the operation of a statute within narrower limits than intended by the law-makers. The general object of an act sometimes requires that the final term shall not be restricted in meaning by its more specific predecessors." Willis v. Mabon (Willis v. St. Paul Sanitation Co.) 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110.

In the section now under consideration the first language used is "payment . . . upon an existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness." Here the general words precede the special enumeration, and certainly the words "any existing contract" are sufficiently broad to characterize the whole section. Moreover, a

she was no longer personally liable. The court in the latter case took occasion to say: "Plaintiff in error cites in support of his contention the case of Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765, where it was held that, when a note is barred, the mortgage securing the same is also barred. We most cordially indorse the doctrine laid down in that case. The trouble with its application to the case at bar rests in the fact that here the note is not barred. and that here the debt for which the mortgage was given has not been discharged."

In a few cases it seems to have been intimated that there is a distinction between those cases where the mortgagor parted with all interest in the property, and where he still retained the equity of redemption or any part of it.

A case of this nature is Du Bois v. First Nat. Bank, 43 Colo. 400, 96 Pac. 169, where, after referring to those cases in which the mortgagor had parted with all interest in the property before the time of payment, and stating that the majority of them hold that in such case the mortgagor cannot prolong the time of the payment of his mortgage, the court said: "But the decided weight of authority is that, when a purchaser with actual notice of the mortgage, or constructive notice by means of registry,—which is the case here,—acquires an interest in mortgaged property, he succeeds to the estate and occupies the position of his grantor. He takes subject to the encumbrance; and so long as the mortgagor retains the equity of redemption, or any part of it, his acknowledgment of the existence of the debt binds the subsequent purchaser."

In Raymond v. Bales, 26 Wash. 493, 67 Pac. 269, where it was held that when mortgaged premises are sold under execution 28 L.R.A. (N.S.)

sale, a partial payment thereafter by the mortgagor on the debt will not stop the running of the statute of limitations as against the purchaser at such execution sale, it was also contended that the payment was made within a year from the date of the execution sale, and that therefore, since he still had the right to redeem, and was still the owner of the equity of redemption, he had such an interest in the mortgaged premises as authorized him to stipulate for an extension of the statute of limitations as to an action upon the mortgage. The court, however, said: "It must be held here that the encumbrance of appellant's judgment lien, and the levy and sale thereunder, vested appellant with such interests in the land as prevented the mortgagor from stipulating an extension of the statute of limitations as to the right of action to foreclose the mortgage against appellant."

Cases in which the question was raised, as in Mack v. Anderson, supra, whether payment by one grantee of a portion of the premises will toll the statute of limitations as to other grantees of the mortgagor, who have secured a portion of the premises, are not included in this note.

Those cases have also been excluded where it was sought to toll the statute of limitations as against the mortgagor because of a payment or new promise by the grantee.

For cases dealing with the question whether absence of the mortgagor from the state will toll the statute of limitations in foreclosure proceedings against his grantee—see note to Boucofski v. Jacobsen, 26 L.R.A. (N.S.) 898.

Effect of part payment on mortgage by one cotenant to toll statute of limitations as to others—see note to Clute v. Clute, 27 L.R.A. (N.S.) 146.

bond—by its very definition—is an instrument under seal, a specialty, and not so different from a mortgage, in the formalities required in its execution, that the latter is unfit to be associated with it in a statute. A mortgage is within the reason of the enactment. It may be given in connection with a promissory note or bond, or may contain the complete contract within itself, but in either case there is no reason for denying a payment made upon such a contract the same efficacy that it would have if made upon a promissory note or bill of exchange. A mortgage is certainly an “evidence of indebtedness,” and not infrequently the only evidence. *Chase v. Ewing*, 51 Barb. 597. We conclude, therefore, that a part payment, either upon the note or mortgage, will toll the statute as to the mortgage. In this conclusion we are supported by the authority of decisions rendered in cases arising in this state. *Sutherlin v. Roberts*, 4 Or. 378; *Allen v. O'Donald* (C. C.) 28 Fed. 346; *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67.

The next and most difficult question is: Who is authorized to make such payment? On principle it would seem clear that the person who contracted the debt, gave the note, and executed the mortgage, would be the only one to whom the creditor should be required to look for fulfilment of his obligations. Under § 5359, *Bellinger & C. Anno. Codes & Statutes*, conveyances of real property not recorded within five days after their execution are void as to subsequent purchasers in good faith of the same property. In other words, the recording of a mortgage is constructive notice to subsequent purchasers, but there constructive notice ceases. Having recorded his mortgage, the mortgagee is not compelled to watch the records to see whether or not the mortgagor has sold the property, but has a right to assume that he still owns it, and to deal with him as such owner. And even if he has notice of a transfer of the legal title, he has a right to assume that the purchaser has informed himself of the condition of the title, and taken it subject to encumbrances that are shown by the record to have a valid existence. It is always in the power of a purchaser, before paying the purchase money, to make himself secure against an existing encumbrance, and, if he fails to do so, he ought not to require a mortgagee to be more diligent to protect him than he has been to protect himself. The weight of authority seems to indicate that a payment upon the mortgage debt by the original debtor, before the statute has run, has the effect to arrest its operation. “A purchaser with actual notice of the

mortgage, or constructive notice by means of a registry, can avail himself of the presumption of payment from lapse of time only when the mortgagor could avail himself of it under the same circumstances. The grantee succeeds to the estate, and occupies the position of his grantor; . . . as, for instance, the purchaser of a part of the mortgaged premises cannot claim a presumption of payment of the mortgage from lapse of time, when this presumption is repelled by payments of interest made by the mortgagor within twenty years, or by his admission within this time that the mortgage was then subsisting.” 2 *Jones, Mortg.* § 1202. While the language above quoted was used by the author in reference to mortgages in jurisdictions where no statute of limitations existed, but where a lapse of twenty years was held to create a presumption of payment, we see no essential difference in principle, between such a condition and that existing in the case at bar. If part payment by a mortgagor, after he has parted with his title or equity of redemption, can rebut the presumption of payment arising from lapse of time, to the prejudice of his grantee, it would seem to follow naturally that part payment by a mortgagor similarly situated would keep the mortgage alive under our statute of limitations.

The case of *Kendall v. Tracy, Hathaway, & Hathaway*, 64 Vt. 522, 24 Atl. 1118, is in point on the matter at bar. In 1866 Kendall sold a farm to Tracy, taking his promissory note and mortgage on the farm in payment. In 1871 Tracy sold a portion of the farm to the Hathaways, who entered into possession and made extensive improvements. In 1889 Kendall brought suit to foreclose his mortgage. Tracy had made partial payments on the note from time to time to keep it alive. The defendants Hathaway pleaded the statute of limitations as to themselves. The court said: “The defendants cannot avail themselves of the statute of limitations. They could acquire by their deed no better title than Tracy had, which title he held subject to the petitioner's mortgage, and that mortgage was kept from the operation of the statute by payments made by Tracy to the petitioner.” In *Barrett v. Prentiss*, 57 Vt. 297, the court says: “Was the claim barred by lapse of time? The payment was made by Prentiss, the maker of the mortgage and notes, after he had sold and quit possession of the premises. He was liable upon the notes as maker; and a payment made by him, we hold, would rebut the presumption that the mortgage debt had been paid, not only as to him, but as to all who were grantees under him, they having taken

their interest with constructive notice of the mortgage." In *Mack v. Anderson*, 165 N. Y. 529, 59 N. E. 289, the court, speaking of the effect of a payment made by a mortgagor after parting with his title, says: "The mortgagor could, of course, have kept the debt alive as to the Andersons, by making payments within the period of limitation, even without their knowledge or consent. Such payments would have bound the Andersons, not upon the theory that the mortgagor was their agent, but because the latter was simply paying his own debt, with which the land of the former was burdened." Nothing could be more applicable to the case at bar than the language above quoted. Idleman, the mortgagor, could have kept the debt alive as to the Blacks by making payments within the period of limitations, even without their knowledge or consent. See also *Perry v. Horack*, 63 Kan. 88, 88 Am. St. Rep. 225, 64 Pac. 990; *Jackson v. Longwell*, 63 Kan. 93, 64 Pac. 991; *Teegarden v. Burton*, 62 Neb. 639, 87 N. W. 337. We conclude, therefore, that payments by Idleman, before the statute had barred the action on the note, tolled the statute, not only as to him, but as to defendants as well.

We have examined the authorities submitted by defendants' counsel, and fail to discover that any one of them covers the exact point in issue. *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.* 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 A. & E. Ann. Cas. 1160, merely holds that the absence of the original mortgagor from the state does not toll the statute of limitations as to his subsequent grantee. Although the course of reasoning by which the learned court arrived at this conclusion is somewhat unique, the conclusion itself is sound and fully in accord with the holding in this state. *Anderson v. Baxter*, 4 Or. 105. The case of *Lord v. Morris*, 18 Cal. 482, is not in point. In that case the mortgagors, after sale of the property, and after the statute had run, attempted to renew the note and debt; and it was held that they could make no new promise to the prejudice of their grantee. Some *dicta* used by the court in its opinion would seem to be favorable to defendants' contention, but it must be taken to refer to the facts before the court, and be construed with those facts in view. In the case of *Day v. Baldwin*, 34 Iowa, 380, Baldwin, the original mortgagor, attempted to revive the mortgage debt as against his grantee after the right of action had become barred, and it was held that such recognition of the mortgage would not bind the grantee. The case of *Cook v. Prindle*, 97 Iowa, 464, 59 Am. 28 L.R.A. (N.S.)

St. Rep. 424, 66 N. W. 781, was a similar case, and the decision followed the rule announced in *Day v. Baldwin*, supra. In *Zoll v. Carnahan*, 83 Mo. 35, it was contended that the absence of the vendee, against whose property a vendor's lien existed, tolled the statutes as to his subsequent grantee, and the court held adversely to this contention. What was said in the opinion in regard to the effect of a part payment by a mortgagor, under such circumstances, was not predicated upon any fact appearing in the case, and is pure *dictum*. The case of *Kendall v. Clarke*, 90 Ky. 178, 13 S. W. 583, arose upon an attempt to enforce a vendor's lien against a grantee of an original vendee. The court held squarely in that case that a payment by the vendee would not keep the lien alive against his grantee. The disfavor with which courts view vendor's liens may have accounted for this decision, though it does not so appear, and we concede this case to be fairly in point, as sustaining defendants' contention, but in view of the weight of authorities to the contrary, as well as what we deem, upon reason, to be the safe and salutary rule, we decline to adopt the reasoning of the case cited. In *Old Alma-House Farm v. Smith*, 52 Conn. 434, the maker of a note and mortgage conveyed his equity of redemption to a third party, who, from time to time, for fifteen years following, paid interest on the note. It was held that this did not toll the statute as to the original mortgagor. The reason given is that the party making the payments was not liable on the note, and that he was not in such privity with his grantor as to be his agent for the purpose of making a new promise. It will be seen that this decision proceeds upon the theory that a part payment constitutes a new promise, and must therefore be made by a joint debtor or someone having actual or implied authority to bind the original maker,—a doctrine expressly repudiated in this state in *Dundee Invest. Co. v. Horner*, supra. The case of *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765, is another case in which an attempt was made to revive a debt already barred by the statute, and is not in point here.

Without pursuing the subject further, it is sufficient to say that, outside of the case of *Kendall v. Clarke*, supra, which we deem unsound, and *Old Alma-House Farm v. Smith*, supra, which is based upon a construction of the statute of limitations different from that which prevails in this jurisdiction, the other cases cited resolve themselves into two classes: (1) Those in which it is held that absence from the state will not toll the statute as to a gran-

tee of the mortgagor; (2) those in which it is held that a payment by the mortgagor, after the statute has run, will not revive the debt as against his grantee. The distinction between these cases and the one at bar is this: (1) In this state a part payment continues and keeps alive the original promise, while the absence of the primary debtor from the state has no such effect. (2) The revival of a debt after it has once been barred is in the nature of a new promise or contract, not a continuation of the old; and a mortgagor has no authority to make such new promise to the prejudice of his grantee.

It follows from the conclusions here arrived at that the decree of the court below should be reversed, and the demurrer overruled, and the cause remanded for further proceedings not inconsistent with this opinion.

WISCONSIN SUPREME COURT.

AUGUSTA MILLER, Resp't.,
v.
SOVEREIGN CAMP WOODMEN OF
THE WORLD, Appt.

(140 Wis. 505, 122 N. W. 1126.)

Death — presumption — absence — search.

1. Proof of diligent search and inquiry is not required to establish the presumption of death when a person has absented himself from his home or place of residence for seven years.

Domicile — parent's home.

2. The home of his widowed mother will be presumed to be that of an unmarried son who, upon reaching majority, goes away to work, but makes such home his headquarters, in the absence of anything to

show an intention to change it to another place.

Insurance — proofs of death — waiver.

3. A requirement of a mutual benefit society that suit cannot be brought until a certain time after proofs of death are furnished is waived by refusal of the proper officer to furnish blanks for such proof, because the notice given him was of absence for more than seven years, rather than of death.

(October 26, 1909.)

A PPEAL by defendant from a judgment of the Circuit Court for Green County in plaintiff's favor in an action brought to recover the amount alleged to be due on a benefit certificate. Affirmed.

Statement by Barnes, J.:

The plaintiff, as the beneficiary in a benefit certificate issued to her son Otto Miller, brings this action to recover \$1,000. To establish the death of the insured, evidence was offered tending to show that at the time the action was begun he had been absent from his home and unheard of for seven years. No evidence was offered by the defendant. The court directed a verdict in favor of plaintiff, and such ruling is assigned as error. Otto Miller was last heard from in 1899. He was then twenty-three years of age and unmarried. He was a musician and a barber, and had pursued both callings for a livelihood, and had been away from home on and off for several years prior to his disappearance. It appears that he was devoted to his mother, writing to her frequently when he was away, and returning to her home at irregular intervals. The testimony fairly shows that, in so far as the alleged decedent had any home, it was with his mother. In 1899 he was en-

Note. — Necessity of inquiry to raise presumption of death from seven years' absence.

As declared in the note upon this question appended to *Modern Woodmen v. Gerdomb*, 2 L.R.A.(N.S.) 809, the weight of modern authority supports the rule that diligent inquiry for a missing person is necessary to raise a presumption of his death from seven years' absence.

Thus, in *Posey v. Hanson*, 10 App. D. C. 496, it was held that to raise such presumption there must be some proof of inquiry made of the persons and at the places where news of the absent person, if living, would most probably be had.

And in *Hansen v. Owens*, 132 Ga. 618, 64 S. E. 800, it was held that it must be shown that there was an unsuccessful effort to find the absent person by search and diligent inquiry at his last known place of

residence, and among his relations or acquaintances, if any.

And in *Policemen's Benev. Assn. v. Ryce*, 213 Ill. 9, 104 Am. St. Rep. 190, 72 N. E. 764, affirming 115 Ill. App. 95, and *Modern Woodmen v. Graber*, 128 Ill. App. 585, the rule enunciated in *Hitz v. Allgren*, 170 Ill. 60, 48 N. E. 1068, was followed, that there must be diligent inquiry at the absentee's last place of residence, and among his relatives and any others who would probably have heard from him if living.

And in *Renard v. Bennett*, 76 Kan. 848, 93 Pac. 261, 14 A. & E. Ann. Cas. 240, the following language from *Modern Woodmen v. Gerdomb*, 72 Kan. 391, 2 L.R.A.(N.S.) 809, 82 Pac. 1100, 7 A. & E. Ann. Cas. 570, was quoted with approval: "In order that the presumption of life may be overcome by the presumption of death there must be evidence, not merely of absence from home or place of residence for the period of seven

gaged to be married to a young lady at Monroe, where his mother resided. In July, 1899, the plaintiff and Otto went to Salina, Colorado, where Mrs. Miller visited some relatives until the following July. It is not entirely clear whether she went to Colorado with the purpose of making it her permanent home, but the inference from the testimony is strong that she did not. Otto did not remain at Salina long, but spent most of his time in Denver and Boulder until December, 1899, at which time he wrote his mother from Denver. Nothing further had been heard from him up to the time of the trial. Some rumors reached plaintiff as to his whereabouts, and numerous letters were written to parties who it was thought might be likely to know of him if he were alive. The plaintiff continued to make the required payments on the benefit certificate for the seven years after the disappearance of her son.

Mr. Arthur H. Burnett, with Messrs. Jeffris, Mouat, Smith, & Avery, for appellant:

The absence of a person for seven years from his usual place of abode or residence, and from whom no intelligence has been received, raises the presumption of death only where there has been diligent inquiry at the person's last place of abode, and among those who would probably hear from him if living.

Stinchfield v. Emerson, 52 Me. 465, 83 Am. Dec. 524; *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068; *Litchfield v. Keagy*, 78 Ill. App. 398; *Cumberland v. Graves*, 9 Barb. 608; *Garwood v. Hastings*, 38 Cal. 229; *Modern Woodmen v. Gerdorn*, 72 Kan. 391, 2 L.R.A.(N.S.) 809, 82 Pac. 1100, 7 A. & E. Ann. Cas. 570, on second appeal, 77 Kan. 401, 94 Pac. 788; *Watson v. England*, 14

Sim. 28; Dowley v. Winfield, 14 Sim. 277; *Smith v. Smith*, 49 Ala. 156.

Where a person changes his abode, the fact that he has not been heard from at his former place of residence raises no presumption of his death, unless it be accompanied by evidence that he has not been heard from at his last known place of abode.

2 Greenl. Ev. § 278f; *Francis v. Francis*, 180 Pa. 644, 57 Am. St. Rep. 668, 37 Atl. 120; *Dunn v. Travis*, 56 App. Div. 317, 67 N. Y. Supp. 743; *Dworsky v. Arndstein*, 29 App. Div. 274, 51 N. Y. Supp. 597.

Mr. J. M. Becker, for respondent:

If a person has absented himself from home or family, and has not been heard of for seven years, the presumption of law is that he is then dead; and if no other evidence is introduced on that point, the court should proceed on the presumption of death, without submitting the question to the jury.

Cowan v. Lindsay, 30 Wis. 586; *Whiteley v. Equitable Life Assur. Soc.* 72 Wis. 170, 39 N. W. 369; *Wisconsin Trust Co. v. Wisconsin M. & F. Ins. Co. Bank*, 105 Wis. 464, 81 N. W. 642.

It is not necessary that inquiry should be made in those places which the absentee merely visited, or to which he may have gone temporarily.

Winship v. Conner, 42 N. H. 341; 1 Jones, Ev. § 57, p. 121.

There is no rule of law which makes it the duty of a beneficiary to make search for the insured after his disappearance.

McAllister v. Connecticut Mut. L. Ins. Co. 78 Ky. 531; *Re Harrington*, 140 Cal. 244, 98 Am. St. Rep. 51, 73 Pac. 1000.

The refusal of the defendant order to send the customary blanks for proof of death is a waiver of the condition of the beneficiary certificate as to furnishing proofs.

years, but there must be a lack of information concerning the absentee on the part of those likely to hear from him, after diligent inquiry."

And in *Dietrich v. Dietrich*, 128 App. Div. 564, 112 N. Y. Supp. 968, it was held that the presumption of the continuance of life was not overcome until the lapse of seven years, "and then only after honest and bona fide attempts to find or hear from the missing person have met with failure."

And that there must be some search for the missing person before the presumption of death from absence can arise was the guiding principle of the following decisions, though no rule was laid down as to the character thereof: *Re Hall's Deposition*, 1 Wall. Jr. 85, Fed. Cas. No. 5,924; *Kennedy v. Modern Woodmen*, post, 181; *Hoskins v. Lindsay*, 1 Del. Co. Rep. 249, cited in 15 *Century Dig.* p. 2489; *Shepherdson's Estate*, 3 Del. Co. Rep. 376; *Schwarzhoff v. Neck-* 28 L.R.A.(N.S.)

er, 1 Posey, Unrep. Cas. (Tex.) 325; *Ross v. Blount*, 25 Tex. Civ. App. 344, 60 S. W. 894; *Latham v. Tombs*, 32 Tex. Civ. App. 270, 73 S. W. 1060; *Re Creed*, 1 Drew. 235; *Benson v. Olive*, 2 Strange, 920; *Doe ex dem. France v. Andrews*, 15 Q. B. 756.

In *Re Allin*, 17 L. T. N. S. 60, and in *Re Robertson* [1896] Pr. 8, the court refused to act upon the presumption of death from seven years' absence until advertisements for the missing person had been published.

In *Bradley v. Modern Woodmen* (Mo. App.) 124 S. W. 69, the testimony given in the trial court was held to tend to prove that enough diligence was exercised to discover the fate and whereabouts of the missing person, "even if we accept, as sound, recent decisions which hold the presumption only arises when due efforts have been made to learn the fate of the missing person."

Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617; *Dean v. Aetna L. Ins. Co.* 62 N. Y. 642; *Evarts v. United States Mut. Acci. Asso.* 40 N. Y. S. R. 878, 16 N. Y. Supp. 27; *Stepp v. National Life & Maturity Asso.* 37 S. C. 417, 16 S. E. 134.

Barnes, J., delivered the opinion of the court:

It is contended by the defendant that the evidence offered was insufficient to raise the presumption of death, and that a verdict should have been directed in its favor. If this contention be not well taken, then it is urged that the jury should have been permitted to pass upon the principal issue in the case.

Some of the more modern cases hold that an interested party seeking to establish the death of another may not rely on the absence of such party from his home or place of residence for seven years without being heard from, as being sufficient to raise a presumption of death, but, in addition thereto, it must be shown that diligent search and inquiry have been made and all available sources of information exhausted without result before a *prima facie* case of death is established. *Modern Woodmen v. Gerdorn*, 72 Kan. 391, 2 L.R.A. (N.S.) 309, 82 Pac. 1700, 7 A. & E. Ann. Cas. 570, and cases cited. If this rule is adopted by this court, the judgment could not be sustained. While a considerable amount of evidence of search and inquiry was offered by plaintiff, and was not contradicted, still different minds might reasonably draw different conclusions as to whether the search was sufficiently diligent, thorough, and exhaustive to meet the requirements of the rule. In such a case the jury rather than the court should draw the inference. The rule stated by Mr. Greenleaf is that "after the lapse of seven years, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved on the other party. . . . It is sufficient, if it appears that he has been absent for seven years from the particular state of his residence, without having been heard from." 1 Greenl. Ev. 16th ed. § 41. Other treatises on the law of evidence state the rule in substantially the same way. 4 Wigmore, Ev. § 2531; Jones, Ev. 2d ed. § 61 (57). Each of the authors named cite an abundance of cases in support of the rule announced. In *Cowan v. Lindsay*, 30 Wis. 586, this court adopted, without qualification, the rule as laid down in Greenleaf on Evidence, and has reiterated such rule in *Whiteley v. Equitable Life Assur. Soc.* 72 Wis. 177, 39 N. W. 369, and in *Wisconsin Trust Co. v. Wisconsin M. & F. Ins. Co.* 28 L.R.A. (N.S.)

Bank, 105 Wis. 464, 81 N. W. 642, although it was not necessary to the decision of either of the two cases last cited to do so. Thus it will be seen that the court is firmly committed to the general doctrine which does not require proof of diligent search and inquiry in order to establish the presumption of death when a person has absented himself from his home or place of residence for seven years. To hold in this case that the home of the plaintiff was not that of her son would be equivalent to holding that where a son has reached his majority, and has made it a practice to work away from home at times, he thereby loses his domicile with his parents, at least in the absence of direct evidence on his part of intention not to change his place of residence.

The plaintiff is a widow seventy-two years of age. She had six children. One died in 1898 and one in 1899, and three others died prior to 1898, so that Otto was the only living child and heir when his mother went to Colorado in July, 1899. Otto appears from the evidence to have been an affectionate son, returning often to the home of his mother, and writing her very frequently during his absence. The death of the plaintiff's daughter Emma in 1899 was the immediate cause of her going to Colorado. While there Otto made her numerous visits up to the time of his disappearance. There was nothing to suggest that he had acquired or intended to acquire a home or place of residence different from that of his mother. Intention is almost invariably a controlling element in determining residence. In Pennsylvania it is held that "residence is, indeed, made up of fact and intention; that is, of abode with intention of remaining. But it is not broken by going to seek another abode; but continues till the fact and intention unite in another abode elsewhere." *Pfoutz v. Comford*, 36 Pa. 420, 422. Other courts hold that a person leaving his place of residence with the present intention of abandoning it thereby ceases to be a resident of such place. *Swaney v. Hutchins*, 13 Neb. 266, 13 N. W. 282. But residence is not lost by leaving it for temporary purposes, where the intention remains to return when such purposes are accomplished. *State ex rel. Daubmann v. Camden*, 39 N. J. L. 57, 59; *Stratton v. Brigham*, 2 Sneed, 420, 422; *Warren v. Thomaston*, 43 Me. 406, 418, 69 Am. Dec. 69. The general rule is that a man must have a habitation somewhere, and that he can have but one, and that, in order to lose one, he must acquire another. *Kellogg v. Winnebago County*, 42 Wis. 97, 107; *Bulkley v. Williamstown*, 3 Gray, 493, 495. Residence signifies a person's permanent home and principal establishment, to which

whenever he is absent he has the intention of returning. Re Clark, 61 Hun, 619, 40 N. Y. S. R. 12, 15 N. Y. Supp. 370, 371. Section 69, Stat. 1898, prescribes rules for determining the residence of electors. Subdivision 3 of this section provides that a temporary absence from home with the intention of returning shall not deprive a party of his residence; and subdivision 9 provides that intention to acquire a new residence, without removal, shall avail nothing, and that neither shall removal without intention. These statutory provisions would seem to be merely declaratory of the common law.

The residence of Otto Miller was with his mother, at least until he reached his majority, as he could form no valid intent to change it before. There is no proof that he acquired or attempted to acquire any new residence. There is abundant evidence that he did return to the home of his mother frequently, and at least made it his headquarters. Under these circumstances, we do not think the court erred in assuming that the residence of the plaintiff was the residence of her son. The certificate upon which suit was brought provided that no legal proceeding should be instituted to recover thereunder until ninety days after proofs of death were furnished. The constitution of the defendant required the officers of the local camp to report the death of a member to the sovereign clerk of the order, and made it the duty of such clerk to forward to the clerk of the local camp such blanks as should be prescribed by the sovereign commander and finance committee, upon which to make proofs satisfactory to them. A proper request for such blanks was made, and was refused on the ground that no notice of death had been received. In refusing to send the blanks, an officer of the defendant, presumably duly authorized, stated that proof of absence could not be received as proof of death, and that the validity of the claim made could not be recognized unless actual death could be shown. The defendant, no doubt in conformity with the provisions of its constitution, had blanks upon which to make proofs of death that would be satisfactory to it. The plaintiff could hardly be expected to know what was required in this regard. There was a denial of liability, if plaintiff proposed to rely on the presumption of death resulting from absence. Under these circumstances, the defendant waived its right to insist on proofs of death as a condition precedent to the beginning of suit. King v. Hekle F. Ins. Co. 58 Wis. 508, 17 N. W. 297; Faust v. American F. Ins. Co. 91 Wis. 158, 30 L.R.A. 783, 51 Am. St. Rep. 876, 64 N. W. 883; Matthews v. 28 L.R.A. (N.S.)

Capital F. Ins. Co. 115 Wis. 272, 91 N. W. 675.

Judgment affirmed.

ILLINOIS SUPREME COURT.

JOHANNA KENNEDY

v.

MODERN WOODMEN OF AMERICA,
Appt.

(243 Ill. 560, 90 N. E. 1084.)

Trial — direction of verdict — evidence concerning absentee.

1. The court cannot direct a verdict for an insurance company in an action on a policy upon the life of one who has been absent from his home for more than seven years, merely because of evidence that the absentee has been seen within that time, since the question of the credibility of such evidence is for the jury.

Evidence — duty to credit.

2. The jury is not absolutely bound by the testimony of a witness, although it is not contradicted by direct evidence, where the evidence itself indicates that it is unworthy of belief.

Witness — impeachment — contradictory statements.

3. Evidence of a witness given at a trial which involved the same facts, and of statements out of court tending to discredit his testimony, is admissible to impeach him.

Evidence — presumption of death — failure to follow rumors — effect.

4. Mere failure of the relatives of one who disappeared without explanation, and remained absent from home for more than seven years, to follow up rumors that he had been seen in different places, and institute diligent inquiry in such places for him, is not sufficient to overcome the presumption of death arising from such absence.

Same — failure to follow rumors.

5. The relatives of one who disappeared without explanation, and has remained absent from home for more than seven years, are not bound to follow up intelligence of a tangible and definite character as to his whereabouts to avoid its rebutting the presumption of death, if the source from which it comes is so corrupt and unreliable as to destroy its value.

Same — admission as to testimony — effect.

6. One receiving upon a trial the benefit of a declaration of an absent witness through the admission of his opponent that he had heard of it takes it subject to the same conditions and limitations which would attach

Note.—As to necessity of inquiry to raise presumption of death from seven years' absence, see note to Miller v. Sovereign Camp W. W. ante, 178.

to it had the declarant been called as a witness.

Same — hearsay — claimed admission.

7. A statement of a stranger reported to the beneficiary of a benefit certificate the holder of which has been absent without explanation for seven years, that he had seen the absentee, the receipt of which is admitted by the beneficiary at the trial of the action to enforce the certificate, is merely hearsay, and evidence is properly admissible to impeach the credibility of the one who made it.

Witness — reputation — remoteness.

8. That a witness removed from a community ten years previous to a trial does not render inadmissible impeaching testimony of those who knew him when there as to his general reputation for truth and veracity, on the theory that it relates to a period too remote.

Appeal — modification of instruction.

9. A modification of an instruction as to the specific evidence the jury is to consider, so as not to include that of a particular person, is not reversible error, if his testimony was included by a general charge as to consideration of evidence.

Evidence — death — preponderance — sufficiency.

10. One seeking to recover on a policy of insurance upon the life of one who disappeared without explanation, and has been absent from home for more than seven years, is not bound to satisfy the jury of his death beyond a reasonable doubt, a preponderance of evidence being sufficient.

Appeal — limiting evidence — error.

11. Unduly limiting the cross-examination of a witness is not reversible error if no prejudice results therefrom.

Evidence — absentee — inquiries.

12. Evidence of having written letters subsequent to the commencement of an action on a policy of insurance upon the life of one who disappeared without explanation, and has not been heard from for more than seven years, making inquiry as to the presence of the insured in a certain place within the seven years, and about the time an informant claimed to have seen him there, is admissible in the action.

(February 16, 1910.)

A PPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Douglas County in plaintiff's favor in an action brought to recover the amount alleged to be due on a benefit insurance certificate. Affirmed.

The facts are stated in the opinion.

Messrs. Truman Plantz, George G. Perrin, and W. W. Reeves for appellant.

Messrs. Eckhart & Moore, J. M. Merica, and John H. Chadwick, for appellee.

Mere rumor that the absent party is dead or living cannot be received in evidence, 28 L.R.A. (N.S.)

either to aid or rebut the presumption of life.

Johnson v. Johnson, 114 Ill. 616, 55 Am. Rep. 883, 3 N. E. 232.

Proof strong enough to remove all reasonable doubt is not required in a civil case.

Sherwood v. First Nat. Bank, 17 Ill. App. 593; Peoria & R. I. R. Co. v. Lane, 83 Ill. 453; Stratton v. Central City Horse R. Co. 95 Ill. 32.

The jury are the judges of the credibility of the witness.

Cicero & P. Street R. Co. v. Rollins, 195 Ill. 219, 63 N. E. 98; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898.

A recognized mode of impeaching the credit of a witness is by proof that he has made statements out of court contrary to what he has testified at the trial.

Craig v. Rohrer, 63 Ill. 326.

Evidence that the general reputation of a witness for truth and veracity was bad during the time he resided in a locality, from whence he moved a considerable time before trial, is admissible.

Holmes v. Stateler, 17 Ill. 454; Blackburn v. Mann, 85 Ill. 227.

Hand, J., delivered the opinion of the court:

This was an action of assumpsit commenced in the circuit court of Douglas county on the 31st day of January, 1907, by the appellee, Johanna Kennedy, against the appellant, the Modern Woodmen of America, upon a benefit certificate issued by the appellant to James Kennedy, bearing date the 19th day of February, 1896, and in and by which certificate the appellant agreed to pay to the appellee, the wife of James Kennedy, in case of his death, the sum of \$2,000. A trial resulted in a judgment and verdict in favor of the appellee, and the appellant prosecuted an appeal to the appellate court for the third district, where the judgment of the circuit court was affirmed, and a further appeal has been prosecuted to this court.

The declaration, in substance, averred that James Kennedy, on the 13th day of December, 1898, suddenly and without explanation left and departed from his home, situated near Tuscola in Douglas county, and that he has been unaccountably absent, and has never returned to his home or been heard of by the appellee, although she has made diligent and continuous search for him ever since his disappearance, and that she has been unable to find him, or any trace of him, although she has made diligent search and inquiry for him, and that by reason of his continued absence for seven years the law presumes said James Kennedy to be dead, and the declara-

tion averred that the said James Kennedy departed this life on the 13th day of December, 1898. The general issue was filed. At the close of the plaintiff's evidence, and again at the close of all the evidence, the appellant made a motion for a directed verdict in its favor, which motion was denied, and the action of the court in denying said motion is assigned as error. It is also assigned as error that the trial court committed error in its rulings upon the admission and rejection of evidence produced on behalf of the appellee and offered on behalf of the appellant, and in modifying and refusing instructions offered on behalf of appellant. By a stipulation found in the record every fact necessary to authorize a recovery in favor of the appellee was admitted by the appellant, except the death of James Kennedy, and the principal question presented by this record is: Does the evidence introduced by the appellee raise the presumption of the death of James Kennedy? No direct proof of the death of James Kennedy was introduced, but the presumption of death arising from his continued and unexplained absence for the period of seven years subsequent to December 13, 1898, is relied upon to sustain the verdict and judgment.

The undisputed evidence shows that James Kennedy was forty-two years of age and had been for a number of years a farmer living near Tuscola with his wife and six minor children, the eldest of whom, a daughter, was about sixteen years of age at the time of his disappearance; that the relations between Kennedy and his family were kindly and affectionate, and that no reason or excuse existed which would justify or explain his disappearance; that on the day he disappeared he was in the city of Tuscola with his wife, and returned to his home in the evening in a happy and contented frame of mind; that he had on his person about \$200 in cash; that he told his family he was going to Champaign by the early train that evening to pay the rent due upon the farm upon which they resided, which would fall due on the 1st day of January, and that he would return to Tuscola on the train which arrived at that place from Champaign, about 1 o'clock the next morning, and requested them to leave sufficient coal in the room for him to replenish the fire on his return, and to leave the south door unlocked so that he could get into the house on his return; that he went to the depot in Tuscola in the evening and purchased a ticket for Champaign; and while waiting for the train he was in his usual frame of mind, and talked with a number of people; that he said to an acquaintance by the name of Smith, at the depot, that he had come to meet some par-

ties, and that he was going to some town near by the next week; that when the train going to Champaign arrived he left the waiting room and went out onto the platform, and was observed going in the direction of the train; that when he did not return to his home after the train arrived from Champaign the next morning upon which he was expected, his wife and children were alarmed, and they and his neighbors and friends immediately commenced to search and inquire for him; that they inquired of the train men in charge of the train going to Champaign, telephoned to Champaign, wrote letters of inquiry to his relatives and friends in adjoining and remote cities, and to his relatives at the place of his nativity in Ireland, but received no information relative to his whereabouts, and that he has never been seen or heard of by his family, neighbors, relatives, or friends since he was seen at the depot in the city of Tuscola on the evening of December 13, 1898.

The law is well settled in this state that where a person leaves home with the expectation of returning thereto within a short time, and he remains away, and his absence is unexplained and unaccounted for, and no intelligence is received from him, and he is not heard from, and his whereabouts cannot be ascertained, although diligent search and inquiry are made in the vicinity of his home and at such places as he would be likely to go, and from such persons as he would be likely to meet and know, and nothing is heard from or of him, and he remains away from his family and home for the period of seven years, a presumption arises from these facts that he is dead, unless there are other facts and circumstances shown which will rebut and overcome such presumption of death. *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; *Reedy v. Millizen*, 155 Ill. 636, 40 N. E. 1028; *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068; *Policemen's Benev. Assn. v. Ryce*, 213 Ill. 9, 104 Am. St. Rep. 190, 72 N. E. 764.

The only testimony found in this record which it is claimed by the appellant tends to rebut the presumption that James Kennedy was dead at the time this suit was brought is the testimony of William E. Rogers, a witness residing in the city of Peoria, whose deposition was read on the hearing, who stated that he saw James Kennedy in Salt Lake City, Utah, in the year 1900, and the statement of appellee, drawn out on cross-examination, that she was informed in the year 1904 by her son that Myrtle King Rogers, the wife of William E. Rogers, had told him in a store in the

city of Tuscola, in the year 1904, that she had seen his father in Salt Lake City in the year 1900. The witness William E. Rogers, in his deposition used in this trial, testified that he had no personal acquaintance with James Kennedy, that he had never spoken to him but on one occasion, and that he had seen him but three times; twice in Tuscola in 1898, when he did not speak to him, and once in Salt Lake City in 1900, when he talked to him but a few minutes.

At the time James Kennedy disappeared he had a benefit certificate in the Court of Honor upon his life, in which his wife was named as beneficiary, and upon which suit was brought at about the time the suit upon the policy in question was commenced, and upon the trial of which case William E. Rogers testified as a witness orally, and his evidence given in that case is found in the record in this case. In the trial of this case proper foundation of impeachment was laid for the purpose of using the testimony given by William E. Rogers upon his examination in the Court of Honor case; and the testimony of William E. Rogers, given in the trial of the Court of Honor case, relating to his acquaintance with James Kennedy and his means of identifying him at the time that he claimed he saw him in Salt Lake City, is materially different from the statements made by him in his deposition read in evidence on the trial of this case. Appellee was also permitted, over the objection of the appellant, after the proper foundation for impeachment had been laid, to prove by T. N. Cofer, county judge of Coles county, that during the trial of the Court of Honor case he occupied a room on the second floor of the hotel in Tuscola adjoining a room occupied by Rogers and his wife; that there were double doors between the rooms; that between 10 and 11 o'clock at night the witness heard Mrs. Rogers say that the attorney for the defendant told her he would get the money by the latter part of the week—by Saturday night—to compensate them; that she told the attorney it was about the first of the month, and they were hard up for money. Witness also testified that he heard Mrs. Rogers say, "Don't you remember that I introduced you to Kennedy in Salt Lake City?" and that Rogers replied, "I believe I do;" that Mrs. Rogers said Kennedy was about forty-five years old, was a heavy man, weighing 160 or 180 pounds, had dark hair, heavy, sandy mustache, was slightly stooped, and "had a peculiar walk, like this," followed by footfalls on the floor.

The appellant contends that the impeachment of William E. Rogers by his former testimony and by the testimony of Cofer was improper, and urges that his testimony

should have been assumed by the court to have been true upon the presentation of its motion to take the case from the jury, and as Rogers's testimony was uncontradicted, it showed that James Kennedy was living in 1900, and that there could, by reason of a failure to establish the death of James Kennedy, be no recovery, and the court erred in not taking the case from the jury upon its motion for a directed verdict. It was a question of fact for the determination of the jury whether or not the presumption of death arising from the unexplained absence of James Kennedy for more than seven years, established by the evidence of the appellee, had been rebutted, and the court could not properly assume, upon the hearing of the motion for a directed verdict, that the evidence of William E. Rogers was true, but it was for the jury to determine the credibility to be given to the evidence of William E. Rogers. The jury were not bound absolutely by the evidence of William E. Rogers, although it was contradicted by no direct evidence. In *Podolski v. Stone*, 186 Ill. 540, 58 N. E. 340, the court, on page 547 of 186 Ill., of the opinion, quoted the following language from *Anderson v. Liljengren*, 50 Minn. 3, 52 N. W. 219: "A court or jury is not bound to accept it [the testimony] as true merely because there is no direct testimony contradicting it, where it contains inherent improbabilities or contradictions which, alone or in connection with other circumstances in evidence, satisfy them of its falsity." And in *Quock Ting v. United States*, 140 U. S. 417, 35 L. ed. 501, 11 Sup. Ct. Rep. 733, 851, the court said: "There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story." And the appellate court, in its opinion, in disposing of the testimony of William E. Rogers, said: "It would unduly extend this opinion to detail and discuss the evidence adduced upon the cross-examination of this witness, together with other evidence in the record introduced on behalf of appellee which tended to discredit his testimony. A most careful examination of the evidence persuades us that the jury were justified in concluding that the testimony of this witness was fabricated, and that he was unworthy of belief." We are of the opinion that the impeachment evidence introduced to disparage the testimony of William E. Rogers was properly admitted, and think

that the trial court did not err in declining to take the case from the jury upon his evidence, although the same was uncontradicted by the direct testimony of any witness.

It appears from the evidence of the appellee that on receiving, in the year 1904, through her son, the intelligence that Myrtle King Rogers claimed to have seen James Kennedy in Salt Lake City in the year 1900, she made no search or inquiry for James Kennedy in Salt Lake City prior to the commencement of this suit, for the reason, as she testified, that the reputation for truth and veracity of Myrtle King Rogers was bad, and that she was of the opinion that it would avail nothing to make search and inquiry for James Kennedy in Salt Lake City, and it is urged by the appellant that the appellee, by reason of her failure to make search and inquiry for James Kennedy in Salt Lake City upon receiving, through her son in 1904, information that Myrtle King Rogers claimed to have seen James Kennedy in Salt Lake City in 1900, is barred of her cause of action, as the presumption that James Kennedy was dead at the time her suit was brought has been rebutted.

In *Johnson v. Johnson*, supra, the defendant in error testified that about one year after her first husband left her, and in 1867, she received a letter from him, and from that time to the time of the trial, in August, 1884, she had not seen him or heard from him, but that she had heard rumors at one time that he was dead, and at another that he was living, and at another that he was married again. In reviewing the effect of this testimony as bearing upon the validity of defendant in error's second marriage, the court said (page 616 of 114 Ill.): "It has been repeatedly held that mere rumor that the absent party is dead or living cannot be received in evidence, either to aid or rebut the presumption of life,"—and the wisdom of the rule of law thus announced by the court in that case is demonstrated in this case by the conduct of the witness Peter Wells. Wells had been in Chicago, and on his return he said to the son of appellee he had seen his father while in Chicago, giving street and number where he had seen him. On the conversation being repeated to the appellee and her family, her eldest son and daughter immediately went to Chicago in search of their father, but learned nothing of him; and on Peter Wells being called as a witness on the trial of this case he admitted he had made the statement to appellee's son on his return from Chicago, but stated that he did not see James Kennedy while in Chicago. He testified: "I was in Chicago September of last year; told Mrs. Kennedy's boy I saw his

father some time last week; was at the eye and ear infirmary on West Adams street, No. 227; saw the Kennedy boy in Newman; he came over to my house; asked me if I saw his father; I said, 'Yes;' I said it as a joke; didn't tell the truth."

We think it clear that the failure to follow up information of the character received from Myrtle King Rogers will not necessarily defeat the right of recovery in a case like the one at bar, on the ground that the receipt of such information, unless followed up by search and inquiry, as a matter of law, rebuts the presumption of death arising from the lapse of seven years' absence, unexplained, of the party whose death is being investigated; but we are of the opinion that the probative force of such information, as bearing upon the presumption of death arising from the continued and unexplained absence of a party for the period of seven years, must be governed by the facts and circumstances surrounding each case under investigation. If such is not the rule of law in cases of this character, then in this case, as there is evidence found in the record that Myrtle King Rogers said she saw James Kennedy in Butte, Montana, Boise City, Idaho, and in the state of Minnesota, in order to establish the presumption of death by reason of the continued and unexplained absence of the party for seven years, it would have been necessary to prove on the trial in this case that diligent search and inquiry had been made for James Kennedy in the cities of Butte and Boise City and in the state of Minnesota, otherwise the presumption that James Kennedy was dead by reason of his long and unexplained absence, which covered a period of more than seven years, would have been rebutted by these statements of Myrtle King Rogers. We think, therefore, when the information as to the absent person, who has been absent for a long period, and whose absence has been unexplained, amounts merely to a rumor, it does not have the effect necessarily to rebut the presumption of death arising from the lapse of time, as a mere rumor is often founded upon nothing substantial, and may rest upon mere gossip, or may be put afloat by interested parties for the purpose of escaping liability, or with a view to defeat the presumption which arises from the unexplained absence of the party for the period of seven years. If, however, the intelligence is of such a tangible and definite character that unexplained, if reliable, it would rebut the presumption of death arising from the unexplained absence of a person for seven years, we think the failure to follow up such intelligence by due search and inquiry can, in a case like this, be excused by showing that the source from which the information

came was so corrupt or so unreliable as to destroy its value,—and that was what was sought to be done in this case by calling witnesses to show that the statement made by Myrtle King Rogers was unreliable and unworthy of belief. A number of witnesses testified that her general reputation for truth and veracity was bad, and other witnesses testified that she made statements to them that she had seen James Kennedy in Butte, Montana, Boise City, Idaho, and in the state of Minnesota, and that she had afterwards denied making to them such statements. The deposition of Myrtle King Rogers had been taken, and was on file in this case, but was not read in evidence, as doubtless the appellant hoped to obtain the benefit of her statement, without calling her as a witness, by relying upon the admission of the appellee that she had received intelligence, through her son, that Myrtle King Rogers had seen James Kennedy in Salt Lake City in 1900, instead of calling Myrtle King Rogers as a witness or reading her deposition in evidence on the trial, and thereby escaping the danger of the evidence of Myrtle King Rogers being impeached by direct contradiction or by witnesses who would swear that her general reputation for truth and veracity was bad. The appellant, by the course pursued, received the full benefit of the statement of Myrtle King Rogers. We think, therefore, if the appellant obtained, by the admission of the appellee, the benefit of the statement of Myrtle King Rogers upon the trial that she had seen James Kennedy in Salt Lake City in 1900, without calling her as a witness, it received the benefit of her statement subject to the same conditions and limitations as it would had she been called as a witness. The statement of Myrtle King Rogers reported to the appellee by her son, and testified to by the appellee, was clearly hearsay evidence, and we think, when admitted, became subject to the general rules of law which govern the impeachment of hearsay evidence when such evidence, under some exception to the general rules against the admission of hearsay evidence, is properly received in evidence, as, for example, dying declarations, which are hearsay evidence, and which it is held may be impeached by any of the methods by which the evidence of the deceased could have been impeached had he been living and testified as a witness. *Dunn v. People*, 172 Ill. 582, 50 N. E. 137; *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042. It is obvious, if this case is analogous to the cases cited,—and we think, on principle, it is,—the impeaching testimony hereinbefore referred to was properly admitted. If the appellant had called Myrtle King Rogers as a witness, and she had testified on the trial of this case to the same statements she made

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to appellee's son about seeing his father in Salt Lake City in 1900, it would have been competent to have impeached her testimony in any of the methods allowed by law, and appellant cannot avail itself of the benefit of her statement that she saw the husband of appellee in Salt Lake City in 1900, and at the same time close the door of attack upon the credibility of the statement of Myrtle King Rogers by any method of impeachment which could have been used had she testified upon the witness stand. If the statement of Myrtle King Rogers can be used without subjecting it to impeachment, the effect would be to give to the statement of Myrtle King Rogers, made *ex parte*, and not under oath, greater potency than if she had testified to the same statement as a witness, and to make her statement thereby immune from attack, though she made the statement not under oath.

It is said, however, that the effect of permitting the witnesses to contradict the statement of Myrtle King Rogers, or to testify that her general reputation for truth and veracity is bad, is to permit a person to be impeached who has not testified as a witness in the case. That is true; but the same is equally true where a dying declaration is impeached by some one of the modes provided by law for impeaching a person who has testified as a witness upon a trial, and arises out of the necessity of the case.

It is said by the appellant, Myrtle King Rogers had not lived at Tuscola for about ten years previous to the trial of this case, and it is insisted that the testimony of witnesses who knew her when she lived at Tuscola, as to her general reputation for truth and veracity, related to a period too remote, and for that reason was incompetent. This precise question was decided contrary to appellant's contention in *Holmes v. Stateler*, 17 Ill. 453, and *Blackburn v. Mann*, 85 Ill. 222, in both of which cases the reasons for the admissibility of impeaching testimony under such circumstances are fully set forth.

It is also urged that the court improperly modified appellant's fourth instruction, and improperly refused to give to the jury appellant's thirteenth, fourteenth, fifteenth, and sixteenth instructions. By the fourth instruction the court was asked to direct the jury that, in arriving at a verdict, they should consider all the evidence admitted by the court, including that relating to James Kennedy having been seen in Salt Lake City and other places, and the court modified the same by inserting therein the words "to the reports," so that as modified it read, "including that relating to the reports of James Kennedy having been seen," etc. The criticism of the modification is

that it excluded from the consideration of the jury the testimony of William E. Rogers that he had seen James Kennedy in Salt Lake City. We do not think the jury were misled by the modification. The testimony of William E. Rogers was included in the statement, "all the evidence admitted by the court," and the testimony of that witness was not excluded from the consideration of the jury by the modification of the instruction.

By the thirteenth and fourteenth instructions the court was requested to direct the jury that, before a verdict could be found in favor of appellee, the evidence must be sufficient to remove all reasonable doubt in their minds of James Kennedy being alive at the time the suit was commenced, and that if they entertained any doubt whether he was dead, the verdict should be for appellant. The refusal of these instructions was correct, as, this being a civil case, it was only necessary for the appellee to establish her case by a preponderance of the evidence. It is conceded that these instructions were contrary to the rule adopted in this state, but it is claimed that they are supported by authorities outside of this state, and this court is asked to follow those authorities. We think the rule announced in *Policemen's Benev. Asso. v. Ryce*, 213 Ill. 9, 104 Am. St. Rep. 190, 72 N. E. 764, where an instruction was considered laying down the rule that it was sufficient, to entitle the plaintiff to recover in a case like this, that he establish his case by a preponderance of the evidence, was a correct statement of the law.

By the fifteenth and sixteenth instructions the court was asked to direct the jury that, if appellee heard of her husband being at any place after his disappearance, it was her duty to make search and inquiry at such place, and if she failed to do so, she could not recover. What we have previously said in this opinion renders unnecessary a further discussion of that question. In our opinion the instructions were properly refused.

It is also insisted that the court erred in declining to permit the son of appellee to state in full the statement made to him by Myrtle King Rogers at the time she informed him she had seen his father in Salt Lake City. The son gave the substance of that conversation and the substance of what he informed the appellee was said to him by Myrtle King Rogers. It may be that the cross-examination of the witness on the point in question was unduly limited, but we do not think appellant was prejudiced thereby. The same may be said with reference to the refusal of the court to permit the mother of Myrtle King Rogers to testify

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what her daughter had reported to her with reference to seeing James Kennedy in Salt Lake City. There is no question but what the jury fully understood that Myrtle King Rogers claimed and repeatedly stated that she had seen James Kennedy in Salt Lake City, and the refusal to permit her mother to reiterate her story we do not think should reverse the case.

It is also said the court erred in permitting the appellee to prove she had written letters of inquiry with reference to James Kennedy to Salt Lake City since this suit was commenced. The letters were not introduced in evidence or called for by the appellant, although copies of the letters written and the replies received thereto were stated by appellee to be in the hands of her attorney, who was in court. For aught that appears, the letters, while written subsequent to the commencement of the suit, may have made inquiry as to the whereabouts of James Kennedy during the seven years subsequent to his disappearance from home, and about the time Myrtle King Rogers claimed she saw Kennedy in Salt Lake City, which clearly would have been a proper subject of inquiry at the time the letters were written, although it might not have been proper to make such inquiry with reference to the whereabouts of James Kennedy subsequent to seven years after his disappearance, which is not decided.

We have given this record the consideration which the importance of the case demands, and are of the opinion it contains no reversible error.

The judgment of the Appellate Court will be affirmed.

KANSAS SUPREME COURT.

STATE OF KANSAS

v.

IRA BRECOUNT, Appt.

(82 Kan. 195, 107 Pac. 763.)

Excusable homicide — unlawful intent — effect.

1. Homicide, to be excusable within the provisions of § 1995 of the General Statute of 1901 (Gen. Stat. 1868, chap. 31, § 10), must have resulted from an act committed with lawful intent. It is not enough that the act is one which, under ordinary circumstances, would be lawful, and is committed by means ordinarily lawful, and with the usual and ordinary caution. There must be absence of unlawful intent.

Criminal law — coroner's warrant — effect.

2. A coroner's warrant for the arrest of

Headnotes by PORTER, J.

a person found guilty by a coroner's jury takes the place of a complaint, and is sufficient authority for the holding of a preliminary examination before an examining magistrate.

(March 12, 1910.)

APPEAL by defendant from a judgment of the District Court for Cowley County, convicting him of manslaughter in the fourth degree. Affirmed.

The facts are stated in the opinion.

Messrs. C. W. Roberts and F. L. Richardson, for appellant:

The homicide was excusable within the meaning of the statute.

Johnson v. State, 66 Ohio St. 59, 61 L.R.A. 277, 90 Am. St. Rep. 564, 63 N. E. 607.

Mr. C. T. Atkinson, with Messrs. Fred S. Jackson, Attorney General, E. J. Fleming, and C. S. Beekman, for appellee:

It is manslaughter at common law and under the statutes of most of the states if one unintentionally kills another in doing an unlawful act, not amounting to a felony, nor naturally dangerous to human life; at least, if the unlawful act is a misdemeanor, and not a mere civil wrong, and is *malum in se*, and not merely *malum prohibitum*.

21 Cyc. Law & Proc. pp. 761, 765, 766b; Thompson v. State, 131 Ala. 18, 31 So. 725; Com. & Matthews, 89 Ky. 287, 12 S. W. 333; Ringer v. State, 74 Ark. 262, 85 S. W. 410; State v. Stentz, 33 Wash. 444, 74 Pac. 588; People v. Thompson, 122 Mich. 411, 81 N. W. 344; White v. State, 84 Ala. 421, 4 So. 598.

Porter, J., delivered the opinion of the court:

Ira Brecount was convicted of manslaughter in the fourth degree, and sentenced to serve a term in the penitentiary, not exceeding two years. From this judgment he appeals.

Note.—In *STATE V. BRECOUNT* the defendant, a fireman, who caused a death while responding to a fake fire alarm known by him to have been turned in merely for the purpose of seeing the people scatter, with which purpose he was in sympathy, claimed that he was protected by a statute providing that "homicide shall be excusable when committed . . . in doing any other lawful act by lawful means, with the usual and ordinary caution, and without unlawful intent." It was held, and rightly, that he was not protected, because he was not without an unlawful intent. There appears to be an absence of direct authority on the effect upon the offense of homicide of the defendant doing an act lawful in itself, but with an unlawful intent.

It would seem that *STATE V. BRECOUNT* 28 L.R.A. (N.S.)

The accident upon which the prosecution is based happened in Arkansas City on the 1st day of July, 1908. The appellant was a substitute fireman in the employ of the fire department of that city. The fire department was called out by a fire alarm, and the appellant, in company with the chief, was making the run in the latter's wagon. The appellant was driving on a gallop through one of the main streets, when a collision occurred with a carriage in which Fred Bowers and his wife were riding, and Mrs. Bowers was thrown out, receiving injuries from which she afterwards died. The accident occurred at about 7 o'clock in the evening while a band concert was being given from a temporary stand erected in a part of the street. The street was filled with vehicles and a crowd of persons in attendance on the concert. The appellant was off duty from 6 o'clock in the evening, and at about 7 o'clock met Harry Scott, the chief of the department, two or three blocks from where the crowd was gathered. Scott had not been on duty during the day and was intoxicated. He had been threatening to turn in a false alarm and have the department make a run to see the crowd scatter. C. H. Peek, who was with Scott, was attempting to prevail upon him not to do so, and asked the appellant to take charge of Scott and get him home, and warned the appellant not to permit Scott to turn in an alarm, because it would result in the injury or killing of someone. Brecount replied, in substance, that Scott was chief and had a right to call out the department if he wanted to do so. Soon after this, Scott turned in an alarm from a box on the corner, and gave the location of the fire in a block on South A street, to reach which would take the fire department through the crowd then surrounding the band stand. After turning in the alarm, Scott and the appellant ran to the fire department building, where the lat-

might also have been disposed of on the ground that the defendant was doing an unlawful act at the time, since it was unlawful for him knowingly to respond to a fake fire alarm turned in with evil intent, and if so, it will come within the scope of a note in 63 L.R.A. 353, on "Homicide in the commission of an unlawful act." This seems to have been recognized, for the court said that whether the act of the defendant "was lawful in this instance depends upon whether it was done with lawful intent. It was the intent which made the act unlawful."

There is a large number of cases in which homicide was committed while doing an act ordinarily lawful, in a negligent manner. These are collected in a note in 61 L.R.A. 277.

ter hitched the horse to the chief's wagon, and together they drove down the street as fast as the horse could travel. The appellant was driving, and Scott was whipping the horse. This occurred several minutes after the alarm had been turned in and after the fire department had made its run, so that by the time the rig driven by the appellant reached the vicinity of the crowd, many of the persons who had followed the first fire wagon, and had learned that the alarm was a false one, were returning in the direction of the band stand. Among them was Fred Bowers in a carriage with his wife and two other persons. Bowers was on the left-hand or wrong side of the street. He saw the danger he was in, and attempted to get out of the way, and called out a number of times, warning the appellant not to drive into his rig. The horse which the appellant was driving was whipped until within a short distance from the place where the collision occurred. Immediately after the accident, Bowers asked appellant why he drove into him, and appellant exclaimed, "G—— d—— you, we will teach you to keep on your own side of the street." There was little conflict in the evidence. The appellant's witnesses testified that during the time he was driving down the street, he held a tight rein on the horse, that the gong was sounded continuously, and the witnesses saw nothing unusual in the manner in which the run was made.

The principal contention of the appellant is that the homicide was excusable within the definition of § 1995 of the General Statutes of 1901 (Gen. Stat. 1868, chap. 31, § 10), which, so far as applicable here, reads: "Homicide shall be deemed excusable when committed by accident or misfortune . . . or in doing any other lawful act by lawful means, with the usual and ordinary caution, and without unlawful intent." It is urged that the evidence of the state established that the appellant was engaged in a lawful act, by lawful means, with the usual and ordinary caution, and without unlawful intent. In this we are unable to concur. In the argument particular stress is laid upon the fact that the appellant was doing the act in the usual and ordinary manner. It may be conceded that the run was being made in the usual and ordinary manner, so far as the speed of the horse, the ringing of the gong, and the keeping of a tight rein on the horse, were concerned. And, if there had been an actual alarm, or one which required the appellant to make the run, and, while making it in good faith, the same accident had occurred, the appellant would not have been criminally responsible for the consequences. But in order to bring

an act within the protection of the statute, something more is required than that it be done with the "usual and ordinary caution." There must be absence of "unlawful intent." It is apparent from the evidence that the alarm was turned in, not in good faith, for the purpose of making a practice run, but with the avowed purpose of running through the crowd, to see the people scatter; and that in the purpose the appellant was *particeps criminis*. There was no lack of evidence indicating the appellant's state of mind and his disregard of the rights of others. His profane exclamation immediately after the collision, to the effect that he would teach Bowers to keep on the right side of the road, and the circumstances under which the alarm was turned in, demonstrate beyond any question that the act was committed with an unlawful intent, that it was reckless, wanton, and wholly inexcusable, the result of a desire to exhibit a little brief authority, and to appear spectacular in the eyes of the people. The act of the appellant in driving through the street in the manner he did might have been lawful on a proper occasion, but whether it was lawful in this instance depends upon whether it was done with a lawful intent. It was the intent which made the act unlawful, and took it outside the protection of a statute which was not designed to relieve persons from responsibility for criminal recklessness.

There is nothing substantial in the claim that the appellant was denied a preliminary examination. While the statute provides that a written complaint under oath shall be filed with the magistrate before the warrant issues (Code Crim. Proc. § 36), there is another method provided by §§ 1768-1771, inclusive, of the Gen. Statutes of 1901. (Gen. Stat. 1868, chap. 25, §§ 127-130.) Where there is a verdict of guilty by a coroner's jury, it is made the duty of the coroner to issue his warrant, upon which the defendant is arrested and taken before a magistrate for a preliminary examination. It is expressly provided that such warrant shall take the place of a complaint, and be sufficient foundation for the proceeding before the justice. Gen. Stat. 1901, §§ 1770, 1771, *supra*. "Such a warrant is of equal authority with one issued by a justice of the peace." *State v. Tennison*, 39 Kan. 726, 18 Pac. 948.

There was no error in the admission of testimony, nor in the instructions; and the evidence in support of the motion for a new trial was merely cumulative.

We are satisfied that the appellant had a fair trial, and the judgment is affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

W. S. DYCUS et al., Appts.,

v.

C. O. BROWN et al.

(135 Ky. 140, 121 S. W. 1010.)

Action — assignee — promise to pay.

1. One who takes from a debtor an assignment of property sufficient to pay all the debts of the assignor, under the agreement that he will pay them, cannot avoid liability to creditors on their claims.

Bankruptcy — barred claims — creditors with notice.

2. Creditors having notice of all steps taken in bankruptcy proceedings against their debtor occupy the same attitude, so far as the barring of claims is concerned, as though they had been mentioned in the petition.

Same — unliquidated claim.

3. A claim for loss on a contract by which one party was to buy produce with money furnished by the other, and to ship it to the latter for sale, after which the net profits were to be divided, is provable in bankruptcy proceedings against the former, so as to be barred by the discharge if the creditor had notice of the proceedings and that a loss was likely to result from the undertaking, although, at the time of the proceedings, the produce had not all been disposed of, so that the amount of the claim was not then ascertained.

Same — partnership transaction.

4. That a claim against a bankrupt grows out of a partnership venture does not relieve the partner holding it from the necessity of presenting it to, and having it audited by, the bankruptcy court.

(October 21, 1909.)

APPEAL by defendants from a judgment of the Circuit Court for McCracken County in plaintiffs' favor in an action brought to recover one half the loss alleged to have been sustained under a certain partnership contract for the buying and selling of tobacco. Reversed.

The facts are stated in the opinion.

Messrs. Miller & Miller and E. H. James for appellants.

Mr. J. D. Mocquot for appellees.

Carroll, J., delivered the opinion of the court:

In November, 1902, the appellants W. S.

Note. — The only additional case which has been found to involve the question whether a discharge covers claims that might have been, but were not, liquidated pursuant to § 63b, is *Re Hilton*, 104 Fed. 981, which is sufficiently set out in *DYCUS v. BROWN*.

On the right to prove unliquidated claim for a tort in bankruptcy, see note to *Brown v. United Button Co.* 8 L.R.A.(N.S.) 961. 28 L.R.A.(N.S.)

and J. B. Dycus, and S. H. Cassidy, now deceased, composing the firm of S. H. Cassidy & Company, entered into a contract with the appellees Brown and Bloom "for the purpose of buying and selling tobacco on joint account during the season of 1902-1903." By the terms of the contract, Cassidy & Company agreed to buy tobacco in the country, to be paid for with money furnished by Brown and Bloom, and ship the same to the Western District Warehouse Company at Paducah for sale by Brown and Bloom. Cassidy & Company were to receive 60 cents per hundred pounds as compensation for buying and delivering the tobacco. And it further stipulated: "When all the tobacco prized and delivered under this contract shall have been sold, and all legitimate expenses of the business have been paid (said expenses to include commissions of 60 cents per hundred pounds, paid S. H. Cassidy & Company, all fire and marine insurance on tobacco, interest on all money used in the business, freight, drayage, and regular warehouse charges for selling said tobacco) then all profits or losses arising from this business shall be divided as follows,—one half to Brown and Bloom, and one half to Cassidy & Company." After this contract was entered into, Cassidy & Company bought a large quantity of tobacco with money furnished by Brown and Bloom, and shipped the tobacco to the warehouse named in the contract. In October, 1903, Cassidy & Company, composed of the members above mentioned, filed their petition in bankruptcy, and in February, 1904, settled with their creditors on the basis of 25 per cent of their claims, which settlement was approved by the bankrupt court, and thereupon the firm was discharged and acquitted of its indebtedness. Brown and Bloom were not mentioned in the bankruptcy proceedings as creditors of Cassidy & Company, nor was any part of the tobacco in the possession of Brown and Bloom scheduled among the assets of the firm, although at that time a large quantity of the tobacco purchased by Cassidy & Company, and shipped to Brown and Bloom, was unsold, and in the custody of the latter in Paducah. Some time in 1904 or 1905 Brown and Bloom sold all of the tobacco that had been purchased by Cassidy & Company, and it was then ascertained that a loss of about \$11,000 had been sustained. In 1908 Brown and Bloom brought this action against W. S. & J. B. Dycus and M. A. Cassidy, the wife of S. H. Cassidy, to recover from them one half the loss. Upon hearing the case, the lower court rendered a judgment in favor of Brown and Bloom for the amount claimed, and it is of this judgment that the appellants complain.

There does not seem to be any serious dispute concerning the fact that the sale of the tobacco resulted in a loss, or the amount of it; but appellants insist that the discharge in bankruptcy released them from all liability to Brown and Bloom, growing out of the tobacco transaction, and that the judgment against Mrs. M. A. Cassidy was erroneous.

Taking up first the question as to the liability of Mrs. M. A. Cassidy, her connection with the transaction arose in this way: In December, 1907, her husband, S. H. Cassidy, conveyed to her all his real and personal estate, and in consideration thereof she agreed "to meet and comply with all his obligations, so far as the property herein conveyed may enable her to do and comply with them." And it was averred in the petition of Brown and Bloom that "the value of the property so conveyed to and received by Mrs. Cassidy was more than sufficient to satisfy the claim of Brown and Bloom, and all other obligations of S. H. Cassidy, and that Mrs. Cassidy took said property in trust, for the purpose of discharging the obligation due to Brown and Bloom, as well as all other indebtedness of S. H. Cassidy." These averments of the petition were confessed by the failure to deny them. We are therefore of the opinion that, unless there be some other reason for setting aside the judgment against Mrs. Cassidy, the objections to it in her behalf cannot avail her.

Cassidy & Company—and for purposes of brevity we include Mrs. Cassidy—set up in their answer that, prior to their adjudication in bankruptcy, they agreed with Brown and Bloom that the latter would take all of the tobacco that had been purchased by Cassidy & Company for the firm, "for better or worse," and pay all debts and expenses growing out of the purchase and sale of the tobacco; and, in consideration of this undertaking on the part of Brown and Bloom, Cassidy & Company surrendered all interest they had in the tobacco, and thereafter did not concern themselves about it, but treated the tobacco as the sole property of Brown and Bloom. They further averred that, because of the agreement and transfer of the tobacco to Brown and Bloom, it was not mentioned in the schedule filed by them in bankruptcy proceedings. All this was denied in a reply filed by Brown and Bloom. On the issue of fact thus presented the evidence is conflicting; but, in the view we have of the case, it does not seem important to further consider this phase of it.

As it is conceded that Brown and Bloom had actual notice of the adjudication in bankruptcy, and all the steps taken in the 28 L.R.A. (N.S.)

bankruptcy proceedings, they occupied towards the bankrupts the same attitude as if they had been mentioned in the petition in bankruptcy as creditors of Cassidy & Company. *Jones v. Walter*, 115 Ky. 556, 74 S. W. 249. It follows from this that if the claim of Brown and Bloom was a "provable" one under the bankrupt act, they should have presented it in the bankrupt court; and, failing to do so, are barred by the discharge in bankruptcy from recovering the amount of it in this action. If their claim against Cassidy & Company was not a "provable" one in bankruptcy, then neither the failure to present it nor the discharge affects their right to recover. It will thus be seen that the question narrows down to the single issue of whether or not the claim of Brown and Bloom was a "provable" claim against Cassidy & Company at the time the latter filed their petition in bankruptcy. That Cassidy & Company, on the one side, and Brown and Bloom, on the other, were partners in this tobacco venture, is manifest from the contract. This being so, it is the contention of counsel for Brown and Bloom that they were not required to surrender the tobacco to the bankrupt court, or present to the court any claim on account of probable or possible loss resulting to the partnership, and it is further insisted that their claim was not a "provable debt." Bankr. act July 1, 1898, chap. 541, 30 Stat. at L. 544 (U. S. Comp. Stat. 1901, p. 3418), provides in part that "in the event of one or more, but not all, of the members of a partnership, being adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." And, also: "Debts of the bankrupt may be proved and allowed against his estate, which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest; . . . (4) founded upon an open account or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition, and before the consideration of the bankrupt's application for discharge . . . unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall

direct, and may thereafter be proved and allowed against his estate."

In the assumption that Brown and Bloom did not have a provable debt against Cassidy & Company in October, 1903, we cannot agree.

Bloom was asked the following questions:

Q. Tell whether, at the time of the filing of the petition in bankruptcy, or the composition that was made, it was known whether or not the partnership venture engaged in between you, Mr. Brown, and the defendants, would result in a profit or a loss.

A. I expected it to be a loss,—in fact, I knew it.

Q. Was it known at that time whether there would be a profit or a loss?

A. Not exactly; the account was not closed up yet. It was open, and some tobacco had to be sold yet.

From this it appears that Brown and Bloom knew at the time Cassidy & Company filed their petition in bankruptcy that there would be a loss, and consequently an indebtedness due by Cassidy & Company to them, although the amount of it was not then ascertained. The mere fact that the total amount of the loss was not then ascertained, or the fact that it could not be ascertained until all of the tobacco was sold, did not, in fair meaning of the bankrupt act, leave it all an unprovable debt. Although the precise amount of the loss was not known when the petition in bankruptcy was filed, yet it was susceptible of ascertainment, and might properly be treated as an unliquidated claim, and as such it was the duty of Brown and Bloom to make application to the bankrupt court to have it liquidated, in order that it might, when liquidated, be proved and allowed against the bankrupt's estate. It only required a sale of the tobacco to fix the exact amount of the loss and consequent liability of Cassidy & Company, and if application had been made to the bankrupt court, it cannot be doubted that the court would have allowed a reasonable time to ascertain the loss, and have entered such orders as would protect the rights of Brown and Bloom in the meantime. The provisions of the bankrupt act in reference to provable debts should be so construed as to permit all debts that come fairly within the meaning of the law to be treated as provable, to the end that the purpose of the act in permitting insolvents to be relieved of their debts may be carried out; and where there is doubt as to whether a debt is provable or not, or as to whether it comes within the meaning of an unliquidated demand that may be made a provable debt, the doubt should be resolved in favor

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of the provability of the debt, or that it is an unliquidated demand in the meaning of the act, as the case may be.

That there is some confusion and apparent conflict in the cases as to what are and are not provable debts, and as to the proper meaning of the words "unliquidated claims," must be conceded; but the weight of authority favors the view we have taken. Thus, in the case of *Re Hilton* (D. C.) 104 Fed. 981, the facts were that in November, 1895, Johnson made a written contract with the firm of Hilton, Hughes, & Company, in which the bankrupt Hilton was a partner, whereby Johnson was employed for five years at an annual salary, payable monthly. Johnson continued in this employment until August, 1896, when the firm made a general assignment for the benefit of their creditors. Johnson was paid up to that time, and discharged from further service. In 1899, Hilton became a voluntary bankrupt, and in his schedule Johnson was named as a creditor for an unliquidated demand arising from the breach of contract, but took no steps to liquidate his claim for damages. The question afterwards came before the court, in the bankruptcy proceedings, as to whether or not Johnson's claim was a provable debt. In considering the case, the court said: "It only remained to liquidate the amount of the damages arising out of the breach of the contract to make it provable like any other debt. Section 63b expressly provides for the proof of such claims, to be liquidated 'in such manner as the court shall direct.' Having made this provision, it is impossible to suppose that it was the intent of the act to allow a creditor voluntarily to withhold such a claim from liquidation, and thereby preserve it as a claim against any subsequently acquired property, and thus practically defeat the object of the bankrupt act as respects the debtor,—to free him from the load of former obligations. Section 17 provides that the discharge shall release the bankrupt from all his 'provable debts,' etc. A 'provable debt,' as here used, means, in my judgment, any claim that the creditor may make provable through the means provided by § 63b. . . . I cannot doubt that the intent of these words, 'claim provable in bankruptcy,' was to include every claim that, under the provisions of the bankrupt act, might be made provable; and the definite provision of § 63b for making unliquidated claims provable is, I think, precisely what is intended to be included in those words, as distinguished from the previous word 'debt.' In my judgment, therefore, this claim, as a claim that could be made provable in the manner provided by the act, would be barred by the bankrupt's discharge." In the case

of *Re Stern*, 54 C. C. A. 60, 116 Fed. 604, it appears that the Manhattan Ice Company entered into contracts with sundry customers to supply them with ice for a fixed period. Before the period expired, the ice company was adjudicated a bankrupt, and the question presented for decision was whether or not the persons with whom it had made contracts to furnish ice had "provable debts" against it for the damages growing out of its failure to fulfil its contract. The court held that they did. In the case of *Re Silverman* (D. C.) 101 Fed. 219, the facts were that Rosenberg presented a claim against the bankrupts, Silverman Brothers, for unliquidated damages growing out of a breach of contract for his employment as manager of one of their departments. In considering the case the court, among other things, stated: "The claim being unliquidated, its allowance against the estate is provided for by subsec. b, § 63, of the bankrupt act, which provides that 'unliquidated claims against the bankrupt may, pursuant to application of the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.' The claimant was therefore premature in presenting his claim for allowance before the referee, without first making application to the court to direct the manner of liquidating it."

In the light of these authorities, and others that we have examined, we are of the opinion that Brown and Bloom had, within the meaning of the bankrupt act, an unliquidated claim against Cassidy & Company that was a provable debt, and should have been presented in the bankruptcy proceedings; and, failing to do so, their right of recovery is barred by the discharge. In our opinion, § 63b, relating to unliquidated claims, was intended to, and does, embrace a claim such as Brown and Bloom had at the time the petition in bankruptcy was filed. Their claim arose out of a contract. It was capable of definite ascertainment; and, although unliquidated in the sense that the exact amount they were entitled to recover was not ascertained, it was nevertheless a provable claim. Provable claims are not confined to the debts or liabilities mentioned in subsecs. 1, 2, 3, 4, and 5 of § 63, but include unliquidated claims arising out of contract that are capable of definite ascertainment, such as the claim we are considering. An unliquidated claim of this character may be barred by the discharge, as well as an ascertained claim due upon a note, judgment, or open account, if the creditor holding such claim fails to present it. A creditor having an unliquidated claim within the meaning of the bankrupt act can no more withhold it, and after the discharge

maintain an action upon it, than he could if his claim was founded upon a judgment or a note.

In *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757, in considering the proper construction of the words "unliquidated claims" in the bankrupt act, the court said: "In § 63b, provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court, in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph b, however, adds nothing to the class of debts that might be proved under paragraph a of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of § 63a, to be liquidated as the court should direct. We do not think that by the use of the language in § 63a it was intended to permit proof of contingent debts or liabilities or demands, the valuation or estimation of which it was substantially impossible to prove." In *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9, the court, upon the same subject, said: "As to paragraph b, two constructions are possible: It may relate to all unliquidated demands, or only to such as may arise upon such contracts, express or implied, as are covered by paragraph a. Certainly paragraph b does not embrace debts of an unliquidated character, and which in their nature are not susceptible of being liquidated." See also *Brown v. United Button Co.* 8 L.R.A. (N.S.) 961, 79 C. C. A. 70, 149 Fed. 48, 9 A. & E. Ann. Cas. 445.

Although the precise question presented in the case before us was not involved in the cases mentioned, the reasoning of the court supports the view we have taken.

Nor does the fact that the claim grew out of a partnership venture which must be settled add anything to the strength of the argument presented by Brown and Bloom, that it was not necessary to assert their claim in the bankrupt court. It may be conceded that Brown and Bloom had the right to settle the partnership business, but it is also manifest that it was their duty to report the settlement made to the bankrupt court. If a profit had been realized on the tobacco, the creditors of the bankrupts were entitled to their interest in it; and if a loss resulted, the partners sustaining the loss had the right to present their claim against the bankrupt's estate. It cannot be successfully maintained that, because the bankrupt act permits those members of a partnership who are not adjudged bankrupt to administer the assets, it was intended to release so much of such assets as might belong to the bankrupt partner from the

payment of his debts. It seems evident that the purpose of the act, in giving to the members of the partnership not adjudged bankrupt the right to settle up the partnership affairs, was to protect their interest, and not to defeat the rights of the creditors of the bankrupt partner. And in our opinion, when some members of a partnership are adjudged bankrupt, and the other partners take charge of the partnership assets, it is their duty to report to the bankrupt court all steps taken by them in the winding up of the partnership business, and to report to the court the amount received in settlement of the partnership affairs. Brown and Bloom, however, did not pay any attention to the bankrupt proceedings, or make any reports of the partnership affairs. Their failure to do this lends support to the contention of Cassidy & Company, that they were to take the tobacco and relieve Cassidy & Company from all liability on account thereof. But, without further extending this opinion, we may conclude by saying that, as Cassidy & Company were discharged from their indebtedness to Brown and Bloom, the judgment against them was erroneous.

Wherefore the judgment is reversed, with directions to dismiss the petition.

Nunn, Ch. J., not sitting.

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN EX REL. JAMES
P. DAVERN, Respt.,

v.

DAVID S. ROSE, Mayor of Milwaukee,
Appt.

(140 Wis. 360, 122 N. W. 751.)

Mandamus — official discretion — control.

1. A mayor having all the powers of a chief executive cannot be compelled by mandamus at the suit of a taxpayer to remove from office the chief engineer of the fire department for dishonesty and perjury, misappropriation of public property, and the use of offices at his command to pay personal debts.

Same — insufficient charges.

2. A mayor having statutory authority to suspend for cause the chief of the fire department and communicate the facts to the board of fire commissioners, who shall proceed to consider the desirability of his removal from office, cannot be compelled by mandamus at the suit of a taxpayer to exercise the power of suspension because of charges of dishonesty against such chief, where he has investigated the charges, and

determined that they were not sufficient to require suspension of the official.

Officer — reasons for action.

3. An executive officer of a city having statutory authority to suspend subordinate officials from office is not bound to declare the reasons for his action or nonaction in any particular case.

(October 5, 1909.)

Note. — Mandamus: to compel exercise of the power to remove or suspend public officer.

In harmony with *STATE EX REL. DAVERN v. ROSE* the cases generally hold that the exercise of the power to remove or suspend a public officer can only be enforced by the courts in so far as they may compel action on the part of the officer or board empowered to remove officers, to pass upon the sufficiency of the charges or investigate the conduct complained of, but that they cannot compel further action, or control the discretion of such officers or board.

Thus, in *McLaughlin v. Burroughs*, 90 Mich. 311, 51 N. W. 283, mandamus to compel the prosecuting attorney to sign a statement that in his opinion charges made in a petition to the governor for the removal of an alderman demanded investigation was denied, it appearing that he had previously informed the persons who signed the petition that no investigation was necessary, notwithstanding that under the statute such a statement by him is necessary to enable the governor to act upon the petition. The court said that, if it should issue a mandamus to compel the attorney to make the statement, it would be directing him to certify the opinion of the court, and would involve an examination and determination of the merits of the charges by the court, and the conclusion by it that the prosecuting attorney had abused his discretion, which it had no power to do; but that it was only when such officers refused to act that the court had jurisdiction, and that extends no further than to set them in motion and compel them to take action; that when such officers, under the law, have exercised their discretion, the court cannot review it.

In *State ex rel. Kelleher v. St. Louis Public Schools*, 134 Mo. 296, 56 Am. St. Rep. 503, 35 S. W. 617, it was held that while mandamus will not ordinarily lie to control the action of an inferior tribunal in whom a discretion as to the performance or nonperformance of duties is imposed upon it by law, yet, if the discretionary power is exercised with manifest injustice, the courts are not precluded from commanding its due exercise. Thus, where a school board has been guilty of a gross abuse of discretion conferred on it by statute, to fix the time, place, and manner of conducting an election of members of the board, by selecting for purely partisan ends judges and clerks of such election, who are all members of the same political party, and by persistently

A PPEAL by respondent from an order of the Circuit Court for Milwaukee County granting an alternative writ of mandamus requiring him as mayor of the city of Milwaukee to remove the chief engineer of the fire department for alleged misconduct in office. Reversed.

Statement by Dodge, J.:

Mandamus. Relator asserts himself to be a citizen and taxpayer of the city of Milwaukee, and that he petitions on behalf of himself and all others similarly situated, asserts various acts of misconduct on the part of the chief engineer of the fire department of said city, and that in September, 1908, he filed with the respondent, then and now mayor of the city of Milwaukee, certain charges of such misconduct; that thereupon said respondent called to his office a large number of the members of the fire department, and took their *ex parte* oral statements, and thereupon refused to suspend said chief or to send such charges to the board of fire and police commissioners for investigation, on the ground, as stated by respondent, that said charges were too flimsy to receive serious consideration. The charges consist principally in that some two or three years before said chief temporarily misappropriated certain funds under his official control; that he committed perjury, for which he was indicted, tried,

and acquitted in 1907; that at that time he was also guilty of subornation of perjury; that at some times not named the labor of certain city employees, and also certain city property, was, under said chief's command, expended for his private benefit; that he appointed a man upon the fire force because of personal pecuniary obligation to him, instead of fitness; that immediately after filing such charges against him he discharged several of the members of the fire department; and other things not deemed material for statement. The respondent moved to quash the alternative writ issued upon said petition, (1) for insufficiency of the matter therein stated to warrant a writ of mandamus; and (2) for defect of parties respondent by reason of the nonjoinder of the chief. The motion to quash was denied, from which action this appeal is brought by respondent.

Mr. Walter H. Bender, with Mr. John T. Kelly, for appellant:

The mayor cannot be compelled at the suit of a taxpayer to exercise the discretion in him vested.

People ex rel. Peabody v. Atty. Gen. 22 Barb. 114.

Mandamus will not lie to control or review the exercise of the discretion of an officer when the act is either judicial or quasi judicial, and, while mandamus may

and arbitrarily refusing to hear or to accede to requests of taxpayers for the appointment of election officers from different political parties, the supreme court, in the exercise of its superintending control over inferior tribunals, will, by mandamus, compel the board to rescind the appointments so made, and to select such judges and clerks from different political parties.

But in *State ex rel. Smith v. Theus*, 114 La. 1097, 38 So. 870, it was held that mandamus would lie against the district attorney to compel him to institute suit to remove a parish superintendent of public instruction from office which he was unlawfully holding and exercising, where such duty was imposed by law upon such officer.

In *State ex rel. Castor v. Saline County*, 18 Neb. 422, 25 N. W. 587, the supreme court, upon an original application, issued a mandamus to compel a board of county supervisors to act upon a complaint against a county officer and to proceed with the trial of the charges, where, under the law, they had authority to hear and determine complaints against county officers. The court said that while they could, by mandamus, compel the board of county supervisors to act upon the complaint, they could in no way control its judgment or legal discretion; but that the trial and ousting from office by the board was not the exercise of the judicial power nor of the power of impeachment, but of a quasi political and

administrative power, and as such could be controlled by the court.

In *Maverick Oil Co. v. Hanson*, 67 N. H. 203, 29 Atl. 461, it was held that mandamus was not the proper remedy to compel the appointing power to remove an oil inspector from office on the ground of his ineligibility to office. In that case the court stated that the proceeding should have been an information in the nature of *quo warranto*, or a petition therefor brought in the name of the attorney general as representative of the state.

In *State ex rel. Warmolts v. Keegan*, 69 N. J. L. 186, 54 Atl. 813, it was held that mandamus would issue to compel the clerk of a board of alderman to strike one name from the roll of members, upon his refusal to comply with the resolution of the board directing him so to do. The court said that the clerk of board of aldermen, in keeping a record of its proceedings, performs a ministerial duty that is imperative in its nature, and his opinion of the legal propriety of the official acts that he is called upon to register is of no consequence.

Cases in which the writ of mandamus was requested for the purpose of restoring one to office have been excluded from this note, though the relief also sought was that the court compel the removal from office of one who had been appointed to take the place of the relator.

be invoked to compel the exercise of discretion, it cannot compel such discretion to be exercised in any particular way.

26 Cyc. Law & Proc. p. 158; *State ex rel. Gericke v. Ahnapee*, 99 Wis. 326, 74 N. W. 783; *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 622, 51 L.R.A. 33, 79 N. W. 1081; *State ex rel. Court of Honor v. Giljohann*, 111 Wis. 386, 87 N. W. 245; *State ex rel. Coffey v. Chittenden*, 112 Wis. 574, 88 N. W. 587; *State ex rel. Ginn v. Wilson*, 121 Wis. 526, 99 N. W. 336; *State ex rel. Wisconsin Metropolis Teleph. Co. v. Milwaukee*, 132 Wis. 615, 113 N. W. 40; *State ex rel. Rudolph v. Hutchinson*, 134 Wis. 283, 114 N. W. 454; *State ex rel. Vanderwall v. Phillips*, 134 Wis. 437, 114 N. W. 804.

Mandamus does not lie to compel a party holding an official position to reverse a decision already rendered in the exercise of discretionary power.

26 Cyc. Law & Proc. pp. 200, 239, 240, 280; 19 Am. & Eng. Enc. Law, 2d ed. pp. 781, 807; *People ex rel. Peabody v. Atty. Gen. supra*; *People ex rel. Demarest v. Fairchild*, 67 N. Y. 335; *People ex rel. Woodward v. Rosendale*, 76 Hun, 103, 27 N. Y. Supp. 837; *People ex rel. Wooster v. Maher*, 141 N. Y. 330, 36 N. E. 396; *Lewright v. Bell*, 94 Tex. 556, 63 S. W. 623; *McLaughlin v. Burroughs*, 90 Mich. 311, 51 N. W. 283; *State ex rel. Castor v. Saline County*, 18 Neb. 422, 25 N. W. 587; *State ex rel. Folk v. Talty*, 166 Mo. 529, 68 S. W. 361; *Everding v. McGinn*, 23 Or. 15, 35 Pac. 178; *Thompson v. Watson*, 48 Ohio St. 552, 31 N. E. 742.

Mr. Hugh Ryan, with Messrs. Ryan, Ogden, & Bottum, for respondent:

Mandamus will lie to compel the mayor to suspend the chief engineer of the fire department, and send the charges against him to the board of police and fire commissioners for investigation.

State ex rel. Buchanan v. Kellogg, 95 Wis. 672, 70 N. W. 300; *State ex rel. Coffey v. Chittenden*, 112 Wis. 569, 88 N. W. 587; *State ex rel. McGovern v. Williams*, 136 Wis. 1, 116 N. W. 225; *People ex rel. Empire City Trotting Club v. State Racing Commission*, 190 N. Y. 31, 82 N. E. 723; *Merrill, Mandamus*, §§ 37, 39-41; *State ex rel. Castor v. Saline County*, 18 Neb. 422, 25 N. W. 587; *Stockton & V. R. Co. v. Stockton*, 51 Cal. 328; *Raisch v. Board of Education*, 81 Cal. 542, 22 Pac. 890; *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; *Brokaw v. Highway Comrs.* 130 Ill. 482, 6 L.R.A. 161, 22 N. E. 596; *Glencoe v. People*, 78 Ill. 382; *State ex rel. Brickman v. Wilson*, 123 Ala. 259, 45 L.R.A. 772, 26 So. 482; *State ex rel. Adamson v. Lafayette County Ct.* 41 Mo. 28 L.R.A. (N.S.)

221; *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622; *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667.

Where an officer may be removed "for cause," the person removed may always procure the adjudication of a court upon the existence of the cause.

Spelling, Extr. Relief, § 1577; *State ex rel. Gill v. Watertown*, 9 Wis. 254; *State ex rel. Carpenter v. Hastings*, 10 Wis. 518; *State ex rel. Brickman v. Wilson, supra*; *State ex rel. Burnham v. Cornwall*, 97 Wis. 565, 73 N. W. 63; *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591, 51 L.R.A. 33, 79 N. W. 1081.

Dodge, J., delivered the opinion of the court:

With a debated question of defect of parties we shall not concern ourselves, since the view we have taken upon the general merits of this case renders it immaterial to the result.

The general plan of the government of the state, either generally or in such sections as its municipal corporations, is framed upon the theory of intrusting to the legislative and executive branches, and administrative officers appointed within them, the formulation of policy and the execution thereof by officials, constitutional or legislative, in whom is vested the discretion as to what will be most promotive of the welfare of the community. In general that policy is decided by the legislature, in detail it must in many respects be left to the individual officials acting upon their knowledge of specific situations and their judgment as to what the public good requires in those specific instances. Those officers are selected either by the people directly, or by some other method considered likely to procure the persons best qualified in judgment, character, and ability to perform their respective duties. They take their places as public officers under the sanction of an oath of office, and under the burden of a trust as binding and transcendent as do the judges of the courts. Their selection, either by the people themselves directly, or by their authorized representatives, carries with it declaration of the fitness of each officer for his place, conclusive until the appointing authority can have an opportunity to speak again, or until those tribunals vested with authority to remove are invoked. With the exercise of the judgment and discretion committed to such officials the courts have no right to interfere, and this for a very good reason. The occupants of judicial places are not selected to manage the political affairs of the state. The qualifications for their places are vastly different, and

not such as to imply abilities to that end. Again, their opportunities for acquainting themselves with the needs and wishes of the people of the state or any locality, with all the complex elements involved in a given exigency, are in nowise comparable to those of the legislative or administrative officers. So that, other things being equal, the probabilities of a correct estimate of the needs of the public are far less in case of the judges than they are in case of the holders of the political offices. Of course, all officials, being human, are liable to err, and the people must suffer the results of errors of judgment into which their responsible officials, judicial as well as others, may fall; but at least the theory of our government is that the peril of error of judgment or intention on the questions committed to them is less in the legislative and executive officials, close to the people and close to the facts of the exigencies in which they act, than it would be at the hands of the judiciary, selected for its supposed ability to apply abstract rules of law to concrete instances. Thus, much has been said because of a growing tendency, of which we think the present proceeding is illustrative, to suppose that any individual who differs with a public official as to the policy which the latter should pursue may demand that the judgment of some court as to his conduct shall be substituted for his own, and control his official acts. Nothing could be further from the theory of our government nor less likely to be promotive of public welfare. *People ex rel. Sutherland v. The Governor*, 29 Mich. 320, 18 Am. Rep. 89. Courts sit to remedy wrongs, and it is often urged that no wrong should, by courts, be allowed to go without a remedy; but no wrong in the legal sense results when one receives all that the law accords him. So, when the only right of an individual, or the public, which the law gives, is that which a designated officer deems best, the honest decision of that officer is the measure of the right, however his judgment may differ from that of others, even of the courts. *State ex rel. Cook v. Houser*, 122 Wis. 534, 570, 100 N. W. 964; *Rowell v. Smith*, 123 Wis. 510, 528, 102 N. W. 1.

Of course, it is true that the legislature may, and very frequently does, impose upon executive and administrative officers absolute duty involving nothing of judgment or discretion except such as is first exercised by the legislature itself, which discretion, being there exercised and pronounced in the law, leaves no choice to the official. Such ministerial duty may be enforced in a proper case by the courts if there is no other adequate method provided. It therefore becomes essential in every case of official ac-

tion to consider whether the legislature has so passed upon all questions of policy and discretion, and imposed by law a mere ministerial duty in obedience to their decision, or has reposed in the administrative or executive officer discretion as to when or how he ought to act. In organizing the government of the city of Milwaukee the legislature followed the general lines of the governments of the United States and of the several states in creating legislative and executive departments and officers mainly independent of each other. The charter provided for a mayor having, within the limited territory, the substantial characteristics of a chief executive in analogy to the President of the United States and the governors of the several states. The charter declared that the mayor should be "the chief executive officer and the head of the fire department and of police in said city," and that he should "take care that the laws of the state and the ordinances of the city are duly observed and enforced." These expressions signify the conferring of all the powers of a chief executive, except as elsewhere limited, with the necessary right of discretion and judgment. They also evince the reliance and confidence in the motives which should actuate the decisions finally arrived at by such an officer, which accompany the delegation of broad discretion and responsibility to the other principal officers of government, imposing as an assurance and sanction for the faithful performance of such duties the same official oath as in the case of a governor of a state or the judges of the highest courts. The mayor, therefore, generally speaking, is in no sense a mere ministerial officer to perform only acts as to which the legislature has exercised all discretion and judgment and made him a mere implement of expression. While, as already said, mere ministerial duties may incidentally be conferred upon him, the general words of the charter go much further. They indicate reliance in his discretion, rather than mere ministerialism. From early times the grant of executive power, the general power to execute the laws, has been construed as broadly effective of itself, and especially so in the matter of appointment and removal of subordinate officers. On this subject occurred the most famous historical instance of constitutional construction by a legislative body. In the first Congress of the United States, upon a bill to create the Secretary of Foreign Affairs, to be appointed by the President, with the consent and approval of the Senate, and "to be removed from office by the President of the United States," ensued in the House of Representatives one of the most remarkable debates in the history of

the Federal government, on the question whether the last-quoted words should be eliminated because implying assertion of power in the Congress to grant or withhold the right of removal; it being contended, on the one hand, that the power under the Constitution might rest in any of several places, and, on the other hand, under the leadership of James Madison, that the "executive power" conferred by the Constitution on the President had already vested in him the power of removal of executive officers, and that the Congress could not take it away, and should not appear to claim such right. Those debates are contained in 1 Annals of Congress, extending from page 455 to page 585, and resulted in the overwhelming adoption of Mr. Madison's contention against the proposition that the power of removal inhered in or resulted from the power of appointment or rested with the legislature to grant or withhold, but that it was included in the "executive power," and hence was vested in the President. That construction of the Constitution has received multitudinous approval since, and been recognized by all thoughtful and careful writers, jurists, and attorneys general of the United States as settled. 2 Marshall, Life of Washington, p. 162; 1 Kent, Com. 310; Bancroft's History of the Constitution; Ex parte Hennen, 13 Pet. 225, 10 L. ed. 136; 4 Ops. Atty. Gen. (Legare) 1; Id. (Clifford) 609; 5 Ops. Atty. Gen. (Crittenden) 288, 290. This subject was exhaustively discussed and a very complete collection of the expressions of leading writers thereon embodied in the brief for the government in *Parsons v. United States*, 167 U. S. 324, 42 L. ed. 185, 17 Sup. Ct. Rep. 880. Mr. Madison's views, thus adopted, are expressed more particularly on pages 462, 463, 464, and 499 of 1 Annals of Congress. Thus, before adoption of our Constitution and before the draft of the Milwaukee charter, it had become established that executive power as conferred by such instruments included the power to appoint and remove subordinate executive officers at discretion, except as qualified by other expressions.

Hence, seemingly, it would be plain that in the absence of any other charter provisions the mayor, merely by his creation as the chief executive, and by the imposition of the duty to see that the laws and ordinances were enforced, would have the power of appointment and removal. That power, however, was qualified in some degree through all stages of the charter of Milwaukee up to the adoption of a fire and police commission, by chapter 378, p. 1251, Laws 1885, whereby the appointment and removal of the chiefs of the fire and police

departments was vested in that board and taken away from the mayor. Section 6 of that act provides that, in case of a vacancy in either office, it shall be the duty of said board to appoint proper persons to fill such offices "during good behavior subject to suspension and removal as hereinafter provided;" and § 12 conferred on the board the power to remove either such officer when of the unanimous opinion that the good of the service would be subserved thereby. These provisions, emanating from the legislature, were, of course, limitations upon the executive power of the mayor, but accompanying them was § 11 of the same act, which provided that the chief of police and the chief of the fire department and other specified officers shall be subject to suspension from office for cause by the mayor at any time. Any officer so suspended shall thereupon cease to exercise the functions of his office until he shall be reinstated. In case of such suspension, the mayor shall at once communicate to said board the charge or charges against the officer suspended, and the board shall at once consider and examine the same, giving the suspended officer opportunity to meet the charges and to be heard in his own defense. If the charges are not sustained by the board, the officer shall be immediately reinstated. If they are sustained, the board shall determine whether the good of the service requires removal from office or suspension, and their decision shall control the action of the mayor. It is clear that thus was formulated an entirely new scheme or plan with reference to certain subordinate executive officers, whereby the whole subject of their appointment and removal was taken out of the hands of the chief executive of the city, and vested in a board; but it is equally apparent that the legislature, appreciating the inherent incapacity of such boards for prompt and effective executive action in emergencies, intended to preserve in the mayor the power of suspension in a proper case. That power was lodged in the mayor as essential to his duty to guard the general welfare, and to see that the laws and ordinances should be enforced. The cause mentioned in § 11 for which the suspension might be made, of course, means any cause which, in the honest judgment of the mayor as a trusted and responsible chief executive, might reasonably render such suspension advisable for the public good. The discretion so conferred empowered him to weigh all considerations in deciding whether sufficient cause existed for such suspension. Those causes and considerations are innumerable. A perfectly good cause for removal may be no sufficient cause for summary suspension, and, *vice versa*, a good cause for

temporary suspension may exist which does not warrant complete removal. In the case of the fire chief his abilities as a fighter of fire to preserve property and the safety of the community are considerations of great importance which may well deter the mayor in his honest judgment from even temporarily displacing him and leaving the city without his services, although he may lack many other attributes of an ideal public officer, and thus make choice of a successor advisable. The condition of things as to the presence upon the force of a subordinate able to supply those emergency qualities which the chief may have, might well justify the mayor in deciding not to suspend one whom he may believe ought not permanently to continue as the chief of that fire department because of other defects of character, during consideration by the board of the sufficiency of those defects as cause of removal. For multitudinous reasons like these, it is not the absolute duty of the mayor, even if informed of great or even gross dereliction in certain directions, to momentarily deprive the city of the protection resulting from other abilities of such an officer as the fire chief or the chief of police. The contention of respondent to the effect that, whenever charges are laid by a "citizen and taxpayer," a ministerial duty is imposed upon the mayor to forthwith suspend, at once suggests illustrations which are convincing of the impossibility of such legislative intention. Were the chief of police engaged in a campaign against gambling houses or houses of ill fame, he would naturally draw upon himself the antagonism of those who profit from such establishments, and if, at the critical moment of such proceedings, a fearless and effective chief of police must lay down the fight because the proprietor of such a building, a "citizen and taxpayer," laid some charge of general impropriety or even dishonesty against him, the possibility of the enforcement of the laws and ordinances for the time being at least might well disappear. The mayor must be authorized in such a case to look not alone to the charges, but as well to the necessities of the community. The possibility of a substitute for the assailed officer competent to meet the exigencies of the moment, and an infinity of other considerations as to whether it is best that he be summarily suspended and the office left vacant until the commission can, in the slow course of investigation and procedure that must characterize such bodies, fill the place with another appointee, present themselves in such a contingency. We are persuaded that the power, and, of course, the duty, of suspension preserved in the mayor by § 11, is discretionary in a very high degree, and therefore, under the uni-

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form holding of this court, that the mayor's decision not to exercise it is not subject to review or direction by the courts, unless, indeed, there may be found an entire refusal to consider and exercise discretion. *State ex rel. Gill v. Watertown*, 9 Wis. 254; *State ex rel. Gericke v. Ahnapee*, 99 Wis. 322, 326, 74 N. W. 783; *State ex rel. Coffey v. Chittenden*, 112 Wis. 569, 574, 88 N. W. 587; *State ex rel. People's Land and Mfg. Co. v. Holt*, 132 Wis. 131, 111 N. W. 1106; *State ex rel. Wisconsin Metropolis Teleph. Co. v. Milwaukee*, 132 Wis. 615, 618, 113 N. W. 40; *State ex rel. Rudolph v. Hutchinson*, 134 Wis. 283, 114 N. W. 453; *State ex rel. Vanderwall v. Phillips*, 134 Wis. 442, 114 N. W. 802; *State ex rel. Wagner v. Dahl* (Wis.) 122 N. W. 748; *High, Extr. Legal Rem.* § 42.

In this case we can find nothing of such refusal. There is no duty resting upon an executive officer vested with such ample discretion as this, to declare the reasons for his decision or his action in deciding against suspension. It is enough for him to declare that he deems the public welfare promoted by action or inaction, which declaration indeed need only be by the act. John Adams, who, as Vice President, had cast the deciding vote in favor of Madison's construction of executive power, referred to in an earlier part of this opinion, gave his own illustration, when President, of the extent of accountability of the chief executive under such a power, in his communication of May 12, 1800, to the then Secretary of State, which reads: "Divers causes and considerations essential to the administration of the government, in my judgment, requiring a change in the department of state, you are hereby discharged from any further service as Secretary of State. John Adams, President of the United States." In the presence of such a solemn declaration courts must indulge in every prima facie presumption in favor of the good faith of the executive officer in his discharge of his duties as such, and only when it can be established by the clearest possible evidence that such officer has wholly refused to exert his jurisdiction or to exercise any discretion whatever can the courts properly interfere by mandamus. *Spalding v. Vilas*, 161 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 631; *People ex rel. Peabody v. Atty. Gen.* 22 Barb. 114, 118; *Ely v. Cram*, 17 Wis. 537; *Connor v. Marshfield*, 128 Wis. 280, 288, 107 N. W. 639. In the present case it appears by the relation itself that, upon receipt of relator's so-called charges, the mayor did enter into an investigation, took various means to inform himself of facts and of the situation, and declared his conclusion that the charges did

not warrant the suspension of the officer, resulting, as it must, to the latter's great detriment and to the deprivation of the city and the public of his services. It is apparent, therefore, on the face of the papers, that the discretion was exercised, and that the conditions upon which it might be the duty of the mayor to suspend the fire chief did not exist. Hence, of course, the motion to quash should have been granted.

Order reversed and cause remanded, with directions to quash the alternative writ of mandamus and to dismiss the proceeding.

MASSACHUSETTS SUPREME JUDICIAL COURT.

PATRICK MALONEY

v.

JEREMIAH F. HAYES.

(206 Mass. 1, 91 N. E. 911.)

Landlord — unsafe sidewalk — liability.

A property owner cannot escape liability for injury to a pedestrian through ice formed on the sidewalk from water cast thereon from a pipe constructed by him, because at the time of the injury the property was in possession of a tenant.

(May 18, 1910.)

EXCEPTIONS by plaintiff to the direction by the Superior Court for Norfolk County of a verdict in defendant's favor in an action brought to recover damages for

Note. — Liability of abutting property owner for injury caused by ice formed from water artificially turned across sidewalk.

The following decisions upon this question have been reported since the preparation of the note accompanying *Hynes v. Brewer*, 9 L.R.A.(N.S.) 598.

A property owner who, as landlord, has general control of his premises as to physical conditions and repair, is liable to one injured by falling on an icy sidewalk in front of such premises, where the accumulation of ice on the walk is due to the freezing of water artificially collected and discharged upon it by a defective gutter. The fact that it is the duty of the occupants of the building to remove the ice from the sidewalk does not discharge the owner from liability where the latter's neglect was the cause of its accumulating. *Smith v. Preston*, 104 Me. 156, 71 Atl. 653.

And so, a property owner who throws water from his roof, by means of a spout, onto his walk in such a manner that by the natural slant it flows to a public walk, where it freezes, is liable for injuries thereby caused to a pedestrian who is himself

personal injuries for which defendant was alleged to be responsible. Sustained.

The facts are stated in the opinion.

Mr. Louis S. Thierry for plaintiff.

Messrs. John H. Appleton and Charles R. Darling, for defendant:

The plaintiff must show that the premises were "permanently dangerous."

Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 4 Am. St. Rep. 279, 15 N. E. 84; *Coman v. Alles*, 198 Mass. 99, 14 L.R.A.(N.S.) 950, 83 N. E. 1097.

It is the occupier who is prima facie liable to third persons for damages arising from any defect.

Leonard v. Storer, 115 Mass. 88, 15 Am. Rep. 76.

The owner has a right to rely on the tenant's managing the premises in such a way as to prevent them from being a nuisance.

Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 4 Am. St. Rep. 279, 15 N. E. 84; *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; *Handyside v. Powers*, 145 Mass. 123, 13 N. E. 462; *Caldwell v. Slade*, 156 Mass. 84, 30 N. E. 87; *Hutchinson v. Cummings*, 156 Mass. 329, 31 N. E. 127; *Frischberg v. Hurter*, 173 Mass. 22, 52 N. E. 1086; *Neas v. Lowell*, 193 Mass. 441, 79 N. E. 810; *Coman v. Alles*, 198 Mass. 99, 14 L.R.A.(N.S.) 950, 83 N. E. 1097; *Rich v. Basterfield*, 4 C. B. 783.

The wooden shoe which received the water from the conductor affixed to the house, and which was not itself affixed to the house, but was detached and movable, was not

in the exercise of due care. *Fried v. Gowdy*, 199 Mass. 568, 19 L.R.A.(N.S.) 236, 85 N. E. 884.

The same principle is recognized in *Drake v. Taylor*, 203 Mass. 528, 89 N. E. 1035, where the court says: "A landowner who collects water into a definite channel, by a spout or otherwise, and pours it upon a public way, whereby through the operation of natural causes ice there forms, is the efficient cause in the creation of a nuisance, and is liable for whatever damage results as a probable consequence."

In the case of *Duffy v. New York*, 128 App. Div. 837, 113 N. Y. Supp. 118, the plaintiff was injured upon an icy sidewalk the condition of which, due to the emptying of water thereon from a broken leader on an adjoining house, had existed for more than a year, and the city was held liable on the ground that it was a continuing nuisance which it should have abated. This decision, of course, cannot be interpreted as holding that the owner of the house would not have been liable also for the conditions which existed. The decision is included for what it may be worth as suggesting a several liability in that line of cases.

itself a nuisance, and could only cause a nuisance, by the manner in which it was, according to the plaintiff's claim, used, viz., by putting it through the fence so as to discharge water onto the sidewalk.

Coman v. Alles, *supra*.

The plaintiff must show that the condition of things which he claims to have been dangerous, or calculated to produce a nuisance, existed when the defendant let the premises.

Frischberg v. Hurter and Neas v. Lowell, *supra*.

Braley, J., delivered the opinion of the court:

The plaintiff, while lawfully using the street as a traveler, was injured by falling on an accumulation of ice, which had been formed from water collected and discharged upon the sidewalk, through a spout attached to a conductor leading from the roof of the defendant's house. A landowner or occupier of land cannot lawfully collect surface water into a definite channel, and discharge it upon a highway, making it unsafe for the use of travelers. The act creates a public nuisance, and a traveler who suffers injury therefrom can sue the wrongdoer. Hynes v. Brewer, 194 Mass. 435, 9 L.R.A.(N.S.) 598, 80 N. E. 503. But as the premises at the time of the accident were in the possession and control of a tenant at will, the defendant contends that he is not responsible. If during the tenancy the defendant voluntarily painted and shingled the house, no retention of control of the premises for the purpose of making repairs or ascertaining their condition is shown, and the tenant had the right of possession and enjoyment of the estate. Porter v. Hubbard, 134 Mass. 233; Kearnes v. Cullen, 183 Mass. 298, 67 N. E. 243; Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544. Where the lessor, whether the letting is by parol or by demise, reserves no right to enter upon the premises to make repairs, or to ascertain if they are properly used, he is not liable for injuries to strangers caused by the tenant's negligence in permitting them to become defective, or arising from the manner in which they are used. Frischberg v. Hurter, 173 Mass. 22, 52 N. E. 1086, and cases cited; Clapp v. Donaldson, 195 Mass. 39, 80 N. E. 486; Neas v. Lowell, 193 Mass. 441, 79 N. E. 810; Coman v. Alles, 198 Mass. 99, 14 L.R.A.(N.S.) 950, 83 N. E. 1097. The unrestricted use and control having been given to the tenant, the duty devolves upon him so to use the property as not to cause an injury to those who may be lawfully upon the premises, or to travelers on the highway upon which the estate abuts. Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 28 L.R.A.(N.S.)

4 Am. St. Rep. 279, 15 N. E. 84. But if the unsafe condition of the sidewalk could have been attributed to the tenant's negligence, the defendant as owner also would be liable, if, at the time of letting, the conductor and spout were adjusted to form a permanent arrangement for the continued discharge of drainage. Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 49, 4 Am. St. Rep. 279, 15 N. E. 84; Lufkin v. Zane, 157 Mass. 117, 122, 17 L.R.A. 251, 34 Am. St. Rep. 262, 31 N. E. 757. The connection of the spout with the conductor was not in dispute, and it was for the jury to decide, upon conflicting evidence, as to the location of the outlet or place of discharge. If they determined that when the tenant entered into occupation the spout projected beyond the fence, through which a hole had been cut and fitted for the purpose, they would be justified in finding, further, that the combination was used and had been designed by the defendant for the disposal of melting snow and water coming from the roof. The defendant let the property for hire with knowledge of these conditions, and if the formation of ice might have been prevented by the tenant's detaching the spout, or in some way confining the overflow within the inclosure, the premises were so constructed as to be permanently dangerous to travelers. Having created a continuing nuisance to which the plaintiff's injury was attributable, the defendant could not relieve himself from responsibility by leasing the premises, when he must have contemplated they would remain and be used in the same manner as when rented. McDonough v. Gilman, 3 Allen, 264, 267, 80 Am. Dec. 72; Prentiss v. Wood, 132 Mass. 486, 488; Jackman v. Arlington Mills, 137 Mass. 277; Dalay v. Savage, 145 Mass. 38, 41, 1 Am. St. Rep. 429, 12 N. E. 841; Lufkin v. Zane, *supra*. The verdict for the defendant was improperly ordered, and there must be a new trial.

Exceptions sustained.

WISCONSIN SUPREME COURT.

HAZEL KATHAN et al., Respts.,

v.

E. G. COMSTOCK et al., Appts.

(140 Wis. 427, 122 N. W. 1044.)

Tax — adverse title.

1. Exclusive possession by the owner of the record title for three years after the execution of a tax deed for the property extinguishes the tax title.

Fraud — positive representations — ignorance.

2. A representation by one claiming a tax

title to real estate, that the title is perfect,—made for the purpose of securing a conveyance in form by the true owners, for a nominal consideration,—which can only be true in case the land was vacant and unoccupied during the period necessary to perfect the title under the statute, involves a representation that it was so in fact; and if such representation was false, the one making it is guilty of fraud in law, which will entitle the grantor to a rescission of the contract, although the one making it had no knowledge on the subject, and believed it to be true.

Same — duty to know.

3. One who makes representations to another of material facts, for the purpose of inducing that other to enter into contractual relations with him, and which are liable

to accomplish the purpose without want of ordinary care on the part of such other, is bound at his peril to know whereof he speaks.

Judgment — separation of relief — evidence.

4. One who desires a decree setting aside a deed of real estate because a portion of it was secured by false representations to apply only to such portion, upon return of a proportionate part of the purchase money, must offer evidence which will enable the court to make an apportionment, and upon his failure to do so, the court may deal with the transaction as an entirety.

(Marshall, J., dissents from proposition 4.)

(October 26, 1909.)

Note. — Fraud: may fraud be predicated of misstatement as to title to real property.

Executed contracts.—when false statement is made with knowledge of its falsity, or without regard to its truth or falsity.

A false statement as to the character of title to real estate, when made as a fact, or without regard to its truth or falsity, for the purpose of inducing another to purchase the same, constitutes actionable fraud, where a sale is induced thereby in reliance thereon, and injury results therefrom, and will entitle the vendee to maintain an action for the fraud and deceit, or a rescission of the sale, if he acts with reasonable promptness after the discovery of the fraud. *Linn v. Green*, 5 McCrary, 380, 637, 71 Fed. 407; *Younge v. Harris*, 2 Ala. 108; *Meeks v. Garner*, 93 Ala. 17, 11 L.R.A. 196, 8 So. 378; *Fitzhugh v. Davis*, 46 Ark. 337; *Muller v. Palmer*, 144 Cal. 305, 77 Pac. 954; *Crutchfield v. Danilly*, 16 Ga. 432; *Fenley v. Moody*, 104 Ga. 790, 30 S. E. 1002; *Eames v. Morgan*, 37 Ill. 260; *Drake v. Latham*, 50 Ill. 270; *Craig v. Hamilton*, 118 Ind. 565, 21 N. E. 315; *James v. Lawrenceburgh Ins. Co.* 6 Blackf. 525; *Anderson v. Buck*, 66 Iowa, 490, 24 N. W. 10; *Riley v. Bell*, 120 Iowa, 618, 95 N. W. 170; *Carpenter v. Wright*, 52 Kan. 221, 34 Pac. 798; *Provident Loan Trust Co. v. McIntosh*, 68 Kan. 452, 75 Pac. 498, 1 A. & E. Ann. Cas. 906; *Young v. Hopkins*, 6 T. B. Mon. 19; *Campbell v. Whittingham*, 5 J. J. Marsh. 96, 20 Am. Dec. 241; *Madden v. Leak*, 5 J. J. Marsh. 95; *Breckinridge v. Moore*, 3 B. Mon. 629; *Fristoe v. Laytham*, 18 Ky. L. Rep. 157, 36 S. W. 920; *Skinner v. Brigham*, 126 Mass. 132; *Stockham v. Cheney*, 62 Mich. 10, 28 N. W. 692; *Reynolds v. Franklin*, 39 Minn. 24, 38 N. W. 636; *Haight v. Hayt*, 19 N. Y. 464; *Udike v. Abel*, 60 Barb. 15; *Jenkinson v. Stoneman*, 4 Ohio Dec. Reprint, 289; *Babcock v. Case*, 61 Pa. 427, 100 Am. Dec. 654; *Wilson's Appeal*, 109 Pa. 606, 7 Atl. 88; *Leird v. Abernathy*, 10 Heisk. 626; *Corbett v. McGregor* (Tex. Civ. App.) 84 S. W. 278; *Morris v. Brown*, 38 Tex. 28 L.R.A. (N.S.)

Civ. App. 266, 85 S. W. 1015; *Koepke v. Winterfield*, 116 Wis. 44, 92 N. W. 437.

The representation, to be actionable fraud, must be made as a matter of fact rather than of opinion, although, of course, any representation as to title is, in part, at least, an opinion. Thus, a representation by a vendor that he had an arrangement with the owner of certain real estate which enabled him to sell it as his own, and that he had examined the title, and it was perfect, and that he would be responsible for it, and that there was no need of any abstract, constituted a fraud entitling the purchaser to recover damages, the representations being false as to the title. *Reynolds v. Franklin*, supra.

In *Buchanan v. Burnett* (Tex. Civ. App.) 114 S. W. 406, affirmed in 102 Tex. 492, 132 Am. St. Rep. 900, 119 S. W. 1141, the court asserted that an unqualified expression of ownership—of absolute title—is an affirmation of fact, notwithstanding it may involve an opinion as to the legal sufficiency of the evidences of such title; and added: "It is well settled that false representations of the vendor affecting the validity and sufficiency of his title, upon which the vendee had a right to rely, and did rely, and which induced the vendee to make the purchase, constitute such legal fraud as authorizes a court of equity to rescind the contract and decree a return of the purchase money paid."

In *Burns v. Dockray*, 156 Mass. 135, 30 N. E. 551, the court remarked that no doubt even a positive statement that a title is good involves somewhat a matter of opinion, but it also imports that there are no facts that affect its validity within the knowledge of the vendor making the representation, and if a purchaser relies upon the statement, he is entitled to recover damages as for fraud.

A false representation by the vendor that he personally knows that the title to certain real estate is good, as he has made an examination of the records of the title, thereby inducing the other party to refrain from taking steps to inform himself as to the title, is fraudulent, and entitles a pur-

APPEAL by defendants from a judgment of the Circuit Court for Shawano County, quieting title to certain real estate. Affirmed.

Statement by Marshall, J.:

Equitable action to set aside deeds to real estate and quiet title.

The issues passed upon in closing the case by judgment may be concisely stated, as follows: The title to the particular land in question and others, aggregating twenty-two tracts, was in Joseph Kathan at the time of his death, May 26, 1901. He died intestate, leaving as his only heirs his widow, Hattie P. Kathan, and three minor children, the plaintiffs herein. The title to said land was vested in them on the death of Mr. Kathan,

subject to six tax deeds thereon in the name of defendant Pier. The title to the particular tract was vested in Mr. Kathan many years before he died. It was occupied and used by him, in the main, as a wood lot and for cutting and removing timber therefrom, continuously, for several years after his ownership commenced. During such time a small part was cleared, cultivated, and inclosed by a fence. The land was thereafter used by Mr. Kathan continuously, down to 1897, in connection with an adjoining tract on which he owned and operated a brickyard. It was thereafter occupied continuously, down to the time of the commencement of the action, by defendant Eagle River Brick Company, in connection with the brickyard 40, under an agreement with

chaser relying thereon to an action for damages if he suffers injury thereby. *Jenkinson v. Stoneman*, supra.

But see *Conwell v. Clifford*, 45 Ind. 392, which holds that a false representation that designated parties had a good title to certain land, and reliance thereon by a purchaser thereof without knowledge of the facts, is no defense to an action by the person making the representations upon notes given for the purchase price. The court said that the allegation that the plaintiff fraudulently represented that certain parties had a good title to the land did not show the representation of a fact, but simply a legal opinion.

A false statement by a vendor that the title was a fee-simple title, when in fact it was only an estate for life or years, is not a valid defense to an action at law by the vendor upon notes given for the purchase price. *Howard v. Witham*, 2 Me. 390.

It is fraudulent for a vendor of real estate falsely to represent that the land he is selling is part of a tract of land granted to him by the United States government, and that he is the sole owner of the tract. *Barnes v. Union P. R. Co.* 4 C. C. A. 199, 12 U. S. App. 1, 54 Fed. 87.

And when a vendee, in purchasing land, declares himself a stranger to it, and that he is relying on the representations of the vendor as to title, it constitutes a fraud entitling the vendee to avoid the sale, for the vendor to represent that his tax title to the land is good, that he has been where the land lies, and has looked at it, and found it all right, such representation being equivalent to saying that the land was unseated and subject to be sold for taxes at the time of the assessment upon which it was subsequently sold. *Babcock v. Case*, supra.

A vendor who falsely represents that a deed executed in blank and delivered by him to the vendee is a valid conveyance of the real estate therein mentioned is guilty of fraud, and the vendee, who has exchanged personal property therefor, may maintain trover to recover it, it appearing that the deed conveyed no title to the premises. *Skinner v. Brigham*, 126 Mass. 132.

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It constitutes fraud for an heir falsely to represent that he is the owner of a one-third interest in the estate left by his father, if he thereby induces another to purchase his interest in reliance upon such representation, the representation being false in that the heir had no interest in the real estate, because of his indebtedness to the estate. *Craig v. Hamilton*, 118 Ind. 565, 21 N. E. 315.

A false representation by the vendor of real estate that the leases thereof held by tenants in possession are not absolute in terms, but are conditional, and inoperative in the event of the sale of the property, constitutes actionable fraud. *Wilson's Appeal*, supra.

A materially false representation by the vendor of real estate as to easements or appurtenances to land, made with the intention of deceiving the purchaser, and which actually does deceive him, amounts to a fraud which will sustain an action for deceit, if injury result therefrom. *Fenley v. Moody*, supra.

The vendor of real estate is guilty of actionable fraud in falsely representing that he was the owner of water from a creek adjoining the property sold, which, in its natural course, flowed over, upon, and through the land, and that the vendee could and would have this water for agricultural purposes, where he had previously parted with such rights. *Wilson v. Higbee*, 62 Fed. 723.

A representation that there is no encumbrance upon real estate, if false to the knowledge of the person making it, constitutes actionable fraud if relied upon by the vendee, to his injury. *Carpenter v. Wright*; *Haight v. Hayt*; and *Jenkinson v. Stoneman*,—supra.

A vendor of real estate who represents that the title thereto is all right is liable to the vendee for injuries occasioned to him by reason of an encumbrance upon the property of which the vendor had knowledge at the time of the representation. *Riley v. Bell*, 120 Iowa, 618, 95 N. W. 170.

The purchaser of real estate has a right to rely upon the representation of the vendor as to the amount due on an encum-

the owner to convey the same to it for \$200, as soon as cleared of back taxes. The plaintiffs did not know of the occupancy aforesaid till after the conveyance hereafter mentioned, to defendant Comstock. Some time subsequent to the death of Mr. Kathan, under an agreement with one Colman, county judge of Vilas county, that title to all the lands should be vested in one George, in the interest of plaintiffs, and the particular tract then be by him conveyed to the brick company, of which Colman was a stockholder, proceedings were had, in form in the county court of Vilas county, but in fact in the county of Shawano, resulting in such title being, in form, so vested, whereupon George conveyed the particular tract to said brick company, pursuant to such agreement.

The first of the aforesaid tax deeds was made and recorded in May, 1889, and the last one in May, 1898. After the proceedings aforesaid, in form vesting the title in George, defendant Pier represented and caused to be represented to plaintiffs that the statute of limitations had run in favor of her tax deeds, effectually divesting the title to said lands from plaintiffs, and vesting the same in her. She did that for the purpose of inducing them to convey, in form, the twenty-two tracts of land to defendant Comstock for the sum of \$30. The particular tract then, and at the time of the commencement of this action, was worth at least \$200. Relying upon such representations, which were in fact false, the tax deed titles as to such particular land having been

brance upon the property purchased, and it is actionable for the vendor falsely to misstate the amount, with knowledge that the vendee is relying upon his representation in that regard. *Hutchinson v. Gorman*, 71 Ark. 305, 73 S. W. 793; *Loucks v. Taylor*, 23 Ind. App. 245, 55 N. E. 238; *Short v. Cure*, 100 Mich. 418, 59 N. W. 173; *Griffeth v. Hanks*, 46 Tex. 217.

Representations by the vendor of real estate as to the balance due on a mortgage on the real estate sold, and also as to what the mortgagee, a building and loan association, had represented to him would be the number of payments still required to extinguish the debt, are not statements of opinion, but are representations of fact, which the purchaser is entitled to rely upon, and if false, to recover damages suffered thereby. *Loucks v. Taylor*, supra.

Where the vendor knows, or may reasonably be supposed to know, material facts concerning the title which are unknown to the vendee, and which cannot otherwise be ascertained by him at the time and place of sale, and he informs the vendor that he relies solely upon the truth of his statements and representations in regard to the title, and the vendor makes statements relative thereto which, if true, would constitute a good title, and the vendee, relying thereon, purchases the property, if the statements afterwards prove to be untrue and the title bad, he is entitled, to the extent of the failure of title, to surrender the property, and defend against an action brought for the purchase money; and under such circumstances, it is immaterial whether the vendor knew that the representations made by him were false, or whether he made them without knowing whether they were true or not. *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891.

In *Barnes v. Union P. R. Co.* 4 C. C. A. 199, 12 U. S. App. 1, 54 Fed. 87, the court said that even if it could be assumed that the vendor had no actual knowledge of the fact misrepresented, this would not relieve him from liability, where he represented the fact as of his own knowledge that the land was within a grant, and that he was the

owner of it; and added that if he knew this to be false, that was fraud of the most positive kind; if he did not know whether the statement was true or not, the positive statement of his own knowledge that it was so was a false and fraudulent statement that he did know this to be a fact; and as these statements caused the same damage to the vendee, the vendor was equally liable in either event.

In *Hutchinson v. Gorham*, supra, it was said that it was sufficient to entitle the vendee of real estate to maintain an action for deceit against the vendor for false representations as to title, for the vendee to show that he was misled by such misrepresentations, and that the vendor made the representations with knowledge of their falsity, or that, having no knowledge with reference thereto, he asserted that they were true, with the intention of deceiving the vendee.

—false statements honestly or mistakenly made.

A vendor of real estate who makes false statements of fact as to the character of his title is guilty of a constructive fraud which will entitle the vendee, relying thereon to his injury, to avoid the purchase, even though, in making the statements, the vendor did not know of their falsity, and believed in the truth thereof. *Lanier v. Hill*, 25 Ala. 554; *Bailey v. Jordan*, 32 Ala. 50; *Lindsey v. Veasy*, 62 Ala. 421; *Kiefer v. Rogers*, 19 Minn. 32, Gil. 14; *Parham v. Randolph*, 4 How. (Miss.) 435, 35 Am. Dec. 403; *Rimer v. Dugan*, 39 Miss. 477, 77 Am. Dec. 687; *Zunker v. Kuehn*, 113 Wis. 421, 88 N. W. 605.

An executed sale of real estate may be rescinded in chancery upon the application of the vendee, who believed and acted upon a false representation as to title; and it is immaterial whether the vendor, in making it, knew it to be false; if the misrepresentation is in relation to a material matter, and a party is misled by it, the court said that the misrepresentation, although it may be innocent, operates as injuriously as if

extinguished by the statute of limitations, the same having been occupied, as aforesaid, such proceedings were taken in the circuit court for Shawano county that the title of plaintiffs in all the lands, for the consideration aforesaid, was vested in Comstock, the deed to that effect being duly recorded. That was accomplished in the interest of said Pier, so that she might control the patent title as well as the tax title to all said lands. The next day after the conveyance to said Comstock, said Pier caused the particular tract to be mortgaged to her daughter, the defendant McIntosh, ostensibly to secure \$250, but in fact to give her standing to commence an action to quiet the title as against the brick company. Such action was commenced, and during the

proceedings therein, plaintiffs became possessed of information as to the possession aforesaid extinguishing the tax title claim. Thereupon this action was brought against all parties adversely interested, to vacate said deeds made by plaintiffs, and the mortgage as well, establish the title to said particular land in plaintiffs, according to the facts, and remove all clouds existing thereon, created by the deed to George, the deed by him to the brick company, the deed to Comstock, and the mortgage.

On such facts judgment was awarded to plaintiffs wholly annulling the deed to Comstock, conditioned upon the consideration paid by him, as aforesaid, being paid into court for his use, and decreeing that the possession by the brick company was lawful,

it had been by design; and upon clearest principles of morality a court of equity should not only refuse to enforce, but should rescind, a contract made under such circumstances. *Lanier v. Hill*, supra.

It is immaterial that the vendor honestly believed the statements he made as to his title to real estate, if in fact they were untrue, where he made them with knowledge that the vendee was relying upon them in making the purchase. *Rimer v. Dugan*, supra.

A vendee may rescind a purchase of real estate where the vendor falsely represented his title to be good, if he relied thereon in making the purchase, and it is immaterial that the representations were made through an honest mistake. *Bailey v. Jordan*, supra.

Compare with *Spence v. Duren*, 3 Ala. 251, which holds that expressions by a vendor that his title is good are not fraudulent, even though acted upon by the vendee to his injury, unless it is shown that the vendor knew that a better title existed.

The representation by a vendor that he has a good record title to land he proposes to sell constitutes fraud if untrue, and relied upon by the vendee in making the purchase, even though the vendor believed it to be true, and had a record title good as to part of the property, and a good title to the balance by adverse possession. *Zunker v. Kuehn*, supra.

A vendor of real estate who represents the land sold to be a freehold when, as a matter of fact, it was only a copyhold, is guilty of a fraud upon the vendee, who purchases in reliance upon the representation, which entitles the vendee to a rescission of the sale; and this is true even though the vendor made the representation believing it to be true. Such a representation is made at the peril of the vendor, as he takes it upon himself to warrant his own belief of the truth of that which he asserts. *Hart v. Swaine*, L. R. 7 Ch. Div. 42.

Where the owner of property, by reason of his gross negligence, is ignorant of a second mortgage thereon, and sells same to another, representing that there is but one

mortgage upon it, which statement is relied upon by the purchaser, such misrepresentation, though mistakenly made, constitutes a fraud, entitling the vendee to a rescission. *Kiefer v. Rogers*, supra.

An untrue representation or a concealment in relation to land, either as to quality or title, by which a purchaser is imposed upon, is fraudulent, and it is immaterial whether the misrepresentations are intentional or not; if the vendor undertook to make such statements as facts, he is responsible for them. *Parham v. Randolph*, supra.

False representations by a vendor as to his seisin and right to convey real estate entitle the vendee to a rescission where he is deceived thereby, and induced to purchase same, and it is immaterial whether the representations complained of were made knowingly or ignorantly. *Lindsey v. Veasey*, supra.

In *Buchanan v. Burnett* (Tex. Civ. App.) 114 S. W. 406, affirmed in 102 Tex. 492, 132 Am. St. Rep. 900, 119 S. W. 1141, the rule was also declared that whether a representation of title by a vendor was made with or without knowledge of its falsity was immaterial; that in either event the vendor was bound to make reparation for the injury.

If the vendor of real estate, in selling same, asserts that the property is unencumbered, which statement is untrue, although he believes it to be true, he is nevertheless liable to the vendee in an action for deceit. "The assertion is equivalent to an assumption of its truth." *Piche v. Robins*, 24 R. I. 325, 53 Atl. 92.

But generally in an action for false representation by a vendor as to the title to property, it is necessary to establish the representation, its falsity, the intent to deceive, and reliance upon the representation by the vendee, and injury therefrom; and where the evidence does not warrant the conclusion that the vendor of real estate intended to deceive the vendee as to the title, but rather establishes that he believed that he was in fact the owner of the premises, the mere fact that there is an ap-

but under a license revokable at the pleasure of plaintiffs. Costs were awarded in plaintiffs' favor in one bill against Comstock, Pier, and McIntosh, and in favor of the brick company against the same parties.

Mr. C. H. Van Alstine, with Mr. C. H. Roemer, for appellants.

Messrs. Wallrich, Dillett, & Larson, for respondents:

Any actual possession by the former owner during the statutory limitation period destroys the constructive adverse possession of the owner of the tax title.

Flanders v. Washburn Land Co. 139 Wis. 390, 121 N. W. 250; Warren v. Putnam, 63 Wis. 410, 24 N. W. 58; Cornell University v. Mead, 80 Wis. 391, 49 N. W. 815; Lewis

v. Disher, 32 Wis. 504, 9 N. W. 890; Midlothian Iron Min. Co. v. Belknap, 108 Wis. 198, 84 N. W. 169.

As the land in dispute was occupied so as to invalidate the tax deeds, and as the misrepresentations of the holder thereof induced the execution of the deed in suit, such deed must be set aside on the ground of fraud.

Zunker v. Kuehn, 113 Wis. 421, 88 N. W. 605; Hogan v. Wixted, 138 Mass. 270; Wells v. McGeoch, 71 Wis. 197, 35 N. W. 769; Matteson v. Rice, 116 Wis. 328, 92 N. W. 1109; Krause v. Busacker, 105 Wis. 354, 81 N. W. 406; Bowe v. Gage, 127 Wis. 245, 115 Am. St. Rep. 1010, 106 N. W. 1074; Palmer v. Goldberg, 128 Wis. 103, 107 N. W. 478; Gunther v. Ullrich, 82 Wis. 228, 33 Am. St. Rep. 32, 52 N. W. 88; Miner v.

parent cloud upon the title does not justify a finding of an intention to defraud on the part of the vendor, since fraud must be proven, and cannot be presumed. Hence, where a vendor left his deed with an agent to be recorded, and the agent procured a deed of the same date to himself, which he recorded, and did not record the vendor's deed, which fact the vendor did not ascertain until some time later, when he caused his deed to be recorded, and then sold the land, representing that he owned it, such representation is not fraudulent. Buchall v. Higgins, 109 App. Div. 607, 96 N. Y. Supp. 241.

In order to constitute fraud there must be a misrepresentation of fact with intent to deceive, and a reliance thereon in entering into the contract; and a grantor, by merely giving a warranty deed of land which he had previously conveyed to another, is not *per se* guilty of fraud within this rule. Brown v. Manning, 3 Minn. 35, Gil. 13, 74 Am. Dec. 736.

The fact that, in a general conversation with a vendee with reference to real estate thereafter sold to him, the vendor referred to the same as "my property," is not sufficient to establish fraud on the part of the vendor, entitling the vendee to a rescission of the purchase, although he testified that he relied thereon. Reuter v. Lawe, 86 Wis. 106, 56 N. W. 472.

—where fraudulent representation is made by a person without interest.

The fact that a person who makes a fraudulent representation had no personal interest in the sale of real estate, the title of which he misrepresented, and that he received no portion of the purchase price, does not relieve him from liability to the vendee, where the latter relied upon the representation. Carpenter v. Wright, 52 Kan. 221, 34 Pac. 798; Eames v. Morgan, 37 Ill. 260.

But mere silence of a third person who happens to be present at a sale of real estate does not render him liable to the vendee, although such third person knew of 28 L.R.A. (N.S.)

a defect in the title to the property purchased. Littlejohn v. Drennon, 95 Ga. 743, 22 S. E. 657.

An owner of land, who executed a deed thereof, leaving the name of the grantee blank, thereby making it possible for the holder of the deed to deceive an innocent person as to his title, is liable to such third person for the fraud practised upon him, even though they never met. Baker v. Hallam, 103 Iowa, 43, 72 N. W. 419.

—expression of opinion.

A mere expression of opinion by the vendor of real estate as to his title, where based upon a state of facts truthfully stated, or equally within the knowledge of both parties, does not constitute fraud, even though the opinion is not well founded, a vendee not being entitled to rely thereon. Saltonstall v. Gordon, 33 Ala. 149; Martin v. Wharton, 38 Ala. 637; Fitzhugh v. Davis, 46 Ark. 337; Choate v. Hyde, 129 Cal. 580, 62 Pac. 118; Drake v. Latham, 50 Ill. 270; Conwell v. Clifford, 45 Ind. 392; Howard v. Witham, 2 Me. 390; Hoyt v. Bradley, 27 Me. 242; Perkins v. Trinka, 30 Minn. 241, 15 N. W. 115; Herman v. Hall, 140 Mo. 270, 41 S. W. 733; Fellows v. Evans, 33 Or. 33, 53 Pac. 491.

Thus, in Choate v. Hyde, *supra*, the court said that an expression of opinion by the vendor of real estate as to the sufficiency of his title was not actionable fraud, where the means of information respecting the title were equally accessible to both parties, or the facts upon which the opinion was based were within the knowledge of both parties.

And in Fellows v. Evans, *supra*, the court said that where all the facts relating to the vendor's title to the land are fully communicated by him to the vendee prior to the purchase, his opinion, based upon such facts, that his title is perfect, does not constitute actionable fraud.

The distinction between a statement of fact as to title and an opinion based upon an understood state of facts is made in Herman v. Hall, *supra*, wherein the court

Medbury, 6 Wis. 295; McKinnon v. Vollmar, 75 Wis. 82, 6 L.R.A. 121, 17 Am. St. Rep. 178, 43 N. W. 800; Billings v. Aspen Min. & Smelting Co. 2 C. C. A. 252, 10 U. S. App. 1, 51 Fed. 338; Hurd v. Hall, 12 Wis. 125; 1 Enc. L. & Pr. p. 455; Tretheway v. Hulett, 52 Minn. 448, 54 N. W. 486; Stackpole v. Hancock, 40 Fla. 362, 45 L.R.A. 814, 24 So. 914; Cramsey v. Sterling, 111 App. Div. 568, 97 N. Y. Supp. 1082, affirmed in 188 N. Y. 602, 81 N. E. 1162; Hubbard v. McLean, 115 Wis. 9, 90 N. W. 1077; Moth-erway v. Wall, 168 Mass. 333, 47 N. E. 135; Busiere v. Reilly, 189 Mass. 518, 75 N. E. 958; Wenegar v. Bollenbach, 180 Ill. 222, 54 N. E. 192; Stack v. Nolte, 29 Wash. 188, 69 Pac. 753; Shaw v. Gilbert, 111 Wis. 185, 86 N. W. 188; Matthews v. Bliss, 22 Pick.

48; Morgan v. Skiddy, 62 N. Y. 319; Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; McClellan v. Scott, 24 Wis. 87; Kaiser v. Nummerdor, 120 Wis. 240, 97 N. W. 934; Birdsey v. Butterfield, 34 Wis. 52; Tyner v. Cotter, 67 Wis. 491, 30 N. W. 782; Hingston v. L. P. & J. A. Smith Co. 52 C. C. A. 206, 114 Fed. 296; Greiling v. Watermelon, 128 Wis. 440, 107 N. W. 339.

Marshall, J., delivered the opinion of the court:

The findings of fact do not appear, at any point, contrary to the clear preponderance of the evidence. Therefore, by a familiar principle, they must be regarded as verities and the judgment based thereon right, if the conclusions of law are warranted.

said that a mere expression of opinion by the vendor that his title is good will not amount to a fraud; but a statement of a fact or facts upon which such statement is based, when made for the purpose of inducing another to act upon it, implies that the person who makes it knows such fact to exist, and that he speaks from his own knowledge; and if the fact does not exist, it constitutes a fraud, entitling the vendee, if injured thereby, to rescind the sale.

A statement by a vendor that his wife, if she should survive him, would be entitled to dower only in land of which he died seised and possessed, does not constitute actionable fraud, although, in reliance thereon, a person purchases real estate without having the wife join therein to bar her dower. *Martin v. Wharton*, supra.

An expression of opinion by the vendor of real estate that his tax title thereto is valid does not constitute fraud, where he makes no representation as to the facts upon the validity of which the title depends. *Drake v. Latham*, supra.

And it does not constitute fraud for the seller of a tax title upon property of another to represent in good faith that he has a valid title to the land, and that he will recover possession thereof in a proceeding he has already commenced for that purpose, even though the opinion is unfounded, and the legal owner of the land, in reliance thereon, purchases such tax title. *Perkins v. Trinka*, supra.

It does not constitute fraud which will entitle a vendee to rescind a purchase of real estate for the vendor honestly to represent that he has a good title to the property sold, where he states that his opinion is based upon a statement of fact made to him by the former owner, to whom he refers the vendee, who consults him in relation thereto before buying. *Hawkins v. Wells*, 17 Tex. Civ. App. 360, 43 S. W. 816.

A representation of title by a vendor of real estate is not fraudulent when honestly based upon an abstract of title furnished the vendee, where no other means are used

to inspire confidence in such assertion. *Botsford v. Wilson*, 75 Ill. 132.

Silence as to, or concealment of, defects in title.

The intentional concealment by a vendor of real estate of defects in his title constitutes actionable fraud, where, to his knowledge, the vendee purchases in ignorance of such defect, and is injured thereby. *Cullum v. Bank of Alabama*, 4 Ala. 21, 37 Am. Dec. 725; *Bryant v. Boothe*, 30 Ala. 311, 68 Am. Dec. 117; *Prout v. Roberts*, 32 Ala. 427; *Strong v. Lord*, 107 Ill. 25; *Devers v. Dallah*, 6 T. B. Mon. 102; *Johnson v. Pryor*, 5 Hayw. (Tenn.) 243; *Ingram v. Morgan*, 4 Humph. 66, 40 Am. Dec. 626; *Napier v. Elam*, 6 Yerg. 108; *Paulsrud v. Peterson*, 109 Minn. 524, 121 N. W. 898, 122 N. W. 874.

In *Cullum v. Bank of Alabama*, supra, the court remarked that "in all cases of purchase there is a trust and confidence reposed by the purchaser in the vendor that the estate is not impaired in value or encumbered by any act done by him; indeed, by offering to sell an estate the vendor virtually represents it as not encumbered by himself, or, if encumbered, he will free it before the sale is executed; and if he wishes to discharge himself from the consequences of this implied representation, it lies with him to show that the purchaser was informed or otherwise knew of the encumbrance."

An action in tort may be maintained against a vendor and others interested in the sale of certain real estate for falsely representing as a matter of fact that the title to the real estate is good, they being in a position to know, where they also concealed the fact that a certain person was insane, where such insanity clouded the title. *Burns v. Dockray*, 156 Mass. 135, 30 N. E. 551.

The vendee of real estate is entitled to rescind his purchase for false representation by the vendor as to title, although he

If the particular tract of land was in the actual possession of Kathan, deceased, for the full three years after execution and recording of the last tax deed, as found by the trial court, and it seems, as above indicated, that such must be taken as the fact, the tax titles were thereby extinguished, leaving Kate Pier without any interest in the land whatever at the time she represented to the Kathan heirs that she had the whole title under her tax deeds, for the purpose of inducing them to part with the patent title to Comstock. *Jones v. Collins*, 16 Wis. 595; *Pulford v. Whicher*, 76 Wis. 555, 45 N. W. 418.

It is the settled law, not disputed at all by appellants, that actual or constructive possession of land under a tax deed for the

full period of three years is necessary for operation of the statute of limitations, and that interruption of the mere constructive possession created by recording a tax deed of vacant and unoccupied land, by actual possession for any period by the former owner within the three years after such recording, turns the statute of limitations in favor of the former owner, which, if not interrupted by action on the part of the tax title claimant, or actual possession by him within the three years after the recording of the tax deed, extinguishes all rights under such deed. *Cornell University v. Mead*, 80 Wis. 387, 49 N. W. 815; *Midlothian Iron Min. Co. v. Belknap*, 108 Wis. 198, 84 N. W. 169.

No question is raised but what the proceedings whereby the title to the land in

was furnished an abstract of the property, where examination thereof would have shown his title to be perfect, the vendor knowingly concealing an outstanding adverse title, not shown by the abstract. *Anderson v. Buck*, 66 Iowa, 490, 24 N. W. 10.

A vendor, after having conveyed away the coal underlying certain land, is guilty of a fraud entitling the vendee to a rescission of the purchase thereof, where he conceals the fact of having made such conveyance, and contracts to convey the land in fee simple, without any encumbrances or restrictions. *Vernam v. Wilson*, 31 Pa. Super. Ct. 257.

Compare with *Wilson v. Higbee*, 62 Fed. 723, wherein the court said that the vendor of real estate, who had disposed of the right to use the waters of the adjoining creek for agricultural purposes, in a subsequent sale of the land might remain silent as to whether the water had been previously disposed of or conveyed to other parties, and if he had done so, he would have been safe, and added: "The seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself."

In order that the concealment of a defect in a vendor's title be fraudulent, it must appear that he had actual knowledge thereof; mere constructive notice is not sufficient. *Wilde v. Gibson*, 1 H. L. Cas. 605.

Silence of the vendor in the sale of land is not fraudulent, although there are outstanding adverse titles to the property, where it does not appear that, at the time, he had knowledge thereof. *Harland v. Eastland*, 3 Hardin (Ky.) 590.

In some jurisdictions a vendee is not permitted to rely upon the mere silence of the vendor as to his title, and make no inquiry or effort to investigate same. Thus, in *Steele v. Kinkle*, 3 Ala. 352, it was held that mere silence as to a mortgage by the person holding a bond for the conveyance of the land covered thereby at the time of selling to another is not a fraudulent concealment, entitling the vendee to relief, in the absence of any practices to conceal such mortgage from the purchaser, who might have ascertained its existence by the exercise of ordinary diligence.

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Mere silence by a vendor as to a judgment which is a lien on land which he is selling is not fraudulent as to a vendee who makes no inquiry in reference thereto. *Ward v. Packard*, 18 Cal. 392.

The mere silence of a third person who happens to be present at the time of a sale of real estate as to an encumbrance thereon of which he has knowledge does not constitute actionable fraud, rendering him liable to the purchaser. *Steele v. Kinkle*, 3 Ala. 352.

A purchaser of real estate who is informed that others own the property she is purchasing cannot rely blindly upon her belief that the vendor owns it and make no investigations in relation thereto, and thereafter hold the vendor for fraud, on the ground that he concealed his want of title. *Grosjean v. Galloway*, 82 App. Div. 380, 81 N. Y. Supp. 871.

Executory contracts.

A purchaser of real estate under an executory contract to purchase is generally held entitled to refuse to carry out the contract, and recover the amount paid on the purchase price, where he entered into the contract in reliance upon false and fraudulent representations of the vendor as to his title, or concealments by him of defects therein. *Smith v. Robertson*, 23 Ala. 312 (fraudulent representations); *Norris v. Hay*, 149 Cal. 605, 87 Pac. 380 (fraudulent representations); *Thomas v. Coultas*, 76 Ill. 493 (fraudulent representations); *Carr v. Callaghan*, 3 Litt. (Ky.) 365 (concealment of defects in title); *Glass v. Brown*, 6 T. B. Mon. 356 (fraudulent representation); *Gunby v. Sluter*, 44 Md. 237 (false or mistaken representation); *Inness v. Willis*, 16 Jones & S. 188 (fraudulent concealment of want of title); *Ryder v. Wall*, 29 Misc. 377, 60 N. Y. Supp. 535 (misrepresentation as to ability to convey); *Lloyd v. Farrell*, 48 Pa. 73, 86 Am. Dec. 563 (concealment by vendor of fact that others had an interest in the property he contracted to convey); *Woods v. North*, 6 Humph. 309, 44 Am. Dec. 312 (agreement by executor to convey, where he was with-

question was conveyed to George, and by him to the brick company, were void. It is insisted, however, that the representation made by Kate Pier as to her tax titles having extinguished the Kathan title was not a representation of fact, but was a mere legal opinion of the effect of the tax deeds, and so was not fatal to the Comstock deed.

We are unable to sustain the contention that the representation was a mere opinion, grounded on such pure mistake of law as equity will not relieve from. She knew, or ought to have known, that such a representation, in all reasonable probability, was false, unless the land was vacant and unoccupied at the time of the recording of her tax deeds, and so continued during the entire statutory period of three years. There-

fore she knew, or ought to have known, that such representation, by necessary implication, carried the idea that such vacancy and nonoccupancy had existed. So the representation was false and was of a fact material to the transaction which it operated to bring about.

It may be that Mrs. Pier did not know there was occupancy of the land, preventing the bar of the statute from running in favor of her tax titles. It may be that there was no moral turpitude characterizing the transaction. Whether there was or was not is not material. In this class of cases fraud in law is just as effective as fraud in fact. If one, in negotiating with another in contractual matters, makes misrepresentations of fact material to the transaction, for

out power to do so); *Mullins v. Jones*, 1 Head, 517 (misrepresentation as to title); *Trigg v. Read*, 5 Humph. 529, 42 Am. Dec. 447 (misrepresentation as to title); *Topp v. White*, 12 Heisk. 165 (misrepresentation as to title); *Spencer v. Sandusky*, 46 W. Va. 582, 33 S. E. 221 (fraudulent representation and intentional concealment of defect in title); *Davis v. Lee*, 52 Wash. 330, 132 Am. St. Rep. 973, 100 Pac. 752 (want of title in vendor); *Adams v. Reed*, 11 Utah, 480, 40 Pac. 720.

In *Davis v. Lee*, *supra*, the court said that "if a vendor who contracts to sell land has no title, or fails or refuses to furnish a proper title at the time the vendee is entitled to it, the latter can maintain an action to recover the purchase price. The vendor has assumed the attitude of ownership, and a failure to perform is in law a misrepresentation for which an action will lie."

Necessity of exercising diligence to discover truth of representation.

Where the vendor of real estate makes representations as of fact with reference to the title thereto, the vendee has a right to rely thereon; and having such right, there devolves upon him no legal duty to search the records or otherwise exercise diligence in investigating the truth of the representations. Hence it is no defense that the vendee might have ascertained the falsity of the representations by the search of the records, or by seeking other accessible information. *Carpenter v. Wright*, 52 Kan. 221, 34 Pac. 798; *Young v. Hopkins*, 6 T. B. Mon. 18; *Campbell v. Whittingham*, 5 J. J. Marsh. 96, 20 Am. Dec. 241; *Pryse v. McGuire*, 81 Ky. 608; *Parham v. Randolph*, 5 Miss. 435, 35 Am. Dec. 403; *Kiefer v. Rogers*, 19 Minn. 32, Gil. 14; *Blumenfeld v. Stine*, 96 App. Div. 160, 89 N. Y. Supp. 85; *Wilson's Appeal*, 109 Pa. 606, 7 Atl. 88; *Vernam v. Wilson*, 31 Pa. Super. Ct. 257; *Griffeth v. Hanks*, 46 Tex. 217; *Morris v. Brown*, 38 Tex. Civ. App. 266, 85 S. W. 1015.

In *Watson v. Atwood*, 25 Conn. 313, an action against the vendor of real estate for 28 L.R.A. (N.S.)

fraud in the sale thereof by means of false representations relating to the title, the court said that the vendor had no cause to complain of the charge to the jury, that it was the duty of the vendee to exercise ordinary care to ascertain the title to land he was about to purchase; and added that such instruction was much more favorable to the vendor than he was entitled to.

The vendee has the right to rely upon the representations of the vendor as to his right to the use of water from a creek adjoining the premises purchased, the facts in relation thereto being within the knowledge of the vendor, and unknown to the vendee. In such circumstances the vendee may rely upon the representations, although other means and opportunity are afforded him to ascertain the truth; he is not bound, under the law, to go to the expense of verifying the truth or falsity of the statements, and the vendor is estopped from asserting that the vendee might easily have ascertained the truth if he had examined the records of the county where the land was situated. The liability of the vendor arises from his own fraud and falsehood, and is not in any manner affected by the question of diligence upon the part of the vendee. *Wilson v. Higbee*, 62 Fed. 723.

In *Simmang v. Harris* (Tex. Civ. App.) 27 S. W. 786, the court remarked that there could be no relief for a vendee who had been defrauded in the purchase of land by false representations as to title, unless he satisfactorily established that he had been prevented from investigating the records and informing himself by the fraudulent acts of his vendors, and added: "If appellant was induced by the fraud of his vendors to forego an examination of the records, and acted on their representation as to the records, and that representation was false, he would, notwithstanding his lack of business prudence, be entitled to a rescission of the contract."

And in *Ward v. Packard*, 18 Cal. 391, the court said that it was not the policy of the law to encourage laches, and if means of information were known to the purchaser, and within his reach, he could not afterwards al-

the purpose of inducing such other to act thereon, and such other reasonably does so act to his prejudice, he may avoid the result on the ground of fraud, actual or constructive,—the latter really involving, generally, mere mistake of fact,—and may have the aid of equity jurisdiction to that end. It is not a sufficient answer to the claim of such other for such person to say he made the representations honestly, for it is, in law and equity, as regards avoiding such a transaction, his duty to know whereof he speaks, or not to speak at all as of his knowledge. This court has many times spoken on that question. *Davis v. Nuzum*, 72 Wis. 439, 1 L.R.A. 774, 40 N. W. 497; *McKinnon v. Vollmar*, 75 Wis. 82, 6 L.R.A. 121, 17 Am. St. Rep. 178, 43 N. W. 800;

lege his ignorance as a ground of fraud, unless by deceit or misrepresentations he had been actually misled.

A misrepresentation by a vendor as to his title or right to convey real estate does not constitute fraud, where, prior to the execution of a conveyance thereof, the title deeds to the property, which indicated that others were the owners, were placed by the vendor in the hands of the vendee for examination. *Warner Elevator Co. v. Guthrie*, 7 Ohio N. P. 200.

Compare with *Buchanan v. Burnett* (Tex. Civ. App.) 114 S. W. 406, affirmed in 102 Tex. 492, 132 Am. St. Rep. 900, 119 S. W. 1141, wherein it appeared that the vendees were given an opportunity to, and that they did partially, examine an abstract of the vendor's title and certain of his deeds, and it further appeared that the complete examination of these papers would have disclosed the defect in the vendor's title complained of. It was, however, held that this fact did not prevent the vendees from relying upon the representations of the vendor, as to his title, and that having such right to rely, they were under no duty to examine the papers at hand to ascertain the truth of the representations. The court said: "Appellees were not bound to exercise diligence to discover the falsity of appellant's representations, if he made them as charged, and appellees, without knowledge of their falsity, . . . believed them to be true, and they constituted a material inducement to appellees to enter into the contract, it was sufficient, notwithstanding greater care and diligence on appellees' part might have resulted in a discovery of the fraud."

In some jurisdictions the rule is asserted that the purchaser of real estate may rely upon the representations of the vendor as to title, where he has exercised ordinary care in investigating the truth of the representations.

Thus, in *Younge v. Harris*, 2 Ala. 108, the court said that a person induced to purchase land by the fraudulent representation of the vendor in relation to his title, the falsehood of which he had no means of ascertaining by the exercise of ordinary dili-

Gunther v. Ullrich, 82 Wis. 222, 33 Am. St. Rep. 32, 52 N. W. 88; *Hart v. Moulton*, 104 Wis. 349-359, 76 Am. St. Rep. 881, 80 N. W. 599; *Krause v. Busacker*, 105 Wis. 350, 81 N. W. 406; *Zunker v. Kuehn*, 113 Wis. 421, 88 N. W. 605.

The statement made to the effect that it is sufficient to put the party making misrepresentations in the wrong if he knew, or ought to have known, of their falsity, is not grounded on principles of actionable negligence, but on the idea that he who makes representations to another of material facts, for the purpose of inducing that other to enter into contractual relations with him, and which are liable to accomplish the purpose without want of ordinary care on the part of such other, is bound at his peril to know

gence, may have relief in chancery for the injury suffered by him by reason thereof.

And in *Steele v. Kinkle*, 3 Ala. 352, the court said that equity would not aid the purchaser of real estate to rescind a contract because of fraudulent representations as to encumbrances thereon, where there had been a want of ordinary diligence upon the part of the vendee in ascertaining the truth of the representations.

Fenley v. Moody, 104 Ga. 790, 30 S. E. 1002, held that material false representations as to easements or appurtenances to land, made by the owner with intent to deceive the purchaser, and which actually did deceive him, entitled the vendee to maintain an action for deceit against the vendor, where the falsity of the representations was not ascertainable by examination of the land.

And see *Andrus v. St. Louis Smelting & Ref. Co.* 130 U. S. 643, 32 L. ed. 1054, 9 Sup. Ct. Rep. 645, wherein the vendee, in seeking to recover for false representations by the vendor to the effect that he could place the vendee in immediate possession of the property, alleged that he used all diligence in his power to find out whether the representations were true or false, except to inspect the premises. The court denied the right to recover, upon the ground that inspection of the premises was the most natural and obvious mode of ascertaining the truth of the representations, and asserted the rule that "the law does not afford relief to one who suffers by not using the ordinary means of information, whether his neglect be attributable to indifference or credulity; nor will industrious activity in other directions to the neglect of such means be of any avail."

Where the purchaser of real estate is informed by another that he owns a portion of such real estate, and he does not believe the vendor owns any of it, she cannot rely blindly upon her belief that the vendor owns the property, and make no investigations in relation thereto. *Grosjean v. Galloway*, 82 App. Div. 380, 81 N. Y. Supp. 871.

A party making a false representation as to title of real estate being sold by him can-

whereof he speaks. He ought to know, not because he should not act negligently, but because, under such circumstances, he should not speak to the facts at all for the purpose of inducing such other to act depending on the truthfulness of what is spoken, unless he knows that his representations are true, or expects to assume the burden of warrantor of their truthfulness. *Palmer v. Goldberg*, 128 Wis. 103-111, 107 N. W. 478.

That one may reasonably act, not knowing the facts involved himself, but on the faith of representations by another who desires to enter into contractual relations with him, as to conditions not presently observable, as in this case, is so elementary that

not escape liability therefor on the ground that a bystander, in the presence of the purchaser, stated facts tending to show that the representation was untrue, where the purchaser nevertheless relied upon the representation of the vendor. *Haight v. Hayt*, 19 N. Y. 464.

As affected by the nature of the conveyance.

It is generally held that the right of a vendee to complain of fraudulent representations by a vendor as to his title to real estate sold is not affected by the fact that he received a deed containing covenants of warranty which extended to the particular defect. *Diggs v. Kirby*, 40 Ark. 420; *Crutchfield v. Danilly*, 16 Ga. 432 (vendor insolvent); *Napier v. Elam*, 6 Yerg. 108.

The fact that the vendee has accepted a conveyance with covenants of warranty does not deprive him of his remedy of rescission for false and fraudulent representations by the vendor as to his title. *Buchanan v. Burnett*, *supra*.

In *Prout v. Roberts*, 32 Ala. 427, a vendee was held entitled to rescind a purchase of real estate for fraudulent concealment by the vendor of a defect in his title, even though he had received a deed with covenants of warranty.

Compare with *Andrus v. St. Louis Smelting & Ref. Co.* 130 U. S. 643, 32 L. ed. 1054, 9 Sup. Ct. Rep. 645, which denied the right of a vendee to maintain an action for deceit practised upon him by the vendors, to induce him to purchase certain real estate by false representations to the effect that they had obtained a release of the right of all claimants to the land in question, and could put him into immediate possession. The court said that the covenant of quiet possession in the deed merged all previous representations as to the possession, and limited the liability growing out of them; and added: "Those representations were, to a great extent, if not entirely, mere expressions of confidence in the company's title and the right of possession which followed it against all intruders; the covenant was an affirmation of those statements in a form 29 L.R.A. (N.S.)

we will treat it as a matter not requiring extended discussion in this opinion.

The claim is made that the court should not have set aside the entire deed to Comstock because of the false representations as to the particular tract of land. It may be that a showing might have been made which would have moved the court, as one of conscience, to require a partial restoration of the consideration paid by Comstock, and, on condition thereof, vacate the deed to him as to the one 40 only. The court, at the close of the evidence, fully acquitted Mrs. Pier of any actual intention to perpetrate a fraud upon respondents. She was found to have innocently, so far as moral turpitude is concerned, made false representations as to a material fact under such cir-

admitting of no misunderstanding. . . . False and fraudulent representations upon the sale of real property may undoubtedly be ground for an action for damages when the representations relate to some matter collateral to the title of the property, and the right of possession which follows its acquisition, such as the location, quantity, quality, and condition of the land, the privileges connected with it, or the rents and profits derived therefrom. . . . Such representations by the vendor as to his having title to the premises sold may also be the ground of action where he is not in possession, and has neither color nor claim of title under any . . . judgment establishing his right to them. . . . But where the vendor holding in good faith under an instrument purporting to transfer the premises to him, or under a judicial determination of a claim to them in his favor, executes a conveyance to the purchaser, with a warranty of title and a covenant for peaceable possession, his previous representations as to the validity of his title or the right of possession which it gives are regarded, however highly colored, as mere expressions of confidence in his title, and are merged in the warranty and covenant which determined the extent of his liability."

The law exacts the same degree of truth and honesty from a vendor by quitclaim deed as from one by warranty deed. Hence, a vendor of real estate, who, by false representations as to the title, induces a purchase thereof, is not relieved from liability for the fraud by reason of the fact that the conveyance was by quitclaim deed. *Ballou v. Lucas*, 59 Iowa, 24, 12 N. W. 745; *Atwood v. Chapman*, 68 Me. 38, 28 Am. Rep. 5.

A vendee who has been defrauded in the purchase of real estate by false representations by the vendor as to his right to the use for agricultural purposes of waters from an adjoining creek is not precluded from recovering for the deceit by the fact that the conveyance to him was only a quitclaim deed. It is immaterial what covenants were in the deed; it is the fact that the plaintiff was induced by the false representations of the vendor to pay his money for the prop-

cumstances as to render the resulting transaction voidable. The court concluded a statement of his views thus: "I think there is sufficient ground for a court of equity to set aside the deed so far as it relates to this tract of land." Thereupon respondents' counsel said, addressing the court: "I am perfectly willing for you to make it optional with defendants whether the whole deed shall be set aside." Then counsel for appellants addressed the court, saying: "I prefer to take the judgment of the court." Thereafter findings were filed, closing with an order for judgment as we find it.

It may be that after what occurred counsel for appellants should have offered evidence enabling the court to apportion the consideration paid by Comstock so as to require restoration to him of the equitable amount which the particular tract repre-

sented. It is the opinion of the court that they should, and that since they failed to do so, it was not error for the court to deal with the transaction as an entirety, as was done. Certainly, as the case was submitted, there was no basis for a judicial splitting up of the consideration.

In the judgment of the writer, the offer of respondents' counsel should, under the circumstances, have been regarded as consenting to restore the whole consideration as a condition of relief from the deeds and mortgage as to the one 40. That is reasonable, it seems, since only the trifling sum of \$30 was involved. It is the writer's judgment that General Bragg, the able counsel who represented appellants at the trial, so understood it. He is too good a lawyer to have supposed it required consent or acceptance of an option on his part to enable the court

erty that gives him a cause of action independent of the covenants in the deed. *Wilson v. Higbee*, 62 Fed. 723.

Necessity that injury result.

The rule is well settled that unless the vendee suffers some damage or injury from the fraudulent representation of the vendor as to title, he has no right of action either for damages for the fraud or to rescind. *Merryman v. David*, 31 Ill. 404; *Buford v. Guthrie*, 14 Bush, 690; *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1026; *Withers v. Atkinson*, 1 Watts, 236.

The rule was applied in *Merryman v. David*, supra, as to representation by the vendor that he was the owner of land, where he made good his title prior to proceedings by the vendee. And to the same effect is *Buford v. Guthrie* and *Sonnesyn v. Akin*, supra.

In *McNeny v. Campbell*, 81 Neb. 754, 116 N. W. 671, modified in other respects, in 81 Neb. 761, 117 N. W. 885, it was held that misrepresentations as to title by a vendor who had no title to the land, but had an option for the purchase thereof, were not material to the contract or calculated to injure the vendee, hence did not constitute a fraud entitling him to a rescission of the contract, especially where he had not affirmatively shown his reliance upon the representations by recording his contract.

And the vendee has no claim against the vendor for false representations as to an encumbrance upon the real estate purchased, where the vendor procures a release thereof before any injury therefrom is caused the vendee. *Withers v. Atkinson*, supra.

The mere existence of a mortgage upon real estate at the time the vendor contracts for its sale is not of itself sufficient evidence of fraud to entitle the vendee to va-

cate the agreement, where the facts are such as to warrant the presumption that the vendor intended to procure the discharge of the encumbrance before the time arrived for him to convey the property to the vendee, free of encumbrance. *Greenby v. Cheevers*, 9 Johns. 126.

A subsequent purchaser from the original vendee, who had assumed and agreed to pay a mortgage given for the purchase price, cannot defend an action for the foreclosure of the mortgage on the ground that the vendor in the original transaction had made false and fraudulent representations as to the title to the property conveyed, it not appearing that he was in any way influenced by such representations. *Harding v. Commercial Loan Co.* 84 Ill. 251.

Effect of vendee retaining possession.

The general rule is that a vendee is not precluded from proceeding against the vendor for fraudulent representations as to the title of real estate by reason of the mere fact that he is in possession of the real estate, although such possession is under and by virtue of the purchase alleged to have been procured through fraud. *Younge v. Harris*, 2 Ala. 108 (action to rescind); *Spence v. Duren*, 3 Ala. 251; *Cullum v. Bank of Alabama*, 4 Ala. 21, 37 Am. Dec. 725; *Bailey v. Jordan*, 32 Ala. 50 (action to rescind); *Watson v. Kemp*, 41 Ga. 586; *English v. Thomasson*, 82 Ky. 280; *Fristoe v. Laytham*, 18 Ky. L. Rep. 157, 36 S. W. 920 (action to rescind); *Stockham v. Cheney*, 62 Mich. 10, 28 N. W. 692 (action for deceit); *Morris v. Brown*, 38 Tex. Civ. App. 266, 85 S. W. 1015.

In *Cullum v. Bank of Alabama*, supra, it was held that a vendee who has purchased real estate believing it to be free from encumbrance, the encumbrance having been

to act upon such an offer, so understood. He doubtless acted as he did without reflection, through caution as to prejudicing the rights of his clients on appeal respecting the merits of the case, and was surprised when the order for judgment was filed providing for a vacation of the deed as to the whole twenty-two 40's, when the only misrepresentation complained of was as to the one 40, and the statute of limitations had, in fact, run as to the other twenty-one 40's, so that the vacation of the deed as to them could not be of any benefit to respondents. I think the trial court should have interpreted the offer of respondents' counsel as indicated, and ordered judgment vacating the deed as to the one tract, on return of the \$30, or a less sum if respondents' counsel saw fit to make proof of the equitable amount.

The court, however, is of the opinion, as

indicated, that as appellants' counsel elected to have the case submitted, the trial court did not commit error; that it was warranted in not requiring restoration of the full consideration for the recovery of the one 40, and in not, on its own motion, requiring proof enabling it to equitably divide the consideration so as to deal with the deed and mortgage as to the one 40 by itself.

The foregoing covers all questions in the case which appear to be of sufficient moment to require special notice. All have received consideration, resulting, in the opinion of the court, that the judgment should be affirmed.

Timlin and Barnes, JJ., took no part.

fraudulently concealed from him, may, upon discovery thereof, require its prompt removal; and if the vendor does not effect its discharge, the vendee is entitled to a rescission of the contract, and he may either remain in possession of the land purchased or abandon it.

The rule was asserted in *Morris v. Brown*, supra, that it was not necessary for a defrauded vendee of real estate to show a prior eviction in order to rescind a purchase of the real estate for fraudulent representation of the vendor as to the title; if a paramount outstanding title is shown, with danger of eviction by reason thereof, it is sufficient.

In *Watson v. Kemp*, supra, it was held that the fact that the purchaser was in possession of the land purchased would not prevent him from defending an action on the note given for the purchase price, on the ground that the vendor made false and fraudulent representations as to the title to the land, where his possession did not accrue from the purchase, he being in possession at the time of the purchase.

But a party entitled to rescind a contract for fraud on the part of the vendor in misrepresenting the title to real estate may deprive himself of this remedy by acquiescing in or by dealing with the property as owner after the discovery of the fraud. "A party claiming to rescind a contract for fraud must act promptly on discovery of the fraud, and restore or offer to restore to the other party what he has received under it; he cannot thereafter deal with the other party on the footing of an existing contract, or with the property acquired under it as his own." *Schiffer v. Dietz*, 83 N. Y. 300.

In conformity with the general doctrine that the party cannot rescind while retaining the fruits of the contract, a purchaser of real property must surrender possession

acquired under the contract before he can maintain an action for its rescission; and where fraud is claimed for misrepresentation as to title, continuance in possession after the discovery of the fraud is evidence of an intent to abide by the contract. *Ibid*.

In *Christian v. Scott, Minor* (Ala.) 354, again before the court in 1 Stew. (Ala.) 490, 18 Am. Dec. 68, it was held in an action upon a bond for the purchase price of real estate, that it was error for the court to refuse to charge the jury that although the vendor may have made fraudulent representations as to his title, yet, if the purchaser received possession of the real estate purchased, and carried the contract into execution by taking unto himself ownership of the land, payment of the bond on the ground of fraud could not be resisted.

The long silence and acquiescence of the purchaser of real estate, in possession thereof, after discovering a defect in his title, innocently represented by the vendor to be good, conclusively shows that such representation did not induce the purchase, and hence cannot be thereafter relied upon as a defense to an action upon notes given for the purchase price. *Glasscock v. Minor*, 11 Mo. 655.

A payment upon the purchase price made by a vendee in possession of land under a contract for the purchase thereof is a waiver of his right to a rescission of the contract on the ground of false and fraudulent representations by the vendor as to his title. *Webb v. Stephenson*, 11 Wash. 342, 39 Pac. 952.

In *Tissot v. Throckmorton*, 6 Cal. 471, it was held that, in order for a vendee of land to entitle himself to a rescission of the purchase upon the ground of fraudulent representations by the vendor as to his title, he must surrender his deed to be canceled.

MONTANA SUPREME COURT.

WESTERN MINING SUPPLY COMPANY,
Respt.,

v.

JOHN J. QUINN et al., Appts.

(40 Mont. 156, 105 Pac. 732.)

Pleading — conversion — sufficiency of allegations.

1. An allegation that, at the time of the seizure of property to satisfy the debt of a third person, plaintiff was the owner and in possession of it, and that such property continued to be his until its sale by the sheriff, is sufficient to support an action for conversion.

Sale — warehouse — delivery of possession.

2. Change of possession of a warehouse on leased land, and its contents, is effected by a delivery of the key, and ceasing to exercise control over the property.

Same — fraud — retention of possession — delivery — attachment.

3. Delivery of possession of chattels under a contract of sale is sufficient as against an attachment, if made prior to the time it is levied, although the sale is not accompanied by immediate delivery, as required by statute.

(December 15, 1909.)

APPEAL by defendants from an order of the District Court for Silver Bow County granting plaintiff a new trial after verdict in defendants' favor in an action brought to recover damages for the alleged conversion of certain property. Affirmed.

The facts are stated in the opinion.

Note.— *Is failure to take immediate possession upon sale of chattels cured by taking possession before attachment of the particular right or lien of the person attacking the sale.*

As to effect of chattel mortgagee taking possession before any specific right or lien of creditors has attached, see note to Martin v. Holloway, 25 L.R.A.(N.S.) 110.

Where the rule prevails that a sale of goods or chattels is invalid as to the creditors of the seller unless there is a change in the possession, it is sufficient to answer this requirement if the buyer takes possession prior to the levy upon the goods or chattels by a creditor or creditors of the seller. Hall v. Gaylor, 37 Conn. 550; Cornwall v. Mix, 3 Idaho, 687, 34 Pac. 893; Cruikshank v. Cogswell, 26 Ill. 366; Blake v. Graves, 18 Iowa, 312; Kirby v. Bunch, 15 Ky. L. Rep. 238; Brown v. Glathary, 4 La. Ann. 124; Shumway v. Rutter, 8 Pick. 443, 19 Am. Dec. 340; Bartlett v. Williams, 1 Pick. 288; McIntosh v. Smiley, 107 Mo. 377, 17 S. W. 979; Markey v. Umstattd, 53 Mo. App. 20; Toney v. Goodley, 57 Mo. App. 235; Halderman v. Stillington, 63 Mo. App. 212; Kelly-Goodfellow Shoe Co. v. Vail Bros. 28 L.R.A.(N.S.)

Messrs. C. M. Parr and James E. Healy, for appellants:

To support an action for conversion, the plaintiff must allege a concurrence both of a right of property, general or special, and the actual possession, or the right of immediate possession; and this concurrence must exist at the time of conversion.

Citizens' Bank v. Tiger Tail Mill & Land Co. 152 Mo. 145, 53 S. W. 902; Gaskill v. Barbour, 62 N. J. L. 530, 41 Atl. 700; Mount v. Cubberly, 19 N. J. L. 124; Irving v. Hubbard, 12 S. D. 67, 80 N. W. 156; Babcock v. Caldwell, 22 Mont. 460, 56 Pac. 1081.

A sale of personal property unaccompanied by immediate delivery is void as to creditors, though delivery be made before levy.

Watson v. Rodgers, 53 Cal. 403; Edwards v. Sonoma Valley Bank, 59 Cal. 149; Ruggles v. Cannedy, 127 Cal. 300, 46 L.R.A. 371, 53 Pac. 911, 59 Pac. 827; Stewart v. Hoffman, 31 Mont. 184, 77 Pac. 689, 81 Pac. 3.

The possession which the purchaser is required to take of the property sold, in order to render the sale valid under the statute, must be open, notorious, and unequivocal, a joint or concurrent possession with the vendor being insufficient.

Allen v. Massey, 17 Wall. 351, 21 L. ed. 542; Dooley v. Pease, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 329; Swartzburg v. Dickerson, 12 Okla. 566, 73 Pac. 282; Stewart v. Hoffman, supra; Ettien v. Drum, 32 Mont. 311, 80 Pac. 369; Johnson v. Emery, 31 Utah, 126, 86 Pac. 869, 11 A. & E. Ann.

84 Mo. App. 94; Scully v. Albers, 89 Mo. App. 118; Clute v. Steele, 6 Nev. 335; Smith v. Stern, 17 Pa. 360; Kendall v. Samson, 12 Vt. 515; Shield v. Anderson, 3 Leigh, 729; M'Kinley v. Ensell, 2 Gratt. 333; Carr v. Glasscock, 3 Gratt. 343.

In Gilbert v. Decker, 53 Conn. 401, 4 Atl. 685, the court said that the retention of possession by a vendor of chattels raised a presumption of fraud only in favor of attaching creditors during such possession, and there was no such presumption as to creditors attaching after delivery to the purchaser.

And in Cornwall v. Mix, the court said that a sale of personal property was not void under the statute of frauds, although not followed by immediate delivery and actual and continuous change of possession of the property sold, where delivery was made prior to the levy of an attachment upon the property by a creditor of the seller, and the property was actually in possession of the buyer at the time of such levy.

In Cruikshank v. Cogswell, the court said that a sale of chattels, although made prior to the taking of possession by the purchaser, was, by taking possession, completed as to all the world, and was as good and

Cas. 23; Cahoon v. Marshall, 25 Cal. 197; Bell v. McClellan, 67 Cal. 283, 7 Pac. 699.

Messrs. Robert B. Smith, Maury & Templeman, and J. O. Davies, for respondent:

The complaint was sufficient.

Kelly v. Northern P. R. Co. 35 Mont. 243, 88 Pac. 1009; Truro v. Passmore, 38 Mont. 544, 100 Pac. 966.

A sale of personal property is not void when possession is taken by the buyer before a levy at the suit of another creditor.

Bartlett v. Williams, 18 Mass. 288; Markey v. Umstattd, 53 Mo. App. 20; Toney v. Goodley, 57 Mo. App. 235; Halderman v. Stillington, 63 Mo. App. 212; Kendall v. Samson, 12 Vt. 515; Sydnor v. Gee, 4 Leigh, 535; M'Kinley v. Ensell, 2 Gratt. 333; Carr v. Glasscock, 3 Gratt. 343; Gilbert v. Decker, 53 Conn. 401, 4 Atl. 685; Blake v. Graves, 18 Iowa, 312; Brown v. Glathary, 4 La. Ann. 124; Kirby v. Bunch, 15 Ky. L. Rep. 238.

Holloway, J., delivered the opinion of the court:

This action was commenced by the plaintiff, a corporation, against John J. Quinn, the surety on his official bond as sheriff of Silver Bow county, and C. M. Parr, to recover damages for the conversion of certain goods and chattels alleged to belong to the plaintiff. The property consists of a warehouse and certain mining machinery, lumber, etc., which was seized by Quinn, the sheriff, on July 8, 1905, by virtue of a writ of attachment issued in an action wherein Parr was plaintiff, and the Shackleton & Whiteway Construction Company was defendant,

perfect as if the sale and delivery had both occurred at the same time; and added: If the sale is not fraudulent in fact, a delay in delivery does not make it fraudulent in law, as to those whose rights accrue subsequent to the time of delivery.

And in McIntosh v. Smiley, it was said that a bona fide sale of goods and chattels, possession of which is not taken within a reasonable time after the sale, is not void as to the vendor's creditors, if, before institution of any attachment suit by such creditors, the purchaser takes and retains actual possession.

So, in Kendall v. Samson, the court remarked that even though, upon the sale of chattels, there was not such a change in the possession as was necessary to protect the sale against the creditors of the vendor, yet such a change might be made at any time before an attachment intervened in favor of the seller's creditors; and added: "If the change [in the possession] does not immediately follow the sale, this would indeed be proper matter to go to the jury on the question of a fraudulent sale in fact, but it would be too much to hold that the change in the possession could not be per-

and afterwards sold by order of the court. In the district court the defendants recovered judgment upon a general verdict in their favor. The plaintiff moved for a new trial, which was granted, and the defendants appealed from the order.

1. It is contended that the complaint does not state facts sufficient to constitute a cause of action. The complaint alleges that, at the time of the seizure of the property, the predecessors of plaintiff were the owners and in possession of all the property, and that such property continued to be theirs until the sale thereof by defendant Quinn. While this pleading is not a model, we think it is sufficient. The seizure of one's property to satisfy a claim of another is a conversion of the property, irrespective of the designation given such seizure in the complaint.

2. The plaintiff claims that its predecessors in interest purchased the property from the Shackleton & Whiteway Construction Company before the seizure by Quinn. But it is urged by defendants that the evidence is insufficient to show such a delivery and change of possession as is necessary to satisfy our statute. The testimony discloses that the warehouse is personal property situated at 516 South Main street, Butte, on leased land; and that the other property was contained in the warehouse at the time of the seizure. It further discloses that on June 26, 1905, upon a sale of the property by the Shackleton & Whiteway Construction Company to Farnham, Wright, & Hale, the predecessors of this plaintiff, the construction company delivered up to Farnham the

perfectly subsequently to the sale, so as to avoid the effect of the principle applicable to sales fraudulent *per se*."

Some statutes have been construed to render absolutely void, as against creditors, any sale of goods and chattels where a change in the possession was not substantially contemporaneous with the sale. In jurisdictions where such a rule prevails, it has been held that a change in the possession some time after the sale, although prior to the attachment of any liens upon the property in favor of the creditors of the seller, does not cure the invalidity; and hence, the property is subject to the seller's creditors, although at the time in the hands of the buyer. Chenery v. Palmer, 6 Cal. 119, 65 Am. Dec. 493; Watson v. Rodgers, 53 Cal. 401; Edwards v. Sonoma Valley Bank, 59 Cal. 148; Autrey v. Bowen, 7 Colo. App. 408, 43 Pac. 908.

This was also formerly the rule in Missouri. Franklin v. Gumersell, 9 Mo. App. 84, s. c. subsequent appeal 11 Mo. App. 306; Cabanne v. Bay, 10 Mo. App. 594. These cases, however, were in effect overruled by McIntosh v. Smiley, *supra*.

key to the warehouse, and thereafter did not exercise any ownership or control over any of the property. While this evidence is meager, it is held to be sufficient by the authorities generally. In *Dodge v. Jones*, 7 Mont. 121, 14 Pac. 707, this court said: "No particular act or formal ceremony is necessary to make a delivery in law. Any act done, coupled with the intent to change the ownership, which has the effect to transfer the dominion over the thing sold to the buyer, is a delivery." In that case it was held sufficient delivery and evidence of change of possession that the horses in question were gathered, a distinguishing brand placed upon them, and they then returned to their customary range. The subject was again considered at length by this court, and the doctrine of the *Dodge Case* approved, in *Webster v. Sherman*, 33 Mont. 448, 84 Pac. 878. It has been repeatedly said by the courts that the acts which will amount to a delivery will vary with the different cases, and will depend upon the character and quantity of the property sold. *Lay v. Neville*, 25 Cal. 546. It is easy enough to understand the meaning of the words "immediate delivery" as used in § 6128, Rev. Codes, when applied to the sale, over the counter, of small articles of merchandise; but when one attempts to apply the same meaning to a sale of a kiln of hot bricks, or hay in the swath, stack, or mow, or a large quantity of ore in bins, he appreciates fully the difficulty in the way of establishing a hard and fast rule applicable to all cases. It is not now an open question that there may be such a constructive delivery as will fully satisfy the requirements of the statute; for the law does not demand impossibilities. In *Sharp v. Carroll*, 66 Wis. 62, 27 N. W. 832, it was held that the delivery by the vendor to the vendee of the key to the granary was a sufficient delivery of the wheat therein, which had been sold. The same thing is held in *Kellogg Newspaper Co. v. Peterson*, 162 Ill. 158, 53 Am. St. Rep. 300, 44 N. E. 411, with reference to a sale of heavy machinery in a room. In *Pope v. Cheney*, 68 Iowa, 563, 27 N. W. 754, it was held sufficient that the purchaser of corn in a crib, immediately after the purchase, nailed up the openings in the crib. The same ruling is made in *Vining v. Gilbreth*, 39 Me. 496; *Morrison v. Oium*, 3 N. D. 76, 54 N. W. 288. See also *Ott v. Sutcliffe* (N. J. Eq.) 60 Atl. 965; *Rapple v. Hughes*, 10 Idaho, 338, 77 Pac. 722.

3. It is further contended by the defendants that at least a portion of the property seized was liable to the satisfaction of Parr's claim against the Shackleton & Whiteway Construction Company, for the 28 L.R.A. (N.S.)

reason that the delivery, if any, was not made contemporaneously with the sale by the construction company to Farnham, Wright, & Hale. The evidence discloses that a portion of the property in controversy was sold by the construction company to Farnham and others, on May 29, 1905, and that the purchasers did not take possession of it until June 26th following, when the remaining portion was sold. Bearing in mind, then, that the attachment was not levied until July 8, these facts present in concrete form the question raised by instruction 6a, given by the trial court. The question may be stated as follows: If a bona fide sale of goods and chattels is not accompanied by an immediate delivery, is the sale void as to an attaching creditor of the vendor, if the vendee, before the institution of the attachment suit, takes and retains actual possession of the property? So far as our investigation discloses, California and Colorado are the only states in which this question is answered in the affirmative. *Watson v. Rodgers*, 53 Cal. 401; *Edwards v. Sonoma Valley Bank*, 59 Cal. 148; *Autrey v. Bowen*, 7 Colo. App. 408, 43 Pac. 908. There is not any reason advanced in any of these cases for the conclusion reached. Counsel for defendants also cite *Stewart v. Hoffman*, 31 Mont. 184, 77 Pac. 689, as indicating the same view; but an examination of the opinion of this court on rehearing (31 Mont. 190, 81 Pac. 3) will disclose that the question was not before the court at all.

Prior to 1888 the court of appeals of Missouri held as do the courts of California and Colorado. *Cabanne v. Bay*, 10 Mo. App. 594; *Franklin v. Gumersell*, 11 Mo. App. 306. But in *McIntosh v. Smiley*, 32 Mo. App. 125, the precise question which we now have before us came before the same court. Section 2505, Mo. Rev. Stat. 1879, is substantially the same as our § 6128 above. Our statute requires an immediate delivery; the Missouri statute requires a delivery within a reasonable time. In other respects the statutes are the same. In the *McIntosh Case*, however, the court found or assumed that the delivery was not made within a reasonable time after the sale, but was made before the attachment was levied; so that the question presented there was the same as the one which we are called upon to decide. The Missouri court makes a careful analysis of the statute, and points out the object to be obtained, as well as some of the objects to be avoided, by its enactment. It refers to the familiar rule that, as between the parties to the sale, the transaction would be equally valid whether there was or was not a delivery. It propounds the question for solution as we have

stated it, and, among other things, says: "Under this statute we think that actual possession taken and retained by the vendee of the things sold completes his title against all persons except those whose rights may have intervened between the sale and the taking of possession. . . .

The vendor having made a sale, another sale is not needed (in fact he has nothing to sell); and he may complete the sale by a delivery of the things sold, to take effect against others from the time that the delivery is made. In such a case the sale runs, as between the vendor and vendee, from the time of the sale; but, as against creditors of and purchasers in good faith from the vendor, from the time of delivery. This we think is the clear meaning of the statute. To hold otherwise would be to prevent a sale unaccompanied by a delivery within a reasonable time from ever becoming perfected as against creditors and subsequent purchasers in good faith. To do this would be to perpetrate wrong, to prevent which was the object of the statute. The want of a delivery places the vendee, as to creditors and subsequent purchasers in good faith, in the same position he would have been in if he had not purchased the property, but in no worse position. While the possession remains in the vendor, after the lapse of a reasonable time for a delivery, as to such creditors and purchasers there is no sale, but the vendee is not disqualified from becoming the purchaser of the property; and taking actual possession and retaining it makes him a purchaser even against such parties, if, at the time of the taking of possession, they have no existing rights. An attaching creditor, as such, has no rights in the debtor's property until after levy under the writ of attachment. Therefore the question in this case must be answered in the negative." Because the court of appeals of Missouri is not a court of last resort, and because of the importance of the question decided, the case was certified to the supreme court, where it is said: "This case is certified here from the Kansas City court of appeals as being in conflict with previous decisions rendered by the St. Louis court of appeals. It is reported in 32 Mo. App. 125. The conclusion reached by the Kansas City court of appeals in this case, that a bona fide sale of goods and chattels, the possession of which is not taken within a reasonable time after the sale, within the meaning of § 2505, Rev. Stat. 1879, is not void, as to an existing creditor at the time of the sale, if, before the institution of an attachment suit by such creditor, the vendee takes and retains actual, continuous possession of the property, and remains in possession thereof at the time of the levy

of the writ in such suit upon such property, meets with our approval. The precise question under that section of the statute has not hitherto been passed upon by this court, but the decision of the court of appeals finds support in the rulings of this court in the following cases: *Dobyns v. Meyer*, 95 Mo. 132, 6 Am. St. Rep. 32, 8 S. W. 251; *Petring v. Chrisler*, 90 Mo. 650, 3 S. W. 405. The judgment of the Kansas City court of appeals is affirmed." *McIntosh v. Smiley*, 107 Mo. 377, 17 S. W. 979.

In *Clute v. Steele*, 6 Nev. 335, this same question came before the supreme court of Nevada, under a statute substantially the same as our own. After speaking of the presumptions arising from nondelivery, as deduced by the courts and text writers, the court says: "While, however, decisions have been thus various, there has been a uniformity of holding upon the necessary status of those who might question such a sale; and the conclusion is that no creditor at large may do so, and that a delivery before the attachment of any lien of a creditor will satisfy the law and validate the sale." And the following is quoted, with approval, from *Hilliard on Sales*: "And the general rule may be laid down that where a vendee takes possession at a time subsequent to the sale, but before the rights of creditors accrue, by attachment or otherwise, he shall hold against creditors." Page 183, note.

Section 2663, Okla. Stat. 1893, is identical in terms with our § 6128 above, and in *Woods v. Faurot*, 14 Okla. 171, 77 Pac. 346, the court held that, under the statute above, if delivery was not made until some months after the sale, but was made before the attachment was levied, the sale was valid as against the attaching creditor. In *Tiedeman on Sales*, p. 115, it is said: "Mere delay in the delivery of the possession is ordinarily not considered fraudulent as to creditors, as long as delivery is actually made before attachment." In 14 Am. & Eng. Enc. Law, 2d ed. p. 382, it is said: "As a general rule, it is considered to be sufficient that the purchaser take possession of the property before any creditors of the vendor have obtained specific rights to, or liens upon, the property sold, as by the levy of attachments or executions or otherwise." The following authorities, in addition to those mentioned, fully support the rule thus announced: *Gilbert v. Decker*, 53 Conn. 401, 4 Atl. 685; *Cruikshank v. Cogswell*, 26 Ill. 366; *Blake v. Graves*, 18 Iowa, 312; *Bartlett v. Williams*, 1 Pick. 288; *Waite v. Mathews*, 50 Mich. 392, 15 N. W. 524; *Weeks v. Fowler*, 71 N. H. 518, 53 Atl. 543; *Levin v. Russell*, 42 N. Y. 251; *Wilson v. Leslie*, 20 Ohio, 161; *Rule v. Bolles*, 27 Or. 368, 41 Pac. 691; *Smith v. Stern*, 17 Pa.

360; *Coty v. Barnes*, 20 Vt. 78; *Sydnor v. Gee*, 4 Leigh, 535. See also *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022; *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

As between the parties to a sale of personal property, it is wholly immaterial whether there is any delivery of the thing sold. It is equally true that a mere creditor, as such, does not have any interest whatever in his debtor's property. If the *Shackleton & Whiteway Construction Company* had in good faith sold all this property to *Farnham* and others on June 26th, and had accompanied the sale by an immediate delivery, *Parr* could not complain, even though such sale might operate to defeat him in the collection of his debt. On the contrary, if *Parr* had commenced his action and procured a writ of attachment to be issued and levied upon the property while still in the possession of the construction company, *Farnham* and others could not complain, even though they had parted with value which would be lost to them. Manifestly, the purpose of the statute is not to hinder the transfer of personal property, but to prevent such property of debtors being fraudulently put beyond the reach of creditors by secret transfers. When, however, the delivery has been made before a creditor has moved to collect his debt, he is not placed at any greater disadvantage than he would have been had delivery accompanied the sale. Even if *Parr* had extended credit to the construction company upon the strength of its ownership of the property in controversy,—which he did not do,—he could not assert a right to have the particular property subjected to the payment of his debt, unless by mortgage or some other lien he had burdened it with his claim; for at any time after extending such credit, and before he fixed a lien upon it, the construction company, by a bona fide sale, accompanied by immediate delivery, could have put the property beyond the reach of *Parr*. It would seem that the legislature did not intend to go further than to declare that, during the time the vendor of personal property remains in possession after sale, his creditors may seize the property in satisfaction of their claims, notwithstanding such sale. This view accords with the overwhelming weight of authority. Instruction 6a, as given by the court, did not correctly state the law.

4. There is not any substantial evidence in this record of actual fraud in the transaction between the construction company and *Farnham* and others, and therefore instruction 7a should not have been given. We are not able to find any evidence to justify the giving of instructions 8a and 9a.

For the errors in giving these instructions,
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the District Court properly granted a new trial, and the order is affirmed.

Brantly, Ch. J., concurs.

Smith, J., being disqualified, did not hear the argument, and takes no part in the foregoing decision.

NEW YORK COURT OF APPEALS.

AMPERSAND HOTEL COMPANY, Appt.,
v.

HOME INSURANCE COMPANY, Respt.

(198 N. Y. 495, 91 N. E. 1099.)

Appeal—striking out defense—error.

1. It is not reversible error to entertain a motion to strike out a separate defense to an action at the trial, if the defense is insufficient in law and has not been demurred to.

Insurance—conspiracy to destroy property—effect.

2. A conspiracy, unaccompanied by an overt act, to burn insured property, in which the owner joins, does not, although it is in process of accomplishment at the time the property is destroyed by fire, avoid the policy, under provisions that the policy shall be void in case of any fraud touching any matter relating to the subject of the insurance, or if the hazard is increased by any means within the control or knowledge of the insured.

(*Willard Bartlett, Werner, and Chase, JJ.,* dissent from proposition 2.)

(May 31, 1910.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Third Department, reversing a judgment of a Trial Term for Franklin County in plaintiff's favor in an action brought to recover the amount alleged to be due on a certain fire insurance policy. **Reversed.**

The facts are stated in the opinion.

Messrs. **William B. Ellison** and **Arnold L. Davis**, with Messrs. **Ellison, MacIntyre, & Davis**, for appellant:

The conspiracy to burn did not constitute a fraud on the part of the plaintiff within the meaning of the policy.

People v. Cook, 8 N. Y. 79, 59 Am. Dec.

Note.—The above decision seems to be one of first impression upon the question whether a conspiracy to burn insured property in which the owner takes part, unaccompanied by an overt act in furtherance thereof, would defeat recovery for a loss of the insured premises by a fire not the result of the conspiracy.

451; Brackett v. Griswold, 128 N. Y. 644, 28 N. E. 365, 112 N. Y. 454, 20 N. E. 376; New York C. & H. R. R. Co. v. Reeves, 41 Misc. 499, 85 N. Y. Supp. 28; 1 Abbott, Trial Brief on Pleadings, p. 311; Douglass v. Winslow, 20 Jones & S. 447; 8 Cyc. Law & Proc. p. 645; Hutchins v. Hutchins, 7 Hill, 107; Bayles v. Vanderveer, 11 Misc. 207, 32 N. Y. Supp. 1117; Place v. Minster, 65 N. Y. 95; Verplanck v. Van Buren, 76 N. Y. 247; Colyer v. Guilfoyle, 47 App. Div. 302, 62 N. Y. Supp. 21; Lee v. Kendall, 56 Hun, 610, 11 N. Y. Supp. 131; Buffalo Lubricating Oil Co. v. Everest, 30 Hun, 586; Kolel American Vatiferes Jerusalem v. Eliach, 29 Misc. 499, 61 N. Y. Supp. 935; Green v. Davies, 182 N. Y. 409, 75 N. E. 536, 3 A. & E. Ann. Cas. 310; Savile v. Roberts, 1 Ld. Raym. 374; Eccardt v. Eisenhauer, 74 App. Div. 37, 77 N. Y. Supp. 18; Kingsland v. Haines, 62 App. Div. 146, 70 N. Y. Supp. 873; Lefler v. Field, 52 N. Y. 621; Farmers' Nat. Bank v. St. Regis Paper Co. 77 App. Div. 558, 78 N. Y. Supp. 889; Saxton v. Dodge, 57 Barb. 84; Dubois v. Hermance, 56 N. Y. 673; Baylies, Code Pleading, 2d. ed. 408.

There was no "increase of hazard" within the meaning of the policy.

Parker v. Arctic F. Ins. Co. 59 N. Y. 1; Smith v. Mechanics' & T. F. Ins. Co. 32 N. Y. 399; Whitney v. Black River Ins. Co. 72 N. Y. 121, 28 Am. Rep. 116; Roberts v. Chenango County Mut. Ins. Co. 3 Hill, 501; Grant v. Howard Ins. Co. 5 Hill, 10; Eager v. Fireman's Fund Ins. Co. 71 Hun, 352, 25 N. Y. Supp. 35, affirmed in 148 N. Y. 726, 42 N. E. 722; LeRoy v. Park F. Ins. Co. 39 N. Y. 56.

Mr. Hartwell Cabell, for respondent:

A conspiracy to burn, between the owner of insured property and third persons, whether successfully consummated or not, is such a fraud upon the insurer as will defeat a recovery.

F. Dohmen Co. v. Niagara F. Ins. Co. 96 Wis. 56, 71 N. W. 69; Fowler v. Phoenix Ins. Co. 35 Or. 562, 57 Pac. 421; Virginia F. & M. Ins. Co. v. Vaughan, 88 Va. 830, 14 S. E. 754; Sternfeld v. Park F. Ins. Co. 50 Hun, 262, 2 N. Y. Supp. 766; Anibal v. Insurance Co. of N. A. 84 App. Div. 634, 82 N. Y. Supp. 600; Imperial F. Ins. Co. v. Gunning, 81 Ill. 238; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 73, 31 L. ed. 63, 66, 8 Sup. Ct. Rep. 68.

A conspiracy to burn the insured property, entered into by and with the knowledge of the assured, constitutes such an "increase of hazard" as will avoid the policy, under the provision declaring it void "if the hazard be increased by any means within the knowledge or control of the insured."

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Kyte v. Commercial Union Assur. Co. 149 Mass. 116, 3 L.R.A. 508, 21 N. E. 361.

Whether the conspiracy caused or did not cause the conflagration is entirely immaterial.

Williams v. People's F. Ins. Co. 57 N. Y. 274; Cole v. Germania F. Ins. Co. 99 N. Y. 36, 1 N. E. 38; Daniels v. Equitable F. Ins. Co. 50 Conn. 551; People v. Bush, 4 Hill, 133.

If there was any danger from incendiarism fairly and reasonably to be apprehended and known to the insurer, it was his duty to disclose it, where the danger was real and substantial, i. e., one that necessarily enhanced the risk.

McBride v. Republic F. Ins. Co. 30 Wis. 562; Curry v. Sun Fire Office, 155 Pa. 467, 26 Atl. 658; North American F. Ins. Co. v. Throop, 22 Mich. 146, 7 Am. Rep. 638; Walden v. Louisiana Ins. Co. 12 La. 134, 32 Am. Dec. 116; Whittle v. Farmville Ins. & Bkg. Co. 3 Hughes, 421, Fed. Cas. No. 17,603; Curry v. Commonwealth Ins. Co. 10 Pick. 535, 20 Am. Dec. 547; Donley v. Glens Falls Ins. Co. 184 N. Y. 107, 76 N. E. 914, 6 A. & E. Ann. Cas. 81; Williams v. People's F. Ins. Co. 57 N. Y. 285.

Gray, J., delivered the opinion of the court:

The plaintiff brought this action to recover the amount of a policy of insurance issued by the defendant, the Home Insurance Company, upon its hotel buildings and contents, which were destroyed by fire. Among other defenses interposed by the answer of the insurer was this, in brief: That the principal stockholder of the plaintiff, who was also its treasurer and a director and who had the management of its affairs, at a time shortly prior to the occurrence of the fire, had entered into a fraudulent conspiracy with one Van de Wall and others, "wherein it was planned that said Van de Wall should procure some person or persons to cause the destruction of the property by fire, to enable the plaintiff to recover . . . the insurance; . . . and that while said plan and conspiracy was still in existence, and in process of accomplishment, the said fire occurred." When the case came on for trial, the plaintiff moved to strike out this separate defense as insufficient in law, and the motion was granted. The trial resulted in a decision in favor of the plaintiff; but the appellate division reversed the judgment, and ordered a new trial of the action. By reference to the opinion below, it appears that the reason moving the learned justices to the reversal was the action of the trial court in striking out the defense to which I have alluded.

That presents the serious question in this case, upon which alone a difference of opinion exists in this court. So far as the practice is concerned, I may say that we do not think that the trial court committed any error in entertaining the plaintiff's motion. If the defense was insufficient in law, it was proper, when it had not been demurred to, to object to it at that time and to move for its dismissal. The advantage in such practice is that the ground to be covered by the evidence upon the trial is seasonably restricted.

The question whether the defense was a good one turns upon two provisions of the policy. The first one provides that the policy should be void "in case of any fraud . . . touching any matter relating to this insurance or the subject thereof." I do not think that there was any actionable fraud, within the meaning of the policy, in the fact alleged in this defense, because, whatever the evil design, nothing—no act—was done touching the insured property, or the contract of insurance. There was neither some fraudulent transaction working, or tending to work, wrong or injury; nor did the conspiracy to defraud get beyond the stage of a mere plan to do something. A fraud was intended, as we must assume; but the intention, not being connected with any injury, remained a mere mental project. A conspiracy, to be the subject of legal complaint, must reach the stage of development where an overt act is committed, or some actual damage is occasioned. It must be put in execution, and not remain in plan. It is not like a case where insurance is procured with a fraudulent intent on the part of the assured; for that would be insurance against knavery. If this defense asserts the truth, the question is, How could an afterthought, an evil design later conceived to burn up the property, which never reached the point of anything done in accomplishment, be deemed to have affected the risk? The contract was unaffected, the subject of the insurance remained the same, and no liability of the insurer was increased.

The other provision of the policy is that it should be void "if the hazard be increased by any means within the control or knowledge of the insured." I do not think that there was any increase in the hazard. I take that language as limiting the meaning of the provision to a case where by some act done to the property, which the assured knew of, or could have prevented, the company's risk had been increased. Ordinarily, we understand, and so the decisions run, that the hazard of insurance is increased when the risk is changed by some new use of, or some other burden placed

upon, the property; that is to say, when the physical status or condition of the subject of insurance is rendered by some act of the insured other than what it was when the insurance was applied for and the application acted upon. It is said in *May on Insurance* (§ 219) that the insurance "must be presumed to be made with reference to the character of the property insured, and to the owner's use of it in the ordinary way, and for the purpose for which such property is ordinarily held and used, or to cover risks incident to such use." Again, the same author, in speaking of the provision against any alteration or change in the situation or circumstances affecting the risk, says (§ 218) that it "binds the assured not only not to make any alteration or change in the structure or use of the property, which will increase the risk, but prohibits him from introducing any practice, custom, or mode of conducting his business which would materially increase the risk, and also from discontinuing any precaution represented in the application to have been adopted and practised with a view to diminish the risk." In *Joyce on Insurance* (§ 2207), the author, when referring to the provision against an increase of risk by the acts of the insured, speaks of "an act done by the insured," which, "although not included in the class of specific hazards, nevertheless avoids the policy if it increases the risk." Here, though a conspiracy, as we must assume, was entered into, it was to execute a plan for defrauding the insurer. The conspiracy did not come to a head. The property and the contract to insure it were unchanged and unaffected by what was a mere proposal to affect them. The purpose to burn up the property never had ceased to be a purpose within the domain of thought. It is not even alleged that the person was procured to execute the plan that was conceived. As the trial judge well suggested, the conspiracy remained but a mental conception. It was not the cause of the fire, and it had no connection with it. The parties charged with conspiring had not got beyond the stage where they might change their minds and repent them of their wicked design. They might conclude eventually to do nothing in completion of their conspiracy.

I think that a mere intention or plan to do an injury is of no consequence, where no act is done to effectuate it, and the party whose interests are aimed at is neither injured, nor exposed to loss, as the result of having put the plan into some way of execution. To allege that the conspiracy was in "process of accomplishment" when the fire actually occurred is not equivalent to the allegation of an overt act. It was noth-

ing more than saying that the conspiracy was proceeding toward accomplishment. I am not aware of any case which holds that the hazard of insurance has been increased, unless some act has been done to, or about, the property, which changes it physically, or the burdens upon it, or affects its ownership.

The defendant could not sue for damages by reason of the conspiracy, and, if that be true, I think it could not set it up as a defense to the performance of its contract.

Upon no other questions affecting the judgment are we divided in opinion, and, for the reasons given, I advise that the order and judgment of the Appellate Division be reversed and that the judgment of the Trial Term be affirmed, with costs in both courts to the appellant.

Cullen, Ch. J., and Haight and Hiscock, JJ., concur.

Willard Bartlett, J., dissenting:

I cannot assent to the proposition that the formation of a conspiracy to burn an insured building, which conspiracy is in process of accomplishment, does not increase the hazard. The hazard referred to is the risk of destruction by fire; and, according to the prevailing opinion, this risk is not increased by taking steps to carry into execution a plan to destroy the building by fire. The phrase "in process of accomplishment" in the answer can only mean that steps were being taken to effect the purpose of the conspiracy. It seems to me so clear that the hazard was thereby increased that I will simply record my dissent without further discussion.

Werner, and Chase JJ., concur.

NEBRASKA SUPREME COURT.

NEBRASKA TELEPHONE COMPANY,
Appt.,
v.
CITY OF LINCOLN.

(82 Neb. 59, 117 N. W. 284.)

Telephone company — occupation of streets — business.

1. The franchise or right to occupy the streets of a city by a telephone company is not identical with the business or occupation of the company.

Double taxation — telephone company — gross earnings — franchise.

2. An occupation tax measured by a percentage of the gross earnings of a tele-

phone company, whose franchise is also taxed in connection with its tangible property, according to its value as a going concern, does not tax the same property twice.

Taxation — telephone company — privilege of using streets.

3. The provision for an annual payment of \$500 to the city of Lincoln in the respective franchise ordinances of two telephone companies, "in consideration of the rights and privileges granted," is a sum exacted by the city for the privilege of using the streets under its proprietorship of the streets, and while termed a "privilege tax," is in the nature of a rental charge or compensation for the use of the streets.

Same — gross earnings.

4. The exaction of a percentage of the gross earnings of its business in the ordinance granting a franchise to the Western Union Independent Telephone Company is an exercise of the taxing power of the city, and is a tax upon the business or occupation of conducting a telephone business within the city.

Telephone company — franchise provision — gross earnings tax — repeal.

5. Such provision is also legislative in its character, and subject to repeal.

Taxation — telephone companies — uniform operation.

6. A provision in an ordinance imposing an occupation tax that "the sum and amount

Note. — Does taxation of the business or occupation of a public-service corporation, and the taxation of its franchise or right to occupy the streets, amount to double taxation.

NEBRASKA TELEPH. CO. v. LINCOLN was followed and its principles applied in Lincoln Traction Co. v. Lincoln, 84 Neb. 327, 121 N. W. 435, in which the same court sustained an occupation tax imposed by the same city upon a street railway company, though the company's franchise was also taxed in connection with its tangible property, according to its value as a going concern.

On the other hand, in Cumberland Teleph. & Teleg. Co. v. Hopkins, 121 Ky. 850, 90 S. W. 594, it was held to be double taxation, and therefore beyond the power of a city, to exact a tax upon the business of selling railroad tickets, or of handling freight for pay within the city, from a railroad company which had already paid a tax on its franchise (which franchise included the right to occupy the streets of the city). The court refused to accede to the proposition that the franchise tax which was collected from the railroad company under the general assessment of its franchise, being a property tax, was quite distinct from the occupation tax which the city sought to impose. The same conclusion was reached as to an occupation tax imposed upon a telephone company by the same city, where the city had sold the company a franchise for a certain price per year, payable annually.

of the occupation tax or taxes on the gross receipts required to be paid under existing ordinances" may be deducted from the amount of the tax is not void because not uniform as to persons or property, since by its operation all persons engaged in the same occupation are taxed upon the same basis and in the same manner.

Occupation tax — telephone company — business outside city.

7. Under its charter, the city of Lincoln may lawfully enact an ordinance imposing upon telephone companies a business or occupation tax measured by the gross receipts within the city, and the fact that tolls and rentals collected within the city are in part for messages over lines lying in part beyond the city limits does not invalidate the tax.

(June 26, 1908.)

A PPEAL by plaintiff from a judgment of the District Court for Lancaster County in defendant's favor in a suit to restrain the enforcement of a municipal ordinance imposing an occupation tax on telephone companies. Affirmed.

The facts are stated in the opinion.

Messrs. H. F. Rose and W. W. Morsman for appellant.

Messrs. John M. Stewart and T. F. A. Williams for appellee.

Letton, J., delivered the opinion of the court:

The Nebraska Telephone Company is a corporation operating a telephone system in the city of Lincoln with local and long-distance connections. In 1885 it obtained a franchise to transact business within the city. No provision was made in the ordinance for the payment of any consideration for the privilege. In 1894 an ordinance was passed giving it the right, for a term of fifty years, to construct and maintain subsurface conduits for carrying its wires and cables under ground. This ordinance provided for the payment of \$500 annually to the city "as a privilege tax," in consideration of the rights and privileges thereby granted. In 1903 the city granted to the Western Union Independent Telephone Company a like franchise to operate a telephone system. This ordinance provided that the grantee should pay the city \$500 annually, "in accordance with the terms and conditions of the existing ordinances fixing the occupation tax upon telephone companies." The grantee was also required to pay a further sum annually, equal to 1 per cent of its gross earnings, during the first term of five years after the commencement of its business, and 2 per cent for the next five years, and 3 per cent annually thereafter during the term of the grant, which was for fifty years. The grantee transferred its rights under this ordi-

nance to the Lincoln Telephone Company, which constructed and has operated a telephone system in Lincoln for several years. In 1907 ordinance No. 448 was passed, providing that all telephone companies doing business in the city should pay an occupation tax "equal to 2 per cent of the gross receipts of such companies from exchange rentals and tolls taken within the city, not including any interstate service or services for the United States government;" and after providing for penalties for delinquencies and for the filing of proper statements, the ordinance further provided that, in the payment of said occupation tax, any such company shall have the right to deduct therefrom "the sum and amount of the occupation tax or taxes on the gross receipts required to be paid by such company or companies to the city of Lincoln under existing ordinances." The Nebraska Telephone Company began this action, praying that the latter ordinance be declared void, and praying for an injunction to restrain the city of Lincoln from attempting to enforce the same or collect the tax imposed thereby. As grounds for the action, it alleged in the petition that the two telephone companies named are the only companies doing business in said city, and that there is no probability there will ever be more; that the ordinance was framed and passed with reference to these companies; that there was not at that time any ordinance imposing any occupation tax or taxes on the gross receipts of telephone companies, or any other ordinance imposing obligations upon such companies, except those named, and that the purpose and object of the provision permitting the companies to deduct from the amount of the tax "the sum and amount of the occupation tax or taxes on the gross receipts required to be paid by such companies to the city of Lincoln under existing ordinances" was to permit each company to deduct the sum which they had severally agreed to pay by the respective franchise ordinances, and was a device, under the pretense of taxation, to impose an unequal burden on the plaintiff by permitting the Lincoln Telephone Company to subtract payments made in performance of its contractual obligations from the amount of the occupation tax ostensibly imposed upon it by the ordinance. The plaintiff alleges, further, that the tax imposed by the ordinance is not uniform in its operation, and imposes unequal taxation, and is in violation of the charter of the city, the Constitution of Nebraska and of the United States. The city answered, admitting the passage of the ordinance, but denying the other facts alleged, and praying for an accounting of the amount of taxes due under the ordinance

from the plaintiff, and a decree for their payment. The district court found the ordinance to be legal and valid, refused an injunction, and ordered the plaintiff to file a statement and pay the tax, as required by the ordinance. From this judgment, the Nebraska Telephone Company has appealed.

The plaintiff first contends that the ordinance creating the occupation tax is void because it imposes double taxation upon it by taxing the same thing for the same purpose twice, but under different names. The argument is that because, under the law in this state with reference to taxation of public-service corporations, their tangible property and their franchises, including all intangible rights and interests, are to be taken together, and the value of the whole be taken as a going concern, the right or privilege of doing business or carrying on the occupation is therefore taxed, and cannot be again taxed by virtue of an impost laid upon the right to carry on the occupation within the city; citing *Western U. Teleg. Co. v. Omaha*, 73 Neb. 527, 103 N. W. 84; *Nebraska Teleph. Co. v. Hall County*, 75 Neb. 405, 106 N. W. 471; *State ex rel. Bee Bldg. Co. v. Savage*, 65 Neb. 714, 91 N. W. 716. The plaintiff, in its brief, says: "We fully concede that the fact that the property employed in a business is taxed as property and *ad valorem* is no objection to a separate tax upon the business in which the property is employed, provided the business or occupation has not in fact been, or is not required by the law to be, taxed in taxing the property and franchises 'by valuation.'" So that the whole argument of the plaintiff on this point is based upon the proposition that the franchise and the business or occupation of the telephone company are identical.

But there is a distinction between the right or privilege to transact or carry on business within the corporate limits of a city and the actual operation of the business itself. It is the franchise, the grant of the right to do business, which must be taxed according to value, the same as other property. It is property and is susceptible of valuation. It is well known that the right to occupy the streets of a city by a corporation, either for gas, water, lighting, street railway, telegraph, or telephone purposes, often constitutes an exceedingly valuable property even before the construction of the operating plant, or the doing of any business whatsoever. Such unavailed of franchises, as a matter of common knowledge, have in some instances been valued and sold at many thousands of dollars before one cent has been realized from the enterprise. On the other hand, the corporation owning a franchise and carrying on a business might be conducting its operations at

an actual loss, its earnings being insufficient to pay running expenses, with no better prospects in the future, and therefore its franchise of little or no value. While its gross earnings might amount to a large sum of money, yet a tax upon the business, measured by the gross earnings, would be upheld as a business tax. A business tax measured by gross earnings is a tax upon the business which is actually performed, and is not a tax upon property in any sense; while a tax levied by valuation on the right to do business is a tax upon property, irrespective of whether or not any business or occupation has been actually carried on. It seems clear that a property tax based upon the value of the franchise, and a business or occupation tax based upon the gross earnings of a public-service corporation, are in no wise identical as to the subject of taxation, and do not constitute double taxation in any sense. On the contrary, it requires no argument to show that the exaction of a heavy business tax upon the gross revenues of a corporation would inevitably have the effect to lower the value of a franchise, and to reduce its assessed value for the purpose of taxation as property. *New York ex rel. Brooklyn City R. Co. v. New York Tax Comrs.* 199 U. S. 50, 50 L. ed. 84, 25 Sup. Ct. Rep. 713; *Wiggins v. Chicago*, 68 Ill. 372; *Goldsmith v. Huntsville*, 120 Ala. 182, 24 So. 509; *St. Joseph v. Ernst*, 95 Mo. 360, 8 S. W. 558; *York v. Chicago, B. & Q. R. Co.* 56 Neb. 572, 76 N. W. 1065; *Producers' Oil Co. v. Stephens*, 44 Tex. Civ. App. 327, 99 S. W. 157; *State v. Galveston, H. & S. A. R. Co.* 100 Tex. 153, 97 S. W. 71; *Browne v. Mobile*, 122 Ala. 159, 25 So. 223; *South Covington & C. Street R. Co. v. Bellevue*, 57 L.R.A. 50 and note (105 Ky. 283, 49 S. W. 23); *Gray, Limitations of Taxing Power & Pub. Indebtedness*, § 1373. We think there is no merit in the plaintiff's contention.

2. The plaintiff next contends that the tax imposed is not equal and uniform, as required by the Constitution of the state and by the charter of the city. The constitutional provision involved is contained in § 6, art. 9, Const., vesting municipal corporations with authority to assess and collect taxes, and providing that "such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The ordinances granting the franchise to the Nebraska Telephone Company (aside from the requirements of a \$500 privilege tax) contain no provision for the payment of any portion of its gross earnings to the city, while the ordinance granting the franchise under which the Lincoln Telephone Company operates provides for a payment annually of a portion of its

gross earnings. The plaintiff's argument is that, though upon its face the taxing ordinance No. 448 seems to be uniform in respect to the telephone companies within the city, yet, in reality, it is a gross discrimination against it, for the reason that its effect is to deprive it of the advantage of its contract with the city; that by a contractual relation of the Lincoln Telephone Company, it is compelled to pay the city a definite amount each year, and that by this ordinance it is allowed to deduct the amount of this contractual obligation from the tax, thus creating a gross lack of uniformity; that since by virtue of its franchise obligation the Lincoln Telephone Company must, for the greater portion of its franchise term, pay 2 or 3 per cent of its gross receipts to the city, if it is permitted to deduct these annual payments from the amount of the tax imposed by this ordinance, it will pay no occupation tax whatever, since the amount of its contract obligation will equal or exceed the tax. On the other hand, the city contends that the annual payments required to be made by the Lincoln Telephone Company by the terms of the franchise ordinance are in the nature of an occupation tax, and that the ordinance under consideration, instead of being subject to the objection of lack of uniformity, does in fact make 'hat uniform which was not so before, since it requires each telephone company to pay an equal tax to the city upon the same occupation. The difference seems to be in the view taken as to the obligations imposed upon the Lincoln Telephone Company by the franchise ordinance. If they are mere payments under contract in return for the privilege of using the streets, we would be inclined to hold with the plaintiff. To determine this question requires us to set out and examine the various provisions of the ordinances referred to, bearing upon the payment of money to the city by each of these companies and by telephone companies generally. The ordinance granting the Nebraska Telephone Company the right to lay underground conduits provides that, "in consideration of the rights and privileges granted to the Nebraska Telephone Company by this and prior ordinances, the said Nebraska Telephone Company shall, so long as it exercises such rights and privileges, pay into the city treasury of the city of Lincoln annually, as a privilege tax, the sum of \$500, said sum to be paid on or before the 1st day of April in each year." The ordinance granting the franchise to the grantor of the Lincoln Telephone Company provides: "In consideration of the rights, privileges, and franchise hereby granted, the Western Union Independent Telephone Company . . . shall pay into the city treasury of

the city of Lincoln annually, the sum of \$500, said sum to be paid on or before the 1st day of April in each year . . . under and in accordance with the terms and provisions of the existing ordinance, fixing an occupation tax upon telephone companies." The only "existing ordinance fixing an occupation tax upon telephone companies" was that granting the Nebraska Telephone Company the right to lay subsurface conduits, a portion of which is quoted. After this provision referring to the previously existing ordinance, it is provided: "And said Western Union Independent Telephone Company shall pay annually into the treasury of the city of Lincoln, on the 1st day of April in each year, a per cent of its gross annual earnings from its plant in the city of Lincoln, as follows: 1 per cent of its said gross earnings each year for the first five years, 2 per cent of its said gross annual earnings each year for the next five years, and 3 per cent of its gross annual earnings annually thereafter during the remaining period granted by this ordinance." The ordinance granting to the Nebraska Telephone Company the right to place subsurface conduits was the only prior ordinance which could be referred to, and the fact that the tax is named therein as a "privilege tax," and not as "an occupation tax," as is stated in the later ordinance, does not, we think, change the legal effect or meaning of the latter. The \$500 was exacted each year from both companies in compensation for the privilege of using the streets. It is not, strictly speaking, an exercise of the taxing power, but is exacted by virtue of the right of proprietorship in the public streets possessed by the city, and, as provided in the first of these two ordinances, is to be paid "in consideration of the rights and privileges granted." The exaction is not a tax upon the property of the corporations nor upon their business, but is in the nature of a rental charge or recompense for the use of the streets. *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485. In that case a charge of \$5 per annum for each telegraph pole placed in the city of St. Louis was held to be of the nature of a rental charge, and not a tax, and was upheld as to the right of the city to impose a reasonable charge for such use.

The provision of the ordinance which follows, requiring a percentage of the gross earnings of the company to be paid to the city, is apparently an exercise of the taxing power pure and simple, and is clearly a business or occupation tax. No part of it became due or payable until the business of receiving and transmitting messages had actually been transacted. The \$500 privilege

tax is payable as long as the respective companies exercise the right and privileges in the public streets granted to them by the ordinances, and not exceeding fifty years, while the tax upon the business does not begin to operate until business is transacted. The tax is similar in its operation to a tax upon the business of an auctioneer, based upon his gross annual sales, or one estimated by the number of passengers carried by a street car company, or the number of messages delivered by a telegraph company. The privilege to use the streets might have been granted gratuitously or in return for a lump sum, or possibly it might have been sold to the highest bidder, but the exaction of a tax upon the business of the corporation stands upon the same footing as a tax upon other occupations. It was within the power of the city to impose the burden upon the corporation in the same ordinance that granted the franchise; and, though ineffective as an occupation tax against other telephone companies, in all probability the grantee, having accepted the benefits of the ordinance, would be estopped to repudiate its burdens. But that company is not here complaining. There can be no doubt that the city has the power to repeal that portion of the ordinance imposing this obligation, and if it had done so before it enacted ordinance No. 448, no objections on the score of lack of uniformity could possibly arise. The fact that a contract was embraced in the ordinance does not make it any less legislative in character, nor less subject to appeal so far as the imposition of the tax is concerned. *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241. Moreover, the Nebraska Telephone Company accepted its franchise subject to the exercise of the taxing power of the city, which was liable to be used at any time. It has no standing in court to complain of the fact that an occupation tax is imposed upon it. It has always been subject to this contingency. Neither has it any right to object to the repeal of an ordinance imposing a tax upon its rival and competitor, or to the enactment of one that may have the same effect, even though the result may be to equalize the burdens of taxation, and thus deprive it of an advantage it possessed over the competing company. The fact that in these ordinances the payments are variously denominated privilege tax or occupation tax does not change their nature, nor does the fact that the payment required by the franchise ordinance is not dignified

with any title whatever change its character. The tax upon gross receipts imposed upon the Lincoln Telephone Company is nothing more or less than a tax upon the business transacted by the company, although it is embraced within the terms of an ordinance which grants a franchise. The exaction is one made under the taxing power of the city, for revenue purposes, and not under the proprietary interest in the streets, and this fact in no wise interferes with the power of the city to impose an equal tax upon the Nebraska Telephone Company. The purpose of the present ordinance is to impose a uniform business or occupation tax upon both telephone companies; and, while a better or less cumbersome method might have been chosen to effectuate the purpose, the law will look to the substance of things rather than to their appearance.

It is probable that the tax may also be upheld upon the principle of classification. We see no reason why telephone companies may not be placed in classes depending upon whether they are required by the term of their franchise to pay a percentage of their gross receipts to the city or not, and requiring a lesser payment from those in the former class than from those in the latter. In the New York franchise tax law such a distinction is made, and those corporations which are required to pay any amount for a special franchise to a municipality are allowed to deduct that amount from the franchise tax levied by the state. These provisions were upheld both by the court of appeals of New York and by the Supreme Court of the United States (*People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 174 N. Y. 417, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69; *Id.*, 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 A. & E. Ann. Cas. 381); both courts holding that they did not deny the holders of some franchises the equal protection of the law, or deprive them of their property without due process of law. These are not the specific objections made in this case, but the rulings are worthy of mention and the opinions are enlightening.

3. The plaintiff's last contention is that this is an occupation tax upon business conducted beyond the corporate limits of the city, and that the city has no power to levy an occupation tax upon a business partially conducted beyond its corporate limits. The tax provided for by the ordinance is "the sum and amount of 2 per cent of the gross receipts resulting from rentals and tolls of such company or companies on the business of such company or companies in the city of Lincoln, including the rental charges resulting from business in the city of Lincoln, and all toll service and charges result-

ing from toll service from persons within this city to persons within this state, and all toll service paid at the office of any such company or companies in the city of Lincoln for toll service between the persons within this state and persons within this city. There shall be excepted from the provisions of this ordinance all toll service between persons in this city and persons outside of this state, and all toll service interstate, and all interstate business and all toll service or rental charges on account of the United States government service or any of its departments, or state service or any of its departments; and no part or portion of the tax provided for in this ordinance shall be levied upon or assessed against or taken from any such business so excepted from the provisions hereof." The plaintiff argues that in the transmission of messages from the city of Lincoln to points outside of the city, a portion of the business transacted must necessarily be beyond the limits of the city, and that the city, therefore, has no power to tax the same, relying upon certain language in the opinion in the case of *Western U. Teleg. Co. v. Fremont*, 39 Neb. 692, 26 L.R.A. 698, 5 Inters. Com. Rep. 46, 58 N. W. 415, and on the dissenting opinion of Irvine, C., in that case. Whatever language might have been used in the argument in the opinion in that case, the law is squarely laid down by the decision that the license tax imposed upon the telegraph company is not invalidated by the fact that the telegrams received and delivered within the city were transmitted over the lines of the telegraph company from other points within the state, or that the messages received by it at its office or place of business in the city were transmitted to various other places in the state. It may be observed in this connection that the tax is not a tax upon the gross receipts, but it is a tax upon the occupation or business, the volume of which is measured by the gross amount of money received in the city of Lincoln for all business transacted, except United States, state, and interstate. The principles involved are discussed in *Sacramento v. California Stage Co.* 12 Cal. 134; *Los Angeles v. Southern P. R. Co.* 61 Cal. 59. Moreover, the argument of the plaintiff, carried to its ultimate conclusion, would result in making it impossible to collect any occupation tax whatever based upon the receipts of telephone companies engaged in long-distance business within the limits of the state. To illustrate, if the city of Lincoln may not base an occupation tax upon the receipts in this city of tolls paid for the use of the telephone company's instruments and wires from Lincoln to Omaha, on account of a por-

tion of the business being transacted without the limits of the city, neither could the city of Omaha collect or impose such a tax upon the same messages for the same reason; and so with every other connection over long-distance lines radiating from the city in every direction. It would be equally impossible to impose or collect such a tax upon the receipts from rural telephones, whose principal value depends upon their connection with the city exchange. It is evident that a large portion of the business of the telephone companies in the city is concerned with the transmission of long-distance messages and the collection of the tolls therefor, and the switchboard connections furnished rural subscribers, and the collection of the rentals for their connection with the exchange. Since the volume of the business transacted in Lincoln is increased by the rural and long-distance lines, we see no reason why the amount of the occupation tax should not be increased in proportion to such volume as measured and ascertained by a percentage of the gross receipts. There is no levy on the receipts themselves, but they are considered merely as a means of ascertaining the volume of the business transacted. Such a tax has been supported in *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; *State v. Hayne*, 4 S. C. 403; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *York v. Chicago, B. & Q. R. Co.* 56 Neb. 572, 76 N. W. 1065; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403. In conclusion, the new ordinance deprives the plaintiff of none of its rights under its grant. It neither takes away nor changes any part of its several franchises. It is true it imposes a tax upon its business, but it does the same upon all other telephone companies. The provision for deduction is of the amount of a like imposition, and is made to secure uniformity and equality of burden, which is what just taxation requires.

We conclude, therefore, that the judgment of the District Court was correct, and the same is affirmed.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down May 7, 1909:

On the argument of the motion for a rehearing two propositions were vigorously discussed: First, that the occupation tax, which the plaintiff asks us to declare void, is double taxation; second, that the tax is void for want of uniformity.

Considering the first proposition, we are

unable to say that the ordinance results in double taxation. It is claimed that it has that effect because, in assessing the property of telephone companies for the purpose of general state and municipal taxation, the value of the property of each company is fixed by taking into consideration its tangible property, such as poles, wires, instruments, office fixtures, etc., and the value of its franchise or intangible property, and in determining that value the gross receipts of the company may be taken into consideration. The evidence in this case does not clearly and conclusively show that the plaintiff's gross receipts were taxed, as such, for the purposes above mentioned, but rather that in fixing the value of the plaintiff's franchise its gross receipts were merely taken into consideration. It is probable that to some extent a consideration of this item may result in double taxation, but we must remember that as yet no system of raising revenue has been devised which will entirely eliminate the matter of double taxation, and in this instance such taxation does not necessarily follow the enforcement of the law. Therefore this contention cannot be sustained.

On the question of lack of uniformity, which is required by our Constitution, it would seem at first blush that plaintiff's objection is well founded, but a careful examination of existing conditions does not bear out that inference. It appears that when the plaintiff applied to the city of Lincoln to obtain its franchise or charter, an ordinance was passed granting it the privilege sought, without exacting any payment on the part of plaintiff therefor. At a later period, when plaintiff applied for the privilege of laying its wires underground, it was agreed between plaintiff and the city that it should pay to the city the sum of \$500 per year for that privilege. It further appears that when its rival, which, for convenience, we will call the Lincoln Telephone Company, made application for its charter, the city had become aware of the fact that it had something valuable to sell, and therefore it required first that that company should pay yearly to the city \$500 for its franchise, and in addition thereto 1 per cent each year of its gross receipts for the first five years of its existence, 2 per cent for the second five years, and after that, for the remaining period of forty years, it should pay to the city 3 per cent of its gross receipts. Matters stood in that condition until the ordinance in question was passed, which provides that all telephone companies doing business in the city of Lincoln shall pay an occupation tax to the city each year, amounting to 2 per cent of their gross receipts. If matters had been left in that condition, it is plain to be seen that the Lincoln Telephone Company would have been required to pay to the city, by way of taxation, a much larger sum proportionately to its business transacted than would the plaintiff company. Therefore, instead of repealing so much of the former ordinance as provided for the payment to the city of 1, 2, and 3 per cent of the gross receipts of the Lincoln Telephone Company, it was provided by the ordinance complained of that any sum required to be paid by way of taxation, based upon gross receipts, by any company under existing ordinances, might be deducted from the amount of the occupation tax in question.

This provision has been construed by the city to operate as a repeal of so much of the former ordinance as required the Lincoln Telephone Company to pay 1, 2, and 3 per cent of its gross receipts, and so both of said telephone companies, which are the only ones doing business in the city, are placed on an equal footing. As the ordinance is interpreted by the taxing authorities, each company now pays to the city \$500 per year for its franchise or right to do business, and each company pays as an occupation tax 2 per cent of its gross yearly receipts. So that the ordinance complained of, as thus interpreted, results, as a matter of fact, in a uniformity of the occupation tax. While the inhabitants of the city may be thus afforded a cause of complaint, we fail to see any discrimination against the plaintiff herein.

For the foregoing reasons, we are of opinion that the motion for rehearing should be overruled, and it is so ordered.

OKLAHOMA SUPREME COURT.

GEORGE C. ELDRIDGE, Plff. in Err.,

v.

C. A. FINNINGER.

(— Okla. —, 105 Pac. 334.)

Sale — payment to agent of undisclosed principal — right to credit for.

1. If the purchaser of coal does not know, and has no good reason to know, that he is dealing with the agent of the owner, he is

Headnotes by TURNER, J.

Note. — Right of defendant in action by undisclosed principal on the contract made by the agent to avail himself of defenses that would have been available in an action by the agent in his own right on the contract.

This note, of course, presupposes that the defendant was originally justified in entering into the contract with the agent, and

justified in treating the agent as owner, and in a suit by the owner for the purchase price, he must take the contract of sale as he finds it, subject to such rights as the purchaser might avail himself of against the agent, assuming him to be the owner. Same — treating agent as owner.

2. If the purchaser of coal does not know, and has not good reason to know, that he is dealing with the agent of the owner, he is justified in treating the agent as owner, and in a suit by the owner for the purchase price is entitled to credit thereon for the amount of loss by said purchaser sustained on the sale of a suit of clothes, agreed by the agent to be by him received in part payment therefor, but which was not delivered, on account of said agent's death.

(November 9, 1909.)

that the action by the undisclosed principal is in affirmation of, and based upon, the contract made by the agent. It therefore excludes cases where the action, whether *ex delicto* or not, is in repudiation of the contract made by the agent. This limitation excludes cases where an agent, without actual or ostensible authority, assumed to sell in his own name property belonging to the principal, and the purchaser seeks to set off a claim held by him against the agent in an action of trover by the principal.

So this limitation excludes cases like *Kimmel v. Bean*, 68 Kan. 598, 64 L.R.A. 785, 104 Am. St. Rep. 415, 75 Pac. 1118; *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366; *Burnett v. First Nat. Bank*, 38 Mich. 630; and *Hutchinson v. Manhattan Co.* 150 N. Y. 250, 44 N. E. 775, as to the right of a bank to apply a deposit of one person's funds, made by another in his own name, to a claim of the bank against the latter, as against the owner of the funds, who repudiates the act of the person by whom the deposit was made.

Cases like *Western U. Teleg. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564, and *Pacific Exp. Co. v. Redman* (Tex. Civ. App.) 60 S. W. 677, involving the right of the undisclosed principal to recover special damages upon breach of the contract, are also beyond the scope of this note.

Defenses generally.

Where an agent contracts with a third person, without disclosing that he is acting for a principal, and the third person supposes that the agent is the real party in interest, and is not chargeable with notice of the existence of the principal, and such principal sues the third person on the contract, he must accept the contract as it was made by the agent and the third party, subject to all the burdens and conditions attached thereto. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 380, 12 L. ed. 481; *Sellers v. Malone-Pilcher Co.* 151 Ala. 426, 44 So. 414; *Woodruff v. McGehee*, 30 Ga. 158 (including warranty of 28 L.R.A. (N.S.))

ERROR to the Oklahoma County Court to review a judgment in plaintiff's favor for less than the amount demanded in an action brought to recover for coal sold and delivered. Affirmed.

The facts are stated in the opinion.

Messrs. Thorp & Thorp for plaintiff in error.

Messrs. Shartel, Keaton, & Wells, for defendant in error:

If the purchaser of property does not know that he is dealing with an agent of the owner, and has not good reason to know it, he is justified in treating the agent as the owner, and payment of the purchase price to him will be a defense to an action by the owner for the amount.

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article sold); *Johnson v. Hoover*, 72 Ind. 395; *Hook v. Crowe*, 100 Me. 399, 61 Atl. 1080; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Dean v. Plunkett*, 136 Mass. 195; *Bruen v. Kansas City Agri. & H. Fair Asso.* 40 Mo. App. 425; *Henderson v. Botts*, 56 Mo. App. 141; *Bennett v. Williamson*, 9 Ohio C. C. 107; *Ramazotti v. Bowring*, 7 C. B. N. S. 851; *Westwood v. Bell*, 4 Campb. 349.

A third party who contracts in ignorance of the existence of a principal can set up against the principal, who sues on the contract, any defenses and equities which he could have set up against the agent, had the latter been in reality the principal, suing on his own behalf. *Buchanan v. Cleveland Linseed-Oil Co.* 33 C. C. A. 351, 62 U. S. App. 332, 91 Fed. 88; *Morris v. Chesapeake & O. S. S. Co.* 125 Fed. 62, affirmed in 78 C. C. A. 179, 148 Fed. 11, on different point; *Huntsville v. Huntsville Gaslight Co.* 70 Ala. 190; *Sellers v. Malone-Pilcher Co.* supra; *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Amann v. Lowell*, 66 Cal. 306, 5 Pac. 363; *Sullivan v. Shailor*, 70 Conn. 733, 40 Atl. 1054 (*dictum*); *Rosser v. Darden*, 82 Ga. 219, 14 Am. St. Rep. 152, 7 S. E. 919; *Allison v. Sutlive*, 99 Ga. 151, 25 S. E. 11; *McConnell v. East Point Land Co.* 100 Ga. 129, 28 S. E. 80; *Nave v. Hadley*, 74 Ind. 157 (*dictum*); *Tutt v. Brown*, 5 Litt. (Ky.) 1, 15 Am. Dec. 33; *Violett v. Powell*, 10 B. Mon. 347, 52 Am. Dec. 548; *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417; *Huntington v. Knox*, 7 Cush. 371; *Barry v. Page*, 10 Gray, 398; *Cushman v. Snow*, 186 Mass. 169, 71 N. E. 529; *Deane v. American Glue Co.* 200 Mass. 459, 86 N. E. 890; *Lough v. Thornton*, 17 Minn. 253, Gil. 230; *Henderson v. Botts*, supra; *Taintor v. Prendergast*, 3 Hill, 72, 38 Am. Dec. 618 (*dictum*); *Wright v. Cabot*, 89 N. Y. 570; *Mullin v. Lamphear*, 48 Hun, 615, 15 N. Y. S. R. 647; *Van Lien v. Byrnes*, 1 Hilt. 133; *Burnham v. Eyre*, 123 App. Div. 777, 108 N. Y. Supp. 452; *Barham v. Bell*, 112 N. C. 133, 16 S. E. 903; *Winslow Bros. v. Staton*, 150 N. C. 264, 63 S. E. 950; *Miller v. Sullivan*, 39 Ohio St. 79; *Foster v. Smith*, 2 Coldw.

Iowa, 181; Hook v. Crowe, 100 Me. 399, 61 Atl. 1080; United States Fidelity & G. Co. v. Shirk, 20 Okla. 576, 95 Pac. 218; Hubbard v. Tenbrook, 124 Pa. 291, 2 L.R.A. 823, 10 Am. St. Rep. 585, 16 Atl. 817; Johnson v. Hoover, 72 Ind. 395; Miller v. Sullivan, 39 Ohio St. 79.

Turner, J., delivered the opinion of the court:

On February 4, 1908, George C. Eldridge, trading in Oklahoma City as the "Eldridge Coal Company," sued C. A. Finninger, defendant in error, before a justice of the peace of that township, on account for coal to him sold and delivered, in the sum of \$25.30. After set-off pleaded and offer to confess judgment for \$2.30 and costs, there

was judgment for plaintiff for that amount, from which plaintiff appealed to the county court. There, by leave, defendant, by amended answer, in substance admitted plaintiff to be the owner of the coal, but alleged that he had bought said coal direct from Lloyd Eldridge, believing him so to be, and that, too, without notice for a long time thereafter that plaintiff was interested therein, whereas, in truth, said Lloyd Eldridge was only the general agent and manager for plaintiff; that in part payment therefor defendant agreed with said agent to and did make him a suit of clothes for \$38, which, by said agreement, should have been credited on the account, but which said suit, because of the death of said Eldridge, was never by him received, but was by de-

474, 88 Am. Dec. 604; Leterman v. Charlottesville Lumber Co. (Va.) 67 S. E. 281; Westwood v. Bell, *supra* (lien on insurance policy); Browning v. Provincial Ins. Co. L. R. 5 P. C. 263; Isberg v. Bowden, 8 Exch. 859; Sims v. Bond, 5 Barn. & Ad. 389 (*dictum*).

But it is no defense to an action by an undisclosed principal on a contract made by his agent, that the agent stipulated that he would not assign the contract without the consent of the other party. Prichard v. Budd, 22 C. C. A. 504, 42 U. S. App. 186, 76 Fed. 710.

Set-off.

The third party, when sued on the contract, may set off or recoup any claim which he may have had at any time before the principal was disclosed. Morris v. Chesapeake & O. S. S. Co. *supra* (mutual claims for demurrage); Gardner v. Allen, 6 Ala. 187, 41 Am. Dec. 45; Quinn v. Sewell, 50 Ark. 380, 8 S. W. 132; Frazier v. Poin-dexter, 78 Ark. 241, 115 Am. St. Rep. 33, 95 S. W. 464, 8 A. & E. Ann. Cas. 552; Ruan v. Gunn, 77 Ga. 53; Rosser v. Darden, *supra*; Durant Lumber Co. v. Sinclair & S. Lumber Co. 2 Ga. App. 209, 58 S. E. 485; Stinson v. Gould, 74 Ill. 80; Wiser v. Springside Coal Min. Co. 94 Ill. App. 471; Traub v. Milliken, 57 Me. 63, 2 Am. Rep. 14; Munroe v. Whitehouse, 90 Me. 139, 37 Atl. 866; Hook v. Crowe, *supra*; Oelrichs v. Ford, 21 Md. 489; Baltimore Coal Tar & Mfg. Co. v. Fletcher, 61 Md. 288; Kelley v. Munson, 7 Mass. 319, 5 Am. Dec. 47; Lime Rock Bank v. Plimpton, 17 Pick. 159, 28 Am. Dec. 286; Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631; Wood v. Bolyston Nat. Bank; Dean v. Plunkett; and Deane v. American Glue Co.,—*supra*; Baxter v. Sherman, 73 Minn. 434, 72 Am. St. Rep. 631, 76 N. W. 211; Greene v. Chickering, 10 Mo. 109; Mitchell v. Bristol, 10 Wend. 492; Hogan v. Shorb, 24 Wend. 458; Hutchinson v. Manhattan Co. 150 N. Y. 250, 44 N. E. 775; Judson v. Stilwell, 26 How. Pr. 513; Bannerman v. Quackenbush, 11 Daly, 529; Pratt v. Collins, 20 Hun, 126; 28 L.R.A. (N.S.)

Nichols v. Martin, 35 Hun, 168; Bliss v. Bliss, 7 Bosw. 339; Tannebaum v. Marsellus, 3 Misc. 351, 22 N. Y. Supp. 928; Pollacek v. Scholl, 51 App. Div. 319, 64 N. Y. Supp. 979; Burnham v. Eyre, 123 App. Div. 777, 108 N. Y. Supp. 452; Winslow Bros. v. Staton and Bennett v. Williamson, *supra*; Girard v. Taggart, 5 Serg. & R. 19, 9 Am. Dec. 327; Frame v. William Penn Coal Co. 97 Pa. 309; Belfield v. National Supply Co. 189 Pa. 189, 69 Am. St. Rep. 799, 42 Atl. 131; Finn-Vipond Constr. Co. v. Wolf, 12 Pa. Super. Ct. 317; Squires v. Barber, 37 Vt. 558; Guggenheime & Co. v. Youell, 53 Wash. 163, 101 Pac. 711; Ramazotti v. Bowring, *supra*; Turner v. Thomas, L. R. 6 C. P. 610; Borries v. Imperial Ottoman Bank, L. R. 9 C. P. 38 (set-off); Ex parte Dixon, L. R. 4 Ch. Div. 133 (holding set-off allowable, although factor violated his instructions in not disclosing his principal); Montagu v. Forwood [1893] 2 Q. B. 350; George v. Claggett, 7 T. R. 359; Rabone v. Williams, 7 T. R. 360, note, 2 Eng. Rul. Cas. 391; Morris v. Cleasby, 1 Maule & S. 579; Bastable v. Poole, 5 Tyrw. 111; Carr v. Hinchliff, 4 Barn. & C. 547; Taylor v. Kymer, 3 Barn. & Ad. 320; Gibson v. Winter, 5 Barn. & Ad. 96; Pigeon v. Osborn, 12 Ad. & El. 715; Purchell v. Salter, 9 Dowl. P. C. 520; Baird v. Anderson, 9 N. S. 181; Bowmanville Mach. Co. v. Dempster, 2 Can. S. C. 21, affirming 11 N. S. 273; Smith v. Grouette, 2 Manitoba L. Rep. 314.

This has been held to be true even when the claim which it is desired to set off accrued prior to the contract with the agent. Ruan v. Gunn; Rosser v. Darden; Wiser v. Springside Coal Min. Co.; Wood v. Boylston Nat. Bank; Greene v. Chickering; and Hogan v. Shorb,—*supra* (claim was note of agent not due at time of sale, which was for cash, but due before suit brought by principal); Winslow Bros. v. Staton, *supra*. *Contra*, Warner v. Martin, 11 How. 209, 225, 13 L. ed. 667, 673; Rodick v. Coburn, 68 Me. 170; Low v. Moore, 31 Tex. Civ. App. 460, 72 S. W. 421.

The claim may be set off, though defendant purchased it for the express purpose of setting it off. Pratt v. Collins, 20 Hun, 126.

fendant, after his death, sold for \$15, leaving \$23 due thereon, for which he claimed credit on the account sued, and tendered \$2.30 and costs in full of the demand. There was trial to the court and judgment for defendant, and that he, "having made tender of \$2.30 in court below, and having kept said tender good," was released from costs subsequent thereto.

After motion for a new trial filed and overruled, plaintiff brings the case here, and assigns as error that said judgment is contrary to the evidence. There is no conflict therein. It, in substance, discloses: That plaintiff, George C. Eldridge, was, at the time of the sale to defendant, in the coal business in Oklahoma City under the name of the "Eldridge Coal Company;" that he had

in his employ one Lloyd Eldridge, whose duties were to solicit orders and sell coal for cash. At that time, known to both plaintiff and defendant, there was in the city telephone directory the following:

"Eldridge Coal Company, G. C., L. E. Eldridge, proprietor. Coal, wood, and feed. 228 West First street

"Eldridge, George C. Eldridge Coal Company, R. 210 W. First.

"Eldridge, Lloyd E. wife, Ruth. Eldridge Coal Company, R. 26 E. Fourth."

On the day of the sale, Lloyd Eldridge, acting as agent aforesaid, but supposed by defendant to be the owner of the Eldridge Coal Company, solicited and obtained from defendant an order for the coal in question, concerning which he testified: "In the first

But if a claim was purchased at a discount, only the amount paid can be set off. *Nichols v. Martin*, 35 Hun, 168.

Where the purchaser learns before delivery that the goods he had contracted to purchase are not the goods of the agent, but of another, he cannot thereafter receive the goods, and at the same time set off a debt of the agent, due him at the time of the making of the contract. *McLachlin v. Brett*, 105 N. Y. 391, 12 N. E. 17; *Belfield v. National Supply Co.* supra; *Moore v. Clementson*, 2 Campb. 22.

But he may refuse the substituted performance by another in any case where his rights or interests would be injuriously affected by the change. *McLachlin v. Brett* and *Belfield v. National Supply Co.* supra.

Where an agent, employed to collect money and to remit it, when collected, to the principal, wrongfully loaned it to one to whom he was indebted in a larger amount, but who was ignorant of the agency, such borrower, when sued by the principal in assumpsit, may set off the indebtedness of the agent to him. *Lime Rock Bank v. Plimpton*, 17 Pick. 159, 28 Am. Dec. 286.

Where an agent sells to another who is ignorant that his vendor is but an agent, and gives in payment an order on a third person who owed him money, and who, likewise, in ignorance of the agency, accepts such order, such third person cannot set off against the principal a debt due him by the agent. *Stevenson v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 854, 24 S. E. 886.

It was held in *Kennedy v. Turnbull*, 15 N. B. 378, that one purchasing goods of a factor, not knowing that he was a factor, when sued by the principal for the price, will not be allowed to set off a note made in his favor by the factor, which was not due until after he received notice of the true ownership of the property. But see, *contra*, *Hogan v. Shorb*, 24 Wend. 458, where suit was not brought until after the note became due.

Under an answer consisting only of a general denial and a plea of payment, the right of a purchaser to set off an indebted-

ness to him of the agent of the undisclosed principal cannot be determined. *Foster v. Graham*, 166 Mass. 202, 44 N. E. 129.

As to right of set-off as affected by notice, or facts charging defendant with notice, of the existence of an undisclosed principal at the time of the original contract, see *infra*, under heading, "Effect of notice of agency."

Payment to agent.

A payment by the third party to the agent before he became aware of the existence of the principal is a defense when sued by the principal. *Copeland v. Touchstone*, 16 Ala. 333, 50 Am. Dec. 181; *Whelan v. McCreary*, 64 Ala. 319; *Lumley v. Corbett*, 18 Cal. 494; *Connally v. McConnell*, 1 Penn. (Del.) 133, 39 Atl. 773; *Peel v. Shepherd*, 58 Ga. 365; *Saladin v. Mitchell*, 45 Ill. 79; *Shine v. Kennealy*, 102 Ill. App. 473; *Eclipse Wind Mill Co. v. Thorson*, 46 Iowa, 181; *Traub v. Milliken*, 57 Me. 63, 2 Am. Rep. 14; *Lough v. Thornton*, 17 Minn. 253, Gil. 230; *Rhea v. Buckley Custom Shirt Mfg. Co.* 81 Mo. App. 400; *Cheshire Provident Inst. v. Gibson*, 2 Neb. (Unof.) 392, 80 N. W. 243; *Larbig v. Peck*, 69 App. Div. 170, 74 N. Y. Supp. 602, affirmed without opinion in 174 N. Y. 513, 66 N. E. 1111; *Maxfield v. Carpenter*, 84 Hun, 450, 32 N. Y. Supp. 381; *Du Bois v. Perkins*, 21 Or. 189, 27 Pac. 1044; *Favenc v. Bennett*, 11 East, 36; *Morris v. Cleasby*, supra (*dictum*); *Coates v. Lewes*, 1 Campb. 444; *Blackburn v. Scholes*, 2 Campb. 343; *Townsend v. Inglis*, Holt, N. P. 278.

The principal, however, can recover the amount unpaid at the time the agency is disclosed, whether it is the whole or only a part of the original amount of indebtedness. *Peel v. Shepherd*, supra; *Warder v. White*, 14 Ill. App. 50; *Bruen v. Kansas City Agri. & H. Fair Asso.* 40 Mo. App. 425; *Henderson v. McNally*, 48 App. Div. 134, 62 N. Y. Supp. 582, affirmed without opinion in 168 N. Y. 646, 61 N. E. 1130; *Bennett v. Williamson*, 9 Ohio C. C. 107; *Lancaster v. Knickerbocker Ice Co.* 153 Pa. 427, 26 Atl. 251; *Roach v. Turk*, 9 Heisk. 708, 24 Am. Rep. 360.

part of August, Mr. Lloyd Eldridge asked me and wanted to know if I didn't want to put in some coal, as it would be a pretty good time, as I could save so much on the ton, and he said he wanted a suit of clothes after a while, and wanted to know how much coal I could use. I told him I only had room for about \$25 worth, and he said, 'I will send it up to you, and after a while I will come in and have my measure taken for a suit of clothes,' and on the 15th of September, 1905, he came in, and I took his measure for the clothes, and I made up that suit of clothes, and they were finished at the time he died; but before that they delivered the coal." When the coal was delivered, he further testified that said agent "came in with a duplicate slip, and told me

to give him credit for \$25.50, which I did." After his death, defendant sold the suit for \$15. Thereafter plaintiff presented his bill for the coal, at which time defendant explained the transaction, and asked credit on the account for \$23 loss on the suit. The trial court, in effect, held that said sum was a proper item of credit, and therein we see no error. The evidence fairly discloses that defendant believed at the time the coal was sold and delivered that he was dealing with the owner thereof, and that he had not good reason to believe otherwise. He so testified, and that he had good reason so to believe appears from the entry in the city telephone directory, introduced in evidence, wherein said agent appears as "proprietor" of the "Eldridge Coal Company."

But the principal cannot recover from the third party money paid to the agent after the name of his principal was disclosed, if the agency and the right of the agent to receive payment were still unrevoked at the time of payment. *Conklin v. Raymond*, 127 App. Div. 663, 112 N. Y. Supp. 77, affirmed without opinion in 197 N. Y. 509, 90 N. E. 1158.

But in *Argenti v. Brannan*, 5 Cal. 351, where an agent sold goods without disclosing the fact of agency, and the vendee was notified of the agency by the principal after payment had been made to the agent, it was held that the principal could not collect the balance from the vendee, who, after such notification, paid the balance to the agent. The court said that "there was no privity of contract between the plaintiff and defendant," and that "the mere notice of . . . [the principal] to the . . . [vendee] was insufficient to interrupt the completion of the performance of the contract. The defendant had the right to disbelieve it and disregard it. He had assumed a liability to another. His duty was to fulfil it, unless legal steps had been taken to prevent him."

A recovery by the agent of an undisclosed principal is a complete protection to the defendant against any claim of the principal, arising upon the contract. *Ludwig v. Gillespie*, 105 N. Y. 653, 11 N. E. 835.

Where a factor sells the goods of his principal without disclosing his agency, and takes the note of the purchaser, payable to himself or bearer at a future day, and before maturity transfers the note to his principal, payment by the purchaser to the factor after such transfer, and before the note falls due, without requiring the production of the note, is no bar to a recovery in an action by the principal, as indorsee, against the purchaser, as maker of the note. *Mitchell v. Bristol*, 10 Wend. 492.

As to effect of notice of agency on right of defendant to avail himself of payment made to agent, see next division.

Effect of notice of agency.

But if the party who dealt with the agent, 28 L.R.A. (N.S.)

acting in his own name, knew or had reason to believe that he was dealing with one who was an agent for some third person, he cannot successfully plead a payment, set-off, or other defense. He must, in order to be protected, be innocent of any knowledge of facts and circumstances which would put a reasonably prudent person on inquiry that he was dealing with an agent. *Whelan v. McCreary*, supra (payment); *Quinn v. Sewell*, 50 Ark. 380, 8 S. W. 132; *Stinson v. Gould*, 74 Ill. 80; *Frazier v. Poindexter*, 78 Ark. 241, 115 Am. St. Rep. 33, 95 S. W. 464, 8 A. & E. Ann. Cas. 552; *Rice & B. Malting Co. v. International Bank*, 185 Ill. 422, 56 N. E. 1062; *Moline Malleable Iron Co. v. York Iron Co.* 27 C. C. A. 442, 53 U. S. App. 580, 83 Fed. 66; *Miller v. Lea*, 35 Md. 396, 6 Am. Dec. 417; *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631, 76 N. W. 211; *Rhea v. Buckley Custom Shirt Mfg. Co.*; *McLachlin v. Brett*; and *Conklin v. Raymond*,—supra (set-off); *Judson v. Stilwell*, 26 How. Pr. 513 (set-off); *Browne v. Robinson*, 2 Cal. Cas. 341; *Gordon v. Church*, 2 Caines, 299 (set-off); *Wright v. Cabot*, 89 N. Y. 570 (set-off, and holding also, that payment to sheriff on attachment proceedings against agent is no defense in action by principal, when, in such proceedings purchaser did not disclose that agent was not real principal); *Mullin v. Lamphear*, 48 Hun, 615, 15 N. Y. S. R. 647 (set-off); *Bliss v. Bliss*, 7 Bosw. 339 (set-off); *Mull v. Ingalls*, 30 Misc. 80, 62 N. Y. Supp. 831 (set-off) affirmed in 62 App. Div. 631, 71 N. Y. Supp. 1142 (set-off); *Winslow Bros. v. Staton*, 150 N. C. 264, 63 S. E. 950; *Dortic v. Jeffers*, 10 Rich. L. 83 (in which purchaser knew his vendor was an auctioneer, though the name of his principal was not disclosed); *Tuttle v. Green*, 10 Vt. 62 (payment); *Squires v. Barber*, 37 Vt. 558 (set-off); *Fish v. Kempton*, 7 C. B. 687 (set-off); *Dresser v. Norwood*, 17 C. B. N. S. 466 (set-off); *Semenza v. Brinsley*, 18 C. B. N. S. 467; *Pearson v. Scott*, L. R. 9 Ch. Div. 198 (set-off); *New Zealand & A. Land Co. v. Ruston*, L. R. 5 Q. B. Div. 474; *Mildred v. Maspons*, L. R. 8 App. Cas.

Webster's International Dictionary 1907 defines the word "proprietor" to mean: "One who has the legal right or exclusive title in anything, whether in possession or not; an owner; the proprietor of a farm or of a mill." Defendant did not know plaintiff before he presented his bill, or that he had any interest in the property. If the purchaser of property does not know, and has not good reason to know, that he is dealing with the agent of the owner, he is justified in treating the agent as owner; and payment of the purchase price to him is a good defense to an action of the owner for the amount.

Eclipse Windmill Co. v. Thorson, 46 Iowa, 181, was an action on account for a balance due upon the sale of a windmill. Defendant

purchased it from Blackmarr & Son, agents for plaintiff. Subsequently he was garnished upon an execution against said agents. He being ignorant of the agency, and supposing he owed said agents for the mill, answered as garnishee that he was so indebted, and judgment was rendered against him on his answer. He pleaded said facts in defense, and judgment was rendered in his favor. Plaintiff appealed. The trial court instructed the jury that, "if you find that Blackmarr & Son, in negotiating the sale of the mill to the defendant, did not disclose the fact that they were acting as agents for the Eclipse Windmill Company, and if you find that defendant did not have good reason to know such fact, then, if Blackmarr & Son have been paid for the

874; Moore v. Clementson, 2 Campb. 22 (set-off).

Hence, if the character of the seller is equivocal,—if he is known to be in the habit of selling sometimes as principal and sometimes as agent,—a purchaser who buys with a view of covering his own debt and availing himself of a set-off is bound to inquire in what character he acts in the particular transaction; and if the buyer chooses to make no inquiry, and it should turn out that he bought of an undisclosed principal, he will be denied the benefit of his set-off. Miller v. Lea and Baxter v. Sherman, supra; Cooke v. Eshelby, L. R. 12 App. Cas. 271.

The set-off is not allowable where purchaser knows that the one with whom he deals is an agent, though he does not know who his principal is. Semenza v. Brinsley and New Zealand & A. Land Co. v. Ruston, supra.

The purchaser of goods from a factor, who is himself a factor in the same place, and who was put on notice that his vendor acted for another, cannot set off a debt due him by the factor when sued by the principal, notwithstanding a local custom among factors to settle among each other once a week, and set off debts due one another. Baxter v. Sherman, supra.

Where the agent has not been given the possession of the goods nor intrusted with the *indicia* of ownership, the purchaser cannot set off a debt due him from the agent. Bernshouse v. Abbott, 45 N. J. L. 531, 46 Am. Rep. 789; Bertoli v. Smith, 69 Vt. 425, 38 Atl. 76.

A distinction has been made between the effect of sales by factors and those by brokers in regard to the right of the purchaser to set off a debt due him by the factor or broker where the principal is undisclosed; and it has been held that, although the set-off will be allowed in case of the factor, it will not be allowed in case of a broker. Bernshouse v. Abbott and Bliss v. Bliss, supra; White v. Jaudon, 9 Bosw. 415; Dunn v. Wright, 51 Barb. 244; Crosby v. Hill, 39 Ohio St. 100.

The reason for the distinction is thus 28 L.R.A. (N.S.)

explained in Baring v. Corrie, 2 Barn. & Ald. 138: "A factor, who has the possession of goods, differs materially from a broker. The former is a person to whom goods are sent or consigned, and he has not only the possession, but, in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority, and it may be right, therefore, that the principal should be bound by the consequences of such sale, amongst which, the right of setting off a debt due from the factor is one. But the case of a broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound. But it is said that by these means, the broker would be enabled by his principal to deceive innocent persons. The answer, however, is obvious, that that cannot be so, unless the principal delivers over to him the possession and *indicia* of property."

A payment by a vendee of goods is good, although the vendee knows that the broker sells for some unknown principal. Campbell v. Hassell, 1 Starkie, 233.

And it makes no difference in such case whether the agent acts under a *del credere* commission. Ibid.

But payment in such case would not be good if it varied from the terms of the original contract. Ibid.

Where an agent sells goods, at the same time disclosing to the purchaser the fact that he is acting for a principal residing without the state, such purchaser, when thereafter sued by the principal for the price, cannot set up as a defense a discharge in state insolvency proceedings subsequent to the sale, even though the name of the principal was not disclosed to him. Ilsley v. Merriam, 7 Cush. 242, 54 Am. Dec. 721.

mill, the plaintiff cannot recover." This was assigned as error. The following bill was sent to and received by defendant:

Beloit, Wis., Jan. 5, 1876.

Paul Thorson bought of Eclipse Windmill Company one 10-foot mill, 100 feet tin galvanized pipe, one tower, \$107.50.

Paul Thorson.

Pay the account to M. V. Blackmarr, who will remit it with other collections to us.

C. B. Salmon, Treasurer.

The court held the instruction good, and in passing said: "We cannot say that the defendant ought to be held to pay for the property twice, if he neither knew nor had good reason to know the plaintiff in the transaction." And in answering the alleged error that the verdict was contrary to the evidence, said that, inasmuch as the testimony disclosed defendant could not read English, the assignment was not well taken; and as the jury declared by their verdict that he did not have any reason to know, notwithstanding the receipt of the bill, who the vendor of the mill was, the court would not be justified in setting the verdict aside.

But let that be as it may, in this case it appears, as stated, that defendant dealt with the agent believing him to be the principal, and made the contract accordingly. As the principal, by this action, now seeks to enforce said contract, he must take it as the agent and the purchaser left it. He must take his pay as the agent agreed to receive it. *Hook v. Crowe*, 100 Me. 399, 61 Atl. 1080, was assumpsit to recover the price of awnings and sash curtains sold and delivered by plaintiffs to defendants. Plaintiffs recovered, to which ruling defendants excepted, and an agreed statement of facts was certified to the law court. The facts were that one Hook, as selling agent of plaintiffs, applied to defendants for an order, which was given for the articles named, on consideration that Hook would take pay therefor in clothes and work out of the store, which he agreed to do. Hook sent an unsigned order to plaintiffs, who later shipped the goods, which were by defendants received, and also mailed them a bill the same day. Plaintiffs had no knowledge of the arrangement for pay between Hook and defendants. On the day of the arrangement, Hook had \$1.50 worth of work done by them, and later \$8.50, all pursuant to said arrangement. Defendants in the action sought to have these items allowed as a credit on the bill. The court below disallowed it. The supreme court, although sustaining the exceptions on other grounds, in passing said: "If the defendants dealt with Hook, the agent, believing him to be a principal, the plaintiffs, who were undis-

closed principals, must take the contract, if they seek to enforce it, as their agent and defendants left it. If they seek the advantages of the contract, they must suffer its burdens, and must allow the defendants by way of payment for the goods sold and services rendered to the agent." And in the syllabus said: "If the purchaser, in dealing with the agent, believes him to be a principal, the undisclosed principal must take the contract, if he seeks to enforce it, as his agent and the purchaser left it. If he seeks the advantages of the contract, he must suffer its burdens. He must take his pay as the agent agreed to take it." See also *Miller v. Sullivan*, 39 Ohio St. 79; *Johnson v. Hoover*, 72 Ind. 395; 2 Greenl. Ev. § 66.

We are therefore of opinion that the judgment of the trial court is supported by the evidence, unless it is true, as contended by plaintiff in error, that the court erred in permitting defendant to testify as to the transaction between himself and the deceased agent. He relies on *Wilson's Rev. & Anno. Stat. (Okla.) 1903, § 4509*, as follows: "No party shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner, or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person." We have examined the cases cited in support of this contention, none of which are in point. As the plaintiff is in no sense the executor, administrator, heir at law, next of kin, surviving partner, or assignee of his agent, nor derived title to this cause of action from him, there is nothing in this contention.

The judgment of the trial court is affirmed.

All the Justices concur.

MARYLAND COURT OF APPEALS.

CROOK-HORNER COMPANY OF BALTIMORE CITY, Appt.,
v.
CHARLES GILPIN.

(112 Md. 1, 75 Atl. 1049.)

Bankruptcy — effect on attachment bond.

A discharge in bankruptcy releases liability on a bond executed to release property of the bankrupt attached less than four months before the commencement of bankruptcy proceedings, where the bankruptcy

statute makes attachments levied against the bankrupt within that time void, although the giving of the bond had released the attachment before the commencement of the bankruptcy proceedings.

(January 12, 1910.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas for Baltimore City in defendant's favor in an action brought to recover the amount alleged to be due upon a building contract, which was commenced by attachment, to secure the release of which a bond was given. Affirmed.

The facts are stated in the opinion.

Mr. Robert H. Smith, for appellant:

The discharge in bankruptcy did not release liability on the bond, as a qualified judgment with a stay of execution as to the bankrupt could be entered.

McCombs v. Allen, 82 N. Y. 116; Re Marshall Paper Co. 2 Am. Bankr. Rep. 653; Kendrick & Roberts v. Warren Bros. Co. 110 Md. 47, 72 Atl. 461.

Mr. J. Craig McLanahan also for appellant.

Messrs. Charles F. Harley and John B. A. Whittle, for appellee:

The bankruptcy having occurred within four months after the issuing of the attachment, the attachment lien cannot be enforced by judgment, and the surety on the attachment bond is released.

House v. Schnadig, 235 Ill. 301, 85 N. E. 395; A. Klipstein & Co. v. Allen-Miles Co. 14 Am. Bankr. Rep. 15, 69 C. C. A. 229, 136 Fed. 385; Collier, Bankr. p. 306; 1 Remington, Bankr. pp. 902, 903; Brandenburg, Bankr. § 415; Loveland, Bankr. p. 852; Kendrick & Roberts v. Warren Bros. Co. 110 Md. 47, 72 Atl. 461; Re Richards, 3 Am. Bankr. Rep. 145.

The bond stands in the place of the property or money attached.

Hill v. Harding, 130 U. S. 703, 32 L. ed. 1084, 9 Sup. Ct. Rep. 725; Hodge & McL. Attachm. § 65; Randle v. Mellen, 67 Md. 181, 8 Atl. 573.

If the surety has to pay the money, the defendant will have to pay it to the surety, and his discharge in bankruptcy, intended to mean something, will avail him nothing.

Hill v. Harding, 130 U. S. 699, 32 L. ed.

Note. — When will discharge of principal in bankruptcy release surety on a bond given by the principal in an action at law.

The earlier decisions on this question may be found in a note to Stull v. Beddeo, 14 L.R.A.(N.S.) 507, to which the cases following are supplemental.

In National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131, where the plaintiff in an action for libel had, more than four months before the adjudication of bankruptcy, sued out process of garnishment, which was dissolved by the filing of a statutory bond conditioned for the payment of the judgment that should be rendered on said garnishment, it was held that as under § 16 of the bankruptcy act the liability of the surety is not altered by the bankruptcy of the principal, and judgment having been regularly obtained, both against the defendant in the main action and against the fund impounded by the garnishment, the contingency upon which the liability of the surety depended had happened. The case of A. Klipstein & Co. v. Allen-Miles Co. 69 C. C. A. 229, 136 Fed. 385, was distinguished upon the ground that, the original action in that case being founded on a debt dischargeable in bankruptcy, and the lien of the garnishment upon the funds in the hands of the garnishee having arisen within four months prior to the adjudication of bankruptcy, so that no judgment could be had upon the answer of the garnishee without working a preference under the bankruptcy act, the contingency upon which the liability of the surety depended became impossible of performance, while in 28 L.R.A.(N.S.)

the present case the main action was founded upon a claim from liability for which a discharge in bankruptcy did not release the bankrupt.

In King v. Block Amusement Co. 126 App. Div. 48, 111 N. Y. Supp. 102 (affirmed in 193 N. Y. 608, 86 N. E. 1126), it was held, upon the authority of McCombs v. Allen, 82 N. Y. 114, that a warrant of attachment would not be vacated, on account of the defendant's discharge in bankruptcy, so as to discharge a surety from liability on an undertaking given to discharge the attachment, the surety having received no property of the defendant, even though, the attachment having been issued within four months of filing the petition in bankruptcy, the lien thereof, if the undertaking had not been given, would have been discharged.

In United States Wind Engine & Pump Co. v. North Penn Iron Co. 227 Pa. 262, 75 Atl. 1094, it was held that the discharge in bankruptcy of a defendant in a writ of foreign attachment issued and served more than four months prior to the filing of the petition in bankruptcy would not prevent the entering of a judgment, with perpetual stay of execution, against the defendant, for the purpose of fixing the liability of the surety on a bond given to discharge such attachment, and conditioned for the payment of such judgment as might be recovered. The earlier Pennsylvania cases of Com. v. Huber, 3 Clark (Pa.) 383; Nesbit v. Greaves, 6 Watts & S. 120; Barber v. Rodgers, 71 Pa. 362; and Hubert v. Horter, 81 Pa. 39, are distinguished as not turning on any general principle making them applicable to all bonds given in actions commenced by *capias*

1083, 9 Sup. Ct. Rep. 725; *Wolf v. Stix*, 99 U. S. 1, 25 L. ed. 309; *Collins v. Rybot*, 1 Esp. 157; *Paul v. Jones*, 1 T. R. 599; *A. Kipstein & Co. v. Allen-Miles Co.* 14 Am. Bankr. Rep. 15.

Briscoe, J., delivered the opinion of the court:

The plaintiff sued out of the court of common pleas of Baltimore city, on the 19th day of December, 1905, an attachment against the defendant, a nonresident of the state, to recover the sum of \$3,906, due and owing for work done and materials furnished in the erection of the heating apparatus of the Hotel Caswell, Baltimore city. The defendant appeared to the suit, and on the 28th day of December, 1905, a bond was filed by the Scranton Trust Company as surety, and the attachment was dissolved. On the 26th day of February, 1906, the defendant was adjudicated a bankrupt by the district court of the United States for the eastern district of Pennsylvania, sitting in bankruptcy, and on the 11th day of January, 1909, by an order and decree of that court, was discharged from

all debts owing by him and provable under the bankrupt act. The declaration in the short-note case is in assumpsit, and contains the usual money counts. The precise question is presented on the pleadings, and it arose in this way: The defendant, on the 28th day of December, 1905, pleaded to the declaration in the short-note case the usual pleas of never indebted as alleged, and did not promise as alleged, and issue was joined thereon. On the 13th day of January, 1909, the defendant, by leave of court, filed an additional plea to the declaration, wherein he sets up and pleads his discharge in bankruptcy by a court of competent jurisdiction from all his debts, and that the adjudication was upon a petition filed less than four months after the issuing of the attachment. In other words, it appears that the attachment was issued on the 19th day of December, 1905, and the decree in bankruptcy was passed on the 26th day of February, 1906, so it is clear that the attachment proceeding was begun against the defendant within four months before the commencement of the proceedings in bankruptcy. To this plea of discharge in bank-

ad respondendum; but as being decided on the theory that the obligation in an insolvent bond is practically complied with when the debtor secures a discharge under the national bankruptcy act; which is not in any sense the case with regard to the obligation in a bond to discharge an attachment.

In *Rice v. Nirdlinger*, 41 Pa. Super. Ct. 238, it was held that the liability of a surety on a bond given to secure the dissolution of a foreign attachment, conditioned for the payment of whatever sum might be recovered in the main action, was not affected by the principal's being adjudged a bankrupt, and obtaining a discharge, even though the attachment, having been levied within four months prior to the institution of the bankruptcy proceedings, would have become void, where the attachment plaintiff was permitted to prosecute his claim to judgment without any steps being taken to bring the pendency of the bankruptcy proceedings to the attention of the state court.

In *Re Mercedes Import. Co.* 20 Am. Bankr. Rep. 648, in which the point arose in connection with a motion for a stay of an action on a claim from liability for which the debtor might become released by his discharge in bankruptcy, and in which the precise character of the bond is not stated, it was said that should the principal debtor obtain a discharge, there never could be a judgment against it, and consequently no judgment against a surety whose liability was conditioned upon entry of judgment against the principal.

In *House v. Schnadig*, 235 Ill. 301, 85 N. E. 395, affirming 138 Ill. App. 498, in which a creditor of the bankrupt sought to obtain

a judgment with perpetual stay of execution in order to establish a liability against the surety on an appeal bond given in appealing a case from a justice of the peace to the circuit court, conditioned for the principal's payment of whatever judgment might be rendered against him in the circuit court, or, in case the appeal was dismissed, his payment of the judgment rendered against him by the justice of the peace, it was held that, the original judgment having been rendered within the four months period, the plaintiff could not claim the special judgment sought upon the ground of necessity for preserving rights that had accrued more than four months before the bankruptcy proceedings were instituted; and that, the discharge in bankruptcy being a bar to the rendition of a judgment against the bankrupt, and the surety's liability not being for the debt, but contingent upon a judgment being rendered against the principal in the bond, the discharge in bankruptcy released the surety.

In *Almon H. Fogg Co. v. Bartlett* (Me.) 75 Atl. 380, which was an action against the sureties on a statutory bond for the release of their principal from arrest on execution on a judgment for a debt provable in bankruptcy, and conditioned upon the debtor's payment of the judgment, his taking of the poor debtors' oath, or his delivering himself into custody within six months,—it was held that, the principal having obtained a discharge in bankruptcy within the period in which the conditions of the bond were to be fulfilled, such discharge constituted an equitable defense to a suit on the bond.

ruptcy the plaintiff replied: "That the adjudication of the defendant a bankrupt, and his discharge in bankruptcy by order or decree of the United States district court for the eastern district of Pennsylvania, does not release or discharge the surety on the bond filed in this case by the defendant to dissolve the attachment which had been previously issued and levied by the plaintiff on the moneys and credits of the defendant, which bond had been executed and filed in the case before the filing in the district court of the defendant's petition to be adjudged a bankrupt; that the judgment sought to be obtained in this case against the defendant is solely and exclusively to bind the surety in the bond filed to dissolve the attachment issued and levied on the moneys and credits of the defendant, and if a judgment is had in this case against the defendant, the court will be asked by the plaintiff by its order to restrain the plaintiff from ever issuing an execution on said judgment against the defendant." The defendant demurred to this replication, and the court below sustained the demurrer, and gave judgment thereon in favor of the defendant. And from this judgment the plaintiff has appealed.

The validity of the plaintiff's replication to the defendant's plea, it will be seen, must depend upon the effect to be given, and the proper construction to be placed on, § 67f of bankr. act July 1, 1898, chap. 541, 30 Stat. at L. 565, U. S. Comp. Stat. 1901, p. 3450. The language of the act is to this effect: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate, as aforesaid, . . . provided that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

On the part of the plaintiffs it is contended that they are entitled to a judgment against the defendant, with a perpetual stay

of execution, in order to establish a liability against the surety, notwithstanding the fact that the bankruptcy proceeding was begun within four months after the attachment was instituted, because a bond was given to dissolve the attachment, and the lien was released, before the proceedings in bankruptcy were commenced; and, further, as no lien existed when the petition was filed, there was nothing upon which the bankrupt law was to act. On the other hand, the defendant contends that, the proceedings in bankruptcy having been instituted within four months after the issuing of the attachment, the courts of this state have no jurisdiction to enter up a qualified judgment, with stay of execution against the defendant, to bind the surety, because, under the bankrupt act, *supra*, such attachment proceedings are declared to be null and void.

While the main question here raised has not been heretofore passed upon by this court, it is, at least, answered in part by the recent case of *Kendrick & Roberts v. Warren Bros. Co.* 110 Md. 47, 72 Atl. 461. In that case, the plaintiff had issued an attachment against the defendant, which was dissolved upon giving a bond. It appears that more than four months thereafter proceedings were had in bankruptcy against the defendant, and he was discharged. We there held that this discharge in bankruptcy did not prevent the plaintiff from obtaining a judgment in the attachment suit against the defendant, with a perpetual stay of execution. The object of the judgment was to allow the plaintiff to proceed against the sureties on the bond given to dissolve the attachment. It was further held, and we here quote from the opinion: "But it is earnestly insisted upon the part of the appellant there is no such practice in this state as to warrant a special or qualified judgment, to wit, a judgment with a perpetual stay of execution, and the courts are without power to so render them. We are unable to agree with this contention. A sufficient warrant, we think, can be found in § 14, art. 26, Code Pub. Gen. Laws 1904, wherein it is provided: The court shall give judgment in all actions according as the very right of the cause and matter in law shall appear to them, without regarding any matters of mere form, so as sufficient matter shall appear in the proceedings, upon which the court shall proceed to give judgment, and it shall appear that the action has been commenced after the cause thereof did accrue. When it appears a good and sufficient reason exists for a qualified judgment, as in this case, such a judgment can be rendered. 2 Evans's Harris, 345, 364; *Peck v. Jenness*, 7 How. 612, 12 L. ed.

841; *Doe v. Childress*, 21 Wall. 642, 22 L. ed. 549; *Hill v. Harding*, 130 U. S. 702, 32 L. ed. 1084, 9 Sup. Ct. Rep. 725."

The ultimate inquiry, then, in the case at bar, and wherein it differs from the *Kendrick & Roberts v. Warren Bros. Co. Case*, supra, properly comes to this: Can the courts of this state enter a judgment, with a perpetual stay of execution, against a defendant in an attachment suit, instituted within four months before the defendant has filed a petition to be adjudicated a bankrupt, and when he is subsequently discharged as a bankrupt, for the purpose of allowing the plaintiff to proceed against the surety on the bond given to dissolve the attachment? The decision of this question, as we have said, must depend upon the language and the effect to be given to § 67f of the bankrupt act, herein cited. The language of this section, we think, is quite clear and comprehensive, and broad enough to include within its terms the defendant and the surety we are here dealing with. It provides in terms that all levies, judgments, attachments, or other liens obtained against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt.

In *Kendrick & Roberts v. Warren Bros. Co.* supra, we held, upon the authority of *Hill v. Harding*, supra, that, where the bond or recognizance was given to dissolve the attachment, issued more than four months before the commencement of the proceedings in bankruptcy, there was nothing in the provisions of the bankrupt act to prevent the state court from rendering a qualified judgment, with a stay of execution. Justice Gray, in delivering the opinion of the court, in *Hill v. Harding*, supra, said: "Such attachments being recognized as valid by the bankrupt act (Rev. Stat. § 5044), a discharge in bankruptcy does not prevent the attaching creditors from taking judgment against the debtor in such limited form as may enable them to reap the benefit of their attachment. . . . The judgment is not against the person or property of the bankrupt, and has no other effect than to enable the plaintiff to charge the sureties, in accordance with the express terms of their contract, and with the spirit of that provision of the bankrupt act which declares that 'no discharge shall release, discharge, or affect any person liable for the same debt, for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.' . . . If the bond was executed before the commencement of proceedings in bankruptcy, the discharge of the bankrupt protects him from liability to

the obligees, so that, in an action on the bond against him and his sureties, any judgment recovered by the plaintiffs must be accompanied with a perpetual stay of execution against him; but his discharge does not prevent that judgment from being rendered generally against them." *Wolf v. Stix*, 99 U. S. 1, 25 L. ed. 309; *Metcalf Bros. v. Barker*, 187 U. S. 165, 47 L. ed. 122, 23 Sup. Ct. Rep. 67; *Black, Bankr.* 94.

But in the case now under consideration we are met with an entirely different proposition, because the bankrupt act (1908) declares that attachments or other liens obtained at any time within four months prior to the filing of a petition in bankruptcy against an insolvent person shall be deemed null and void in case he is adjudicated a bankrupt, and the property affected by the attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt. Now, it is quite clear, we think, if no bond had been filed, the attachment having issued within four months prior to the filing of the petition, the lien, attachment, and all the proceedings, would have been null and void, by the terms and operation of the bankrupt act. In *Hill v. Harding*, 130 U. S. 703, 32 L. ed. 1084, 9 Sup. Ct. Rep. 725, it is said the bond or recognizance takes the place of the attachment as a security for the debt of the attaching creditor; they cannot dispute the election, given to the debtor by statute, of substituting the new security for the old one. In *Corner v. Mallory*, 31 Md. 468, this court said the period of four months was fixed as a period within which no preference should be gained by one creditor by attachment over the claims of other creditors of the bankrupt. And the law effects no hardships in dissolving such attachments, as the creditor's claim is not impaired, and he is only deprived of a lien and priority that he might otherwise obtain to the prejudice of other creditors, and in violation of the policy of the law, which is to effect a fair and equal distribution of the property of the bankrupt among all his creditors.

It is also quite certain, under both the decisions and the terms of the bankrupt act itself, that if the property had been attached within four months prior to the filing of the petition, and the defendant had been adjudged a bankrupt, it would have been released and discharged; and if this be so, there can be no reason why the bond which stands in the place of the attachment and the property should not be relieved and released. *Metcalf Bros. v. Barker*, 187 U. S. 174, 47 L. ed. 126, 23 Sup. Ct. Rep. 67; *Hill v. Harding*, 130 U. S. 699, 32 L. ed. 1083, 9 Sup. Ct. Rep. 725; *Wolf v. Stix*, 99

U. S. 1, 25 L. ed. 309; Randle v. Mellen, 67 Md. 181, 8 Atl. 573; Hutchins v. Taylor, 5 Law Rep. 289, Fed. Cas. No. 6,953; Swan v. Littlefield, 4 Cush. 574; Curtis v. Barnum, 25 Conn. 370. The recent cases of House v. Schnadig, 235 Ill. 304, 85 N. E. 395, and A. Klipstein & Co. v. Allen-Miles Co. 69 C. C. A. 232, 136 Fed. 388, are in point, and are somewhat analogous cases. They present a construction of § 67f of the bankrupt act of 1898, and support the conclusion we have reached in this case. In the Illinois case, *supra*, the court said that case was distinguishable from the Hill v. Harding Case, because in the Hill Case the attachment was sued out more than four months prior to his filing his petition in bankruptcy. The attachment became a lien in favor of the attaching creditor, upon a levy being made, and this lien would not have been affected by the bankruptcy proceedings. Its release was accomplished by the recognizance given in accordance with the provisions of the statute. In the case at bar (the Illinois case) the appeal bond was given on the 31st day of May, 1906, and the petition in bankruptcy was filed on the 8th of June following. If the appellants had secured a lien on property, by an execution or otherwise, at the time the appeal bond was given, it would have been rendered null and void by the bankruptcy proceedings. Section 67f, bankrupt act. The supreme court of Illinois held that the discharge in bankruptcy, on the facts of that case, was a bar to the rendition of a judgment against the bankrupt, and released the surety. In the Klipstein Case, the circuit court of appeals, fifth circuit, held that where the debt for which the plaintiff sued was provable in bankruptcy, and defendant was insolvent at the time suit was brought, and had since been insolvent, its discharge in bankruptcy pending such suit released it from liability, as provided by the bankrupt act of 1898, and plaintiff cannot have judgment on it against the defendant. This case was based upon a garnishment proceeding, and it was admitted as a fact that the defendant had been discharged in bankruptcy, and that within four months prior to the proceedings garnishment was taken out, and these proceedings had been dissolved by a bond signed as surety by the Fidelity & Deposit Company of Maryland. The court held, upon the facts of the case, that judgment could not be entered against the defendant for the purpose of taking final judgment on the bond given to dissolve the garnishment, because the discharge prevents the surety from incurring the liability. And this was so, independent of the statute of Georgia, because the garnishment proceedings being had within four months prior to the bank-

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ruptcy proceedings, they were invalidated by the adjudication in bankruptcy. The facts of the case, said the court, clearly distinguish it from the case of Hill v. Harding, *supra*, and from the other cases cited.

Our conclusion, then, is that the case at bar is distinguishable from the case of Kendrick & Roberts v. Warren Bros. Co. 110 Md. 47, 72 Atl. 461, and for the reasons given, the defendant's demurrer to the plaintiff's replication was properly sustained, and the judgment on the demurrer in favor of the defendant will be affirmed. This conclusion, it seems to us, is sanctioned by the weight of authority, as declared by the courts and by the text writers. Collier, Bankr. 306; 1 Remington, Bankr. 902; Brandenburg, Bankr. 415; Loveland, Bankr. 852; Re Richards, 3 Am. Bankr. Rep. 145, 37 C. C. A. 634, 96 Fed. 935; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. ed. 907, 26 Sup. Ct. Rep. 580; A. Klipstein & Co. v. Grant, 201 U. S. 647, 50 L. ed. 904, 26 Sup. Ct. Rep. 761. The case of McCoombs v. Allen, 82 N. Y. 115, cited and relied upon by the appellant in its brief, cannot be regarded as a controlling authority, if an authority at all, to sustain the appellant's position, under the facts of this case. In that case the court held that the proceeding in bankruptcy was no defense, as there was at the time no attachment lien or attachment in force upon which the proceeding could operate, and that neither the letter nor the policy of the bankrupt act was infringed by holding the defendants liable.

For the reasons given, the judgment will be affirmed, with costs.

NEW YORK COURT OF APPEALS.

THOMAS F. HURLEY, Respt.,

v.

J. VAN V. OLCOTT et al., Receivers, etc.,
Appts.

(198 N. Y. 132, 91 N. E. 270.)

Servant — injury — notice — service by mail.

Failure of the employer to receive the notice is immaterial where a statute providing for service of notice of injury for which the master is to be held liable states that it may be served by post, by letter addressed to the person on whom it is to be served.

(March 15, 1910.)

Note. — Service by mail of notice required by employers' liability acts.

This appears to be a question which as yet has had little attention from the courts.

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Westchester County in plaintiff's favor, in an action brought to recover damages for personal injuries under the employers' liability act. Affirmed.

The facts are stated in the opinion.

Messrs. Eugene Lamb Richards, Jr., and Rutherford B. Meyer, with Mr. Frank Verner Johnson, for appellants:

The mailing of the notice, properly addressed and postpaid, merely raised a presumption that it had been received by the person to whom it was directed.

Moyle v. Jenkins, L. R. 8 Q. B. Div. 116; McCoy v. New York, 46 Hun, 268; Rosenthal v. Walker, 111 U. S. 193, 28 L. ed. 398, 4 Sup. Ct. Rep. 382; Huntley v. Whittier, 105 Mass. 393, 7 Am. Rep. 536; Austin v. Holland, 69 N. Y. 576, 25 Am. Rep. 246.

Mr. L. F. Fish, with Mr. Thomas J. O'Neill, for respondent.

Cullen, Ch. J., delivered the opinion of the court:

The action is brought under the employers' liability act (Laws 1902, chap. 600), servant against master, to recover damages for personal injuries. The notice alleged to have been served seems, under our recent decision in Bertolami v. United Engineering & Contracting Co. 198 N. Y. 71, 91 N. E. 267, to be sufficient, and the only question necessary to consider on this appeal is as to the service of the notice. The plaintiff claimed to have made the service by mail; defendants denied receipt of the notice. The trial court charged the jury that if they found that the notice "was actually written as the plaintiff's wife says it was, and plainly addressed to the defendants, and the postage prepaid, and deposited by her in a postoffice box, it was sufficient, whether defendants received it or not." To this ruling the defendants excepted, and contend that it should have been left to the jury to decide whether in fact the defendants did receive the notice, and the jury instructed that if defendants failed to receive it, the service was insufficient.

In support of this position, counsel for the appellants cites many authorities to

show that from the deposit of a letter in the postoffice there arises only a presumption of its delivery, which may be rebutted, and thus a question of fact be presented. This is, undoubtedly, the law; but it has no application to the case before us. In the cases cited by the counsel it was necessary for a party to show actual notice to the adverse party, or the actual receipt of the communication addressed to him. But such is not the requirement of the statute before us. It reads: "The notice may be served by post, by letter addressed to the person on whom it is to be served, at his last known place of residence or place of business; and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post." This provision is not anomalous. In many cases the statute provides that notice may be served by mail. Such is the provision as to service of papers on the attorneys in an action, and it has been uniformly held that the service was effective when the papers were properly mailed, regardless of their receipt by the adverse party. The risk of miscarriage is with the party to whom they are directed. Jacobs v. Hooker, 1 Barb. 71; Brown v. Briggs, 1 How. Pr. 152; Radcliff v. Van Benthuyssen, 3 How. Pr. 67. The law may prescribe other than personal service even of original process by which it is sought to bring a party into court, and bind him by its judgment. In United States Trust Co. v. United States F. Ins. Co. 18 N. Y. 199, it was held that personal service is not required to constitute due process of law, and that the legislature may prescribe "a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him." (P. 215.) In that case the notice was by advertisement in a newspaper. To the same effect is Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129, citing Cooley on Constitutional Limitations, p. 404. The Code provides for service of a summons on persons without the state by advertisement and the mail, and the fact that unfortunately the party sought to be served does not receive notice in no wise affects the validity of the service or the jurisdiction of the court. In this case no constitutional ques-

No authorities have been found as to the sufficiency of service by mail of the notice which employers are entitled to receive under the provisions of liability statutes, where no specific mode of service is provided for in the act itself.

The New York employers' liability act allows service of the notice of injury by mail, and so the courts of that state recognize the sufficiency of such service without 28 L.R.A. (N.S.)

question. See Eddington v. Union R. Co. 109 N. Y. Supp. 819.

Under a section of the English employers' liability act, notice of the injury may be served by registered letter; but a service by ordinary post has been held good, where there was evidence that the letter had actually been received. Previdi v. Gatti, 58 L. T. N. S. 762; Faul v. Fletcher (1881) 71 Law Times, 84.

tion is involved, because the legislature might have dispensed altogether with service of notice, either personally or by mail. The only question is the construction of the statute; and, in accordance with the uniform current of authority in analogous cases, it is clear that the proper deposit in the post is a complete compliance with the statutory requirement.

The judgment appealed from should be affirmed, with costs.

Gray, Edward T. Bartlett, Haight, Vann, Willard Bartlett, and Chase, JJ., concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY

v.

MATTHEW J. READY, Plff. in Err.

(— N. J. —, 75 Atl. 564.)

Evidence — will — declarations of intent — forgery.

In defense of a prosecution for forgery of a will, evidence is admissible of declarations of the testator indicating an intent to execute a will of the tenor of that alleged to have been forged, if made at a period not so remote from the date of the will as to render them immaterial.

(November —, 1909.)

Note. — Admissibility, upon issue of forgery, of declarations out of court by person whose name is charged to have been forged.

The decisions as to the admissibility, upon the question of forgery, of declarations out of court by persons whose names are charged to have been forged, are not entirely agreed. Some courts admit such declarations upon an issue as to forgery of a will, not as direct proof of the forgery, but as corroborative of other testimony.

Thus, in *Hoppe v. Byers*, 60 Md. 381, where it was claimed that an instrument presented as a will of personalty was a forgery, after direct proof of its genuineness and direct proof to the contrary had been introduced, declarations of the deceased, made after it was alleged to have been executed, that he had made no will, that he intended to leave his property to certain persons, etc., were held admissible, and declarations made prior to its execution, that he intended to give the beneficiary named a share of his estate, were admitted, as were also declarations made subsequently, that he had done what he said he would do. The court said: "But in thus sustaining the ruling excepted to, it must be distinctly understood that we hold that such declarations would not be admissible if they stood alone, 28 L.R.A. (N.S.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Court of Quarter Sessions for Essex County, convicting defendant of forgery. Reversed.

The facts are stated in the opinion.

Mr. Samuel Kallsch, for plaintiff in error:

The statements made by the deceased, that he intended to make a will and leave his property to Miss Calvin, were wrongfully excluded.

Boylan v. Meeker, 28 N. J. L. 292; *Hunter v. State*, 40 N. J. L. 537.

Mr. Thomas S. Henry, also for plaintiff in error:

Evidence as to testator's declaration in regard to the intended disposition of his property was admissible.

Taylor Will Case, 10 Abb. Pr. N. S. 300; *Hoppe v. Byers*, 60 Md. 381; *Gould v. Lakes*, L. R. 6 Prob. Div. 1; *Sugden v. St. Leonards*, L. R. 1 Prob. Div. 154; *Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437; *Com. v. M'Pike*, 3 Cush. 181, 50 Am. Dec. 727; *Harriman v. Stowe*, 57 Mo. 97; *Aveson v. Kinnaid*, 6 East, 188; *Clawson v. Brewer*, 67 N. J. Eq. 208, 58 Atl. 598; *Davis v. Elliott*, 55 N. J. Eq. 473, 36 Atl. 1092; *Hatch v. Sigman*, 1 Dem. 519; *Crispell v. Dubois*, 4 Barb. 393; *Re Hesdra*, 119 N. Y. 615, 23 N. E. 555; *Best*, Ev. 236; *Beadles v. Alexander*, 9 Baxt. 604; *People v. Patrick*, 182 N. Y. 211, 74 N. E. 843; 3 Greenl. Ev. § 105; *Wills, Circumstantial Ev. Beers's Am. ed.* 905; *Taylor*, Ev. § 1083;

and had not been preceded by the direct proof of witnesses as to the genuineness of the handwriting. They are not to be taken as direct proof to establish the paper, but merely as corroborative of such direct proof, or as a circumstance in a case of this character, where such direct evidence had been first given, proper for the consideration of the jury."

And the same rule was applied in the following cases, where the declarations were admitted: *Taylor Will Case*, 10 Abb. Pr. N. S. 300 (declarations of one whose name appeared as testator, made subsequent to the date of the instrument, showing his affection for certain recipients under the will); *Turner v. Hand*, 3 Wall. Jr. 88, Fed. Cas. No. 14,257 (alleged testator's declarations, at or about time of execution of will claimed to be forgery, as to the way in which he had disposed of his property); *Johnson v. Brown*, 51 Tex. 65 (declarations of person whose name was alleged to have been forged to will, made before and after its date, expressing ill-will or kindness towards beneficiaries); *Gurley v. Armentraut*, 27 Ohio C. C. 199 (declarations showing intention of making will).

In *Turner v. Hand*, supra, the court said: "Testimony of the sort proposed is, generally speaking, not admissible; but when you have strong proof that the paper

1 Jarman, Wills, 4th Eng. ed. 723; *Re Foster*, 34 Mich. 25; 1 Wharton, Ev. § 454; 2 Am. & Eng. Enc. Law, p. 281; 7 Am. & Eng. Enc. Law, p. 70; *Vandiver v. Vandiver*, 115 Ala. 328, 22 So. 154; *Abbott, Trial Ev. Crawford's ed.* pp. 146, 148, 186; *Abbott, Trial Brief*, 158; *People v. Wright*, 9 Wend. 195; *Patterson v. Westervelt*, 17 Wend. 549; *Chitty, Crim. Law*, 1003; 2 Starkie, Crim. Ev. 506; *Stephen, General View*, 2d ed. 131, 132; *Harris v. Harris*, 26 N. Y. 433; *Findley v. State*, 125 Ga. 579, 54 S. E. 106; *Green v. State*, 89 Miss. 331, 42 So. 797; *Phillipps, Ev. under head, "Hearsay & Res Gestæ;"* 1 Wigmore, Ev. 102, 112; 3 Wigmore, Ev. §§ 1723, 1725, 1772, 1777; *Tait v. Hall*, 71 Cal. 149, 12 Pac. 391; *Chicago v. Drexel*, 141 Ill. 89, 30 N. E. 774; *Redf. Wills*, 511.

It is immaterial whether the declarations were made before or after the making or loss of the will.

1 Phillipps, Ev. 185; 2 Taylor, Ev. Chamberlayne's 9th ed. § 123; McKelvey, Ev. 213; 1 Wharton, Ev. 259; Starkie, Ev. 9th ed. 88; *Crispell v. Dubois*, supra; *Collagan v. Burns*, 57 Me. 449; *Beadles v. Alexander*, supra; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Leonard v. Quinlan*, 121 Mass. 579; *Re Hesdra*, supra; *Canada's Appeal*, 47 Conn. 463; *Abbott, Trial Ev. Crawford's ed.* § 70, p. 157; *Re Johnson*, 57 Cal. 529; *Re Valentine*, 93 Wis. 45, 67 N. W. 12; *Hoppe v. Byers*, supra.

offered as a will is a forgery, and the issue is fraud and forgery, I think it is competent, as tending to prove the issue. It is, however, a somewhat dangerous kind of evidence, and a court must hold a tight rein over it, in charging the jury as to its legal effect, in relation to the positive and unimpeached evidence of execution."

In *Corbett v. State*, 3 Ohio C. D. 79, which was a prosecution for forging a will, declarations of the supposed testatrix, made shortly before and after the date of the alleged forgery, showing her feelings as to the disposition of her estate, were admitted upon the question of the genuineness of the paper.

And to the same effect is *Breck v. State*, 2 Ohio C. D. 477.

And in *Doe ex dem. Ellis v. Hardy*, 1 Moody & R. 525, the declarations of a testator as to who he intended should have his property were held admissible, where a codicil was claimed to be forgery.

So, in *Estate of Thomas*, 155 Cal. 488, 101 Pac. 798, where an instrument undertaking to transfer all of deceased's property to one relative, and stating that he had only one relative, was claimed to be a forgery, the deceased's declarations that he had other relatives were held admissible to show that he had knowledge of other relatives

Messrs. Wilbur A. Mott and Frank E. Bradner for defendant in error.

Gummere, Ch. J., delivered the opinion of the court:

The plaintiff in error was convicted in the Essex quarter sessions of the crime of forging the will of the late John W. Russell, who died on the 28th of November, 1905. The record of the conviction was removed into the supreme court for review, and numerous errors were there assigned and considered. The conclusion reached by the reviewing tribunal was that the assignments were, each of them, without legal support; and the conviction was thereupon affirmed. The present writ of error is sued out to test the validity of the judgment of affirmance.

We concur in the conclusion reached by the supreme court upon all of the assignments of error, except those which challenge rulings of the trial court excluding testimony offered on behalf of the plaintiff in error of declarations made by Mr. Russell to witnesses, who were called upon to prove those declarations. Their purport was that the deceased intended to make a will, and leave his property to Mary Calvin, who was his housekeeper, and had lived with him in that capacity for about six years preceding his death. They were objected to, and excluded, upon the ground that they were hearsay.

The will which was alleged to have been forged by the plaintiff in error bears date

at the time the purported will was executed.

Such declarations are held by other decisions, both in cases of forgery of wills and of other instruments, to be inadmissible, on the ground of hearsay.

Thus, in *Kennedy v. Upshaw*, 64 Tex. 411, declarations of a testator, made several days after the date of a codicil which was claimed to be a forgery, that he had made no change in the disposition of his property, and intended to make none, were held inadmissible. The court said: "The true rule as to declarations of a testator, made before or after the execution of a testamentary paper, when such an issue is presented, we believe to be that summarized by Mr. Redfield from the case of *Boylan v. Meeker*, 28 N. J. L. 274, thus: The conduct and declarations of the testator, both before and after he executed the will, are competent evidence to show his want of capacity at the time the will was executed, where the issue is upon the sanity of the testator; but after the will is made, such conduct and declarations, manifesting ignorance of the existence of the will, are not competent to show that the testator had never made the will in question. And where the execution of a will is proved in the mode required by law, the declarations of the testator, made before or after

the 15th of November, 1905. By its terms it devised and bequeathed all of the testator's property, real and personal, to one M. Calvin, who was also created by it "executor or executrix" of the will. The declarations of Mr. Russell which were sought to be proved were made, one of them about three months before his death, and the other "shortly before" that event.

It cannot be doubted that if the decedent, shortly before the date of the controverted will, had made up his mind to leave his property to his housekeeper, Miss Calvin, this pre-existing testamentary design would not only have been relevant, but would have had great potency in determining the question whether the disputed instrument was a forgery, or his genuine will; for what a man determines to do, or not to do, he generally does or refrains from doing, unless something occurs before the time for executing his intention arrives which causes him to change his mind, or prevents him from carrying his intention into execution. To this extent I find no difference in judicial view. But on the question whether a person's intention to make a will, or to make a will of a particular purport, can be shown by his antecedent declarations of that intention, judicial sentiment is altogether out of harmony. In England it is entirely settled that declarations of this character are admissible. In the leading case of *Doe ex dem. Shalcross v. Palmer*, 16 Q. B. 747, an interlineation had been made by the testator in his will, by the terms of

which an interest in a portion of his real estate was devised to A. B. Except in the interlined provision, she was not mentioned in the will, either as devisee or legatee. The question to be determined was whether this interlineation had been made before or after the execution of the will. It was held that antecedent declarations of the testator, expressing an intention to make provision by his will for A. B., were admissible for the purpose of showing the existence of that intention prior to the time of making the will. Lord Campbell, who delivered the opinion of the court, after reviewing the earlier cases, declared that they were none of them adverse to the admissibility of such declarations, and pointed out that, "in all cases where there is any imputation of fraud in the making of the will, the declarations of the testator are admitted respecting his dislike or affection for his relations, or those who appear in the will to be the objects of his bounty, and respecting his intentions either to benefit them or to pass them by in the disposition of his property." In the case of *Sugden v. St. Leonards*, L. R. 1 Prob. Div. 154, it was held by all of the judges that declarations of the testator antedating his will were competent evidence to prove his testamentary intentions. Their admissibility for that purpose was again affirmed in *Dench v. Dench*, L. R. 2 Prob. Div. 64. *Woodward v. Goulstone*, L. R. 11 App. Cas. 469, the latest case in the House of Lords upon the subject of the admissibility of the declarations of the testator contains

the execution of the instrument, are not competent to prove fraud, duress, or forgery, or to disprove the execution; they are hearsay, merely; but such declarations, made at the time the instrument was executed, are admissible as part of the *res gestæ*. The rule upon these points is the same in the case of wills that it is in the case of deeds."

The same rule was applied in the following cases: *Leslie v. McMurtry*, 60 Ark. 301, 30 S. W. 33 (declarations after alleged will was executed, that he had made no will, held inadmissible to prove it a forgery); *People v. Driggs*, 12 Cal. App. 240, 108 Pac. 62, 64 (statements by purported lessor, who was deceased, to the effect that defendant was liable to present forged papers against his estate, and that she wanted him to sign a lease, but that he did not do it, and was deeding his property away so that she would not get it); *People v. Alderdice*, 120 App. Div. 368, 105 N. Y. Supp. 395 (declarations of one whose name has been forged to a deed, that he had given certain property to a relative of defendant); *People v. Landis*, 139 Cal. 426, 73 Pac. 153 (declarations by deceased person, against whose estate a note claimed to have been forged was presented, to the effect that defendant had swindled him and was a thief); *State v. Allen*, 56 S. 28 L.R.A. (N.S.)

C. 495, 35 S. E. 204 (holding, in indictment for forgery of a school claim against a school district, declarations of a deceased trustee whose name appeared thereon inadmissible).

Declarations of a supposed testatrix, made some months before the date of the will alleged to be a forgery, that she had executed a will, and declarations some years before, of an intention to make a will, have been held inadmissible as too vague and remote to be considered corroborative of the testimony of witnesses to the execution of the writing offered as a will. *Swope v. Donnelly*, 190 Pa. 417, 70 Am. St. Rep. 637, 42 Atl. 882.

In *Beavan v. Atlanta Nat. Bank*, 142 Ill. 302, 31 N. E. 679, where it was claimed as a defense to a note that one of the names had been forged, evidence that such person, who was deceased, had said that she had assisted the defendant, and did not think she would lose anything by it, was admitted. The objection made here was that the testimony had no reference to the note.

For a note on the admissibility of antetestamentary declarations of a testator upon the issue of undue influence, see *Hobson v. Moorman*, 3 L.R.A. (N.S.) 749.

no intimation of a doubt as to the soundness of the earlier decisions I have referred to, so far as they relate to declarations of a testator antedating his will.

In this country courts are divided on the question of the admissibility of such evidence. The leading case against its admissibility is that of *Throckmorton v. Holt*, 180 U. S. 552, 45 L. ed. 663, 21 Sup. Ct. Rep. 474. In that case the litigation was over the admission to probate of a paper purporting to be the last will and testament of Judge Holt. One of the questions was whether or not the alleged will was a forgery. Some of the declarations of the testator were offered as tending to prove, and others as tending to disprove, the factum of the will. Mr. Justice Peckham, in an elaborate opinion, after referring to the fact that the state courts are not in accord upon this subject, cites in a marginal note those cases which he considers favor the exclusion of such evidence, and those which favor its admission. He concludes that the weight of authority, as well as the principles upon which the law of evidence is founded, necessitates the exclusion of such evidence for any purpose, except the determination of the mental capacity of the testator. The first three cases which he cites in support of his conclusion are *Boylan v. Meeker*, 28 N. J. L. 274; *Rusling v. Rusling*, 36 N. J. Eq. 603; and *Re Gordon*, 50 N. J. Eq. 397, 26 Atl. 268. I shall discuss these cases later. Others of those authorities are *Shailer v. Bumstead*, 99 Mass. 112; *Lane v. Moore*, 151 Mass. 87, 21 Am. St. Rep. 430, 23 N. E. 828; *Marx v. McGlynn*, 88 N. Y. 357; *Robinson v. Hutchinson*, 26 Vt. 38, 60 Am. Dec. 298; *Mooney v. Olsen*, 22 Kan. 69.

I am unable to agree that these decisions support the conclusion of the principal case. They seem to me rather to be opposed to it than to support it. In *Shailer v. Bumstead*, Colt, J., on page 126 of the opinion in 99 Mass., says: Such "evidence was not competent as a declaration or narrative to show the fact of fraud or undue influence at a previous period. But it was admissible not only to show retention or loss of memory, tenacity or vacillation of purpose existing at the date of the will, but also in proof of long-cherished purposes, settled convictions, deeply rooted feelings, opinions, affections, or prejudices, or other intrinsic or enduring peculiarities of mind inconsistent with the dispositions made in the instrument attempted to be set up as the . . . testatrix's will."

In *Lane v. Moore*, Allen, J. (151 Mass. 90), after referring to earlier Massachusetts cases in which declarations of the testator had been admitted, says: "The evidence is 28 L.R.A. (N.S.)

received merely for the purpose of throwing light upon the state of mind of the person at the time in question, and not as tending to establish the truth of any facts which may have been stated by him. There are certain proper limitations to the admissibility of such evidence. One is . . . that the testimony should appear to have some natural bearing upon the mental condition of the person, or his intention at the particular time which is immediately involved in the issue."

In *Marx v. McGlynn*, Earl, J. (88 N. Y. 374), says that such declarations are in the nature of hearsay, and "are incompetent for the purpose of defeating or destroying the will or any of its provisions. They are competent only as bearing upon the condition of the mind of the testatrix at the time of the execution of the will. Such memoranda or declarations . . . are competent as bearing upon the testator's mental capacity. They are also competent as bearing upon the condition of the testator's mind with reference to the objects of his bounty."

In *Robinson v. Hutchinson*, Isham, J. (26 Vt. 47), expresses the conclusion reached by the court as to the admissibility of such declarations as follows: "The true rule and distinction on this subject we apprehend is given in 2 *Phillipps on Evidence*, in notes by Cowen & Hill, 648, in which the editor remarks 'that the difficulty seems to lie in acting upon the distinction between declarations going to develop the operations of the mind, and those containing the assertion merely of a distinct fact. The former are admissible, the latter not.'"

In *Mooney v. Olsen*, 22 Kan. 69, the conclusion reached by the court is thus expressed by Mr. Justice Brewer, on page 77 of the opinion: "While declarations are not admissible as mere impeachment of the validity of a will, they are admissible as evidence of the testator's state of mind." A man's words show his mental condition. It is common to prove insanity by the party's sayings as well as by his acts. One's likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances; so that it is generally true that, whenever a party's state of mind is a subject of inquiry, his declarations are admissible as evidence thereof. In other words, a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay, if not made upon oath; but a declaration which is sought as evidence of what the declarant thought or felt, or of his mental capacity, is of the best of evidence.

Turning now to the New Jersey decisions: An examination of them shows that there has been much vacillation of judicial view

upon the admissibility of the declarations of a testator.

In the case of *Den v. Vancleve*, 5 N. J. L. 589, Justice Southard, on page 676 of the case, declared that antecedent declarations of the testator were competent to rebut a charge that the will was the result of fraud or imposition exercised upon him, saying: "The allegation and proof then were that testator was imposed on and did not speak his own will. Was it not a proper answer that he did what for twenty years he had intended to do, and therefore there could be no imposition? And if this be a proper answer, shall not the defendant be permitted to prove it? And can it be proved in a better way than by the testator's acts and declarations? I am aware of none." Chief Justice Kirkpatrick considered that the declarations were not competent for the purpose indicated, and Rossell, J., expressed no opinion upon the subject.

In *Day v. Day*, 3 N. J. Eq. 549, antecedent declarations of the deceased as to his testamentary intentions were received in evidence, and were considered by the prerogative court to support the conclusion that a paper offered for probate as his last will and testament was signed by him without being acquainted with its contents.

In *Boylan v. Meeker*, 15 N. J. Eq. 310, which was a controversy in the prerogative court over the probate of the will of Jonathan M. Meeker, and where the allegation of the caveators was that the paper offered for probate was not the genuine will of the deceased, it was held that it was competent for the caveators to show that the provisions of the contested will were contrary to the expressed intentions, views, and feelings of the deceased before the time at which it bore date.

In the later case of *Boylan v. Meeker*, 28 N. J. L. 274, which was an action in ejectment between the same parties, and where one of the questions in issue was whether or not the alleged will of Meeker was a forgery, Whelpley, J., in delivering the leading opinion for the supreme court, refused to follow its earlier decision in *Den v. Vancleve*, and, after a review of many of the cases upon both sides of the question, concluded that "the decision of this case upon principle and the great weight of authority requires the rejection of evidence of the testator's declarations, whether made before or after the execution of a will, either to support or destroy its validity, when the declarations are offered as evidence of the facts declared, and not as showing soundness or unsoundness of mind." Opinion, page 294 of 5 N. J. L.

The first case where this question was mooted in this court, so far as my examination of our decisions has disclosed, was the 28 L.R.A. (N.S.)

celebrated litigation over the will of Dr. Vanderveer, decided ten years later than *Boylan v. Meeker*, reported *sub nom.* *Harris v. Vanderveer*, 21 N. J. Eq. 561. One of the questions litigated in that case was whether the signature of Dr. Vanderveer to his will had been fraudulently procured, without a full knowledge on his part of its contents. Both sides put in evidence declarations of the deceased, showing his testamentary intentions. Those declarations were received without objection, and were considered, not only by the court below, but by this court, in reaching a conclusion upon the merits. Van Syckel, J., who delivered the opinion of this court, was careful to guard against the conclusion that this court, by its action, affirmed the admissibility of such evidence, by the following statement: "It is proper to say that it is not intended to intimate any opinion as to the admissibility of the testator's declarations before and after the execution of the will; they have been used in the argument on both sides without objection, each party claiming a benefit from them." This statement was undoubtedly called forth by the fact that the prior decisions of the supreme court and the prerogative court were not in harmony upon this question, and that this court was not willing to declare itself upon the one side of it or the other, until appropriate occasion for doing so should arise.

In the case of *Rusling v. Rusling*, 36 N. J. Eq. 603, the question was again touched upon by this court. A caveat had been filed against the will of Gersham Rusling, deceased, upon the ground that it was the product of undue influence. The caveators offered to prove declarations of the testator respecting the conduct toward him of the favored legatees. The purpose of the offer was to prove the facts stated by the deceased. On the trial in the court of first instance, before the late Chief Justice Beasley and a jury, that distinguished jurist stated in his charge that the declarations were not competent for that purpose; that they were only competent for the purpose of showing the effect upon the testator of the exercise of the alleged power or dominion which the favored legatees were said to possess over him. Added weight is given to the chief justice's exposition of the law by the fact that he presided in this court when *Harris v. Vanderveer* was decided. Chancellor Runyon, when the case came into the prerogative court for review, thus dealt with the question: "That charge (i. e., the charge of the chief justice to the jury) was in accordance with the settled law on the subject in this state, although it has never been so declared, indeed, by the court of last

resort." See his opinion, 35 N. J. Eq. 129. When the case came into this court, Dixon, J., delivering the unanimous opinion of the court, thus deals with the question (page 607 of 36 N. J. Eq.): "These declarations are not admissible as evidence of the facts which they were offered to prove. When undue influence is set up in impeachment of a will, the ground of invalidity to be established is that the conduct of others has so operated upon the testator's mind as to constrain him to execute an instrument to which, of his free will, he would not have assented. This involves two things: First, the conduct of those by whom the influence is said to have been exerted; second, the mental state of the testator, as produced by such conduct, which may require a disclosure of the strength of mind of the decedent and his testamentary purposes, both immediately before the conduct complained of, and while subjected to its influence. In order to show the testator's mental state at any given time, his declarations at that time are competent, because the conditions of the mind are revealed to us only by its external manifestations, of which speech is one. Likewise, the state of the mind at one time is competent evidence of its state at other times not too remote, because mental conditions have some degree of permanency. Hence, in an inquiry respecting the testator's state of mind before or pending the exertion of the alleged influence, his words, as well as his other behavior, may be shown for the purpose of bringing into view the mental condition which produced them, and, through that, the antecedent and subsequent conditions. To this extent his declarations have legal value. But for the purpose of proving matters not related to his existing mental state, the assertions of the testator are mere hearsay. . . . There is no legal principle upon which they can be treated as evidence of acts constituting undue influence. The weight of authority touching this matter is in accordance with true principle, but it is not necessary here to review the cases. In *Boylan v. Meeker*, 28 N. J. L. 274, Whelpley, J., refers to many of them, examining the point with much care, and more recently, in *Shailer v. Bumstead*, 99 Mass. 112, Colt, J., has discussed the subject with great clearness of discrimination; the conclusions in both opinions being that at which we have arrived."

From a cursory reading of the concluding portion of this extract it might be thought that this court concurred completely in the views expressed by Justice Whelpley in the *Boylan v. Meeker* Case. But this is clearly not so. The only question for determination in the *Rusling* Case was whether the declarations of a testator were evi-

dential of the acts referred to in them. The conclusion reached was that they were not. This conclusion is identical with that reached both in *Boylan v. Meeker* and in *Shailer v. Bumstead*. The question whether such declarations were admissible to show the state of mind of a testator—his testamentary intentions—was not before the court, and what was said by Justice Dixon upon that point, as well as what was said by Chief Justice Beasley and Chancellor Runyon in the earlier stages of the case, was purely *obiter*. That Justice Dixon's view upon that point was no part of the conclusion, which he declared was the same as that expressed in *Boylan v. Meeker*, and *Shailer v. Bumstead*, is apparent, not only from the fact that those two cases are absolutely opposed to one another upon this question, as the above-cited extracts from the opinions in those cases show, but also from the further fact that the conclusion in the *Boylan v. Meeker* Case upon this point is opposed to his own *obiter* expressions in the case he was considering.

In *Re Gordon*, 50 N. J. Eq. 397, 424, 26 Atl. 268, 278, declarations of the testator "which made for or against the authenticity of the disputed will" were held by Chancellor McGill, sitting as ordinary, to be incompetent, on the authority of *Boylan v. Meeker* and *Rusling v. Rusling*. The purpose for which the declarations were offered is not stated in the opinion of the court. It is impossible, therefore, to determine whether the case is an authority against the admissibility of the declarations of the testator for the purpose of proving his intention at the time they were made, with relation to the making or not making a testamentary disposition of his property. It is also to be observed that the decree of the prerogative court was affirmed, when the case came into this court, without any expression of opinion on the subject of the propriety of excluding these declarations. *Gordon v. Old*, 52 N. J. Eq. 317, 30 Atl. 19.

In *Davis v. Elliott*, 55 N. J. Eq. 473, 36 Atl. 1092, Chancellor McGill, sitting in the prerogative court, took into consideration declarations of the testatrix showing her testamentary intentions with relation to the caveator, in determining the question whether the alleged will was a forgery. This decision, rendered five years after that promulgated by him in the *Gordon* Case, would seem to justify the inference that the later case was not considered by him to be in conflict with the earlier one, and that the rejected declarations in the *Gordon* Case were not offered to prove the state of mind of the testator, but for the same purpose which led to their rejection in the *Rusling* Case, *viz.*, as evidence of the facts declared.

From this *résumé* of the New Jersey cases it appears that the prerogative court, from its decision in *Day v. Day*, in the year 1831, down to that in *Davis v. Elliott*, in 1897, has consistently held to the view (with the possible exception of the *Gordon Case*) that antecedent declarations of the testator are competent for the purpose of showing that the provisions of a contested will are contrary to, or in harmony with, his intentions, views, and feelings, as exhibited by those declarations; that the supreme court at one time held the same view, but subsequently repudiated it, and held that such declarations were competent only for the purpose of showing mental capacity, or lack of it, in the testator; and that this court has not, up to this time, been called upon definitely to decide the question, but has *obiter* expressed the view that such declarations are competent for the purpose of showing the state of mind of the testator, when his state of mind at the time of making the declarations is germane to the issue being tried.

The present case now requires us to declare our conclusion upon this question, and it is this: That the true rule is that stated by Prof. Wigmore in his very able treatise on the Law of Evidence (§ 1735), *viz.*, that where the issue is whether a will was executed, or whether a will was made to have a certain tenor or provision, the pre-existing testamentary design of the alleged testator is always relevant; and to evidence the existence of that design, his antecedent statements are admissible, when not too remote to be material.

The excluded declarations of Mr. Russell, tending to show his testamentary design, are those referred to in the opinion of the supreme court as being made the subject of the seventeenth and eighteenth assignments of error in that court, and those contained in the proffered testimony of Elisha Doremus. These declarations were not rejected as too remote in point of time, but solely upon the ground that they were hearsay. Under the rule which we have declared, they were not objectionable upon that ground, and should have been admitted, unless it had been made to appear that they were so remote as to be immaterial upon the issue whether the paper writing dated thirteen days before the death of Mr. Russell was, in fact, his last will and testament, or whether it was a forgery. Their exclusion was, we think, harmful error.

It is proper that we should say, before closing, that, in the state of our decisions as they existed at the time when this case was tried, the trial court was not only justified in following the decision of the supreme court in *Boylan v. Mecker*, but was under a legal obligation to do so; and that 28 L.R.A. (N.S.)

the supreme court itself was also required to pursue the same course, unless it considered that decision to be manifestly unsound.

The exclusion of the declarations of the testator makes it necessary to reverse the judgment under review, and to order a new trial.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS
EX REL. WILLIAM A. BARTLETT et
al., Appts.,

v.

FRED A. BUSSE et al.

(238 Ill. 593, 87 N. E. 840.)

Intoxicating liquors — Sunday law — operation of statute.

1. Illinois Crim. Code, § 259, providing punishment for one who keeps open on Sunday a place where intoxicating liquor is sold, is in force in Chicago.

Mandamus — enforcement of law.

2. Mandamus will not lie to compel the mayor of a city to enforce the Sunday closing law against a saloon keeper.

(February 19, 1909.)

Note. — Mandamus to compel public officials to enforce the liquor law.

The weight of authority seems to hold with the principal case, that public officers cannot be compelled by mandamus to enforce the liquor laws, since this would involve the ordering of a course of action which is, to some extent, discretionary, and which it would be difficult, if not impossible, for the courts to enforce.

In *Gowan v. Smith*, 157 Mich. 443, 122 N. W. 286 (decided since *PEOPLE EX REL. BARTLETT v. BUSSE*, it was held that mandamus would not issue to compel a police commissioner of a municipality to enforce the law of the state relating to the closing of saloons on Sunday, by making complaint for its violation, and obtaining the arrest of the offender, as that was a discretionary executive power, and should not be subjected to the control of the courts, except in cases of gross and manifest abuse. In that case it appeared that numerous complaints had been made because of previous violations of the law, and that the cases were then pending in the courts, which was also averred in the petition for the writ. After disposing of the contention that the police commissioner had the right summarily to close a saloon found open at times forbidden by law, upon the ground that the statute was unconstitutional, the court held that the only action which the relator could demand from the officer was that he proceed to collect evidence against that particular offending saloon keeper, and if such evidence was found by him to be sufficiently conclusive to warrant the making of a complaint, then to

APPEAL by petitioners from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County, dismissing a petition for a writ of mandamus to compel the mayor of Chicago to enforce the Sunday closing law. Affirmed.

The facts are stated in the opinion.

Messrs. Church & McMurdy and Walter J. Miller, for appellants:

The Sunday closing law of Illinois is in full force in the city of Chicago.

People ex rel. Hinch v. Harrison, 185 Ill. 307, 56 N. E. 1120; Gardner v. People, 20 Ill. 434; Wragg v. Penn Twp. 94 Ill. 11, 34 Am. Rep. 199; McPherson v. Chebanse, 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. 454; Hankins v. People, 106 Ill. 628; Hart v. People,

89 Ill. 407; Illinois C. R. Co. v. Stewart, 230 Ill. 204, 82 N. E. 590; Egypt Street, 2 Grant, Cas. 455; Haywood v. Savannah, 12 Ga. 404; Simpson v. Savage, 1 Mo. 359; State v. Young, 17 Kan. 414; Angerhoffer v. State, 15 Tex. App. 613; Moore v. Kelley, 136 Mich. 139, 98 N. W. 989; Chicago Teleph. Co. v. Illinois Mfrs. Asso. 106 Ill. App. 66; Harrison v. People, 195 Ill. 466, 63 N. E. 191; Re Whitney, 24 N. Y. S. R. 968, 3 N. Y. Supp. 838.

The mayor has no discretion as to the duty to enforce the law.

McPherson v. Chebanse, supra; Brokaw v. Highway Comrs. 130 Ill. 482, 6 L.R.A. 161, 22 N. E. 596; People ex rel. Bartlett v. Dunne, 219 Ill. 346, 76 N. E. 570; Binder v. Langhorst, 234 Ill. 583, 84 N. E. 400.

make such complaint, and to proceed in the ordinary orderly prosecution thereof. The court also said that should the writ issue in that case, the officer, in obeying the mandate of the court in that respect, would be bound to use the discretion with which he was clothed; that he was charged not alone with the execution of the liquor laws of the state within the city, but likewise with the suppression of all crime and the conservation of the peace; and that to enable him to perform the duties imposed upon him by law, he was supplied with certain limited means, and that it was entirely obvious that he must exercise sound discretion as to how those means should be applied for the good of the community; that he could not draw the entire police force at his command from their ordinary duties, and detail them to collect evidence against lawbreaking saloon keepers, lest other crimes should multiply; that a certain portion of his force was so employed was apparent from the averments of the petition, and that the writ should not issue unless the court was prepared to exercise a constant or recurring supervision over the daily acts of the police commissioner, and a definite control of the discretion with which he was clothed by law; and that that could not be done. An able dissenting opinion was also rendered in the case.

And in State ex rel. Hawes v. Brewer, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 1001, 4 A. & E. Ann. Cas. 197, mandamus to compel the sheriff of a county and the marshal of a city to make complaints and prosecute the persons who violated the laws of the state against keeping saloons open for trade on Sunday was denied on the ground that mandamus will not lie to compel a general course of official conduct, because it is impossible for the court to oversee the performance of such duties. The court also pointed out that the statute provided a remedy against public officers who refuse or neglect to inform against and prosecute such offenders, by fine and removal from office, which must be resorted to by the citizen in case of violation of duty by the officer.

And in State ex rel. Clark v. Murphy, 3 28 L.R.A. (N.S.)

Ohio C. C. 332 (reversing 10 Ohio Dec. Reprint, 256), it was held that mandamus would not lie to compel the superintendent of police of a city to enforce the Sunday closing laws, where the failure to perform such duties was a ground for his removal from office. The court said that mandamus would not lie to compel a general course of official conduct, and that the remedy provided (removal of the officer) was not only adequate, but was much more appropriate than mandamus to compel him to do his duty.

But in Goodell v. Woodbury, 71 N. H. 378, 52 Atl. 855, it was held that a remedy by removal of the officer would not prevent mandamus to compel a chief of police to prosecute violations of the liquor law. The court said: "This remedy is clearly not an adequate one. At most it cannot enforce the duty in question, and leaves the required act still unperformed. It is a fundamental rule that a remedy which does not compel specific performance is inadequate and constitutes no bar to a writ of mandamus. To supersede it a party must not only have a specific, adequate, legal remedy, but one competent to afford relief upon the very subject-matter of his application, and which is equally speedy, convenient, complete, and beneficial." In that case the petition requested the enforcement of the general public statutes relating to the sale of intoxicating liquors, and especially the section which provided for fine and imprisonment of the certain named offenders. The contention was made that courts would not issue a writ where it involved a long series of continuous acts, and virtually amounted to a supervision by the court of the enforcement of the law by municipal officers. The court said: "Conceding that mandamus may not be an appropriate remedy to compel a long series of continuous acts, there is no reason to apprehend that such acts will be necessary in the present case, but quite the contrary. Neither the petition nor the order of the court necessarily requires continuous action by the defendant. He is merely required, and in accordance with his legal duty, to enforce the provisions of § 16 against the spec-

The court has power by mandamus to compel the performance by a municipal executive of a public duty wilfully refused or evaded.

Huey v. Waldrop, 141 Ala. 318, 37 So. 380; Young v. Carey, 184 Ill. 613, 56 N. E. 960; People ex rel. O'Reilly v. New York, 59 How. Pr. 277; State ex rel. Buchanan v. Kellogg, 95 Wis. 672, 70 N. W. 300; State ex rel. McKay v. Curtis, 130 Wis. 357, 110 N. W. 189; Glencoe v. People, 78 Ill. 382; State ex rel. School Dist. v. Cummings, 17 Neb. 311, 22 N. W. 545; Moores v. State, 71 Neb. 522, 115 Am. St. Rep. 605, 99 N. W. 249; State ex rel. Barricelli v. Noonan, 59 Mo. App. 524; Atty. Gen. v. Boston, 123 Mass. 460; State v. Williams, 45 Or. 314, 67 L.R.A. 166, 77 Pac. 965; Goodell v. Woodbury, 71 N. H. 378, 52 Atl. 855; State ex rel. Roundtree v. Gibson County, 80 Ind. 478, 41 Am. Rep. 821; People ex rel. Case v. Collins, 19 Wend. 56; Brunswick v. Bath, 90 Me. 479, 38 Atl. 532; Re Whitney, supra; Ottawa v. People, 48 Ill. 233; People ex rel. Burke v. Bloomington, 63 Ill. 207; People ex rel. Faulkner v. Harris, 203 Ill. 272, 96 Am. St. Rep. 304, 67 N. E. 785; Lorraine v. Pittsburg, J. E. & E. R. Co. 205 Pa. 132, 61 L.R.A. 502, 54 Atl. 580; Chicago & N. W. R. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690; Illinois C. R. Co. v. People, 143 Ill. 434, 19 L.R.A. 119, 33 N. E. 173; People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 656, 52 N. E. 292; Illinois State Dental Examiners v. People, 123 Ill. 227, 13 N. E. 201; Brokaw v. Highway Comrs. 130 Ill. 482, 6

L.R.A. 161, 22 N. E. 596; State ex rel. Kelleher v. St. Louis Public Schools, 134 Mo. 296, 56 Am. St. Rep. 503, 35 S. W. 617; Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 242, 18 Pac. 766.

Messrs. Levy Mayer and Edward J. Brundage, with Messrs. Mayer, Meyer, & Austrian, for appellees:

Mandamus will not lie to compel a public official to enforce a criminal law, either generally or in a specific case.

People ex rel. Bartlett v. Dunne, 219 Ill. 346, 76 N. E. 570; People ex rel. McCarroll v. Mohr, 1 Ill. C. C. 100; People ex rel. Clapp v. Listman, 40 Misc. 372, 82 N. Y. Supp. 263, affirmed in 84 App. Div. 633, 82 N. Y. Supp. 784; State ex rel. Clark v. Murphy, 3 Ohio C. C. 332; State ex rel. Wear v. Francis, 95 Mo. 44, 8 S. W. 1; State ex rel. Hawes v. Brewer, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 1001, 4 A. & E. Ann. Cas. 197; Alger v. Seaver, 138 Mass. 331; Mitchell v. Boardman, 79 Me. 469, 10 Atl. 452; Boyne v. Ryan, 100 Cal. 265, 34 Pac. 707; People ex rel. Fitzgerald v. Whipple, 41 Mich. 548, 49 N. W. 922; Merrill, Mandamus, § 69; High, Extr. Legal Rem. pp. 315, 316; People ex rel. Cady v. Ihnken, 129 Mich. 466, 89 N. W. 72; People ex rel. Hammond v. Leonard, 74 N. Y. 443; 13 Enc. Pl. & Pr. p. 497.

There is no duty imposed upon the mayor of Chicago to enforce the Sunday laws of Illinois.

People v. Mathiessen, 28 Chicago Leg. News, 345.

ified parties, but in no particular way; in other words, 'to put himself in motion,' to substitute action for nonaction, prohibition for permission, and to do a specific thing which experience has shown to be so efficacious against violators of that section that repeated prosecutions of them are rarely found to be necessary."

And in State ex rel. Lay v. Hoboken, 75 N. J. L. 315, 67 Atl. 1024, it was held that mandamus requiring a municipal board to order, upon resolution or otherwise, the exposure on Sunday of the interior of bars or business rooms in a city in which intoxicating liquors are sold, as required by state law, may issue upon application of a private relator who is a resident and taxpayer of the municipal district. The court said that the duty thus pointed out by statute to licensing bodies is a ministerial one clearly mandatory, and that mandamus is the proper remedy to enforce performance by public boards of such duties. It was also held that mandamus would not be denied on the ground that there was a remedy by indictment. The court said that indictment would not furnish a complete remedy, for while it might be the means of punishing the delinquent members, it would leave the public

duty still unperformed, and that to justify the refusal of the writ on that ground, the other remedy must be specific and adequate.

And in State ex rel. School Dist. v. Cummings, 17 Neb. 311, 22 N. W. 545, it was held that the writ of mandamus would issue to compel the city marshal to perform duties required of him by a law which made it his duty to notify unlicensed liquor dealers to cease the traffic, and to make complaint against all those selling without a license.

In State ex rel. Wear v. Francis, 95 Mo. 44, 8 S. W. 1, it was held that while mandamus would issue to compel the board of police commissioners to vacate an order directing the chief of police not to interfere with the sale of wine or beer on Sunday, which was prohibited by the state law, it would not issue to compel the board to arrest and prosecute certain named persons for past violations of the law against selling fermented liquors on Sunday.

Cases involving the question of the right to issue mandamus to compel a revocation of the license to sell intoxicating liquors because of violations of the law have been excluded from this note.

A writ of mandamus will not lie to compel the performance of discretionary duties.

Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155; Harrison v. People, 222 Ill. 150, 78 N. E. 52.

The Sunday closing law is not in force in the city of Chicago.

State v. Binder, 38 Mo. 450; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471; Dill. Mun. Corp. 4th ed. § 88; Bennett v. People, 30 Ill. 389; Seibold v. People, 86 Ill. 33; Kimball v. People, 20 Ill. 348; State v. De Bar, 58 Mo. 395; St. Johnsbury v. Thompson, 59 Vt. 300, 59 Am. Rep. 731, 9 Atl. 571; Spake v. People, 89 Ill. 617.

Carter, J., delivered the opinion of the court.

This was a petition for a writ of mandamus, filed on December 21, 1906, in the superior court of Cook county, at the relation of William A. Bartlett, A. Lincoln Shute, and Robert J. Bennett, against Edward F. Dunne, then mayor of Chicago, and Michael Kenna, proprietor of two licensed dramshops in the city of Chicago. Kenna demurred to the petition and Dunne answered. The petitioner demurred to the answer. The court by the same order sustained the demurrer to the petition, and overruled the demurrer to the answer. Petitioner stood by its petition and by its demurrer to the answer. Thereupon final judgment was entered against it. That judgment has been affirmed by the appellate court for the first district, and a further appeal is prosecuted to this court. While the case was pending in the appellate court, the term of Dunne as mayor expired, and his successor, Fred A. Busse, was substituted as an appellee.

The petition, so far as material, avers that Kenna is the owner of two licensed dramshops in Chicago; that he is operating them by virtue of licenses issued for a period beginning November 1, 1906, and ending April 30, 1907; that in the conduct of said saloons Kenna has openly, habitually, and continually violated § 259 of the Criminal Code (Hurd's Rev. Stat. 1908, chap. 38), which provides, "Whoever keeps open any tippling house or place where liquor is sold or given away upon the first day of the week, commonly called Sunday, shall be fined not exceeding \$200;" that the mayor had knowledge of these habitual violations of the section in question by Kenna as they occurred, and that he has made no attempt in any way to enforce or compel the observance of this statute, and that he will hereafter continue to permit Kenna to disregard that statute, and will permit Kenna habitually to keep his dramshops open on Sundays, and will fail and refuse to take any

steps or measures to compel Kenna to observe that statute; that the ordinances of the city of Chicago provide that, if the mayor shall be satisfied at any time that liquor is sold, served, or given away in a dramshop contrary to the laws of the state or the ordinances of the city, he may revoke the license of the keeper. The prayer of the petition is that the mayor be commanded to use without delay, so far as may be necessary, every means, power, and authority conferred upon him by the laws of the state or the ordinances of the city to enforce against Kenna the statute above quoted, by closing, or compelling Kenna to close, his saloons, and keep the same closed on each and every Sunday after the writ of mandamus issues; and, in case of Kenna's refusal to obey the law, to secure his prosecution therefor, and to punish such violation of the law by a revocation of Kenna's licenses. The answer filed by former Mayor Dunne, as set out in appellees' brief, avers that said § 259 of the state law is not in force in the city of Chicago. If this averment were true, it would of necessity dispose of this case. But it is not true. That section is the law in Chicago, precisely as it is the law in all other parts of the state. The mayor of a city is charged with the execution of all laws and ordinances in force therein. Hurd's Rev. Stat. 1908, chap. 24, p. 311, § 23. It is to be observed that the petition does not seek to have the mayor commanded to do any specific act or any series of specific acts, that the relators have no property rights that will be affected by the event of the suit, and have no interest in the enforcement against Kenna of the statute in question except the interest which they possess in common with other members of the public.

The case of People ex rel. Bartlett v. Dunne, 219 Ill. 346, 76 N. E. 570, was a motion made in this court for leave to file here an original petition for mandamus at the relation of the same persons who are the relators in the present proceeding. In that case the purpose was to have the mayor of the city of Chicago commanded by this court to enforce the statute in question against all persons in the city of Chicago engaged in the business of selling liquor, it being there alleged that all the dramshops in the city, about 7,000 in number, were and would be habitually kept open on the Sabbath Day, in violation of law, and that the mayor refused to enforce the law. The prayer of the petition which accompanied the motion in that case was not different from the prayer of the petition in the case at bar, except that in the earlier case it was sought to have the mayor commanded to enforce the statute in question against all

the dramshop keepers in the city of Chicago, while in the case now before us it is sought to have him enforce this law against Kenna alone, who is the keeper of two dramshops.

In *People ex rel. Bartlett v. Dunne*, supra, leave to file the petition was denied for three reasons: First, because mandamus will not be awarded except where the duty is specific in its nature, and of such character that the court can prescribe a definite act or series of acts which will constitute a performance of that duty, so that the respondent may know precisely what he is to do, and the court may know whether the precise act or acts have been performed,—the duty which it was there sought to have the mayor perform not being of that character; second, because the petitioner improperly sought to have the court control and regulate a general course of official conduct, and enforce the performance of official duties generally, with reference to violations of the law which it was alleged would occur in the future; third, because to grant the prayer of the petition would be for the court to wrongfully assume the management of the municipal affairs of the city, and to assume governmental functions which are lodged in the executive department. The opinion in that case was announced orally from the bench, and while no authorities were then specifically referred to, the propositions of law there announced are fundamental and abundantly supported by precedent. *Merrill, Mandamus*, §§ 31, 69; *People ex rel. Billings v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *The Secretary v. McGarahan* (*Cox v. United States*) 9 Wall. 298, 19 L. ed. 579; *People ex rel. Hammond v. Leonard*, 74 N. Y. 443; *State ex rel. Wear v. Francis*, 95 Mo. 44, 8 S. W. 1; *State ex rel. Hawes v. Brewer*, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 1001, 4 A. & E. Ann. Cas. 197; *Alger v. Seaver*, 138 Mass. 331; *Boyne v. Ryan*, 100 Cal. 265, 34 Pac. 707; *Mitchell v. Boardman*, 79 Me. 469, 10 Atl. 452; *People ex rel. Fitzgerald v. Whipple*, 41 Mich. 548, 49 N. W. 922; *People ex rel. Cady v. Ihnken*, 129 Mich. 466, 89 N. W. 72; *Sweet v. Smith*, 153 Mich. 674, 117 N. W. 59; *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441. Appellants contend, however, that *People ex rel. Bartlett v. Dunne*, supra, differs essentially from this case in two particulars: First, it is said that the petition in that case, being addressed to this court, brought the petitioner within the rule that this court would exercise its discretion in every instance where a motion for leave to file a petition for mandamus was made in this court, as to whether it would entertain the petition, and that in doing so it would

not consider itself bound by any strict rule. While counsel do not state accurately the rule in reference to the circumstances under which we will entertain an original petition for mandamus, yet it clearly appears that the distinction claimed does not exist, for the reason that our decision in the earlier case was not placed on the ground that the petitioner had stated a cause of which we would, in the exercise of our discretion, refuse to take jurisdiction as an original proceeding. The second particular in which it is said the cases differ is found in the fact that by the petition which accompanied the motion in *People ex rel. Bartlett v. Dunne*, supra, it was sought to have the mayor commanded to enforce the statute in question as to all dramshops within the city of Chicago, while in the present case the duty which the mayor is to perform is to enforce the statute against Kenna and his two saloons. This is not a material difference. No authority is cited which recognizes such a distinction. Every objection to commanding the mayor to enforce this law with reference to 7,000 saloons, suggested in *People ex rel. Bartlett v. Dunne*, supra, applies in lesser degree to commanding him to enforce it with reference to one owner and two saloons. If counsel for appellants be correct, by the institution of 7,000 suits instead of one, the courts could be required to exercise precisely the supervision over the mayor that we held in the *Dunne* Case they could not be required to exercise. Counsel for appellants confuse the functions of the executive and judicial departments of government. If their contention were to prevail, the mandate of the court would be substituted for the statute which denounces misfeasance and malfeasance in office.

It is impossible within an opinion of any reasonable length to discuss the numerous cases cited and quoted from by counsel for appellants in the 168 pages of brief and argument presented. It seems proper, however, to refer briefly to the cases of *Brokaw v. Highway Comrs.* 130 Ill. 482, 6 L.R.A. 161, 22 N. E. 596, and *People ex rel. Faulkner v. Harris*, 203 Ill. 272, 96 Am. St. Rep. 304, 67 N. E. 785, upon which they place great reliance. In the first of these cases the commissioners were required by mandamus to remove an obstruction in a public highway, in accordance with a statute which made it their duty so to do. In the second, the mayor and aldermen of the city of Champaign were required by mandamus to remove an obstruction in or an encroachment upon a street. In the *Brokaw* Case it was held that the commissioners were, as to the removal, without discretion, and that it was their duty under the law to re-

move the obstruction. The obstruction then existed in the highway. The mandate of the court was in reference to an existing condition. A specific act was directed. It was not necessary to supervise generally the official conduct of the officers in reference to violations of the law which it was alleged would take place in the future. It is not here sought to have the mayor commanded to do a specific thing in reference to a violation of the law which has already taken place, but the purpose is to have him commanded to enforce the statute above set out, which he might do in any one or all of several ways, against Kenna in reference to his two dramshops so far as future violations of that statute are concerned. The case is thus readily distinguished from the case at bar. The Champaign Case is not different from the Brokaw Case, so far as the matters here material are concerned.

Upon the motion of appellees, the superior court struck out certain averments contained in the petition as originally filed. Exceptions to this action of the court do not seem to have been properly preserved, but, regardless of that question, the averments stricken were, under our view of the law, as above expressed, immaterial.

The judgment of the Appellate Court will be affirmed.

Petition for rehearing denied April 7, 1909.

KANSAS SUPREME COURT.

STATE OF KANSAS EX REL. JOSEPH TAGGART, County Attorney, et al.,

v.

F. M. HOLCOMB, County Clerk.

CUDAHY PACKING COMPANY, Intervener.

(81 Kan. 879, 106 Pac. 1030.)

Mandamus — assessment of taxes — correction.

1. Mandamus is an appropriate remedy to compel a county clerk to enter upon the tax rolls taxable property omitted from the assessor's returns, where such officer admits the existence and value of the property, but declines to correct the assessment and enter it upon the tax rolls because of a contention that the property is not taxable, and because he is in doubt as to his power in the premises.

Taxation — omitted property — adding after settlement.

2. Taxable property not listed for taxation nor returned by the assessor may be added to the tax rolls by the county clerk

after the settlement with the county treasurer in October of the year the assessment should have been made, and after the tax rolls have been turned over to the county treasurer.

Same — finished product of manufacturer — taxability.

3. The finished product of a manufacturer is subject to taxation, and it is his duty to list such property, and, where it has not been listed by the owner nor returned by the assessor, it is the duty of the county clerk or the board of county commissioners to take steps to correct the assessor's return, and of the county clerk to enter such omitted property on the tax rolls.

(February 12, 1910.)

APPPLICATION for a writ of mandamus to compel the Wyandotte County clerk to enter certain property for taxation. Granted.

The facts are stated in the opinion.

Messrs. Keplinger & Trickett, for plaintiff:

The duty which constitutes a basis for mandamus may arise by reasonable implication from a statute, rather than by its expressed terms.

Moses, Mandamus, 177; State v. Ousatonic Water Co. 51 Conn. 137; Merrill, Mandamus, §§ 13, 59, 157, 159.

Omitted property may be added to the tax rolls after settlement with the county treasurer.

Lappin v. Nemaha County, 6 Kan. 403.

Where proceedings are commenced, and are pending, and the delay is caused by the fault of the parties seeking to escape taxation, a tax subsequently imposed would be

Note. — Is property for which no method of taxation is prescribed subject to taxation under a statute declaring that all property not exempt shall be taxed "in the manner provided by this act."

The argument of the property owner in the foregoing case apparently was that notwithstanding the general statute provided that all property not expressly exempt should be subject to taxation, and the finished product was undeniable property, and not expressly exempted, still it was not subject to taxation, inasmuch as the statute did not expressly provide the manner in which it should be taxed. It would seem that the decision is undeniably correct. It is a general rule that exemptions are never presumed, and the fact that a method of taxing the finished product had not been provided would appear insufficient to overcome the express provision that all property should be taxed, aided as that express provision is by the general presumption against exemptions not expressly made.

A very similar question arose in State ex

of the same force and effect, and to all intents and purposes, as though made on the date originally set for the hearing and deciding of the matter.

Challiss v. Rigg, 49 Kan. 119, 30 Pac. 190; 27 Am. & Eng. Enc. Law, 2d ed. p. 715.

Mr. Joseph Taggart, also for plaintiff:

The state can by mandamus compel a county clerk to place omitted property on the tax rolls.

State ex rel. Foster v. Faulkner, 20 Kan. 547; *Craft v. Jackson County*, 5 Kan. 518; *Bobbett v. State*, 10 Kan. 9; *Bartlett v. State*, 13 Kan. 99; *State ex rel. Reed v. Marion County*, 21 Kan. 434; *Harvey County v. Munger*, 24 Kan. 209; *State ex rel. Lewis v. Eggleston*, 34 Kan. 723, 10 Pac. 3.

Messrs. O. W. Sears, O. Q. Clafin, and J. E. McFadden, with Messrs. Blair, Scandrett, & Scandrett and Thomas Creigh for defendants.

Johnston, Ch. J., delivered the opinion of the court:

This proceeding was brought by the state of Kansas, on the relation of Joseph Taggart as county attorney, and also the board of county commissioners of Wyandotte county, against F. M. Holcomb, county clerk of Wyandotte county, to compel that officer to add to the personal statement of the Cudahy Packing Company property, termed the "finished product," of the value of \$498,178.41, which had not been listed by it or returned by the assessor, and to enter the same on the tax rolls of the county. Proceedings were instituted in August, 1909, to correct the property statement of the company and to add this property to the tax rolls, and in October, 1909, the company made and filed with the board of county commissioners a written statement showing the amount on hand in March, 1908, and in each succeeding month of the tax year, and that the average value of the finished product of their packing business was \$498,178.41. In November, 1909, the board made an order requiring the county clerk to cor-

rect the returns of the assessment and add this amount to the tax rolls; but the county clerk, while admitting that he had information that the property had been omitted from the assessor's returns and was of the value stated, answered that the company contended that the omitted property was not taxable, and, further, that the county clerk had no power to add omitted property after November 1, 1909, and, being doubtful of his own power, he declined to make the correction until ordered to do so by a court of competent jurisdiction. After this proceeding had been commenced, the Cudahy Packing Company intervened, and, among other things, alleged that it was engaged exclusively in the manufacturing business, and that its finished product was in no event subject to taxation, that its taxable property had been listed and returned by the assessor, and that a check for the amount of taxes due on its assessment had been delivered to the county treasurer and accepted by him, and that neither the board of county commissioners nor the county clerk had authority to add omitted property at the time when the order mentioned had been made.

Three propositions arising on the answer of the company have been argued and submitted for decision: First. Can mandamus be employed to compel the county clerk to place omitted personal property on the tax rolls? Second. Is there any power in the county clerk or the board to correct returns or to add omitted property after the October settlement with the county treasurer has been made and after the tax rolls have been delivered to the county treasurer? Third. Is the finished product of a manufacturer taxable?

On the first proposition there can be little chance for controversy. Mandamus is an appropriate remedy to compel an officer to perform a duty which the law enjoins upon him. The statute requires the county clerk to enter upon the tax rolls personal property subject to taxation, which has not been listed by the owner or returned by the assessor. Gen. Stat. 1901, § 7599. In an inquest, of which the company had notice, it

rel. *Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746, where the relator contended that although the general statutes provided that all property not expressly exempt was taxable, and a special statute provided that the exemption provided for railroads should not apply to railroads operated by cable or electrical power, nevertheless street railway franchises, which were not expressly exempted, were not taxable, as the statute made no provision for their valuation as it had made for the other property of the company. It was held, however, that an exemption could not be presumed from a mere failure to indi-

cate detailed directions for valuing and taxing property. The contention seems admirably answered by the court when it says. "The cardinal requirement is that as property they [franchises] shall be taxed. All else is matter of method and detail."

And in *Commercial Electric Light & P. Co. v. Judson*, 21 Wash. 49, 57 L.R.A. 78, 56 Pac. 829, where practically the same question arose, the court, after quoting at length from the *Anderson Case*, said that the objection to the assessment in the case at bar, because the method had not been prescribed by the legislature, was sufficiently answered by the *Anderson Case*.

has been ascertained that personal property belonging to the company was not listed by it or returned by the assessor, and that it is of a certain value. This is confessed by the county clerk, who declines to correct the assessment and make the entry as the statute requires, because of a claim of the owner that the property is exempt from taxation, and a desire on his part to have a judicial decision of the question before he takes action. In effect he says, the property is owned by the company. It was not listed or returned. It is of a certain value, but a question of law has arisen whether such property is taxable, and hence "I refuse to make the entry." Assuming that the property is taxable, the duty of the county clerk is clear. He has no alternative but to make the entry, and no right to postpone action until a court has determined it to be his duty. As to the propriety of the state employing mandamus to require official action there is no room for contention. The action is brought in the name of the state by the county attorney, who for this purpose represents the people of the state.

On the second proposition, it is contended that the time has passed in which the assessment may be corrected, or omitted property entered upon the tax rolls. The statute provides that the board and the county clerk may take action to correct an assessment and add omitted property "at any time before the final settlement with the county treasurer." Gen. Stat. 1901, § 7599. In this matter there was no delay nor lack of diligence on the part of the county officers. Proceedings to make the correction were instituted in August, and the only apparent reason for the delay was the opposition of the company, which, although admitting the existence of the property and its omission from the tax rolls, resisted every effort to place it upon the tax rolls. A party cannot escape taxation by contesting the right of officers to impose a tax, and keeping it in litigation beyond the time fixed by law for making the assessment. Nor is an officer justified in setting up the excuse in a mandamus proceeding, that the time fixed by statute to do the act has passed, when it was his own failure to perform the duty within the statutory time which made it necessary to bring the mandamus proceeding. An officer cannot, by failure to perform a duty, nullify the statute imposing it, nor defeat the public in compelling performance where it takes reasonably prompt action to enforce performance. In *Lewis v. Marshall County*, 16 Kan. 102, 22 Am. Rep. 275, it is said: "As a general rule, when a duty is at the proper time asked to be done and improperly refused to be done, the right to compel it to be done is

fixed, and is not destroyed by the lapse of the time within which in the first place the duty ought to have been done." p. 108. See also *State ex rel. Wilson v. Kearny County*, 42 Kan. 739, 22 Pac. 735. Aside from these considerations, the time in which omitted property might be added by the clerk had not passed. It is contended that the October settlement mentioned in the statute, before which the correction must be made, is the settlement of the year in which the assessment is made, and reference is made to the ferret cases of *Douglas County v. Lane*, 76 Kan. 12, 90 Pac. 1092, and *Jackson County v. Kaul*, 77 Kan. 715, 17 L.R.A. (N.S.) 552, 96 Pac. 45. These cases are disposed of upon the theory that the statute has fixed an absolute limitation for the revision of the tax rolls or the imposing of taxes on omitted property. It was held that when the October settlement is had between the treasurer and the county commissioners of the financial affairs of the county, and a new set of accounts, transactions, and proceedings is started, and the business of the year is closed up, the right to impose additional taxes for that year is ended. The accounts and transactions arising out of the assessment and tax proceedings of 1909 cannot, in the nature of things, be settled and closed up until the October settlement of 1910. Although not definitely stated the settlement referred to is manifestly the one following the levy and collection of taxes for the preceding tax year. When the taxes are extended by the county clerk and the tax rolls are turned over to the treasurer, he collects the taxes, apportions them among the various funds and different municipalities, and, that being done, he makes a final settlement. It was evidently the intention of the legislature that a revision might be made or omitted property added until the tax proceedings, including the assessment and collection of the taxes, had been completed, and a settlement thereon had with the county treasurer. That was the view taken in *Lappin v. Nemaha County*, 6 Kan. 403, where proceedings to revise the assessment and to add omitted property were taken before the board of county commissioners in December after the tax roll had been turned over to the county treasurer. The right to make a revision at that time was directly challenged, and the court said the "county commissioners have authority in December and January, after the tax roll has passed into the hands of the treasurer, to place on the tax roll property omitted by the assessor, and charge up the proper taxes thereon." Syllabus. That the power of the county clerk to enter omitted property for taxation does not end with the October settlement of the year when the assess-

ment is made is indicated by the provision relating to the taxation of merchants, which is to the effect that parties who begin merchandizing after March 1st and before November 1st, and whose property has not been listed in another county, shall report to the county clerk the average value employed in the business during this period, and it is the duty of that officer to enter the property upon the assessment rolls, and it is taxed the same as if returned by the assessors. This provision necessarily contemplates action by the county clerk after the October settlement by the county treasurer. Gen. Stat. 1901, § 7543. Another provision in the county officers' act makes it the duty of the county treasurer, in case he shall learn that property subject to taxation has not been assessed, to notify the county clerk, who is required to place the same on the tax roll. Gen. Stat. 1901, § 1669. It has been suggested that this ancient provision has been superseded by § 7599, and it may well be argued that the specific provisions of the latter section will control the county clerk as to the time and manner of correcting assessments. There remains in the section, however, the admonition to the county treasurer that, when he learns of property not upon the tax roll, he shall notify the county clerk of the omission, and thus aid in bringing it upon the tax roll and subjecting it to taxation. These statutory provisions, although only incidental to the question, tend in some degree to support the view that corrections may be made after the October settlement following the assessment.

Is the finished product of a manufacturer subject to taxation? This question depends alone upon the interpretation of our statutes, and little aid can be derived from either argument or illustration. The property in question is tangible and subject to ownership, and is, of course, taxable unless it is exempted by force of some statutory provision. The statute provides that "all property in this state, real and personal, not expressly exempt therefrom shall be subject to taxation in the manner prescribed in this act." Gen. Stat. 1901, § 7502; Laws 1907, chap. 408, § 1. The legislature defines the word "property" as used in the act relating to taxation to "mean and include every kind of property subject to ownership." Laws 1907, chap. 408, § 1. There being no question as to the existence of ownership of the property spoken of as the finished product, what reason is there for exempting it from taxation? The general theory of the law is that all property shall contribute equally to the support of the government. It is

competent for the legislature to exempt property from taxation, but to the extent that one is relieved from this burden it is necessarily imposed on others, and hence, before a person can have such a discrimination in his favor, he must clearly show it to have been within the legislative purpose. The policy of our law being to tax all property not expressly exempt, it devolves on one claiming to have been relieved from paying his share of the public burden to find and clearly point out an express constitutional or statutory exemption. So it has been said: "Any person claiming immunity from the common burdens of taxation, which should rest equally upon all, must bring himself clearly within the exemption, and hence it is held that a provision creating an exemption should be strictly construed." *Ottawa University v. Franklin County*, 48 Kan. 460, 29 Pac. 599. See also *Washburn College v. Shawnee County*, 8 Kan. 344; *Stahl v. Kansas Educational Asso.* 54 Kan. 542, 38 Pac. 796; *National Council K. & L. S. v. Phillips*, 63 Kan. 808, 66 Pac. 1014; *Cooley*, Taxn. 3d ed. 356.

Now we have a provision enumerating the articles and classes of property that are exempt, and the finished product of manufacturers is not among those named. Laws 1907, chap. 408, § 2. It is contended that the statute providing that all property not expressly exempt shall be subject to taxation is qualified by the added clause, "in the manner prescribed in this act." Gen. Stat. 1901, § 7502. The argument is that this clause in effect limits taxation to the kinds of property specially named in the act, that the finished product cannot be taxed until it is named as one of the subjects of taxation, and that up to this time the legislature has omitted to make provision for taxing it. It has provided a method for taxing the raw material which the manufacture has on hand, and, since the manufactured product was not included in this provision, it is argued that the legislature did not intend that it should be taxed. The clause referred to relates to the method of imposing taxes upon property already declared to be subject to taxation. It is not a limitation on the declaration that all property not expressly exempted shall be subject to taxation. It deals with methods, not subjects, of taxation. Various methods are prescribed for the assessment and taxation of the different classes of property. The act prescribes one method for listing and assessing the property of banks, another for the property of merchants and certain property of manufacturers, another for telegraph and telephone property, and still oth-

ers for railroad and other kinds of property, and as to the property for which no special manner is prescribed as to listing and valuation there is a general rule that all property shall be listed and valued as of the 1st day of March. Gen. Stat. 1901, § 7514. Then there are many provisions prescribing in detail the duties of owners as well as assessors and other taxing officers respecting the assessment and collection of taxes. As to manufacturers, it is provided that, when they list their property for taxation, they shall also return the average amount of material purchased or held to be used in manufacturing, refining, or combining which they have had on hand during the preceding year. This is to be ascertained by taking the amount on hand in each month, and dividing the aggregate by the number of months of the year they have been engaged in business. Gen. Stat. 1901, § 7545. Another section specially provides that they shall list the value of engines, tools, and machinery, which form no part of the real estate. Gen. Stat. 1901, § 7546. The fact that the legislature prescribes a special manner for taxing the raw material held for manufacturing purposes does not mean that other tangible property of the owner shall escape taxation. Except as limited by the Constitution, the whole matter of taxation is within the discretion and power of the legislature. It may choose its own methods of assessment and different ones for different classes of property. It may give specific directions as to the manner in which officers shall determine valuations, but the absence of such directions as to a class of property does not argue that such property is not taxable under a general provision. State ex rel. Milwaukee Street R. Co. v. Anderson, 90 Wis. 550, 63 N. W. 746. The section providing a method for assessing raw material proceeds on the theory that the manufacturer shall list his other property. The fact that a manner of valuing one kind of property is prescribed does not warrant the inference that another kind of property shall be exempt from taxation. The provision that all property shall be taxed unless expressly exempted precludes the making of a mere implied exemption. Reference has been made to the statutes and rules of Ohio and some other states, but none of them are of special value in interpreting our own statute. The property, not having been expressly exempted, must be listed and valued the same as other tangible property for which a special method has been prescribed.

On the questions submitted on the pleadings, it must be held that mandamus is a proper remedy to compel the entry on the tax rolls of omitted property, that such cor-

rections and entry may be made after the tax rolls are turned over to the county treasurer, and that the finished product of a manufacturer is subject to taxation.

All the Justices concur.

UTAH SUPREME COURT.

BLACKROCK COPPER MINING & MILLING COMPANY, Appt.,

v.

CHARLES S. TINGEY, Respt.

(34 Utah, 369, 98 Pac. 180.)

Tax — corporate franchise.

1. The mere right to be a corporation is not property so as to come within the operation of a constitutional provision that all property shall be taxed according to its value, and declaring that the word "property" shall include franchises.

Same — license tax — validity.

2. A license tax on corporations is not a tax on their franchises in the sense that the word is used in the Constitution, declaring them to be property and requiring property to be taxed according to its value, and therefore such taxes may be proportioned to the capital involved, at least where the Constitution also authorizes a license tax on franchises.

Statute — validity — tax.

3. To overthrow a tax law on the ground that it violates the Constitution, it must be clearly shown to do so.

Note. — Right to be a corporation as a franchise within constitutional or statutory provisions subjecting franchises to taxation as property.

In Western U. Teleg. Co. v. Omaha, 73 Neb. 527, 103 N. W. 84, under a statute providing for the laying of a tax upon the gross receipts of express, telegraph, and telephone companies, "as an item of property," and declaring that such gross receipts should represent "the franchise valuation," it was held that the "franchise" the value of which was sought to be reached by such statute was not the franchise to be a corporation, but was the right to do and transact express, telegraph, and telephone business within the state.

On the other hand, the rule is established in California that a constitutional declaration that "property" for the purpose of taxation shall include franchises, authorizes taxation of the right to exist as a corporation. Spring Valley Waterworks v. Schottler, 62 Cal. 69, affirmed in 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; Bank of California v. San Francisco, 142 Cal. 276, 64 L.R.A. 918, 100 Am. St. Rep. 130, 75 Pac. 832; San Joaquin & K. River Canal & Irrig. Co. v. Merced County, 2 Cal. App. 593, 84 Pac. 285.

Tax — equality — corporate right.

4. The mere right to be a corporation is not within the operation of a constitutional provision for uniform and equal taxation, so that every person or corporation shall pay a tax in proportion to the value of his or its property.

Tax — certainty.

5. A statute providing for the payment, by corporations, of a license tax on or before a certain day of a certain month of each year, is not void for uncertainty in not fixing the time at which the duty to pay the tax arises.

Same — license tax — yearly period — interim.

6. That under a statute providing for the payment by a corporation of a license tax on a certain day in each year, which will entitle it to do business for the ensuing year, a corporation organized after the expiration of the specified day may do business until the next tax day arrives, does not invalidate the statute.

Same — refusal to pay — effect.

7. That a corporation refusing to pay its license tax is not thereby deprived of the right of doing business does not invalidate the statute providing for the tax.

Tax — lien.

8. A license tax upon a corporation, and penalty for its nonpayment, may be made a lien upon its tangible property.

(November 7, 1908.)

A PPEAL by plaintiff from a judgment of the District Court for Salt Lake County in defendant's favor in an action brought to recover license taxes which had been paid under protest. Affirmed.

The facts are stated in the opinion.

Messrs. Lawrence & Robertson and Snyder & Snyder, for appellant:

A tax on the franchise is a tax on property.

Cache County ex rel. Matthews v. Jensen, 21 Utah, 207, 61 Pac. 303; Cooley, Const. Lim. 242; 21 Am. & Eng. Enc. Law, p. 773; 2 Cooley, Taxn. pp. 1098, 1138; 25 Cyc. Law & Proc. p. 597; Re Cosmopolitan Power Co. 70 C. C. A. 388, 137 Fed. 862; Banger's Appeal, 109 Pa. 79; Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. 672; Wilmington & W. R. Co. v. Reid, 13 Wall. 264, 20 L. ed. 568; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; Spring Valley Waterworks v. Schottler, 62 Cal. 69, 108; Bank of California v. San Francisco, 142 Cal. 276, 64 L.R.A. 918, 100 Am. St. Rep. 130, 75 Pac. 832; Salt Lake City v. Christensen Co. 34 Utah, 38, 17 L.R.A. (N.S.) 898, 95 Pac. 525.

The law is wanting in both equality and uniformity.

Western U. Teleg. Co. v. Omaha, 73 Neb. 527, 103 N. W. 84; State ex rel. Shriver v. 28 L.R.A. (N.S.)

Karr, 64 Neb. 520, 90 N. W. 300; State ex rel. Bee Bldg. Co. v. Savage, 65 Neb. 714, 91 N. W. 716; Railroad Tax Case, 8 Sawy. 238, 13 Fed. 732; Exchange Bank v. Hines, 3 Ohio St. 1; Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Re Cosmopolitan Power Co. 70 C. C. A. 388, 137 Fed. 858; Cache County ex rel. Matthews v. Jensen, supra.

Messrs. M. A. Breeden, Attorney General, and A. R. Barnes, for respondent:

Provisions that property shall be assessed for taxes under general law, and by uniform rules according to its true value, when that instruction contains no other restriction upon the power of taxation, does not inhibit the legislature from imposing a license or franchise tax, or render such tax invalid for want of equality.

Standard Underground Cable Co. v. Atty. Gen. 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564; Ogden City v. Crossman, 17 Utah, 66, 53 Pac. 985.

The act imposes a privilege tax, which is in no way a tax on property.

Burroughs, Taxn. § 54; Cooley, Taxn. 2d ed. 176, 379; State Assessors v. Central R. Co. 48 N. J. L. 146, 4 Atl. 578; Standard Underground Cable Co. v. Atty. Gen. 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733; Phoenix Carpet Co. v. State, 118 Ala. 143, 72 Am. St. Rep. 143, 22 So. 627; Vicksburg Bank v. Worrell, 67 Miss. 47, 7 So. 219; Western U. Teleg. Co. v. Mayer, 28 Ohio St. 521; Southern Gum Co. v. Laylin, supra; 4 Thomp. Corp. §§ 5557, 5560, 5561; People v. Coleman, 4 Cal. 46, 60 Am. Dec. 581; State, Trenton Sav. Fund Soc., Prosecutor, v. Richards, 52 N. J. L. 156, 18 Atl. 582.

The act does not infringe the constitutional uniformity clause.

American Smelting & Ref. Co. v. People, 34 Colo. 240, 82 Pac. 531; Denver City R. Co. v. Denver, 21 Colo. 350, 29 L.R.A. 608, 52 Am. St. Rep. 239, 41 Pac. 826; Re Martin, 62 Kan. 638, 64 Pac. 43; State v. Traders' Bank, 41 La. Ann. 329, 6 So. 582; 1 Cooley, Taxn. 3d ed. p. 412; Home Ins. Co. v. New York, 134 U. S. 600, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593; California v. Central P. R. Co. 127 U. S. 1-41, 32 L. ed. 150-157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888; New York, L. E. & W. R. Co. v. Marion County, 48 Ohio St. 249, 27 N. E. 548.

Frick, J., delivered the opinion of the court:

This is an action to recover back certain license taxes paid by the appellant to re-

spondent under protest. The controversy arises with regard to the validity of a certain act passed by the legislature in 1907 (Laws 1907, chap. 107, p. 126), and now incorporated into the Compiled Laws of Utah of 1907 as §§ 456 x 6 to 456 x 10, inclusive. The title to the act in question reads as follows: "An Act Requiring All Corporations to Pay an Annual State License; Providing for the Enforcement of Same and Prescribing a Penalty for Refusal or Failure to Comply therewith and Making Certain Exceptions." The original act is divided into five sections. Section 1 reads as follows: "All corporations organized under and by virtue of the laws of this state, or under the laws of the territory of Utah, and all foreign corporations doing business in this state, except as hereinafter provided, are hereby required to pay an annual state license as follows: All corporations with an authorized capital stock of \$10,000 or less, \$5; with an authorized capital of more than \$10,000, and not to exceed \$25,000, \$10; with an authorized capital of more than \$25,000, and not to exceed \$50,000, \$15; with an authorized capital of more than \$50,000, and not to exceed \$75,000, \$20; with an authorized capital of more than \$75,000, and not to exceed \$100,000, \$25; and with an authorized capital of more than \$100,000, and not to exceed \$150,000, \$35; and with an authorized capital of more than \$150,000, and not to exceed \$200,000, \$40; and with an authorized capital of over \$200,000, \$50. Provided, that all corporations of religious or charitable societies, and corporations organized not for pecuniary profit, and canal and irrigation companies organized for the express purpose of providing water for lands owned solely by the incorporators, and all insurance companies, shall be exempt from said license." Section 2 requires the license tax to be paid to the secretary of state on or before the 15th day of November of each year. Section 3 is not material here. Section 4 prescribes a penalty for the failure to pay the tax, which subjects the defaulting corporation to the payment of a penalty of \$100, and provides that such penalty and taxes shall be a lien upon the property of the corporation, and, further, that the attorney general or county attorney may institute an action in the name of the state for the recovery of the license tax and penalty. Section 5 provides that upon payment of the license tax the secretary of state shall issue to the corporation a certificate evidencing payment of the tax. The attorney general, who appeared in the court below for respondent, demurred to appellant's complaint, and the court sustained the demurrer, and, appellant electing to stand upon his complaint, 28 L.R.A. (N.S.)

the court entered judgment dismissing the action, and hence this appeal.

It is urged by appellant that the court erred in sustaining the demurrer. This contention is based upon the ground that the act in question is unconstitutional, and that therefore the license tax thereby imposed is invalid and nonenforceable, and hence the appellant should have had judgment for the amount paid by it under protest. No question is raised with respect to the sufficiency of the facts alleged in the complaint to entitle appellant to recover if the act in question should be held invalid, nor is there any question presented affecting the respondent's right to collect the tax if the act is held to be valid. The sole question, therefore, is the validity of the act in question.

The Constitution of this state (article 13, § 2), so far as material here, reads as follows: "All property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article, is hereby declared to include moneys, credits, bonds, stocks, franchises, and all matters and things (real, personal, and mixed) capable of private ownership." Section 3 of the same article requires the legislature to provide by law for a uniform and equal rate of assessment and taxation "so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property." Section 12 of the same article reads as follows: "Nothing in this Constitution shall be construed to prevent the legislature from providing a stamp tax or a tax based on income, occupation, licenses, or franchises."

Appellant strenuously insists that in that part of § 2, *supra*, quoted from above, franchises are declared to be property, that by § 3 all property is to be taxed under a uniform system of assessment, that the tax in question is a tax upon the corporate franchise of appellant, and therefore is a tax upon property which can only be taxed in accordance with the value thereof, which value must be ascertained in the same manner as the value of other property is ascertained for the purposes of taxation. The contention therefore is that the act in question is void because it imposes a tax upon property not in proportion to its value, but by simply naming the amount to be paid in gross, regardless of the value of the thing upon which the tax is imposed. The question therefore turns upon the soundness or unsoundness of the foregoing contention.

By a reference to either the text or the title of the act, nothing is discoverable by which the tax in question is in terms stated to be a tax either upon property or upon

franchises as such. As an affirmative argument, it is asserted that the mere right to be a corporation is a franchise, that franchises are by the Constitution declared to be property, and, since the tax is imposed only upon corporations, it must be assumed that the tax is necessarily intended as a tax upon corporate franchises considered as property. As a negative argument, it is urged that the tax in question cannot be considered as an occupation or business tax, because it applies to corporations only; that merely to exist as a corporation is neither an occupation nor a business within the meaning of occupation or license tax laws; that the tax in question is not imposed as a license to regulate any business or calling; that it is not a license by which any privilege or permission is conferred, because it confers no right or privilege upon corporations that they did not enjoy before the act was passed; and that it permits individuals to pursue the business or calling which is carried on by the taxed corporation without the imposition of this license tax.

It is not necessary to enter into any argument with regard to what is ordinarily meant by a license. Nor are we inclined to enlarge upon the numerous definitions given by the courts with regard to the true meaning of a franchise. It must suffice to say that the courts are apparently in hopeless conflict with regard to whether a franchise is or is not property within the purview of the general tax law, and as to whether a franchise may or may not be considered in a dual sense for the purposes of taxation; that is, that in one sense franchises may be considered as property valued and assessed as such, and in another sense as merely conferring a privilege upon the incorporators to transact any lawful business as a corporate body. That a corporate franchise is dual in its character, we think, does not admit of serious doubt. When the law authorizes a given number of individuals to form a corporation, the mere right to exist as such is a franchise, and is usually termed a corporate franchise. While the right thus conferred may be a valuable right, it cannot be said to partake of the incidents of property. The right thus conferred is one merely to transact the contemplated business as a corporate body. The same individuals who combine their means in the form of capital stock of a corporation could combine the same means to form a copartnership or voluntary association, and could thus carry on the same or a similar business without obtaining a franchise. In one view, therefore, a corporate franchise is no more than a mere privilege to conduct any lawful business or enterprise as a body corporate. Whatever value there may be to

such a privilege or so-called franchise inures therefore to the incorporators, or to the individual stockholders, rather than to the legal entity called a corporation. To illustrate: In case a number of individuals engage in any business or enterprise as copartners, each individual member thereof becomes liable for the whole partnership debts, and all of his individual property may be subjected to the payment of the firm's obligations, while, as a stockholder or incorporator of a corporation, he hazards only the amount subscribed or what he has paid in, in case he has paid up his subscription. While the privilege which exempts the individual stockholder's general property from liability cannot exist apart from the corporation itself, and is, no doubt, to be considered as inhering in the corporate franchise in one sense, it nevertheless is not to be classed as an asset of the corporation, and is not corporate property, although it may be, and no doubt is, of considerable value to the individual incorporators or stockholders who form and constitute the corporation. It is apparent, therefore, that the privilege to exist as a corporate body, and to carry on any business or enterprise as such, may be of considerable value to the members composing the corporation, although such a privilege is not property in any except in the broadest sense, for the reason that it is a thing of value. It is manifest that this privilege could not be transferred by the corporation as property, nor could it be levied upon and subjected to the payment of the corporate debts, although clearly pertaining to corporate existence, because the privilege cannot exist without a corporate franchise.

Upon the other hand, there are corporate franchises which clearly are assets of the corporation and constitute a part of its property. The right to operate street railways, to lay water mains through which water is distributed to users in our cities, the right to erect and maintain telephone and telegraph poles and wires in the city streets or on a public road, and by virtue thereof conduct a telephone or telegraph business, or the right to conduct a toll bridge or ferry across streams, and other like privileges called franchises, are each and all not only valuable, but they are assets of the corporation owning them and constitute a large part of its property. It will be observed that the corporators to whom is granted the franchise to conduct a corporate business enjoy all of the privileges of a corporation first instanced, and may also enjoy the franchise or privilege to conduct a certain business to the exclusion of others under one and the same franchise; but, whether an exclusive privilege is

granted or not, the franchise to conduct any one of the last-mentioned enterprises is still property, and the extent of its value is affected only by the fact that the franchise is exclusive or otherwise. Such a franchise, or any part of it, may be sold or transferred the same as any other tangible property without also transferring the franchise of the corporation to be or to exist as a corporate body, while the franchise we first mentioned cannot be so sold or transferred. The franchise to carry on any one of the particular enterprises above enumerated therefore is property in every sense of that term, and may be valued, assessed, and taxed in proportion to its value in money the same as all other property may be. For the purposes of taxation, in view of the provisions of our Constitution, such franchises must be assessed on their actual value, whatever that may be, and this value must be ascertained in the same manner as is the value of property generally.

But it is contended that, inasmuch as franchises are declared to be property by the Constitution, this includes all corporate franchises, and hence no franchise tax may be imposed except by valuation and assessment and by the regular method of valuation and assessment. We cannot agree with this contention. To our minds it is clear that the legislature did not intend the license tax imposed by the act in question as a property tax, notwithstanding that the Constitution provides, in the section quoted from, that franchises are property. Nor did the framers of the Constitution, in our opinion, intend to limit the right of the legislature to impose any other than a property tax by valuation upon franchises by what is said in § 2, art. 13. If such had been the intention of the framers of that instrument, all that was necessary to say was said in § 2 of that article. Why therefore specially refer to franchises again in § 12 of the same article, and there expressly state that the legislature may impose a license tax upon franchises, if it was intended that no tax other than a direct valuation tax could be imposed upon corporate franchise? In our view these two provisions are not even conflicting, but, if they were, it would be our duty to harmonize them and to give each one its proper effect so far as possible under the rules of construction. In construing a certain provision of the Constitution, we, in case of doubt, not only may, but it is our duty to, have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of the particular provision in question. Section 7 of article 12 of the Constitution reads as follows: "No corporation shall lease or alienate any franchise, so as to relieve the franchise or

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property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in operation, use, or enjoyment of such franchise or any of its privileges."

It is reasonably clear, to us at least, that the framers of the Constitution in this section intended to and did refer only to such franchises as were the subject of lease or bargain and sale, and not to franchises which merely give the right to be or exist as a corporation. As we have pointed out, the latter right cannot be leased or alienated, or sold as a thing separate from the corporation, while the franchises mentioned in the section last above quoted may be. While the foregoing section may, in itself, shed but a faint light upon the actual meaning intended to be placed upon the word "franchises" as used in § 2 of article 13, supra, yet, when it is read in connection with § 12 of the same article to which we have referred, and which certainly does not prevent the legislature from imposing a license tax upon corporate franchises, then there is little if any room left for doubt that the framers of the Constitution treated, and intended to treat, corporate franchises as partaking of a dual character, the one as property subject to alienation and transfer, and the other as a mere right to be or exist as a corporation. That part of a franchise which may be alienated and transferred by the corporation while still continuing its existence as such clearly falls within § 2 of article 13, supra, and must be assessed and taxed as other property, while, upon the mere right to be or exist as a corporation, a license tax may be imposed. No doubt, the framers of the Constitution had in mind the fact that a franchise which relates merely to the right or privilege to be or exist as a corporation, although a matter of value to the incorporators or stockholders, is not an asset of the corporation and transferable as such, and that its value cannot, under ordinary rules, be ascertained for the purposes of assessment and taxation; but, since it is a privilege or right which is granted by the state, a license tax may be imposed upon this right or privilege for the purposes of raising revenue, and the method by which such a tax shall be imposed and the extent thereof is left to the sound discretion of the legislature, in whom, in the absence of constitutional restrictions, the whole power of taxation is vested. It is further apparent that the license tax imposed by the act in question can be said to be a franchise tax in a very limited sense merely. It is far more in the nature of a license tax imposed upon the privilege of being and continuing to exist as a corporation. It must be conceded,

however, that nearly all, if not all, the authorities apply the term "franchise" to the privilege of becoming and existing as a corporation. The cases are, however, so numerous, and, in view of the varied facts and circumstances upon which the decisions are based are so conflicting, that they shed but little, if any, light upon the real question to be solved in this case in view of the provisions of our Constitution. There are a large number of cases, however, in which it is held that franchises for the purposes of taxation, and perhaps for some other purposes, partake of a dual character. We shall refer to a few only of the many cases that might be cited.

In the case of *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, at page 238, 91 N. W., at page 1083, it is said: "The term 'franchise' is defined in various ways, and its meaning depends more or less upon the connection in which the word is employed. Without going into any extended research as to its origin, it may be said that a franchise is a special privilege conferred by governmental authority upon individuals, and which does not belong to citizens of the country generally as a matter of common right. It is also to be regarded as a generic term covering all rights granted to a corporation by legislative act or statute. . . . A corporation (by which is meant an association of individuals into a body lawfully exercising corporate powers) is itself a franchise, and the different powers which may be exercised by the corporation are also franchises. In the first illustration above used, the franchise is the privilege by the individual members to be a corporation and exercise corporate powers; and, in the second, the franchise is the privilege which is granted to the corporation, when organized, to perform certain acts or to carry on certain business." The same thought is expressed in different words in the case of *Pierce v. Emery*, 32 N. H. 484, in which case Mr. Chief Justice Perley, at page 507, uses the following language: "The word 'franchise,' so often used in the act and in the deed, has various significations, both in a legal and popular sense. A corporation is itself a franchise belonging to the members of the corporation; and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation. A municipal corporation, for instance, may have the franchise of a market, or of a local court; and the different powers of a private corporation, like the right to hold and dispose of property, are its franchises. . . . A corporation, being itself a franchise, consists and is made up of its rights and franchises." In the case of *State, Marsden Co.*, 28 L.R.A. (N.S.)

Prosecutor, v. State Assessors, 61 N. J. L. 461, 39 Atl. 638, the question as to whether a certain license tax imposed upon certain corporations was a tax upon corporate property was involved. The corporation asserted that it was, and the assessors contended to the contrary. At page 462 of 61 N. J. L., Mr. Justice Collins, in speaking for the court, adopts and approves the language used by the same court in another similar case reported in *Standard Underground Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733. The language referred to is as follows: "The fault of this position is the assumption that this tax is one upon property. Such, manifestly, is not the case. The law in question imposes a tax on certain corporations by way of a license for exercising corporate franchises. It is declared to be such tax by the act, and although it is laid on this class of corporations with respect to the capital stock, the tax possesses the legal quality of a license or franchise tax." The same doctrine is laid down in *Honduras Commercial Co. v. State Assessors*, 54 N. J. L. 278, 23 Atl. 668, and also in the following cases: *People ex rel. United States Aluminium Printing Plate Co. v. Knight*, 174 N. Y. 475, 63 L.R.A. 87, 67 N. E. 65; *Home Ins. Co. v. New York*, 134 U. S. 595, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Tremont & S. Mills v. Lowell*, 178 Mass. 469, 59 N. E. 1007.

We do not deem it necessary to refer to the other cases that in some form or other invoke the same doctrine. The contention that the case at bar is distinguishable from the cases cited above, upon the ground that the Constitution of this state declares franchises to be property, is not tenable, in view that that instrument in terms recognizes the fact that franchises may and do partake of a dual character, as we have pointed out. We have therefore cited the foregoing cases only for the purpose of showing that the framers of our Constitution, in attributing to corporate franchises a dual character, were clearly in harmony with the law as it is declared to be by the courts. The act, in our opinion, is valid, and we again repeat, what this court has so often declared, that when an act or statute is attacked upon the ground that it violates some provision of the Constitution or in some way is repugnant to that instrument, it must clearly appear to be so, or the act or statute must be held valid. This doctrine applies with especial force to a law which sets in motion a sovereign power such as the power of taxation, when it is alleged that the Constitution prohibits the exercise of the power. In such a case, unless it is made to appear beyond a reasonable doubt that the sovereign power to impose taxes in

a particular way is withheld from the legislature, the law imposing a particular tax must be upheld.

The case of *Western U. Teleg. Co. v. Omaha*, 73 Neb. 527, 103 N. W. 84, relied upon by appellant, does not in any way impugn the doctrine we are seeking to enforce here. The decision in that case is based upon the theory that the legislature could not, within the provisions of the Constitution of Nebraska, arbitrarily determine the value of franchises and tax them at the rate that other property is taxed; but it is held that if franchises are taxed as tangible property, then the value thereof must be ascertained by the same methods that the value of other property is ascertained for the purposes of taxation. It is, however, conceded in that case that the legislature may do what is attempted to be done in the act in question, namely, impose a tax upon the right to exercise the privilege conferred by the corporate franchise. The other cases cited by counsel for appellant upon this point, in effect, do no more than support the doctrine of the Nebraska case referred to.

The contention that the act is void, upon the ground that it offends against the uniformity clause of the Constitution, cannot be sustained. Having determined that the tax is not a tax upon property within the purview of the Constitution of this state, it follows that the classification, the amount of the tax, and the manner of collecting it, is a matter largely, if not entirely, within the legislative discretion. With regard to this point the same principle is involved in this case that was involved, in the case of *Salt Lake City v. Christensen Co.* 34 Utah, 38, 17 L.R.A. (N.S.) 898, 95 Pac. 523, and it is therefore needless to extend the discussion upon this point. In addition to the authorities cited in that case, we refer to the following: *Denver City R. Co. v. Denver*, 21 Colo. 350, 29 L.R.A. 608, 52 Am. St. Rep. 239, 41 Pac. 826; *Home Ins. Co. v. New York*, 134 U. S. 600, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593; 1 Cooley, Taxn. 3d ed. p. 412.

It is further contended that the act is void for uncertainty, in that it fixes no time at which the duty to pay the tax arises, and because the nonpayment thereof does not prevent the corporation from continuing its business, although it may refuse or neglect to pay the tax. As to the first point, it is sufficient to say that the license tax imposed is an annual tax payable "on or before the 15th day of November of each year." Any corporation falling within the class mentioned in the act upon whom the tax is imposed, and which has obtained from the state a franchise to transact business as a corporation at any time before the

15th day of November of any year, is liable for the tax, and, when paid, is entitled to the certificate mentioned in § 5 of the act, which entitles such corporation to continue to transact its corporate business for the whole year and until the 15th day of November of the following year. Any corporation organized after the 15th day of November in any year, clearly cannot be required to pay the tax until the following November. If it be said that this authorizes a newly created corporation to transact business for a period for which it pays no tax, it may likewise be said that the same condition exists with regard to any annual tax. Even upon a property tax when a person becomes the owner thereof after the time for assessing the property has passed, he may hold it immune against taxation until the next annual period for assessment arrives. The legislature no doubt could have provided that any corporation formed after the 15th day of November in any year should be required to pay a tax in proportion to the time intervening between its organization and the end of the yearly term, namely, the 15th day of November. The mere fact that this was not done, however, in no way affects either the certainty or the uniformity. It is made to operate upon all corporations in the same way where their status is the same. Nor do we see anything objectionable in the fact that the act does not deprive the corporation of its privileges in case of default of payment of the tax. This is a mere matter of detail in enforcing the tax. If the tax is valid, and we think it is, then the corporations upon whom it is imposed certainly cannot be heard to complain that the penalty in case of default is not more drastic than it is. Nor is there any merit in the contention that both the tax and penalty constitute a lien upon the tangible property of the corporation. This is the method that the legislature has adopted to enforce payment of the tax, and, as we have pointed out in *Salt Lake City v. Christensen*, supra, is a matter entirely within the legislative discretion. The law, no doubt, is somewhat crude and imperfect, and may not be the best that could be devised for the purposes of raising revenue, but neither one nor all of these reasons can in any way, nor to any extent, affect the validity of the law itself.

From what has been said, we hold: (1) That the act in question is not clearly repugnant to any constitutional provision; (2) that the tax in question is a mere license tax imposed by the state upon certain corporations for the privilege granted them by it to be and to continue to transact business in this state as a corporation, and

the tax was not intended to be, nor is it, a tax upon franchises as tangible property, and therefore does not offend against the provisions of § 2 of article 13 of the Constitution; (3) that the manner in which the tax is imposed and the amount that each corporation is required to pay, as ascertained and fixed by the act, is not contrary to any constitutional provision; (4) that the period of time for which the payment of the tax entitles the corporation to continue its business without further payment is certain; and (5) that the act is not so uncertain nor unfair in any of its provisions that a court would, for that reason, be authorized to declare it invalid.

The judgment therefore ought to be, and it accordingly is, affirmed, with costs to respondent.

McCarty, Ch. J., and Straup, J., concur.

MINNESOTA SUPREME COURT.

HULDA E. FRISK

v.

CHARLES M. CANNON et al.

(110 Minn. 438, 126 N. W. 67.)

Physician — use of electricity — negligence.

Plaintiff was placed by one of defendant physicians on an insulated platform, a conical cap was put above and in front of her head, and electricity was caused to be discharged by a static machine through the cap upon plaintiff's head. Defendant left

Headnote by the Court.

Note. — Liability of physician for injuries resulting from electrical or X-ray treatment.

The rule governing the liability for injuries resulting from the use of the X-ray is the same as in other actions for malpractice, and the criterion is whether such reasonable care and skill has been exercised as is usually given by physicians and surgeons in good standing in the locality. *Henslin v. Wheaton*, 91 Minn. 219, 64 L.R.A. 126, 103 Am. St. Rep. 504, 97 N. W. 882, 1 A. & E. Ann. Cas. 19; *Gere v. Brockman*, 138 Mo. App. 231, 119 S. W. 1082; *Sweeney v. Erving*, 38 Wash. L. Rep. 295. The court in the first case said; "This is the first case to come before us involving alleged negligence on the part of physicians in applying the recently discovered X-rays, and no rule of care in such cases has been laid down. But there can be no doubt that the rule applicable to the care and skill required of physicians toward their patients in other cases applies. That rule was stated in *Martin v. Courtney*, 87 Minn. 197, 91 N. W. 487, in the 28 L.R.A. (N.S.)

the room. No attendant was present. Plaintiff's head was seriously burned. It is held that actionable negligence on the part of defendant was shown.

(Jaggard, J., dissents.)

(April 22, 1910.)

CROSS-APPEALS from a judgment of the District Court for Ramsey County in plaintiff's favor as to defendant Frank E. Balcome, and from an order dismissing as to defendant Charles M. Cannon, an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence; the plaintiff appealing from the order of dismissal, and defendant Balcome from the judgment taken against him. Order and judgment affirmed.

The facts are stated in the opinion.

Messrs. Richard & Coe for plaintiff.

Messrs. C. D. O'Brien and R. D. O'Brien, for defendants:

Defendant Balcome was not negligent.

Jenkins v. St. Paul City R. Co. 105 Minn. 504, 20 L.R.A. (N.S.) 401, 117 N. W. 928.

Per Curiam:

Plaintiff and appellant charged the defendants and respondents, as partners engaged in the practice of medicine, with having negligently treated plaintiff with static electricity, to her injury. It was alleged: Plaintiff was placed on an insulated platform connected with the electrical machine. Above and in front of her head was put a conical cap, in a position subsequently described in detail. Static electricity was caused to be discharged from the machine, through the cap, in, upon, and through

following language: "The legal obligation of the physician to his patient, where his conduct is questioned in an action of this character, demands of him no more than the exercise of such reasonable care and skill as is usually given by physicians or surgeons in good standing." The rule is one of ordinary care and prudence, and the question presented in the case at bar is whether the evidence received and that offered on the trial tended to show a failure on the part of defendants to exercise such care."

And a physician is not an insurer of the success of treatment by the X-ray, or that it will not be attended by unexpected results, but he is only required to have the necessary learning and experience to give the treatment in a careful and prudent manner. *Gore v. Brockman*, supra.

It has been held that the fact that a patient was burned by an X-ray is itself evidence that the treatment was improper. *Shockley v. Tucker*, 127 Iowa, 456, 103 N. W. 360.

But a different result was reached in *Sweeney v. Erving*, supra, where it was

plaintiff. Defendant then left the room. No attendant was present. After the lapse of eight or ten minutes, plaintiff screamed. Defendant immediately entered the room, and discovered that her head was smoking. Through the negligence of defendant a large portion of the top and sides of plaintiff's head was seriously burned, whereby she was damaged in the sum of \$5,000. Defendant admitted the fact of burning, but denied negligence. The case was tried to a jury, which returned a verdict of \$1,200 for plaintiff. This appeal was taken from judgment entered against defendant Balcome.

Plaintiff made out a prima facie case of negligence. Plaintiff's only expert testified that, if the cap were brought close to the head and there was volume enough, there would be a continuous spark, and harm would result. His testimony to the effect that the distance the cap was placed from plaintiff's head would determine whether a burn was likely to occur, together with the testimony of plaintiff that it was not adjusted as on former occasions, and also the conduct of defendant in leaving the plaintiff in the room unattended, while the machine was working, for the space of ten minutes, during which time the burn occurred, in connection with the other evidence in the case, was sufficient to take the question of defendant's negligence to the jury.

The trial court was justified in concluding that defendants were not partners, and that defendant Cannon was not liable for the negligence of defendant Balcome.

Order and judgment affirmed.

O'Brien, J., took no part.

Jaggard, J., dissenting:

I respectfully dissent. The evidence in my opinion rebuts the inference of negligence, to which it may be conceded the circumstances gave rise. It appears that this plaintiff had been subjected to the same treatment by the same machine on seven or eight previous occasions without harm. Defendant called a number of well-known experts of the highest character. The effect of their testimony is: The amperage or the quantity of electricity generated by the machine in question is infinitesimal. It figures at some one-millionth of an ampere; but the electromotive force is large. The effect resembles shooting a piece of eider down from a gun. There is great force, but the missile is so slight in character that it can do no harm. No case has ever been known of injury to a person by a static machine, nor is one known in the literature of the profession. The occurrence was "unique in experience," "a perfect mystery, contrary to all laws of physics." It could not be accounted for by any action of the static machine. A physician who had been using one in his practice daily since 1885, and had given perhaps 100,000 treatments, gave similar testimony. Another physician with seventeen years' experience in the use of the machine testified that he knew of nothing which could have produced this injury by this machine, and he knew of nothing which could have prevented it. The testimony of the physicians was cogent evidence of its veracity and of their competency.

Certain experiments were performed by defendant after the accident. If it be conceded that this subsequent knowledge of sci-

held that this fact was not evidence of negligence, and did not throw the burden on the defendant of showing that the injury was not caused by his negligence.

And it has been held that where some of the testimony tends to show that the physicians in the community are ignorant of the effect of X-ray exposures, the jury may well conclude that its use by one who has little knowledge of the consequences is negligence *per se*. *Sauers v. Smits*, 49 Wash. 557, 17 L.R.A.(N.S.) 1242, 95 Pac. 1097.

It has been held that a physician to whom a surgeon referred one of his patients for the purpose of having an X-ray diagnosis made might rely upon the surgeon's judgment that the patient was in a physical condition to undergo the exposures. *Sweeney v. Erving*, supra.

A patient who is burned by X-ray light while under a physician's treatment is not precluded from recovering for her injury because she quits his treatment before she should have done so, and before he wished her to, or by the fact that she neglected to follow his instructions as to the care

of the part affected. *Sauers v. Smits*, supra.

Where an action for malpractice by burning plaintiff by the use of the X-ray is submitted to the jury solely on the question of whether the defendant was negligent in his methods of using the X-ray, testimony of physicians of other schools of medicine than the defendant, to the effect that X-ray treatment is not a proper one for appendicitis, is admissible, since the question of negligence is one of science and skill, wholly independent of the methods of treatment by any particular school. *Shockley v. Tucker*, supra.

So, where it is applied merely to locate a foreign substance, a physician is not entitled to have the question of his care determined by those of his own school alone, and a professor who is familiar with the X-ray may testify as to whether the use was negligent. *Henslin v. Wheaton*, supra.

Evidence that defendant in an action for a negligent burning by use of an X-ray machine had burned other patients is incompetent. *Shockley v. Tucker*, supra.

ence, as distinguished from the mere application of familiar forces to ordinary substances, was admissible in evidence,—compare *Staloch v. Holm*, 100 Minn. 276, 9 L.R.A. (N.S.) 712, 111 N. W. 264, with *Glockner v. Harwood Mfg. Co.* 109 Minn. 30, 122 N. W. 465, 123 N. W. 807,—the experiments were not significant in this case. The way in which the conical cap, described as an inverted crown or sunflower, was placed near plaintiff's head, the one suggested explanation of how the accident happened, is not shown to have been its cause. According to plaintiff, that cap was placed within 2 or 3 inches from her head, instead of 6 or 8 inches away, as at other times. The decrease in distance tended to increase the strength of the current communicated to the patient's head; but it had never been known to produce the effect here complained of before the accident. It was shown by uncontradicted and unimpeached testimony that the force of the charge or amount of electricity used or turned on plaintiff in its usual operation would have been absolutely harmless, however the cap had been adjusted; that if the cap had been placed immediately on top of her head, it might have produced unpleasant sensations, but according to all known experience would not have injured the plaintiff. "Good practice requires that it should just clear the head; that is all." The patient could perceive the cone in front of her, so that, if there had been a spark, she would have seen it, but did not see it. It is to be noted that it was the back of her head which was burned. Moreover, it is the universal experience that there might have been a spark without possible harm. When an individual passes over a carpet, a spark is often generated, which would, for instance, light gas, without any possible harm to the individual.

The absence of any assistant in the room with plaintiff is not shown to have been a material factor. How such person, if present, could have prevented the harm, does not appear. If he had, for example, turned off the electricity which operated the machine, its wheels would have revolved for some time from momentum. Nor has it been suggested how any interposition could have been effective to have stopped the passage of the current, which plaintiff said took more time than a second, but which must have been practically instantaneous. It appears that the presence of a physician or an assistant was not required by good medical practice, nor that there was any reasonable anticipation of harm which suggested it. Neither the facts in the record nor any conjecture reasonably founded thereon tends to show that the failure of the physician to give plaintiff any directions concerning the 28 L.R.A. (N.S.)

use of the machine, or to be present in person or by representative, was the proximate cause of the harm complained of.

The defendant had a right to rely on the presumption of the uniformity of the operation of natural forces. He was not bound to anticipate that a certain exceptional phenomenon, beyond the range of invariable and extensive experience, would happen. The courts have, indeed, denied responsibility for damage due to flood, tempests, or to lightning, which are known to happen frequently, and of which certain premonitory indications are common. See *Baccelli v. North River Stone Co.* 133 App. Div. 449, 118 N. Y. Supp. 29. This accident was like a flash from a clear sky. Wind, it is known, can prove destructive; but could the proprietor of a place where an electric fan is used be reasonably held to anticipate that the breeze it generated would inflict injury? It is true defendant was dealing with a force which he knew in many manifestations is dangerous; but in this particular form in numberless instances it had proved innocuous. According to the record before us,—and we are controlled by that,—nothing within the range of a large and familiar experience suggested even the possibility of harm. Defendant, moreover, had purchased from reputable makers a standard machine, which, at the time of the accident, was in perfect order. It had previously been operated upon this plaintiff repeatedly and safely. He had a right to rely on its uniform and safe operation. *Jenkins v. St. Paul City R. Co.* 105 Minn. 504, 20 L.R.A. (N.S.) 401, 117 N. W. 928.

I am compelled to conclude that plaintiff suffered from the results of a physical force partially known and in some measure unknown, whose particular potentiality for harm could not have reasonably been foreseen, and for which defendant was not responsible.

UNITED STATES SUPREME COURT.

ALFRED DOZIER, Plff. in Err.,
v.

STATE OF ALABAMA.

(218 U. S. 124, 54 L. ed. 965, 30 Sup. Ct. Rep. 649.)

Interstate commerce — state license tax — peddlers and drummers.

The sale within the state of a frame for a portrait, made in another state, to fill an order taken by a solicitor in the former state, cannot be so separated from the rest of the dealings between the nonresident maker and the purchaser as to sustain the imposition of a license tax under Ala. act

of March 7, 1907, § 17, where the order for the portrait contemplated its delivery in an appropriate frame, which the purchaser of the portrait should have the option of buying at the factory price.

(May 31, 1910.)

ERROR to the Alabama Supreme Court to review a judgment affirming a judgment of the City Court of Montgomery, convicting defendant of selling picture frames without a license. Reversed.

The facts are stated in the opinion.

Mr. A. D. Gash, for plaintiff in error:

Section 17 of Alabama act of March 7, 1907, providing that every person who solicits orders for pictures or frames, or sells or disposes of picture frames, shall pay a li-

cense tax in each county, is an attempt to interfere with and to regulate commerce, and as such is invalid as to an agent of a corporation residing out of the state.

Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Lyng v. Michigan, 135 U. S. 161, 23 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Brown v. Maryland, 12

Note.—License or occupation tax on hawkers and peddlers, and persons engaged in soliciting orders by sample or otherwise, as a violation of the commerce clause.

This question has already been covered in a note to State v. Bayer, 19 L.R.A.(N.S.) 297, to which may be added the following decisions, reported since its compilation:

Discrimination against manufactures or products of other states.

The Colorado statute Rev. Stat. 1908, §§ 3563 et seq.) providing for the licensing of itinerant vendors, which defines the term "itinerant vendor" as any person, either as principal or agent, who engages in a temporary or transient business in the state, either in one locality or in traveling about the country, or from place to place, selling manufactured goods, wares, or merchandise, except to merchants, in the usual course of business, and which therefore in its operation would exempt from license a person permanently engaged in manufacturing in the state, although he might travel about the state to sell his product, while requiring a manufacturer in another state, without a permanent place of business within the state enacting the statute, to obtain a license before seeking to obtain a market for his product by selling to purchasers for their own use, is unconstitutional, as imposing a burden upon interstate commerce; since, when reduced to its final analysis, the license exacted is nothing more or less than a tax imposed upon outside manufacturers for the privilege of selling their products in the state direct to the consumers, while manufacturers within the state are relieved from that burden. Smith v. Farr, 46 Colo. 364, 104 Pac. 401; Leonard v. Reed, 46 Colo. 307, 104 Pac. 410.

Validity as an exercise of police power.

In Ex parte Crowder, 171 Fed. 250, a statute requiring peddlers, with certain exceptions, to procure a license in each county where they did business, to pay a li-

cense fee of \$100 for a peddler on foot, \$150 for a peddler with one horse and a wagon, \$250 for a peddler with two horses and a wagon, and \$300 for a peddler with any other conveyance, and to make a special deposit with the county treasurer of \$500, which deposit is made subject to taxes, to attachment and execution on behalf of creditors of the licensee, whose claims arise in connection with the business done under the license, to garnishment in any civil action in contract or tort brought against the licensee, to the payment of fines incurred by the licensee through violation of the statute, and to be held by the county treasurer for a period of ninety days from the date of cancellation of the license,—which statute is general in its application, without discrimination against persons, whether residents or non-residents of the state, nor against commodities, whether produced within the state or imported from other states or countries,—was held to be strictly a police and revenue statute, applicable to business to be transacted wholly within the state, and not to create an invidious burden upon interstate or foreign commerce.

Interstate character of transaction as affected by delivery through agent.

In Wilcox v. People, 46 Colo. 382, 104 Pac. 408, it was held that an agent for a manufacturer located in another state, who, through persons employed for that purpose, solicited and secured orders for vehicles manufactured and then in such other state, which orders were filled by his principal, and the vehicles shipped to him, and by him delivered to the purchasers, could not constitutionally be required to obtain a license.

—as affected by shipment in bulk to agent.

In Crenshaw v. State (Ark.) 130 S. W. 569, it was held that a statute requiring any person who shall travel over and through any county and peddle or sell certain articles, to procure a license, and which, in defining peddling, departs from the common-law definition in not making it

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Wheat. 419, 6 L. ed. 678; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576.

An agent of a foreign corporation, who delivers a frame to each purchaser of portraits whose contract of purchase provides that the portrait will be delivered in a suitable frame, that may be accepted at factory price, who has only one frame fitted to and surrounding each portrait as it is delivered, and who does not offer to sell any frame to others than those whose contract calls for the option of accepting said suitable frame, and who carries no extra frames whatever, but keeps the title for his company, or returns to his company any frame that is refused,—is engaged solely in interstate commerce.

Chicago Portrait Co. v. Macon, 147 Fed. 967; State v. Coop, 52 S. C. 508, 41 L.R.A. 501, 30 S. E. 609; Laurens v. Elmore, 55 S. C. 477, 45 L.R.A. 249, 33 S. E. 560.

The statute discriminates against the rights and privileges of citizens of other states.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565.

Messrs. Alexander M. Garber, Attorney General, and Thomas W. Martin, for defendant in error:

The sale of the frames was made and completed in Alabama by the agent after the frames were brought into the state, and while in the possession of the agent; and therefore the transaction with respect to the frames was not interstate but intrastate commerce, and the conviction should be sustained under the latter alternative in the complaint.

State v. Montgomery, 92 Me. 433, 43 Atl. 13; Chrystal v. Macon, 108 Ga. 27, 33 S. E. 810; Howe Mach. Co. v. Gage, 100 U. S.

676, 25 L. ed. 754; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; General Oil Co. v. Crain, 209 U. S. 231, 52 L. ed. 765, 28 Sup. Ct. Rep. 475.

As to when the taxing power of the state begins, see:

American Steel & Wire Co. v. Speed and Rearick v. Pennsylvania, *supra*; General Oil Co. v. Crain, 209 U. S. 212, 52 L. ed. 755, 28 Sup. Ct. Rep. 475.

Mr. Justice Holmes delivered the opinion of the court:

The plaintiff in error was convicted and sentenced to a fine on a complaint for breach of an Alabama statute of March 7, 1907. By § 17 of that act a license tax was imposed on persons who did not have a permanent place of business in the state, and also keep picture frames as a part of their stock in trade, if they solicited orders for the enlargement of photographs or pictures of any character, or for picture frames, whether they made charge for such frames or not, or if they sold or disposed of picture frames. The Chicago Crayon Company, having its only place of business in Chicago, and being engaged in the business of making and enlarging portraits from photographs, and in the manufacturing of picture frames, solicited orders in Alabama without paying the license tax. These orders were given in writing for a portrait of the size and kind wanted, specified the price, cash on delivery, and continued: "I understand that my portrait is to be delivered in an appropriate frame, which this contract entitles me to accept at factory price." The agent of the company gave back a written

essential that the vendor deliver his wares at the time he makes sales thereof,—which statute did not discriminate against non-residents, or goods manufactured without the state,—was not, as applied to a person traveling about and taking orders for ranges, which ranges were shipped by the manufacturer from another state, the ranges not being separately appropriated to the filling of any particular order by being tagged with the name of any purchaser, or as applied to the person engaged in delivering them, a burden on interstate commerce.

Sale of picture frame as incidental to transaction protected by commerce clause.

As stated in the earlier note above referred to, there has been a conflict of opinion upon the question whether, where one who, as a transaction of interstate commerce, has ordered a picture, is given an

option of purchasing a frame delivered with it, the sale of the frame under such circumstances is within the protection of the commerce clause, which is now authoritatively settled by the decision of the United States Supreme Court, above reported.

The point was also involved in *Roselle v. Com. (Va.)* 65 S. E. 526, in which the evidence showed that defendant had in his possession a considerable consignment of pictures and picture frames, that none of those from whom orders for the pictures had been secured were obligated to take frames, but that the purchase of the frame was the subject of negotiation at the time the picture was delivered, and it was held that the sale of the frame was not so intimately connected with the sale of the portrait as to be a transaction of interstate commerce, so as to preclude the application of a statute requiring peddlers to be licensed.

acceptance, repeating the other terms of the bargain, and adding: "All portraits are delivered in appropriate frames, which this contract entitled the purchaser to accept at factory prices," with particulars purporting to show that these prices were from one third to one half the retail or usual ones. The plaintiff in error, who also had no permanent place of business in Alabama and had paid no license tax, was an agent of the company, who delivered pictures and frames, and collected for them, in pursuance of the agreed plan. The pictures and frames were sent to the agent, and remained the property of the company until paid for and delivered. On these facts the supreme court of Alabama, while admitting that the dealings concerning the pictures were commerce among the states, sustained the conviction, on the ground that the sale of the frames was a wholly local matter. 154 Ala. 83, 129 Am. St. Rep. 51, 46 So. 9.

No doubt it is true that the customer was not bound to take the frame unless he saw it, and that the sale of it took place wholly within the state of Alabama, if a sale was made. But, as was hinted in *Rearick v. Pennsylvania*, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159, what is commerce among the states is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed. It was agreed that the frame should be offered along with the picture. The offer was a part of the interstate bargain, and as it was agreed that the frame should be offered "at factory prices," and the company and factory were in Chicago, obviously it was contemplated, if not agreed, that the frame should come on with the picture. In fact, the frames were sent on with the pictures from Chicago, and were offered when the pictures were tendered, as part of a transaction commercially continuous, and one at prices generically fixed by the contract for the pictures, and by that contract represented to be less than retail or usual prices, in consideration, it is implied, of the purchase already agreed to be made. We are of opinion that the sale of the frames cannot be so separated from the rest of the dealing between the Chicago company and the Alabama purchaser as to sustain the license tax upon it. Under the decision, the statute, as applied to this case, is a regulation of commerce among the states, and void under the Constitution of the United States. Art. 1, § 8. *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Rear-* 28 L.R.A. (N.S.)

ick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159.

Judgment reversed.

GEORGIA SUPREME COURT.

A. M. PRYOR

v.

LUDDEN & BATES SOUTHERN MUSIC HOUSE.

(— Ga. —, 67 S. E. 654.)

Note — purchase price of chattel — defense — breach of warranty.

Where a note recites that its consideration is the purchase price of a particular described piano, in a suit thereon by the promisee the maker may plead, in defense of the action, that the plaintiff represented that the piano was new and capable of being used as a musical instrument, and that the defendant, acting on this representation and warranty, and without actual or constructive knowledge of its true condition, bought it, when in point of fact it is worse than secondhand, and not capable of being used as a musical instrument.

(March 19, 1910.)

Headnote by EVANS, P. J.

Note. — Breach of parol warranty as defense to action between original parties on note for purchase price of chattel.

This note does not include cases passing on the question of whether a breach of warranty may be taken advantage of by counterclaim or set-off, but is confined to the question of whether it may be used as a defense in an action on a note given for the purchase price of a chattel.

The weight of authority is in accord with the decision in *PRYOR v. LUDDEN & B. SOUTHERN MUSIC HOUSE* in holding that the breach of a parol warranty may be shown as a defense *pro tanto* in an action between the original parties to a note given for the purchase price.

This result was reached in the following cases where parol evidence showing such warranties was held admissible, the notes in suit being silent as to the existence of warranties: *Ruff v. Garrett*, 94 Ill. 475; *Crist v. Jacoby*, 10 Ind. App. 688, 38 N. E. 543; *Farrar v. Mathews*, 37 Iowa, 418; *Thompson v. Wheeler & W. Mfg. Co.* 29 Kan. 476; *Shepherd v. Temple*, 3 N. H. 455; *Lytle v. Bass*, 7 Coldw. 303; *Gilman Bros. v. Williams*, 74 Vt. 327, 52 Atl. 428.

And in *Nauman v. Ullman*, 102 Wis. 92, 78 N. W. 159, it was held that the signing of a note was not such a reduction of the contract to writing as would render parol evidence of a warranty inadmissible. The court said: "The defendant contends, how-

CERTIFICATION by the Court of Appeals for the opinion of the Supreme Court of a question arising on writ of error to the City Court of Sylvania, to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. Instructions given favorable to plaintiff in error.

The facts are stated in the opinion.

Mr. E. K. Overstreet for plaintiff in error.

Messrs. Strange & Cobb, for defendant in error:

Breach of a parol warranty could not be set up as a defense.

Bullard v. Brewer, 118 Ga. 918, 45 S. E. 711; Seitz v. Brewers' Refrigerating Mach. Co. 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46; 2 Mechem, Sales, 1254; Fleming v. Satterfield, 4 Ga. App. 351, 61 S. E. 518.

ever, under both the fourth and the seventh assignments of error, that the signing of the note above referred to was a reduction of the contract to writing, so that any evidence of a parol warranty was inadmissible. This contention cannot be sustained, for it is obvious that the note does not in terms purport to state the whole contract, and the evidence of the transaction makes still clearer the fact that it does not. It was only a method of evidencing a promise to pay a portion of the purchase price, and to secure the same. It was a document in execution of a part of the contract in fact made, instead of one purporting to declare the terms of the contract. Such writing does not exclude proof of a parol warranty."

And in the following cases where suit was brought on a bought note containing a memorandum of the sale, parol evidence was held admissible to prove a warranty and a breach thereof. Curtis v. Soltau, 16 Daly, 490, 12 N. Y. Supp. 285; Routledge v. Worthington Co. 119 N. Y. 592, 23 N. E. 1111.

And a maker may prove a parol warranty notwithstanding the note in suit contains the words, "no promise or contract outside of this note will be recognized." Gale Sulky Harrow Mfg. Co. v. Stark, 45 Kan. 606, 23 Am. St. Rep. 739, 26 Pac. 8.

And in Rumsey v. Sargent, 21 N. H. 397, where there was a warranty in substance that, if the pump sold did not give satisfaction, the seller would refund the money, it was held in an action on a note that evidence that the pump neither worked well nor gave satisfaction might be given.

In the following cases it was held that a breach of warranty could be shown as a defense in an action upon a note given for the purchase price of a chattel, no question of evidence relating to such defense being raised or discussed: O'Neal v. Bacon, 1 Houst. (Del.) 215; Dukes v. Nelson, 27 Ga. 457; Sturges v. Miller, 80 Ill. 241; McClure v. Williams, 65 Ill. 390; Beers v. Williams, 16 Ill. 69; Rose v. Wallace, 11 28 L.R.A. (N.S.)

Evans, P. J., delivered the opinion of the court:

The court of appeals desires the instruction of the supreme court as to the following question of law:

"Where there is a sale of a specific article of personal property, such as a certain particular piano, and the purchaser gives to the seller a promissory note stating that the consideration thereof is the particular designated article sold, and the note is otherwise silent as to representations and warranties, is the defendant precluded by what is commonly called the 'parol evidence rule,' or by any other principle of law, from pleading in defense to an action on the note that the plaintiff represented that the piano was new and was suitable for the use for which such articles are usually and generally intended (i. e., in the case of the piano, that it was new and capable of being used as a

Ind. 112; Brayley v. Goff, 40 Iowa, 76; Pratt v. Johnson, 100 Me. 443, 62 Atl. 242; Perley v. Balch, 23 Pick. 283, 34 Am. Dec. 56; Goodwin v. Morse, 9 Met. 278; Aldrich v. Stockwell, 91 Mass. 45; Stevens v. Johnson, 28 Minn. 172, 9 N. W. 677; Nichols & S. Co. v. Soderquist, 77 Minn. 509, 80 N. W. 630; Ferguson v. Oliver, 16 Miss. 332; Wade v. Scott, 7 Mo. 509; Murphy v. Gay, 37 Mo. 536; Brown v. Weldon, 99 Mo. 568, 13 S. W. 342; Broderick v. Andrews, 135 Mo. App. 57, 115 S. W. 519; Buhrman v. Baylis, 14 Hun, 608; Steigleman v. Jeffries, 1 Serg. & R. 477, 7 Am. Dec. 626; Aultman & T. Co. v. Hefner, 67 Tex. 54, 2 S. W. 861; Butler v. Titus, 13 Wis. 430; Hoopes v. Northern Nat. Bank, 42 C. C. A. 436, 102 Fed. 448.

And it has been held that a breach of an implied warranty that the goods sold were merchantable could be shown in defense to an action on a note given for the purchase price. Williams v. Wyly, 45 Ga. 580; Bullard v. Brewer, 118 Ga. 918, 45 S. E. 711.

But in Nash v. Weidenfeld, 41 App. Div 511, 58 N. Y. Supp. 609, affirmed in 166 N. Y. 612, 59 N. E. 1127, where, for the purpose of the decision, it was taken as admitted that the plaintiff transferee was liable to all defenses which existed in the hands of the payee, it was held that a breach of warranty was not a defense to an action on a note given in part payment for goods, but that it must be taken advantage of by counterclaim.

The same result was reached in Atwater v. Orford Copper Co. 85 N. Y. Supp. 426, which was an action on a written contract containing no warranty.

And in Peerless Reaper Co. v. Conway, 79 Wis. 622, 48 N. W. 854, where an action was brought to recover damages for a failure of a purchaser to give his notes, as agreed, it was held that a mere breach of warranty was no defense in whole or in part where no counterclaim was interposed.

musical instrument), and that the defendant, acting on this representation and warranty, and without actual or constructive knowledge of its true condition, bought it, when in point of fact it is worse than secondhand, and not capable of the use mentioned (i. e., in the case of the piano, of being used as a musical instrument)?"

In deciding whether a note given for the purchase money of a specific article may be reduced in amount, or a recovery entirely defeated, by showing a breach of a contemporaneous oral express warranty, regard must be had to two well-defined rules of law, one of which is the rule which prohibits an unconditional written promise to pay money to be changed into a conditional one by a contemporaneous parol agreement, and the other is the parol evidence rule, which rejects, in the absence of fraud, accident, or mistake, parol evidence which adds to, varies, or contradicts the written memorial of a contract. The principle is well established that a negotiable instrument which expresses on its face an absolute promise to pay cannot be cut down into a conditional promise by a contemporaneous parol agreement. Thus, where a note expressed on its face that it was given for the rent of a warehouse, in a suit upon the note, a plea of total or partial failure of consideration, resulting from a breach of a collateral engagement of the landlord to make certain repairs, will not be allowed. *Wyche v. Winship*, 13 Ga. 208. Nor can the maker show a prior or contemporaneous parol agreement that the payee was to accept a less amount. *Loudermilk v. Loudermilk*, 93 Ga. 443, 21 S. E. 77. Though a maker of a note, when sued by his promisee, is always permitted to show by parol a want or failure of consideration, yet he will not be allowed, unless fraud exists, to prove that his obligation to pay was dependent or conditional upon the promisee's compliance with a contemporaneous or prior agreement, not expressed in the note. *Lester v. Fowler*, 43 Ga. 190; *Howard v. Stephens*, 52 Ga. 448; *Goodman v. Fleming*, 57 Ga. 350; *Hayley v. Evans*, 65 Ga. 157; *Hirsch v. Oliver*, 91 Ga. 554, 18 S. E. 354; *Dinkler v. Baer*, 92 Ga. 432, 17 S. E. 953; *Scaife v. Beall*, 43 Ga. 333.

As an incident to a sale of a chattel, the law implies a warranty, which the parties may waive or change by express agreement. The warranty, whether express or implied, necessarily enters into the consideration of the article sold. A plea of breach of warranty is the substantial equivalent of a plea of failure of consideration; and the defense is allowed upon the principle that the consideration of a note between the parties is always open to inquiry so far as the prom-

ise to pay depends upon its existence, continuance, or amount, and that, as a warranty is incident to every sale of a chattel, parol evidence is admissible, not for the purpose of showing that a different promise from the written one was made, but that it is different in legal effect, as a consequence of the want, cessation, or shrinkage of the consideration. *Aultman v. Mason*, 83 Ga. 212, 9 S. E. 536. The parol evidence rule, as relating to written contracts, has been thus stated: "Where parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the entire contract, and parol evidence of prior or contemporaneous representations or statements is inadmissible to add to, take from, or vary the written instrument." *Bullard v. Brewer*, 118 Ga. 918, 45 S. E. 711. Where the law requires that the contract, in order to be valid, shall be expressed in writing, the writing alone must be depended upon to ascertain the contract of the parties, and its deficiencies cannot be supplied by parol proof. Where the law does not require the agreement to be reduced to writing in order to render it valid, and it is insisted that the writing contains a complete agreement of the parties, it becomes a question of intention, as to whether or not the agreement has been integrated in the writing. In such a case, in order to allow parol evidence to be admitted to show other terms, it must appear, either from the contract itself or from the attendant circumstances, that the contract is incomplete, and what is sought to be shown as additional terms neither conflicts with nor contradicts what is contained in the writing. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 81 Am. St. Rep. 28, 37 S. E. 485; *Johnston v. Patterson*, 86 Ga. 725, 13 S. E. 17; *De Pauw v. Kaiser*, 77 Ga. 176, 3 S. E. 254.

If the writing shows on its face a definite and complete contract between the parties, parol evidence will not be received to vary, modify, or contradict its terms. The rule does not apply to cases where the instrument shows incompleteness on its face, and parol evidence is allowed to show an agreement referable to the incompleteness, when not inharmonious with the writing. The question in such cases is whether there is a vacuum to be filled. If the alleged omission of an important detail is lacking, which can be supplied by legal presumption, the want of express provision leaves no vacuum. In case of the sale of a chattel, the parties may contract for an express warranty, or they may rely upon the warranty which the law implies. Our Code declares that, if there is no express covenant of warranty, the sell-

er warrants that he has a valid title and right to sell, that the article sold is merchantable and reasonably suited to the use intended, and that he knows of no latent defects undisclosed. Civil Code 1895, § 3555. In Benjamin on Sales, 7th ed. § 621, it is said that "where the written sale contains no warranty, or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of a warranty in the former case, or to extend it in the latter by inference or implication." So, where it appears that the agreement has been integrated in the writing, the terms of the writing cannot be changed or contradicted by parol evidence.

The essential thing to be ascertained in a suit upon a promissory note given for a particular described chattel, in order to exclude parol evidence, is whether or not it varies the terms of the note, or, if the agreement has been integrated in the note, whether it varies the terms of the contract, as expressed in the note. Ordinarily a promissory note given for the purchase price of an article is intended to contain only the obligation of the vendee; and that obligation is to pay the vendor a definite sum of money at a definite time. The vendor's obligation has no place in a purely negotiable instrument given by the vendee; and in a suit upon a promissory note for the price of personal property, which does not purport to disclose the contract of sale, evidence of a parol warranty of the property, and a breach of the warranty, is admissible. *Kemp v. Byne*, 54 Ga. 527. The maker of a negotiable note for the purchase of a chattel may incorporate therein the complete contract of sale; and when this is done, the law will not permit him to prove different or additional terms. *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143; *Bullard v. Brewer*, supra. In these cases the purchaser signed a note which reserved the title of the property sold in the seller, and also contained the other provisions of the sale contract. The maker of a negotiable note for the purchase of a chattel may, without integrating the entire agreement of sale, express therein partial terms of sale. A purchaser of an article, who gives his note for the price of the article, and therein accepts a limited warranty, and stipulates not to exact anything beyond, will not be allowed to prove by parol another representation or warranty of the seller, unless upon the ground of fraud. *Allen v. Young*, 62 Ga. 617; *Patterson v. Ramspeck*, 81 Ga. 808, 10 S. E. 390.

Applying these observations to the query of the court of appeals, we do not think that a note which expresses that the consideration thereof is the purchase price of a spe-

cific article (nothing more appearing) indicates upon its face that the terms of sale have been integrated in the writing, and parol evidence is admissible to show a failure of consideration, consequent upon a breach of a contemporaneous parol express warranty.

All the Justices concur, except Fish, Ch. J., absent on account of sickness.

KANSAS SUPREME COURT.

MARY H. KIRBY, Guardian of Mary Estelle Kirby, Appt.,
v.

CORA KIRBY SELLARDS.

(82 Kan. 291, 108 Pac. 73.)

Will — devise to witness — effect.

1. The statute (Gen. Stat. 1909, § 9786) making void a devise or bequest to a witness to a will which cannot be proved without his testimony applies only to attesting witnesses, not to other persons called upon to testify when the will is offered for probate.

Same — execution — failure to fasten sheets — identity.

2. Where a will offered for probate consists of several separate sheets, not permanently fastened together, only the last one bearing the signature of the testator, the connection of the subject-matter may be sufficient to establish prima facie the identity of the other sheets.

Same — beneficiary daughter as draftsman — undue influence.

3. The fact that a will is written by the daughter of the testator, who is named as

Headnotes by MASON, J.

Note. — Evidentiary force of circumstance that one benefited by a will was the draftsman thereof, or was active in procuring its execution.

I. Scope and introduction, 271.

II. As bearing on question of fraud and deceit, 272.

a. Application of rule where beneficiary not actual draftsman, 273.

b. Application where draftsman not directly benefited, 274.

c. Probative force, 274.

d. Effect upon burden of proof, 275.

e. Circumstances under which proponent required to present additional proof, 276.

f. Character and sufficiency of proof to repel suspicion of fraud.

1. Degree, 279.

2. Amount, 279.

3. Kind, 279.

4. Specific instances, 280.

the executrix, but is not otherwise favored over the other children, does not raise a presumption of undue influence.

Same — effect.

4. The fact that a will is written by a daughter of the testator, who shares its benefits equally with the other children, does not make a case for the application of the statutory provision (Laws 1905, chap. 526, § 1; Gen. Stat. 1909, § 9787) that a will written by the principal beneficiary, who was the confidential agent or legal adviser of the testator, or who occupied any other position of confidence or trust to him, shall not be held valid unless it shall be affirmatively shown that the testator knew the contents, and had independent advice with reference thereto.

Same — revocation — evidence — sufficiency.

5. No error appears in the admission to probate of a will, where there was evidence that the testator had duly signed it in ink, below the attestation clause, in the presence of the subscribing witnesses, and a few

weeks later had delivered it to the executrix, who retained possession of it until his death, although, when it was produced in court, the testator's signature had been partially erased by knife scratches, and his name had been written in pencil above the attestation clause, apparently by himself, and no further showing was made as to when, by whom, or with what purpose the changes had been made.

(April 9, 1910.)

A PPEAL by defendant from an order of the District Court for Osage County, reversing an order of the Probate Court, refusing probate to the will of Peter Kirby, deceased. Affirmed.

The facts are stated in the opinion.

Mr. J. H. Stavely, for appellant:

In a proceeding for the probate of a will, the burden rests upon the proponents to establish its valid execution.

McConnell v. Keir, 76 Kan. 527, 92 Pac.

III. As bearing on question of undue influence.

a. Preliminary statement, 281.

b. In general, 282.

c. Application of rule where draftsman not directly benefited, 282.

d. Probative force of the so-called "presumption" of undue influence, 283.

e. Effect upon burden of proof, 284.

f. Circumstances under which proponent must, or should, present additional proof, 286.

g. Sufficiency of proof to repel inference or presumption, 288.

I. Scope and introduction.

It is the purpose of this note to determine the nature, character, and force of the implication attributable to the circumstance that one who drafted or was otherwise active in the preparation and execution of a will receives a benefit thereunder, both where it stands alone and where it exists in conjunction with other circumstances, notably the existence of a confidential relation between the testator and such beneficiary; the circumstances which add force to such implication; its effect, if any, upon the burden of proof; the circumstances under which it becomes necessary to introduce evidence to repel it; and the amount and character of proof necessary to that end.

It is important to note at the outset that the whole origin and cause of the difficulty which pervades this subject lies in the want of a satisfactory and accurate terminology in relation to the subject of presumption and the kindred subject of burden of proof. The word "presumption" has been loosely, yet, for want of a better word, necessarily, used to describe the whole gamut of indirect proof, ranging from a simple inference up to the establishment of a fact so indis-

putably that no amount of opposing evidence will be permitted to overturn it. Nor is the situation much improved by the employment of the terms "presumption of law" and "presumption of fact." One has only to turn to the judicial definitions of these terms to discover astounding differences of opinion as to their signification.

In the present connection some courts have used the word "presumption" as connoting something from which the existence of the fact in issue *may*, but not necessarily must, be inferred; but have been understood by others as having used the word as signifying something from which an inference as to the existence of the fact in issue *must*, in the absence of rebutting evidence, be drawn. This confusion is doubtless in a large measure due to the fact that the rule as to the onus of explanation being upon the beneficiary is laid down in many cases, and especially in the English decisions, not as a rule of law, but as a precept by which the court as a trier of the fact in issue, would be guided.

In this note where the word "presumption" is used alone and without qualification, it must be understood simply as meaning an inference the probative force of which is within the domain of the trier of the fact.

Less difficulty is encountered in connection with the term "burden of proof," which, it must be remembered, has a twofold meaning. In one sense—the sense in which it is to be held to be upon the party having the affirmative of the issue—it is used as signifying the risk of nonpersuasion of the jury; while in the other sense it denotes the duty of producing evidence to satisfy the judge, and so to bring or keep the issue within the domain of the trier of the fact. It is obvious that while the burden of proof in the first sense does not shift, it may in the second. See Wigmore, Ev. §§ 2485–2490.

540; *Bethany Hospital Co. v. Hale*, 69 Kan. 618, 77 Pac. 537; *Singleton v. Tomlinson*, 38 L. T. N. S. 653; *Jones v. Habersham*, 63 Ga. 157; *West's Goods*, 9 Jur. N. S. 1158; *Re Brewis*, 10 Jur. N. S. 593; *Re Whatman*, 10 Jur. N. S. 1242; *Re Drummond*, 2 Swabey & T. 8; *Tovey's Goods*, 39 L. T. N. S. 235; *Lea v. Libb*, 3 Mod. 263.

The daughter was disqualified by reason of her being an interested person.

Clark v. Miller, 65 Kan. 726, 68 Pac. 1071; *Waddington v. Buzby*, 43 N. J. Eq. 154, 10 Atl. 862; *McQueen v. Wilson*, 131 Ala. 606, 31 So. 94.

Animus revocandi is a legal presumption from the paper itself, and the burden is on the proponent to show to the contrary.

Bethell v. Moore, 19 N. C. (2 Dev. & B. L.) 311; 2 Cyc. Law & Proc. p. 234.

The inferences of which the circumstance under discussion goes to form the basis are of two kinds, which may, but, as will presently be shown, do not necessarily, coexist,--the one being of fraud and deceit and the other of undue influence. The first arises from the circumstance itself, while the second arises from the circumstance when taken in conjunction with certain others.

Thus, it has been held that the presumption which arises against a will by reason of the draftsman taking a benefit thereunder is one of falsity and fraud (*Von Stentz v. Comyn*, 12 Ir. Eq. Rep. 622), but not of undue influence (*Berry v. Hamilton*, 10 B. Mon. 129; *Carpenter v. Hall*, 19 N. Y. Supp. 778, affirmed without opinion in 141 N. Y. 572, 36 N. E. 345; *Henry v. Hall*, 106 Ala. 84, 54 Am. St. Rep. 22, 17 So. 187),--in the latter of which cases it is said that such conduct or participation, to create a presumption of undue influence, must be coupled with a benefit under the will and evidence of confidential relations or dependency, or some position or fact which tends to show that the party was able to exercise undue influence if he desired to do so.

It. As bearing on question of fraud and deceit.

By the civil law, where a person wrote a will in his own favor, the instrument was rendered void, in conformity to an ordinance under Claudius, that the writer of another's will should not mark down a legacy for himself. *Paske v. Ollat*, 2 Phillim, Eccl. Rep. 323; *Ingram v. Wyatt*, 1 Hagg. Eccl. Rep. 384; *Daniel v. Hill*, 52 Ala. 430; *Drake's Appeal*, 45 Conn. 9; *Beall v. Mann*, 5 Ga. 456; *Bennett v. Bennett*, 50 N. J. Eq. 439, 26 Atl. 573; *Delafield v. Parish*, 25 N. Y. 9; *Crispell v. Dubois*, 4 Barb. 393; *Re Everett* (N. C.) 68 S. E. 924; *Re Barney*, 70 Vt. 352, 40 Atl. 1027; *Riddell v. Johnson*, 26 Gratt. 152.

A less stringent rule, however, obtains in the courts of England and the United States. While some cases, apparently employing

The presumption is that a will which is mutilated has been revoked, unless the contrary is shown.

Morton's Goods, 57 L. T. N. S. 501; *Hobbs v. Knight*, 1 Curt. Eccl. Rep. 768; *Jarman Wills*, 161 and notes; *Magnesi v. Hazelton*, 44 L. T. N. S. 586; *Dallow's Goods*, 31 L. J. P. N. S. 128; *Abraham v. Joseph*, 5 Jur. N. S. 179; *Baptist Church v. Robbarts*, 2 Pa. St. 110; *Woodfill v. Patton*, 76 Ind. 575, 40 Am. Rep. 269; *Youse v. Forman*, 5 Bush, 337; *McIntyre v. McIntyre*, 120 Ga. 67, 102 Am. St. Rep. 71, 47 S. E. 501, 1 A. & E. Ann. Cas. 606; *Bennett v. Sherrod*, 25 N. C. (3 Ired. L.) 303, 40 Am. Dec. 410; *Smock v. Smock*, 11 N. J. Eq. 156; *Re White*, 25 N. J. Eq. 501; *Muh's Succession*, 35 La. Ann. 394, 48 Am. Rep. 242; *Bell v. Fothergill*, 23 L. T. N. S. 323, L. R. 2 Prob.

the term as signifying a presumption of fact, have stated that where a person benefited by a will himself writes or procures it to be written, there is a presumption against the instrument (*Hill v. Barge*, 12 Ala. 687; *Garrett v. Heflin*, 98 Ala. 615, 39 Am. St. Rep. 89, 13 So. 326; *Henry v. Hall*, 106 Ala. 84, 54 Am. St. Rep. 22, 17 So. 187; *Hughes v. Meredith*, 24 Ga. 325, 71 Am. Dec. 127), or that it is prima facie evidence of fraud (*Adams v. McBeath*, 27 Can. S. C. 13), the more common form of statement is to the effect that the circumstance forms a just ground for suspicion, and calls upon the court to be vigilant and jealous (*Baker v. Batt*, 2 Moore, P. C. C. 317; *Barry v. Butlin*, 2 Moore, P. C. C. 480; *Raworth v. Marriott*, 1 Myl. & K. 643; *Mitchell v. Thomas*, 6 Moore, P. C. C. 137; *Ingram v. Wyatt*, supra; *Durling v. Loveland*, 2 Curt. Eccl. Rep. 225; *Brown v. Fisher*, 63 L. T. N. S. 465; *Parker v. Duncan*, 62 L. T. N. S. 642; *Scoular v. Plowright*, 28 L. T. 193; *Fulton v. Andrew*, L. R. 7 H. L. 448; *Hegarty v. King*, Ir. L. R. 7 Eq. 18; *Von Stentz v. Comyn*, supra; *Hogg v. Maguire*, 11 Ont. App. Rep. 507; *Daniel v. Hill*, supra; *Lyons v. Campbell*, 88 Ala. 462, 7 So. 250; *Byrne's Estate*, Myrick Prob. Ct. Rep. 1; [Cal.] *Rusling v. Rusling*, 36 N. J. Eq. 603; *Re Soule*, 22 Abb. N. C. 236, 3 N. Y. Supp. 259, affirmed without opinion in 57 Hun, 586, 11 N. Y. Supp. 949; *Peck v. Belden*, 6 Dem. 299, 10 N. Y. S. R. 698; *Re Eckler*, 47 Misc. 320, 95 N. Y. Supp. 986; *Re Everett*, supra; *Patton v. Allison*, 7 Humph. 319); or, more briefly, that it raises a suspicion (*Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312, 15 A. & E. Ann. Cas. 548; *Cramer v. Crumbaugh*, 3 Md. 491; *Dudley v. Gates*, 124 Mich. 446, 83 N. W. 97, 86 N. W. 959); or is a circumstance of suspicion (*Re Hollingsworth*, 58 Iowa, 526, 12 N. W. 590; *Griffith v. Diffenderfer*, 50 Md. 466; *Jones v. Simpson*, 171 Mass. 474, 50 N. E. 940; *Muller v. St. Louis Hospital Asso.* 5 Mo. App. 390, affirmed without discussion of this point in 73 Mo. 242; *Bennett v. Bennett*, supra; *Yardley v. Cuthbertson*, 108

& Div. 148; *Price v. Price*, 27 L. J. Exch. N. S. 409, 3 Hurlst. & N. 341.

Where the signature is destroyed, the burden is on the proponent to account for the mutilation.

Scott v. Thrall, 77 Kan. 694, 17 L.R.A. (N.S.) 184, 127 Am. St. Rep. 449, 95 Pac. 563; *Cutler v. Cutler*, 130 N. C. 1, 57 L.R.A. 209, 89 Am. St. Rep. 854, 40 S. E. 689; *Re Clark, Tucker*, 445; *Re Diehl*, 112 N. Y. Supp. 717.

The presumption is that the mutilation was the act of the testator.

Greenl. Ev. § 681; 1 Jarman, Wills, 119; Beach, Wills, § 73.

The mutilation not being explained by evidence, the paper will not be admitted to probate.

Pa. 395, 56 Am. Rep. 218, 1 Atl. 765; *Riddell v. Johnson*, supra; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; or that it excites a stricter scrutiny and requires stricter proof of volition and capacity (*McDaniel v. Crosby*, 19 Ark. 533; *Duffield v. Robeson*, 2 Harr. [Del.] 375; *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *Keyes v. Kimmel*, 186 Ill. 109, 57 N. E. 851; *England v. Fawbush*, 204 Ill. 384, 68 N. E. 526; *Crispell v. Dubois*, supra); or calls for satisfactory explanation (*Bush v. Delano*, 113 Mich. 321, 71 N. W. 628); or renders it proper to look outside the will for evidence indicating a recognition of its contents by the testator (*Leaycraft v. Simmons*, 3 Bradf. 35; *McKnight v. Wright*, 12 Rich. L. 232); or that the mere formal proof of the execution of the paper is not enough to entitle it to probate (*Daniel v. Hill*; *Lyons v. Campbell*; *Peck v. Belden*; and *Re Eckler*,—supra; *Kelly v. Settegast*, 68 Tex. 10, 2 S. W. 870).

This rule is not exclusive and uniform, but in its application is modified by the circumstances of each particular case. (*McKnight v. Wright*, supra, *Mordecai v. Canty*—S. C.—, 68 S. E. 1049); the suspicion may be strong or weak, depending upon all the attending circumstances (*Snodgrass v. Smith*; *Griffith v. Diffenderffer*; and *Bennett v. Bennett*,—supra), such as, for instance, the amount of the benefit, its proportion to the whole estate, or the claims of the party on the bounty of decedent (*Barry v. Butlin*; *Lyons v. Campbell*; *Patton v. Allison*, supra). It is increased where the draftsman is the attorney or confidential agent of the deceased (*Paske v. Ollat*; *Ingram v. Wyatt*; *Hill v. Barge*; and *Garrett v. Heflin*,—supra), and is strengthened by extreme debility in testator, and clandestinity (*Paske v. Ollat*; *Hill v. Barge*; and *Garrett v. Heflin*,—supra); doubtful testamentary capacity (*Griffith v. Diffenderffer* and *Bennett v. Bennett*, supra); by the absence of any disinterested person at the time of its execution, by secrecy observed in relation there-

Re Wilson, 8 Wis. 171; *Doran v. Mullen*, 78 Ill. 342; 30 Am. & Eng. Enc. Law, 2d ed. p. 642.

The presumption of law is that, by reason of the relations existing between the proponent and the testator, and because she wrote the will, and was the principal legatee therein, the testator was under legal restraint at the time he executed the original will, and that the proponent exerted undue influence on the testator, and induced him to make the will in her favor.

Ginter v. Ginter, 79 Kan. 721, 22 L.R.A. (N.S.) 1034, 101 Pac. 634; *Lake v. Ranney*, 33 Barb. 49; 2 Pom. Eq. Jur. § 951; *Tyrrell v. Painton* [1894] P. 151; *Jones v. Simpson*, 171 Mass. 474, 50 N. E. 940; *Adair v. Adair*, 30 Ga. 102; *St. Leger's Appeal*, 34

to, and by the circumstance that the witnesses were friends of the beneficiary, unknown to the testator, and did not know the paper attested by them was of a testamentary character (*Hegarty v. King*, supra); or by the fact that the beneficiary took charge of the will immediately upon its execution, and that it was not read by the subscribing witnesses, nor to the decedent in their presence. (*Re Hollingsworth*, supra); or by the fact that the beneficiary is a stranger to the testator's blood. (*Adams v. McBeath*; *Lyons v. Campbell*; and *Griffith v. Diffenderffer*,—supra).

On the other hand, such suspicion is in some cases of no weight at all, as where the gift to the draftsman is of trifling value, or moderate in amount. *Barry v. Butlin and Bennett v. Bennett*, supra; *Trubey v. Richardson*, 224 Ill. 130, 79 N. E. 592.

Although in one instance (*Hughes v. Meredith*, 24 Ga. 325, 71 Am. Dec. 127) the rule is stated as though an absence of relationship were an element thereof, it has been expressly held that the rule is not limited to cases where the beneficiary is a stranger to the blood of the testator. *Hegarty v. King*, supra. But in Pennsylvania the rule seems to be qualified to the extent that where the draftsman benefited by the will is a blood relative it is not necessary for him to produce affirmative proof that the testator was acquainted with its contents. See *Blume v. Hartman*, 115 Pa. 32, 2 Am. St. Rep. 525, 8 Atl. 219.

a. Application of rule where beneficiary not actual draftsman.

The rule that the participation of a beneficiary in the making of a will will arouse the vigilance of the court is applicable where such beneficiary has much to do with its preparation, or is particularly active in procuring its execution, as well as where the beneficiary is the actual draftsman. *Lyons v. Campbell*, supra (where the residuary legatee and executor procured the will to be written by his son, from his own direction); *Purdy v. Hall*, supra (where one

Conn. 434, 91 Am. Dec. 735; Drake's Appeal, 45 Conn. 9; Re Barney, 70 Vt. 352, 40 Atl. 1027; Wilson v. Mitchell, 101 Pa. 495; McQueen v. Wilson, *supra*; Carroll v. Hause, 48 N. J. Eq. 269, 27 Am. St. Rep. 469, 22 Atl. 192; Edgerly v. Edgerly, 73 N. H. 407, 62 Atl. 716; Cassoday, Wills, § 488; Bancroft v. Otis, 91 Ala. 279, 24 Am. St. Rep. 904, 8 So. 286; Isham v. Bingham, 126 Ill. App. 513; McDaniel v. Crosby, 19 Ark. 533; Page, Wills, 483, 486, 491, 560.

The execution of the will in the presence of two witnesses is not sufficient to overcome the presumption.

Boyd v. Boyd, 66 Pa. 283; Claffey v. Ledwith, 56 N. J. Eq. 333, 38 Atl. 433; Harvey v. Sullens, 46 Mo. 147, 2 Am. Rep. 491; Lyons v. Campbell, 88 Ala. 462, 7 So. 250.

of the chief beneficiaries did not get the lawyer whom the testator desired to draw the will, but procured the services of another, of his own selection, and the will was prepared by such lawyer in the presence of the beneficiary and the testator, no one else being present); Den ex dem. Trumbull v. Gibbons, 22 N. J. L. 117, 51 Am. Dec. 253 (where the will was drawn at the lodgings of the principal devisee, who actually took part in preparing the draft, and paid the attorney); Delafield v. Parish, 25 N. Y. 9 (where the chief beneficiary of a codicil prepared and gave instructions therefor, it being drawn up at her suggestion, upon her procurement, and by counsel employed by her); Tyler v. Gardiner, 35 N. Y. 559 (where the principal beneficiary under a will executed by a party borne down by disease and close upon the verge of death, prepared formal instructions, employed a draftsman, and selected the witnesses, being present at every stage of the proceedings); Swails v. White, 149 Pa. 261, 24 Atl. 292 (where the will was prepared by the direction of one of the two beneficiaries named therein, the scrivener and the testator not being brought together); Miller v. Livingstone, 31 Utah, 415, 88 Pac. 338 (where the beneficiary gave instructions for the will, directed its terms, and it was drawn at her request); O'Brien's Appeal, 100 Me. 156, 60 Atl. 880; Slinger's Will, 72 Wis. 22, 37 N. W. 236.

But compare, in this connection, Logan's Estate, 195 Pa. 282, 45 Atl. 729, in which the fact that the son of testatrix, who was a preferred beneficiary, procured the scrivener who wrote the will, and communicated to him the data therefor, was held to raise no presumption against the validity of the will.

b. Application where draftsman not directly benefited.

The rule has been held applicable where the will was written by the husband of the principal beneficiary (Hill v. Barge, 12 Ala. 687; Montague v. Allan, 78 Va. 592, 49 Am. Rep. 384; Waddington v. Buzby, 45 28 L.R.A. (N.S.)

The burden was on the proponent to show that no undue influence was exerted.

Nexsen v. Nexsen, 2 Keyes, 229; Hill v. Barge, 12 Ala. 687; Bush v. Delano, 113 Mich. 321, 71 N. W. 628; Claffey v. Ledwith, *supra*; Higginbotham v. Higginbotham, 106 Ala. 314, 17 So. 516; Patton v. Allison, 7 Humph. 320; Crispell v. Dubois, 4 Barb. 393; Waddington v. Buzby, *supra*; Weston v. Teufel, 213 Ill. 291, 72 N. E. 908; Moore v. Spier, 80 Ala. 129; Barkman v. Richards, 63 N. J. Eq. 211, 49 Atl. 831; Blume v. Hartman, 115 Pa. 32, 2 Am. St. Rep. 525, 8 Atl. 219; Re Miller, 31 Utah, 415, 88 Pac. 338; Riddell v. Johnson, 26 Gratt. 152; Jones v. Roberts, 37 Mo. App. 163; McDaniel v. Crosby, 19 Ark. 533; Hegney v. Head, 126 Mo. 619, 29 S. W. 587; Richmond's Ap-

N. J. Eq. 173, 14 Am. St. Rep. 706, 16 Atl. 690); and where a bequest was made to the infant children of the draftsman (McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682); or where a son of the draftsman was one of the principal legatees (Waddington v. Buzby, *supra*); and where the will was drawn and its execution supervised by a son of the sole beneficiary (Tyrrell v. Panton [1894] P. 151).

But the rule has been held to have no application where the only interest taken by the draftsman, or person alleged to have procured the will, was his appointment as executor (Woodson v. Holmes, 117 Ga. 19, 43 S. E. 467; Linton's Appeal, 104 Pa. 228; Re Thompson, 121 App. Div. 470, 106 N. Y. Supp. 111); or where the draftsman was named as trustee of some of the beneficiaries, it being considered that, in legal contemplation, the duties and responsibilities of the position are a full equivalent of any merely personal advantage arising from it (Stokes v. Miller, 10 W. N. C. 241; Re Thompson, *supra*).

For similar decisions with reference to the presumption of fraud and deceit, see appropriate heading, *infra*.

But in Tomkins v. Tomkins, 1 Bail. 92, 19 Am. Dec. 656, it is held that although the interest taken by the draftsman, named by a will to act as guardian for certain children, may be inconsiderable, he falls within the suspicions on which the rule is founded that strong proof of intention is required where an act is done by the agency of the party to be benefited.

In Drake's Appeal, 45 Conn. 9, the question was left open whether the interest of a vestryman of a church, which received a benefit under the will of which he was the draughtsman, was such as to warrant the application of the principle.

c. Probative force.

Fraud may be inferred from the circumstance alone that the draftsman of a will is a beneficiary thereunder (Ingram v. Wyatt, 1 Hagg. Eccl. Rep. 384; Von Stentz v. Comyn, 12 Ir. Eq. Rep. 622); but such

peal, 59 Conn. 226, 21 Am. St. Rep. 85, 22 Atl. 82; Walls v. Walls, 30 Ky. L. Rep. 948, 99 S. W. 960; McFadin v. Catron, 120 Mo. 252, 25 S. W. 506; Clark v. Stansbury, 49 Md. 346; McReynolds v. Smith (Ind.) 86 N. E. 1009; Hopkins v. Wampler, 108 Va. 705, 62 S. E. 926; Hoffbaur v. Morgan (Ind.) 88 N. E. 337.

Messrs. James A. Troutman, Robert Stone, and George T. McDermott, for appellee:

"Attestation," standing alone, means that a witness saw the signature made to which he is attesting, or heard it acknowledged, and signs as a witness to that fact and nothing more.

Re Laudy, 148 N. Y. 403, 42 N. E. 1061; Canada's Appeal, 47 Conn. 450; Webster v.

Yorty, 194 Ill. 408, 62 N. E. 907; Brownfield v. Brownfield, 43 Ill. 147; Palmer v. Owen, 229 Ill. 115, 82 N. E. 275.

The incompetency raised by § 11 refers only to attesting witnesses.

Clark v. Miller, 65 Kan. 726, 68 Pac. 1071.

The several sheets of the will were sufficiently identified.

Jarman, Wills, p. 118; Bond v. Seawell, 3 Burr. 1775; Roche v. Nason, 105 App. Div. 256, 93 N. Y. Supp. 565; 30 Am. & Eng. Enc. Law, 2d ed. pp. 580, 584; Wikoff's Appeal, 15 Pa. 281, 53 Am. Dec. 597; Schouler, Wills, 2d ed. ¶ 337; Jones v. Habersham, 63 Ga. 146; Re Snell, 32 Misc. 611, 67 N. Y. Supp. 581; Woerner, Am. Law of Administration, p. 65.

The validity of the instrument as a will

circumstance is not necessarily decisive evidence thereof (Paine v. Hall, 18 Ves. Jr. 475; Snodgrass v. Smith, 42 Colo. 60, 94 Pac. 312, 15 A. & E. Ann. Cas. 548; Cramer v. Crumbaugh, 3 Md. 491; Post v. Mason, 91 N. Y. 539, 43 Am. Rep. 689; Booth v. Kitchen, 3 Redf. 52).

It is in no case more than a suspicious circumstance, the weight of which is for the jury to determine. Snodgrass v. Smith, supra; Griffith v. Diffenderffer, 50 Md. 466; Bennett v. Bennett, 50 N. J. Eq. 439, 26 Atl. 573; Dudley v. Gates, 124 Mich. 446, 83 N. W. 97, 86 N. W. 959; Re Carver, 3 Misc. 567, 23 N. Y. Supp. 753, affirmed without opinion in 75 Hun, 612, 28 N. Y. Supp. 1126; Downey v. Murphey, 18 N. C. (1. Dev. & B. L.) 82; Riddell v. Johnson, 26 Gratt. 152; Cheatham v. Hatcher, 30 Gratt. 56, 32 Am. Rep. 650.

d. Effect upon burden of proof.

While in a number of the cases expressions may be found to the effect that the onus is upon him who propounds the will to rebut and overcome the presumption arising from the circumstance that the draftsman takes a large interest thereby, by showing that the testator knew its contents (Lyons v. Campbell, 88 Ala. 462, 7 So. 250; McDaniel v. Crosby, 19 Ark. 533; Hughes v. Meredith, 24 Ga. 325, 71 Am. Dec. 127; Carrie v. Cumming, 26 Ga. 690; Purdy v. Hall, 134 Ill. 298, 25 N. E. 645; Nexsen v. Nexsen, 2 Keyes, 229; Blume v. Hartman, 115 Pa. 32, 2 Am. St. Rep. 525, 8 Atl. 219; Tyrrell v. Painton, supra; McHugh v. Doolley, 10 B. C. 537), it has been said that where the maxim *qui se scripsit heredem* has been held to impose upon the proponent proof of a more clear and satisfactory character there has intervened the element either of impaired faculties or weakened mind, or some affirmative evidence tending to show undue influence, or some intimate relation of a confidential or fiduciary character between the testator and the writer of the will. (Booth v. Kitchen, supra.) See, as supporting this position, cases under 25 L.R.A. (N.S.)

heading, "circumstances under which proponent required to present additional proof," infra.

It is probable also that all that is meant in most cases by such expressions is that the proponent, by failing to introduce evidence directly tending to show that testator knew the contents of the will, simply runs the risk of a contrary inference being drawn by the tribunal to which the decision of the question is committed. See, by way of illustration, Dudley v. Gates, supra, in which an instruction that the law looks upon the circumstance that a will was drawn by proponent's husband as raising a suspicion, the weight of which is for the jury to determine, but which is sufficient to render it incumbent upon the party offering the will for probate to remove such suspicion by evidence, was approved.

The more discriminating decisions hold that the circumstance that the draftsman or one active in procuring the execution of a will received a considerable benefit thereunder will not cast the burden of proof upon the proponent (Griffith v. Diffenderffer and Downey v. Murphey, supra; Miller v. Livingstone, 31 Utah, 415, 88 Pac. 338); and that the unexplained existence of such circumstance will not create a presumption which will require the court to pronounce against the will (Paine v. Hall; Snodgrass v. Smith; and Cramer v. Crumbaugh, supra; Post v. Mason, 91 N. Y. 539, 43 Am. Rep. 689; Booth v. Kitchen, supra); but that it is in no case more than a suspicious circumstance (Snodgrass v. Smith, supra; Griffith v. Diffenderffer; Bennett v. Bennett; Re Carver; Riddell v. Johnson; and Cheatham v. Hatcher, supra), the weight of which is for the jury to determine (Griffith v. Diffenderffer; Dudley v. Gates, and Downey v. Murphey, supra).

And in one case the court has even gone so far as to say that if the draftsman of a will and the principal beneficiary turn out to be one and the same person, it is not the business of the court to stigmatize the fact as a suspicious circumstance, it being for the jury to determine whether it is, in the particular case they are trying, a sus-

is unaffected by the fact that it is on several sheets of paper, if they are connected or coherent in sense when an adaptation of the several parts in mode.

Barnewall v. Murrell, 108 Ala. 366, 18 So. 831; Wigmore, Ev. § 2452; Ela v. Edwards, 16 Gray, 99; Wikoff's Appeal, supra; Woodruff v. Hundley, 127 Ala. 640, 85 Am. St. Rep. 145, 29 So. 98; Montgomery v. Perkins, 2 Met. (Ky.) 448, 74 Am. Dec. 419; 30 Am. & Eng. Enc. Law, 2d ed. p. 580; Bond v. Seawell, 3 Burr. 1773; Martin v. Hamlin, 4 Strobb. L. 188, 53 Am. Dec. 673; Schillinger v. Bawek, 135 Iowa, 131, 112 N. W. 210.

Unless the signature is illegible, it does not amount to a revocation.

Re Godfrey, 69 L. T. N. S. 22; Lovell v. Quitman, 88 N. Y. 377, 42 Am. Rep. 254,

picious circumstance or not. Stirling v. Stirling, 64 Md. 138, 21 Atl. 273.

With reference to this phase of the question, it was said in the leading case of Barry v. Butlin, 2 Moore, P. C. C. 480, apropos of the statement made in an earlier case, that where the party benefited prepares the will, the presumption and *onus probandi* are against the instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper: "If, by these expressions, the learned judge meant merely to say, that there are cases of wills prepared by a legatee, so pregnant with suspicion, that they ought to be pronounced against in the absence of evidence in support of them, and that extending to clear proof of the actual knowledge of the contents, by the supposed testator, and that instructions proceeding from him, or the reading over the instrument by or to him, are the most satisfactory evidence of such knowledge; we fully concur in the proposition so understood; in all probability the learned judge intended no more than this. But if the words used are to be construed strictly; if it is intended to be stated as a rule of law, that in every case in which the party preparing a will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure but a particular species of proof is thereupon required from the party propounding the will,—we feel bound to say that we assume the doctrine to be incorrect. The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the onus is imposed on the party propounding a will, it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed, and it cannot be that the simple fact of the party who prepared the will being himself a legatee is in every case, and under all circumstances, to create a contrary presumption, and to call upon the court to pronounce against the will, unless additional evidence is produced to prove

25 Hun, 537; Howard v. Hunter, 115 Ga. 357, 90 Am. St. Rep. 121, 41 S. E. 638.

Even though the cancelation or obliteration were sufficient, it must be shown to have been done with the intention that it should operate as a revocation.

Woodruff v. Hundley, supra; Dan v. Brown, 4 Cow. 483, 15 Am. Dec. 395; Re Wood, 2 Connoly, 144, 11 N. Y. Supp. 157; Underhill, Wills, pp. 314, 316, 317; King's Goods, 2 Rob. Eccl. Rep. 403; Schouler, Wills, § 392; Re Prescott, 4 Redf. 178.

No presumption arises that the scratching of the name was done *animo revocandi*.

Bethell v. Moore, 19 N. C. (2 Dev. & B. L.) 311; Scott v. Thrall, 77 Kan. 688, 17 L.R.A.(N.S.) 184, 127 Am. St. Rep. 449, 95 Pac. 563; McIntyre v. McIntyre, 120 Ga. 67,

the knowledge of its contents by the deceased. A single instance, of not unfrequent occurrence, will test the truth of this proposition. A man of acknowledged competence and habits of business, worth £100,000, leaves the bulk of his property to his family, and a legacy of £50 to his confidential attorney, who prepared the will; would this fact throw the burden of proof of actual cognizance by the testator, of the contents of the will, on the party propounding it, so that if such proof were not supplied, the will would be pronounced against? The answer is obvious, it would not. All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance, of more or less weight, according to the facts of each particular case; in some, of no weight at all, as in the case suggested, varying according to circumstances; for instance, the quantum of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies: but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased."

e. Circumstances under which proponent required to present additional proof.

Although, in the nature of things, no precedent is likely to be on all fours with any future case, the following decisions, showing the circumstances under which it has been held incumbent on the proponent to produce additional evidence in order to establish the will, may be of some value. These are presented without regard to whether the production of such evidence is to be required as a matter of law, or simply at the risk of an unfavorable inference being drawn in its absence.

In Finny v. Govett, 25 Times L. R. 186, where it appeared that the will propounded

102 Am. St. Rep. 71, 47 S. E. 501, 1 A. & E. Ann. Cas. 609; Giddings v. Giddings, 65 Conn. 149, 48 Am. St. Rep. 201, 32 Atl. 334; Hairston v. Hairston, 30 Miss. 305; Wilbourn v. Shell, 59 Miss. 205, 42 Am. Rep. 363; Dower v. Seeds, 28 W. Va. 113, 57 Am. Rep. 646; Woerner, Am. Law of Administration, p. 90; Strong's Appeal, 79 Conn. 123, 6 L.R.A.(N.S.) 1107, 118 Am. St. Rep. 138, 63 Atl. 1089; Perrott v. Perrott, 14 East, 423; Pringle v. M'Pherson, 2 Brev. 279, 3 Am. Dec. 713; Wolf v. Bollinger, 62 Ill. 368; Thomas v. Thomas, 76 Minn. 237, 77 Am. St. Rep. 639, 79 N. W. 104; Re Knapen, 75 Vt. 151, 98 Am. St. Rep. 808, 53 Atl. 1003; Re Penniman, 20 Minn. 256, Gil. 220, 18 Am. Rep. 368; Varnon v. Varnon, 67 Mo. App. 537.

The testator was not under legal restraint when he executed the will.

Ginter v. Ginter, 79 Kan. 721, 22 L.R.A. (N.S.) 1024, 101 Pac. 634.

Mason, J., delivered the opinion of the court:

Probate of the will of Peter Kirby was refused by the probate court, but granted by the district court on appeal, and this proceeding is brought to review that order. The will was written by his oldest child, Mary Kirby Sellards, who was the executrix and a principal beneficiary, on five sheets of paper, which were separate at the time of its execution, but fastened together with a pin when offered for probate; the second and fourth pages being interchanged. The

had been prepared by the residuary legatee for testatrix, a very old lady, in failing health, without her having had any independent advice or assistance, and that the fact of the execution had been kept absolutely secret, it was held that, under the circumstances, the onus was upon such beneficiary to show that the document clearly expressed the mind and intention of the testatrix.

In Wright v. Jewell, 9 Manitoba L. Rep. 607, where the evidence as to the mental capacity of the testator was conflicting, and the will was procured to be prepared and executed by the beneficiaries, it was held that the onus was upon them of proof that the transaction was a righteous one.

In Purdy v. Hall, 134 Ill. 298, 25 N. E. 645, it was held that the fact that a will gave the bulk of a large and valuable estate to a certain beneficiary and his immediate relatives, that such beneficiary did not get the lawyer whom the testator desired to draw the will, but procured the services of another lawyer, of his own selection, and that the will was prepared by such lawyer in the presence of the beneficiary and the testator, no one else being present, imposed the burden upon the proponents to show that the testator knew what disposition he was making of his property.

In Howell v. Taylor, 50 N. J. Eq. 428, 26 Atl. 566, where it appeared that the testator was feeble in mind and easily imposed upon; that one of the principal legatees personally gave instruction to the draftsman of the will, and paid him for his services; that two of the legatees were present at the execution of the document, and the will subsequently came from their possession,—it was said that these circumstances are sufficient to excite the judicial mind to suspicious scrutiny, and naturally call upon those who participated in the production of the will, and who profited by it, to satisfy the court that the document was not the product of their unlawful management.

In Tyler v. Gardiner, 35 N. Y. 559, it is said that where the principal beneficiary

under a will prepared for execution by a party worn down by disease, and close upon the verge of death, assumes the responsibility of initiating it, of preparing formal instructions, of employing the draftsman, of selecting the witnesses, of being present at every stage of the proceedings, and of excluding those to whose inheritance a new direction is given, it behooves such beneficiary to be provided with evidence that the instrument expresses the honest and spontaneous purposes of the person who is called upon, at such a time, to reverse the provisions of a previous testamentary disposition, made in health and strength, in favor of those having clear claims upon his justice and bounty.

In Crispell v. Dubois, supra, where a will containing a considerable gift to the draftsman was drawn by one standing in a relation of special confidence to testatrix, both as her medical attendant and confidential adviser, and testatrix was at the time laboring under the influence of a painful illness, which proved fatal a few hours afterward, and the objects of her bounty were all strangers to her blood, to the exclusion of an only brother, it was held that the circumstances of the case were such as to create a strong presumption against the validity of the will, which could be overcome only by very clear proof of the unbiased intention of the testatrix to make such a disposition of her property as was contained in the will, and that it was executed by her with full understanding of the nature and effect of the instrument.

In Re Soule, 22 Abb. N. C. 236, 3 N. Y. Supp. 259, affirmed without opinion in 57 Hun, 586, 11 N. Y. Supp. 949, where the testator was about ninety years of age, physically infirm, slow of movement, poor of sight, so that he depended upon others to read to him, and the instrument was, in respect to the most important provisions, contrary to the previous will and codicils, and the attorney and draftsman was one of the beneficiaries, it was held that such facts required that the proponents should satisfy the court by a clear preponderance

signature of the testator and the witnesses appeared only on the last sheet, and the only direct testimony as to the identity of the others was that of Mrs. Sellards. The opponent of the will contends that the proof in this respect failed by reason of the incompetence of the witness, and also that a presumption of undue influence arose from the relation of the draftsman to the testator.

The statute (Gen. Stat. 1868, chap. 117, § 11; Gen. Stat. 1909, § 9786) provides that "if a devise or bequest be given to a person who is a witness to the will, and the will cannot otherwise be proved than by the testimony of such witness, the devise or bequest shall be void, and the witness shall be competent to give testimony of the execution of the will in like manner as if such de-

viser or bequest had not been made." Clearly, however, the words "witness to the will" refer to an attesting witness. This accords with the purpose and history of the legislation. That the statute distinguishes between a witness to the will and one who testifies in its support when it is offered for probate is made apparent by the original language of the succeeding section, providing that "the court shall cause the witnesses to such will, and such other witnesses or any person interested in having the same admitted to probate as may desire, to come before such court." Gen. Stat. 1868, chap. 117, § 12; Gen. Stat. 1901, § 7948. Mrs. Sellards was not a witness to the will in such a sense that her competency was affected by her interest. Moreover, her testimony was not

of evidence that the testator fully understood the nature and consequences of the testamentary act.

In *Leaycraft v. Simmons*, 3 Bradf. 35, where a testator eighty-nine years old executed a will at his son's residence, of which the son was the draftsman, and under which the son was the principal beneficiary, without the knowledge of his daughter, his only other child, it was held that, in view of all the circumstances, it was proper to look for evidence outside the will indicating a recognition of its contents by the testator.

In *Re Elster*, 39 Misc. 63, 78 N. Y. Supp. 871, it was held that where the evidence disclosed that the testator was of advanced age, of impaired faculties, and feeble in mind and body; unable to read and write; and signed by mark a will drawn solely under the direction and dictation of one of the chief beneficiaries; the witnessing of the execution by all the legatees in the presence of the subscribing witnesses; the disinheritance, without apparent reason, of probable objects of his bounty; previous wills made; short duration of time between the making of the will and the death of the testator,—under such circumstances the ordinary presumptions flowing from the act of formal execution do not obtain, but the burden is thrown upon the parties seeking to establish the testamentary act to show that all those precautions were taken, and those explanations were had, that were necessary to secure to the testator the full, free, and unbiased action of his impaired faculties.

While the circumstance that one standing in a relation of trust or confidence is instrumental to any extent in procuring a testamentary provision in his own favor does not, in and of itself, invalidate the bequest, it calls for satisfactory explanation, and imposes upon him claiming under such provision the burden of showing that it was in all respects fair and honest. *Re Carver*, 3 Misc. 567, 23 N. Y. Supp. 753, affirmed without opinion in 75 Hun, 612, 28 N. Y. Supp. 1126.

In *Re Eckler*, 47 Misc. 320, 95 N. Y. Supp. 986, reversed on other grounds in 126 App. Div. 199, 110 N. Y. Supp. 650 where 28 L.R.A. (N.S.)

the draftsman of a will, a stranger to the blood of testator, received the whole estate, it was held that, in view of the peculiarity of the language employed, the age, condition of mind, and degree of intelligence of the testator, the burden was on the proponent to show that testator knew and understood what disposition he was making of his property.

In *Boyd v. Boyd*, 66 Pa. 283, where it appeared that a testator was aged, infirm, not of a strong mind, and exceedingly illiterate, and that the will, which was drawn by his business adviser, contained substantial benefits to the scrivener and his family, it was held that the onus was upon the scrivener of showing that the provisions of the will were fully explained to and understood by the testator, and fully assented to by him.

Where the will of an old, infirm, mentally weak man makes the draftsman a residuary legatee, the burden is upon him to prove affirmatively that the alleged testator was laboring under no mistaken apprehension as to the value of his property and the probable amount of his residuary estate. *Cuthbertson's Appeal*, 97 Pa. 163.

In *Wilson's Appeal*, 99 Pa. 545, where it appeared that one of the chief beneficiaries named in the will of a testator of great age and physical infirmity was a trusted and confidential friend, who was the main instrument in procuring the preparation and execution of the will in question, it was held that the burden was upon such beneficiary affirmatively to show that the gift to him was the free, intelligent act of the testator.

In *Kelly v. Settegast*, 68 Tex. 16, 2 S. W. 870, where the paper claimed to be the will of the decedent was written by the person who, under it, would take one half of his estate, though, at the suggestion of one of the persons who subsequently became a subscribing witness, it was copied by another person, and the decedent was aged, ill, and unable to read, and the alleged will gave all his estate to strangers to his blood, ignoring the claims of his children, it was held that it should be shown that the testator

necessary to identify the unsigned sheets. As the first four pages happened to end with incomplete sentences, the connection of the subject-matter made as effective a union of the several parts as could have been accomplished by their physical attachment. "It is a rudimental principle that a will may be made on distinct papers. . . . It is sufficient that they are connected by their internal sense, by coherence, or adaptation of parts." Wikoff's Appeal, 15 Pa. 281, 53 Am. Dec. 597; 30 Am. & Eng. Enc. Law, p. 580. The sequence of the pages was indicated by figures placed at the top of each, as well as by the connection of the language, and the fact that they were fastened together in other than the proper order is not important.

correctly understood the contents of the paper which he signed, and that the mere formal proof of the execution of the paper was not enough to entitle it to probate.

f. Character and sufficiency of proof to repel suspicion of fraud.

1. Degree.

It has been variously said that the proof that the instrument propounded expressed the true will of the deceased, necessary to repel the suspicion arising from the circumstance under discussion, must be clear (Lyons v. Campbell, 88 Ala. 462, 7 So. 250; Swails v. White, 149 Pa. 261, 24 Atl. 292); clear and satisfactory (Baker v. Batt, 2 Moore, P. C. C. 317; Barry v. Butlin, 2 Moore, P. C. C. 480; Raworth v. Marriott, 1 Myl. & K. 643; Mitchell v. Thomas, 6 Moore, P. C. C. 137; Hegarty v. King, Jr. L. R. 7 Eq. 18; Von Stentz v. Comyn, 12 Ir. Eq. Rep. 622; Ingram v. Wyatt, 1 Hagg. Eccl. Rep. 384; Durling v. Loveland, 2 Curt. Eccl. Rep. 225; Brown v. Fisher, 63 L. T. N. S. 465; Parker v. Duncan, 62 L. T. N. S. 642; Scoular v. Plowright, 28 L. T. 193; Fulton v. Andrew, L. R. 7 H. L. 448; Hogg v. Maguire, 11 Ont. App. Rep. 507; Adams v. McBeath, 27 Can. S. C. 13; Snodgrass v. Smith, 42 Colo. 60, 94 Am. Dec. 312, 15 A. & E. Ann. Cas. 548); strict (Hill v. Barge, 12 Ala. 687; Garrett v. Heflin, 98 Ala. 615, 39 Am. St. Rep. 89, 13 So. 326); strong (Adair v. Adair, 30 Ga. 102); satisfactory (Crispell v. Dubois, 4 Barb. 393); such as will satisfy the jury that the testator was not imposed on (Duffield v. Robeson, 2 Harr. [Del.] 375; Beall v. Mann, 5 Ga. 456; Rush v. Delano, 113 Mich. 321, 71 N. W. 628); such as to give full and entire satisfaction to the court or jury (Purdy v. Hall, 134 Ill. 308, 25 N. E. 645; England v. Fawbush, 204 Ill. 384, 68 N. E. 526; Re Soule, 22 Abb. N. C. 236, 3 N. Y. Supp. 259, affirmed without opinion in 57 Hun, 586, 11 N. Y. Supp. 949).

In *McDaniel v. Crosby*, 19 Ark. 533, and *Hill v. Barge*, 12 Ala. 687, it was said that the proof that the testator knew and un-

A further contention is that the fact that the will was written by the testator's daughter, who was one of the principal beneficiaries, created a presumption of undue influence which was not rebutted by any evidence. There is some apparent conflict in the authorities as to the effect to be given to the circumstance that a will is drafted by a legatee. In *Underhill on the Law of Wills*, it is said (§ 137): "Many cases seem to hold that the circumstance that a party draws a will, . . . under which he takes a legacy, . . . raises a presumption of undue influence exerted by him, which must be rebutted by clear and satisfactory evidence. . . . But the safer and more correct statement of the rule is that such a condition of affairs creates no pre-

derstood the contents of the will should be so satisfactory and convincing as not to leave a reasonable doubt in the minds of the jury; but in *Garrett v. Heflin*, supra, it was said that possibly such measure of proof was too stringent, as in civil cases the proper measure of proof is that the jury must be reasonably satisfied of the truth of any fact.

In *Paske v. Ollat*, 2 Phillim. Eccl. Rep. 323, it was said that the proof must be clear and decisive, and that the balance must not be held in *equilibrio*.

2. Amount.

In *Durnell v. Cornfield*, 1 Rob. Eccl. Rep. 51, it is said that the proof must be in proportion to the degree of suspicion, which, of course, will vary; that the greater the benefit and the less the capacity, the more stringent is the requirement of proof of knowledge of the contents.

The amount of proof necessary to repel suspicion may be increased by circumstances, such as testator's unbounded confidence in the draftsman of the will, extreme disability in the testator, clandestinity, and other circumstances, which may increase the presumption even so much as to be conclusive against the instrument. *Paske v. Ollat*; *Hill v. Barge*; and *Garrett v. Heflin*,—supra.

If the interest is small in proportion to the whole estate, and the decedent, at the time of making the will, was in health, and in the possession of his faculties, slight proof will suffice. On the other hand, if his mind is feeble, and the party drawing the will takes a considerable portion of the estate, to the exclusion of the heirs, proof of a most conclusive nature will be required. *Drake's Appeal*, 45 Conn. 9.

3. Kind.

No particular species of evidence is required to show that testator knew and approved of the contents of a will by which the draftsman benefits. *Durling v. Loveland*, 2 Curt. Eccl. Rep. 225; *Mitchell v. Thomas*, 6 Moore, P. C. C. 137.

sumption, but merely raises a suspicion which ought to appeal to the vigilance of the court. . . . It is a fact to be considered with other facts. It is undoubtedly a suspicious fact, but its weight depends, not solely upon its character, but upon the facts and circumstances with which it is connected. In some cases it would have no weight at all. Thus, if it appear that the testator had testamentary capacity, that he dictated his will, and knew its contents at the date of its execution, and that it was executed in the statutory manner, the mere fact that the will was written by the sole beneficiary would not be enough, unless coupled with other extremely suspicious facts, to overthrow it, or, taken alone, to cast the slightest suspicion upon it." What

justly creates suspicion is not that the draftsman is a legatee, or even a sole legatee, but that he receives an unreasonable or unnatural benefit. This idea is thus expressed in Schouler on Wills, 3d ed. § 245: "The circumstance that a party who derives under the will a disproportionate benefit, or a benefit to which he had no natural claim, is the party who drew it, lends disfavor to the instrument, and may turn the scale against its admission to probate. . . . Our later cases appear to rule that, wherever the testator's draftsman or manager of the execution may be thought worthy of some generous token, undue influence and fraud are not to be presumed from the fact that the will gives him a legacy or executorship accordingly. The extent of his benefit,

It may be circumstantial as well as direct. *Raworth v. Marriott*, 1 Myl. & K. 643; *Beall v. Mann*, 5 Ga. 456.

Such proof may take the form of evidence that the will was read to testator or by him, though not necessarily so (*Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312, 15 A. & E. Ann. Cas. 548), or that he gave instructions for such a will, or of some other fact or facts equal as evidence to one of these (*Hughes v. Meredith*, 24 Ga. 325, 71 Am. Dec. 127).

4. *Specific instances.*

In *Durling v. Loveland*, supra, it is said that the drawer of a will taking a considerable benefit under it need not do more than show that deceased had knowledge of its contents.

In *Paske v. Ollat*, supra, it was held that the suspicion arising from the fact that the draftsman of the will received a legacy therein was repelled by evidence that the instructions from which the will was drawn originated with the testator, and were a surprise to the draftsman, who suggested that another solicitor be employed, and openly refused to act as an attesting witness upon the ground of his being an interested party.

In *Woodson v. Holmes*, 117 Ga. 19, 43 S. E. 467, it was held that the rule of law that where a party preparing or procuring a will takes a large beneficial interest thereunder, stricter proof than usual is necessary to show knowledge of the contents of the will on the part of the testator, has no application in a case where the only interest taken by the party alleged to have procured the will was his appointment as executor without bond or the necessity to make returns, and the provision for the payment of a debt due to him by the estate of the testatrix, the evidence of which he already held; and where it appears that such person did nothing to suggest or instigate the making of the will, but acted only in furtherance of the expressed wishes of the testatrix.

In *Re Wells*, 96 Me. 161, 51 Atl. 868, it 28 L.R.A. (N.S.)

was held that the fact that the attorney who drew the will was named as executor, and received a legacy constituting a relatively small portion of the estate, was entitled to little weight, where it appeared that the draftsman was a nephew, and received under the will the same sum as all other nephews and nieces of the testatrix, that he had been her attorney for years, that she had the initiative in the preparation of the will, and that no secrecy attended its execution.

In *Den ex dem. Trumbull v. Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253, it is held that the suspicion attaching to the participation of a principal devisee in the preparation of the will is removed by evidence that the testator was a man of strong mind and strong self-will, that he was at the time in the full vigor of his intellectual powers, that he was in no wise dependent upon the devisee, that he did not reside with him, was in free intercourse with others, that the attorney received his instructions from the testator himself, and that the principal provision in favor of the devisee had been prepared by the testator in his own writing years before.

Proof necessary to show that the testator was not imposed on by a will containing a benefit to the draftsman is supplied by evidence of instructions given to the writer; that the testator read over the will, being of sufficient capacity to understand what he was reading; or by other evidence showing that he knew the will was in favor of the writer. *Duffield v. Robeson*, 2 Harr. (Del.) 375.

Where there is neither mental imbecility, dependence on the legatee, glaring change in testamentary intention, unreasonable or inofficious bequests in favor of the legatee, attempts on his part to conceal from others interested knowledge of the will, strangeness in the fact that the legatee drafted the will, or any other circumstances tending to confirm the suspicion which that fact may engender,—under these conditions, the suspicion should be laid aside. *Rusling v. Rusling*, 36 N. J. Eq. 603.

The circumstance that the draftsman of a

as compared with that of natural objects of one's bounty, is a matter of some consequence."

So, also, the suspicion that attaches to a will written by a beneficiary is heightened where he sustains a confidential relation toward the testator. That condition is sometimes said to create an actual presumption against the will. Thus Mr. Underhill says: "Where it appears from the evidence that the testator and the beneficiary stood in confidential relations towards one another, and it also appears that the legatee . . . was the draftsman of the will, . . . circumstances are shown from which a presumption of undue influence or fraud arises, which the proponent of the will has the burden of proof to

overthrow, and to show that the will was the free and voluntary act of the testator." 1 Underhill, Wills, § 145. On the other hand, a portion of a note in the same work reads: "The fact that the draftsman of a will, who is a legatee at the same time, stands in a confidential relation to the testator, does not, in the absence of affirmative proof of fraud or coercion, raise a presumption against the voluntary character of the will." 1 Underhill, Wills, note 3, p. 196, § 137. And the rule is thus stated in 20 Am. & Eng. Enc. Law, 2d ed. p. 124: "Undue influence is not generally presumed in the case of a legacy or devise made by a client in favor of his attorney from the mere relation itself, or from the circumstance that the will was drawn by the attorney,—

will is appointed one of the executors, and is also a legatee, while tending to excite suspicion, is without force where the legacy to the draftsman is moderate in amount, and in just proportion to the sums given to other persons standing in the same relationship to the testator. Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235.

The fact that a trifling gift is made to the draftsman of a will, who has been upon pleasant and friendly terms with the testator, is insufficient to raise a presumption of fraud or improper influence (Trubey v. Richardson, 224 Ill. 136, 79 N. E. 592), or to shift the burden of proof from the party alleging fraud or undue influence (Stokes v. Miller, 10 W. N. C. 241).

The force of the fact that a lawyer and draftsman of the will was one of the three residuary legatees is overcome by proof that on the part of the testator there was adequate capacity, testamentary intention, and a due execution of the will, with full knowledge of its contents. Post v. Mason, 91 N. Y. 539, 43 Am. Rep. 689.

A suspicion aroused by the circumstance of the draftsman being a beneficiary is removed by the fact that the testator had full testamentary capacity, and knew the contents of the will. Re Soule, 22 Abb. N. C. 236, 3 N. Y. Supp. 259, affirmed without opinion in 57 Hun, 586, 11 N. Y. Supp. 949.

The suspicion aroused by the circumstance that a will contains a provision in favor of the draftsman is removed by evidence of previous declarations of the testator in conformity to the will, often repeated and continuing up to near the time of its execution, all indicating the purpose which the contents of the will developed. Patton v. Allison, 7 Humph. 319.

On the other hand, in Tyrrell v. Painton [1894] P. 151, it was held that the suspicion aroused by the circumstance that a son of the sole beneficiary drew and supervised the execution of the alleged will of an aged and infirm lady was not removed by the evidence of the draftsman and his friend, whom he brought with him to be an attesting witness, and who were the only persons present.

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Where a testatrix was in a dying condition at the time the transaction in question occurred, the force of the fact that the beneficiary wrote the instructions and originated the will is not necessarily overcome by the circumstance that they were afterward accepted by the testatrix, and that she assented to the will in which they were embodied. Tyler v. Gardiner, 35 N. Y. 559.

III. As bearing on question of undue influence.

a. Preliminary statement.

Thus far this note has been concerned solely with the inference of fraud or deceit. It is now purposed to consider the bearing of the circumstance under discussion upon the question of undue influence.

It has been held that no presumption of undue influence arises from the fact of participation by a beneficiary or by one closely connected with him in matters relating to the preparation and execution of a will, in the absence of evidence tending to show a relation of confidence or influence between the testator and the person thus taking an active part (Henry v. Hall, 106 Ala. 84, 54 Am. St. Rep. 22, 17 So. 187); and that such a circumstance is not alone evidence of undue influence (Berry v. Hamilton, 10 B. Mon. 129; Carpenter v. Hall, 19 N. Y. Supp. 778, affirmed without opinion in 141 N. Y. 572, 36 N. E. 345; but that it is only a circumstance to be considered in connection with other circumstances indicative of fraud or undue influence (Re Carver, 3 Misc. 567, 23 N. Y. Supp. 753, affirmed without opinion in 75 Hun, 612, 28 N. Y. Supp. 1126).

So also, in Carpenter v. Hatch, 64 N. H. 573, 15 Atl. 219, it is said that there was no presumption of law or of fact that one who wrote a codicil by which he alone was benefited, controlled the testator's mind; but that whether he did or did not control or improperly influence the testator was a question of fact for the determination of the jury upon all the evidence, including his relations to the testator, his acts and conduct in respect to the making of the will and the

at least, where the legacy or devise is not disproportionately large."

Perhaps an unnecessary difficulty is created by an effort to say at just what point the union of a number of suspicious circumstances, no one of which is enough in itself to defeat probate, shall be deemed to give rise to an actual presumption that a will was the result of undue influence. The real question in each case is whether all the circumstances, so far as shown, are such as to lead the court to believe that in fact the will does not actually express the voluntary purpose of the testator. The substance of Kirby's will was that his property was to go to his wife for her life, and then, except for a specific legacy to each of two granddaughters, to his three children. There is nothing

in this disposition to suggest any overreaching on the part of Mrs. Sellards. Nor was she shown to have occupied a position of confidence and trust toward her father beyond that arising from their relationship. If it had appeared that she had been intrusted with the general management of his business, or that he was in the habit of deferring to her judgment in his affairs, a different question would be presented. We think that her writing the will created no presumption of undue influence. No question of incapacity or restraint appears to have been raised at the hearing. The controversy turned chiefly upon whether there had been a revocation. But in seeking to counteract evidence in support of the will, its opponent introduced affidavits of the

codicil, and the benefit he derived from them.

And in *White v. Cole*, 20 Ky. L. Rep. 858, 47 S. W. 759, it was held that the fact that a will was written by a beneficiary, who was a practising lawyer and a relative of the testator, was not sufficient to warrant setting aside a verdict in favor of the proponents upon the issue of undue influence.

The questions, therefore, to be considered in this connection, are, what additional circumstances are necessary to give rise to the presumption of undue influence, the weight of such presumption and its effect, if any, on the burden of proof, its effect as productive of a necessity to introduce evidence in rebuttal, and the character and sufficiency of such evidence to overcome the presumption.

b. In general.

While it is well settled that no presumption of undue influence is raised solely because of a confidential relation existing between a testator and a beneficiary (see *Bancroft v. Otis*, 91 Ala. 279, 24 Am. St. Rep. 904, 8 So. 286; *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459; *McQueen v. Wilson*, 131 Ala. 606, 31 So. 94; *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85, 22 Atl. 82; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *Re Sparks*, 63 N. J. Eq. 242, 51 Atl. 118; *Re Cooper* [N. J.] 71 Atl. 676, affirmed without opinion in [N. J.] 75 Atl. 1100; *Re Smith*, 95 N. Y. 516), it is held that a presumption of more or less strength arises from such a relation, coupled with activity of a beneficiary in and about the preparation and execution of a will (*Collins v. Kilroy*, 1 Ont. L. Rep. 503; *Daniel v. Hill*, 52 Ala. 430; *Bancroft v. Otis*, supra; *Henry v. Hall*, 106 Ala. 84, 54 Am. St. Rep. 22, 17 So. 187; *Higginbotham v. Higginbotham*, 106 Ala. 314, 17 So. 516; *Coghill v. Kennedy*; *Richmond's Appeal*; and *McQueen v. Wilson*,—supra; *St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735; *Denning v. Butcher*, supra; *Gilman v. Ayer* [N. J.] 47 Atl. 1049, affirmed without opinion in 63 N. J. Eq. 806, 52 Atl. 1131; *Re Sparks* and *Re Cooper*, supra; *Weston v. Teufel*, 213 28 L.R.A. (N.S.)

Ill. 291, 72 N. E. 908; *Re Bromley*, 113 Mich. 53, 71 N. W. 523; *Lake v. Ranney*, 33 Barb. 49; *Re Barney*, 70 Vt. 352, 40 Atl. 1027; *Montague v. Allan*, 78 Va. 592, 49 Am. Rep. 384).

But some decisions limit the presumption to cases where the testimony is conflicting as to testamentary capacity (*Yorke's Estate*, 6 Pa. Dist. R. 327, affirmed in 185 Pa. 61, 39 Atl. 1119), or, what amounts to the same thing, deny its existence where the testator is shown to have been in a vigorous mental condition (*Re Sheldon*, 40 N. Y. S. R. 369, 16 N. Y. Supp. 454, affirmed without opinion in 65 Hun, 623, 21 N. Y. Supp. 477; *Stevenson v. Kingsley*, 8 Pa. Dist. R. 245).

And in the following cases, in which a presumption of undue influence was held to exist, it affirmatively appears that the testator was of weak mind, or aged or infirm, or extremely ill at the time of the execution of the alleged will. *Re Morey*, 147 Cal. 495, 82 Pac. 57; *England v. Fawbush*, 204 Ill. 384, 68 N. E. 526; *Wood's v. Devers*, 14 Ky. L. Rep. 81, 19 S. W. 1; *Harvey v. Sullens*, 46 Mo. 147, 2 Am. Rep. 491; *Edgerly v. Edgerly*, 73 N. H. 407, 62 Atl. 716; *Boisaubin v. Boisaubin*, 51 N. J. Eq. 252, 27 Atl. 624; *Barkman v. Richards*, 63 N. J. Eq. 215, 49 Atl. 831; *Crispell v. Dubois*, 4 Barb. 393; *Re Smith*, 95 N. Y. 516; *Re Everett*, (N. C.) 68 S. E. 924; *Hoopes's Estate*, 174 Pa. 373, 34 Atl. 603; *Scattergood v. Kirk*, 192 Pa. 263, 43 Atl. 1030.

c. Application of rule where draftsman not directly benefited.

The presumption of undue influence arising from the existence of confidential relations and a benefit to the draftsman does not apply where the draftsman is named therein merely as executor (*Carter v. Dixon*, 69 Ga. 82; *Re Marlbor*, 121 App. Div. 398, 105 N. Y. Supp. 131), or as executor and trustee (*Livingston's Appeal*, 63 Conn. 68, 26 Atl. 470).

For similar decisions with reference to the presumption of fraud and deceit, see appropriate heading, supra.

attesting witnesses which had been read in the probate court, stating, among other things, that when Kirby signed the will he was of sound mind and memory, and not under any restraint.

A recent statute makes this provision: "In all actions to contest a will, if it shall appear that such will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent or legal adviser of the testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall be affirmatively shown that the testator had read or knew the contents of such will, and had independent advice with reference there-

to." Laws 1907, chap. 430, § 1; Gen. Stat. 1909, § 9787. This rule by its terms relates to actions to contest a will; but, even if extended by interpretation to cover proceedings for its admission to probate, the present case would not be affected. The requirement that the testator must be shown to have had independent advice clearly implies that, in order to be deemed to occupy a position of confidence or trust to the testator, the draftsman must be someone to whom he naturally looks for counsel. That situation does not follow from the mere relationship of daughter and father.

The fact being established that the will had been duly executed, a more difficult question is whether the evidence showed that it had been revoked. The testator, in

Activity in and about the preparation and execution of a will need not, in order to create the legal presumption against the validity of the will when coupled with confidential relations, be on the part of a person who occupies such relations, or of the beneficiary, but if the members of a family have a common scheme or purpose to induce a person to execute a will in favor of any members of a family, one of whom occupies the confidential relation, and another, in the execution of the common purpose, actively participates in the execution of the will by which legacies are given to various members of the family, the legal presumption arising from these facts will cast upon each of the beneficiaries the burden of showing the absence of undue influence. *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459.

The rule was also applied in *Henry v. Hall*, 106 Ala. 84, 54 Am. St. Rep. 22, 17 So. 187, and *Gilman v. Ayer* (N. J.) 47 Atl. 1049 (affirmed without opinion in 63 N. J. Eq. 806, 52 Atl. 1131), where the business adviser of the testatrix caused the preparation and supervised the execution of a will of which, in the first case his wife, and in the second his wife and children, were the chief beneficiaries.

d. Probative force of the so-called "presumption" of undue influence.

As remarked in *Edgerly v. Edgerly*, supra, there is a difference of opinion as to whether the inference of undue influence arising under the combinations of circumstances above described is one of fact or law. Such difference, however, is largely due to the elasticity of meaning of the term "presumption," to which allusion has been heretofore made; and many of the cases bearing on the point will be found upon analysis not to be so much at variance as upon their face would seem to appear. This phase of the question is, of course, closely related to the matter of burden of proof, under the heading relating to which the decisions as to the necessity, as a matter of law, of producing evidence in rebuttal, will be found.

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In a number of cases the statement has been made that the presumption of undue influence arising from the combination of the circumstance under discussion with other facts is not conclusive against the will (*Conpher v. Browning*, 219 Ill. 429, 109 Am. St. Rep. 346, 76 N. E. 678; *O'Brien's Appeal*, 100 Me. 156, 60 Atl. 880; *Re Bromley*, 113 Mich. 53, 71 N. W. 523; *Koegel v. Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Crispell v. Dubois*, supra), but that the issue is one of fact, to be determined by the tribunal to which it is submitted (*O'Brien's Appeal* and *Crispell v. Dubois*, supra; *Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219).

Other cases arrive at practically the same conclusion by holding that the presumption of undue influence arising from the preparation of the will in his own favor by one sustaining a fiduciary relation toward the testator is one of fact, and not of law, and may be rebutted by proper evidence. *St. Leger's Appeal* and *Harvey v. Sullens*, supra.

In *England v. Fawbush*, supra, it was held that the active agency of the beneficiary of a will in procuring it to be drawn, especially in the absence of those who have at least equal claims upon the justice of the testator, and where the testator is enfeebled by old age and disease, is a circumstance which will warrant the submission to the jury of the question of undue influence.

In *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85, 22 Atl. 82, it was said that whenever a legacy is given to a person sustaining a relation of special confidence to a testator, or when the individual who prepares the instrument or conducts its execution, not being a relative who would, in the absence of a will, be an heir, derives a benefit from its provisions, in either instance the surrounding circumstances may be such that a presumption would naturally arise against the volition or knowledge of the testator, which presumption, in the absence of rebutting proof or explanation, should justify the finding of a jury that undue influence existed.

So, also, in *Woods v. Devers*, supra, it was

the presence of the subscribing witnesses, signed it with pen and ink below the attestation clause, and not elsewhere. He kept it in his own possession for a few weeks, and then delivered it to the executrix, who retained it until after his death. When she offered it for probate, his ink signature had been partly obliterated by means of knife scratches, and his name had been written in pencil just above the attestation clause, either by himself or by someone who closely imitated his handwriting,—a matter concerning which the opinions of witnesses differed somewhat. The law permits a will to be revoked "by the testator tearing, canceling, obliterating, or destroying the same with the intention of revoking it, by the testator himself, or by some person in his

presence or by his direction." Gen. Stat. 1868, chap. 117, § 37; Gen. Stat. 1909, § 9814. In order to accomplish revocation under this provision, it is necessary that the testator, with an intention to revoke, cause some physical defacement of the will, adapted to give expression to that purpose. If the other conditions were proved, there would be no difficulty in saying that here a sufficient actual defacement was shown, for, while the signature was not rendered wholly illegible, the partial erasure of it was of such a character as to suggest a purpose to discredit it. Under the English act requiring "burning, tearing, or otherwise destroying," a mere crossing out of the signature, leaving it still legible, is held not to be enough (Williams, Exrs. & Admsrs. 10th ed.

held that from the existence of confidential relations between the testatrix and a devisee, together with the fact that such devisee drafted the will, in connection with her feeble mental condition and the exclusion of her own kindred by the provisions of the instrument, the jury might infer the exercise of undue influence.

It will be perceived that the foregoing decisions cannot properly be considered as authority, pro or con, upon the question whether proof of facts from which the so-called presumption arises establishes prima facie the charge that the execution of the will was the result of undue influence exercised by the beneficiary, so as to render it necessary, in order to bring the issue within the sphere of the trier of fact, for the proponent to bring forward evidence in rebuttal. This question will be considered in the ensuing subdivision.

e. Effect upon burden of proof.

In reviewing the decisions relative to the effect of the presumption of undue influence growing out of the combination of the circumstance under consideration with various other circumstances, upon the burden of proof, it is important to keep in mind the twofold meaning attached to the phrase "burden of proof."

The term is used in its first sense, that of risk of nonpersuasion of the jury, in *Weston v. Teufel*, 213 Ill. 291, 72 N. E. 908, where it is said that proof of the existence of confidential relations between a testator and a beneficiary, and of the fact that such beneficiary prepared or procured the preparation of the will, while casting upon proponent, if he is to sustain the will, the necessity of showing that the execution of the will was the result of free deliberation on the part of the testator, and of the deliberate exercise of his judgment, and not of imposition or wrong practised by the trusted beneficiary, does not cause the burden of proof to shift, but upon the whole case the burden of proof is upon the contestant to establish the existence of undue influence.

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From this proposition there is, and can be, no dispute. But with regard to the second sense in which the term "burden of proof" may be used,—that of the necessity of introducing evidence to keep the issue within the domain of the triers of fact,—it is not easy to determine just what is meant by the decisions; that is, whether the production of evidence in rebuttal is simply necessary to satisfy the triers of the fact, or whether it is necessary to keep the issue of undue influence within the sphere of the triers of fact,—in other words, necessary in order to avoid the direction of a verdict, or a finding of the court as a necessary consequence, in favor of the contestant.

That the proof of facts which give rise to the inference or "presumption" of undue influence does not, as a matter of law, render it incumbent upon the proponent to introduce evidence in rebuttal, seems to be necessarily implied in the holding in certain New York decisions that where the draftsman of a will has been an agent or attorney of the testator, and is made a beneficiary, the courts will closely scrutinize the transaction, but no presumption of undue influence necessarily arises therefrom. *Re Smith*, 95 N. Y. 516; *Re Edson*, 70 Hun, 122, 24 N. Y. Supp. 71; *Clarke v. Schell*, 84 Hun, 28, 31 N. Y. Supp. 1053; *Re Suydam*, 84 Hun, 514, 32 N. Y. Supp. 449, affirmed without opinion in 152 N. Y. 639, 46 N. E. 1152; *Re Murphy*, 28 Misc. 650, 59 N. Y. Supp. 1078, affirmed in 48 App. Div. 211, 62 N. Y. Supp. 785; *Re Gallup*, 43 App. Div. 437, 60 N. Y. Supp. 137; *Re Wilcox*, 55 Misc. 170, 106 N. Y. Supp. 468; *Haughian v. Conlan*, 86 App. Div. 290, 83 N. Y. Supp. 830.

A like view seems to be taken in *Re Morey*, 147 Cal. 495, 82 Pac. 57, in which it is said that evidence that a will was drawn by one of the residuary legatees, who had been for a long time before the attorney for the testator, and that the testator was then old, feeble, and suffering intensely from disease, will raise the technical presumption that the will was procured by undue influence, or at least require the proponents to show what did actually occur at

101, 102; 1 Jarman, Wills, 6th ed. p. *116; but the rule is otherwise where the statute includes the word "canceling" (Olmsted's Estate, 122 Cal. 224, 54 Pac. 745; Re Hopkins, 172 N. Y. 360, 65 L.R.A. 95, 92 Am. St. Rep. 746, 65 N. E. 173. See also Woodfill v. Patton, 76 Ind. 575, 40 Am. Rep. 269).

Except as already stated, the evidence in this case affords no light as to when, with what purpose, or by whom the changes were made. The general rule is that, where a mutilated will is found among the testator's effects, the presumption arises that the mutilation was his own act, done with a revoking purpose. 1 Underhill, Wills, §§ 231, 232; 1 Redf. Wills, 3d ed. § 25, ¶ 8, p. *307; 30 Am. & Eng. Enc. Law, p. 635; 28 Am. St. Rep. 351, note. Here the will

the time of its execution and prior thereto, so that the presence or absence of undue influence can be determined.

And in *Carter v. Dixon*, 69 Ga. 82, it was held that no legal presumption of undue influence requiring to be rebutted by proof arises.

And something of this kind may have been in the mind of the court in *Koegel v. Egner*, 54 N. J. Eq. 623, 35 Atl. 394, where it was said that the circumstances aroused suspicion and demanded their critical consideration by the court, although they were not strong enough to raise a presumption against the instrument.

On the other hand, the following decisions seem to hold more or less clearly that the failure of the proponent to rebut this presumption of undue influence will, as a matter of law, entitle the contestant to a verdict or finding in his favor.

In *Weston v. Teufel*, supra, and *Isham v. Bingham*, 126 Ill. App. 513 (appeal dismissed in 227 Ill. 634, 81 N. E. 690), it is said that where a fiduciary relation exists between the testator and a devisee who receives a substantial benefit from the will, and where the will is written or its preparation procured by that beneficiary, proof of these facts establishes prima facie the charge that the execution of the will was the result of undue influence exercised by that beneficiary, and that this proof, standing alone, and undisputed by other proof, entitles the contestant to a verdict.

The force of this statement is somewhat impaired by the circumstance that the decisions cited in its support cannot properly be regarded as authority therefor.

In *Scattergood v. Kirk*, 192 Pa. 263, 43 Atl. 1030, it was held error to refuse to give an instruction that if the jury should find that the beneficiary lived in the house and company, and had the care, of the testatrix; that the latter was eighty-eight years of age and had the bodily infirmities incident to such age; that the beneficiary gave instructions to her own lawyer from which the will and codicil in dispute were drawn, and that she was a beneficiary thereunder.—then it was incumbent upon her to

had been out of the possession of the testator for about a year at the time of his death; but, as the proponent must be deemed to assert that it was not changed while in her custody, the situation is doubtless the same as though it had never left the testator's hands. The partial erasure of the signature is not so unequivocally a cancelation as the running of a pen through it, but would doubtless be sufficient to warrant the application of the rule referred to, if it were not for the penciled addition. We must regard this as a genuine signature, for the trial court evidently so treated it, and the evidence supports that view. Doubtless, if the testator erased his first signature, intending an unconditional revocation thereby, a subsequent unattested signing could

show affirmatively that the testatrix had independent advice and a full understanding of the effect of the two papers; and that this not having been done, a verdict should be rendered for the contestant.

And in *Re Barney*, 70 Vt. 352, 40 Atl. 1027, it is said that while no rule of general application can be formulated with regard to shifting the burden of proof where a will is drawn by a beneficiary therein who stands in a confidential relation to testator, yet, where such a relation existed and the proponent drew the will, taking the entire estate, or a large bequest, and would have taken nothing as heir, while near, needy, and deserving relatives took nothing, then the law not only regards the transaction with suspicion, but the burden should be cast upon the proponent to show that he did not, nor did anyone in his behalf, unduly influence the testator, and that the instrument propounded is the testator's will.

And see also as seemingly, although less clearly, supporting this view, *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459, in which it is said that the existence of confidential relations, coupled with activity in and about the preparation or execution of the will, "changes the burden of proof;" *McQueen v. Wilson*, 131 Ala. 606, 31 So. 94, where it is said that the presumption of undue influence arising from this circumstance throws upon the beneficiary the burden of showing a severance of the confidential relation by independent and competent advice; *Re Cooper* (N. J.) 71 Atl. 676, affirmed without opinion in (N. J.) 75 Atl. 1100, in which a presumption of undue influence is spoken of as "a legal presumption;" and *Montague v. Allan*, 78 Va. 592, 49 Am. Rep. 384, in which it is said that the circumstance of a confidential relation between the testator and the draftsman of a will, of which his wife was the principal beneficiary, engenders suspicion and arouses the vigilance of the court, "and, if unexplained or repelled, will annul the transaction."

But by far the greater number of cases which speak of the burden of proof being upon the beneficiary to repel the presump-

not revive the will. 30 Am. & Eng. Enc. Law, p. 657. But the condition of the instrument affords no presumption that such was the case. In *King's Goods*, 2 Rob. Eccl. Rep. 403, a will was admitted to probate under these circumstances: "After the death of the testator, the will was found with his signature, as at first written, opposite to the center of the attestation clause, erased; but subsequently to that erasure, the testator's signature was written a short distance beneath the place where the original signature stood." P. 403. The only evidence regarding the change was that it was made after the will was executed and witnessed, and before it was found after the testator's death. The opinion reads: "The original signature of the deceased has been

erased, but by whom and with what motive it is not easy to determine. It is manifest, however, from the facts and circumstances deposed to, that the erasure was not made by the testator *animo revocandi*, as required by the wills act. On that ground, therefore, I decide this case: In the probate the original signature must be restored, and the second signature omitted." P. 404. Citing that case in *Schouler on Wills*, 3d ed. § 392, the author says: "If a will should show the testator's signature struck through with a pen, and another signature written and left, the natural presumption would be that the original erasure was not made with the intention to revoke at all, but was connected in some way with the final execution by the signature substituted."

tion of undue influence must be considered neutral upon the question whether the failure to produce such evidence will, as a matter of law, entitle the contestant to a finding or verdict, as they cannot safely be considered as meaning more than that the beneficiary, in failing to introduce such evidence, runs the risk of an adverse decision being rendered by the trier of the fact.

Within this category may be placed the following decisions: *Daniel v. Hill*, 52 Ala. 430; *Henry v. Hall*, 106 Ala. 84, 54 Am. St. Rep. 22, 17 So. 187; *Higginbotham v. Higginbotham*, 106 Ala. 314, 17 So. 516; *St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735; *Woods v. Devers*, 14 Ky. L. Rep. 81, 19 S. W. 1; *Harvey v. Sullens*, 46 Mo. 147, 2 Am. Rep. 491; *Boisaubin v. Boisaubin*, 51 N. J. Eq. 252, 27 Atl. 624; *Gilman v. Ayer* (N. J.) 47 Atl. 1049, affirmed without opinion in 63 N. J. Eq. 806, 52 Atl. 1131; *Barkman v. Richards*, 63 N. J. Eq. 215, 49 Atl. 831; *Re Sparks*, 63 N. J. Eq. 242, 51 Atl. 118; *Re Cooper* (N. J.) 71 Atl. 676; *Re Smith*, 95 N. Y. 516; *Douglass's Appeal*, 162 Pa. 567, 29 Atl. 715; *Hoopes's Estate*, 174 Pa. 373, 34 Atl. 603; *Yorke's Estate*, 6 Pa. Dist. R. 327, affirmed in 185 Pa. 61, 39 Atl. 1119; *Collins v. Kilroy*, 1 Ont. L. Rep. 503.

This view of the effect of decisions of this type as to the onus which is upon the proponent finds support in *O'Brien's Appeal*, 100 Me. 156, 60 Atl. 880, in which it is said that it is not accurate to say that upon proof that a draftsman occupying a confidential relation was benefited by the provisions of the will, the burden of proof shifts from the contestant to the proponent; but that it may, as a matter of fact, cast upon the proponent the burden of explanation, the absence of a satisfactory explanation being an additional fact of more or less weight.

f. Circumstances under which proponent must, or should, present additional proof.

The following cases will serve to illustrate (though without any attempt to in- 28 L.R.A. (N.S.)

dicating the character of the necessity as a rule of law or as a precept for the guidance of the trier of the fact) the circumstances the proof of which will render it incumbent upon the proponent to explain away the inference, or overcome the presumption, of undue influence arising therefrom.

The existence of confidential relations between the testator and principal or large beneficiary under the will is not alone sufficient to place upon the latter the burden of disproving undue influence, but there must also be evidence of activity on the part of the latter in and about the preparation or execution of the will, such as the initiation of proceedings for the preparation of the instrument, or participation in such preparation, employing a draftsman, selecting the witnesses, excluding persons from the presence of the testator at or about the time of the execution, concealing the making of the will, and the like. *Bancroft v. Otis*, 91 Ala. 279, 24 Am. St. Rep. 904, 8 So. 286.

Where a will in his own favor is prepared by one sustaining a fiduciary relation to an aged and childish testatrix, the onus of establishing the devise to have been voluntary and well understood rests upon the party claiming; and this in addition to the evidence to be derived from the execution of the will conveying or devising the property. *Harvey v. Sullens*, 46 Mo. 147, 2 Am. Rep. 491.

In *Boisaubin v. Boisaubin*, 51 N. J. Eq. 252, 27 Atl. 624, where it appeared that testator was weak-minded and easily influenced, and was taken by a brother to the office of a lawyer, where he made a will giving his entire estate to that brother, to the exclusion of his other brothers, it was held that the burden of proving that testator was free from the exercise of undue influence upon his part was cast upon such beneficiary.

In *Farnum v. Boyd*, 56 N. J. Eq. 766, 41 Atl. 422, where an attorney drafting a will received a benefit thereunder, it was held that his participation in the bounty of testatrix in any material degree can be allowed only upon the clearest exhibition that his

In *Re Wood*, 2 Connoly, 144, 11 N. Y. Supp. 157, a will was admitted to probate which had been found in the testatrix's safe, with the signature erased first by drawing lines over it, and then by nearly erasing such lines and the original signature, but with her name rewritten by her over the erasure. It was not shown when or why the change was made. In the opinion it was said: "The proponents having proved the due execution of the will, it is entitled to probate, unless the contestants prove its revocation by some one of the modes pointed out by the statute. . . . If the will had been found in her safe, carefully preserved among the valuable papers of the testatrix, with her signature erased, it would be a fair and reasonable presumption that she erased the

signature *animo revocandi*; and it would then be lacking in one of the statutory requirements of a valid will,—the signature of the decedent at the end thereof. But when found with the signature carefully restored, no such presumption arises. In the absence of all proof, how can I find that it was made with the intent to revoke, when the instrument was preserved by her with her signature carefully restored? An intention to revoke a will, not fully consummated, is not revocation. . . . It may be that Mrs. Wood drew the lines through her name with the intention of revoking the will, but immediately, and before the act was completed, changed her mind, erased the marks, and restored her signature. To sustain the theory of the learned counsel for the contestants,

conduct was fair and unobjectionable, and that testatrix exercised a judgment in dispositions in which he was concerned, capable of independence of the confidence induced by the relationship between them.

In *Gilman v. Ayer* (N. J.) 47 Atl. 1049, affirmed without opinion in 63 N. J. Eq. 806, 52 Atl. 1131, where it appeared that the business adviser of the testatrix had the will prepared, that he supervised its execution, and that his wife and children were the chief beneficiaries under it, it was said that, in view of these conditions, it should undoubtedly appear that she made the will with full understanding of its provisions, and with no undue coercion in executing it.

In *Barkman v. Richards*, 63 N. J. Eq. 215, 49 Atl. 831, where a testator who was weak-minded and sick made a will leaving all his property to a friend, to the exclusion of a sister, the beneficiary being active in relation to the execution, it was held that the burden was upon the beneficiary to show that it was executed by the deceased without undue influence.

In *Re Cooper* (N. J.) 71 Atl. 676, it is held that where a will was shown to have been drawn and executed under the supervision of testatrix's attorney, who was largely benefited thereby, and named as sole executor thereof, the burden of proving that the will was the spontaneous act of the decedent was thrown upon him.

In *Re Smith*, 95 N. Y. 516, it was held that while the mere fact that the proponent was the attorney of the testatrix did not of itself create a presumption against the validity of a legacy given by the will, yet, taking all the circumstances together,—the fiduciary relation and change of testamentary intention, the age and mental and physical condition of the decedent, the fact that the proponent was the draftsman and principal beneficiary under the will, and took an active part in procuring its execution, and that the testatrix acted without independent advice,—a case was made which required explanation, and which imposed upon the proponent the burden of satisfying the court that the will was the free, untrammelled, and

intelligent expression of the wishes and intention of the testatrix.

In *Re Everett* (N. C.) 68 S. E. 924, it is said that when a will is executed through the intervention of a person occupying a confidential relation toward a testator, whereby such person is the executor and a large beneficiary under the will, such circumstances create a strong suspicion that an undue or fraudulent influence has been exerted, rendering it necessary for proponent to go on with evidence showing that the will was the free and voluntary act of the testator, and cause the scales at least to balance.

In *Hoopes's Estate*, supra, it was held that, in view of the age and insanity of the testator, and the confidential relation existing between him and the draftsman, who was a beneficiary under the alleged will, the proponents must establish both testamentary capacity and freedom from undue influence by proofs clear and of the most conclusive character before its probate could be permitted.

In *Yorke's Estate*, 6 Pa. Dist. R. 327, affirmed in 185 Pa. 61, 39 Atl. 1119, it is said that the rule that the burden is upon the confidential adviser who prepared the will under which he, or members of his family, took the bulk of the estate or substantial benefits, to the exclusion of children or next of kin to the testator, is applicable where the testimony is conflicting as to the mental capacity of the testator, either from the effects of old age, disease, mental impairment, or intemperate habits, and the confidential adviser is a stranger to the testator, or a near relative who has acted in the procurement of the will in his or her favor, to the exclusion of others equally entitled, and is shown to have exercised a controlling influence over the mind of the testator; but that such rule is not applicable when the testator is proved to possess full and entire testamentary capacity, even though to some extent enfeebled by the infirmities of age.

In *Collins v. Kilroy*, 1 Ont. L. Rep. 503, where one standing in a confidential relation

I must find that the erasure was made by the testatrix herself, understandingly, freely, and voluntarily, with no other purpose than to destroy her will, and that it was done at some time previous to the act of re-writing her name, and this finding is asked for in the absence of proof, and with the burden resting upon the contestants to establish the fact of revocation." P. 158.

In the present case the one fact concerning the testator's intention that is definitely established is that at one time he wished to dispose of his property according to the terms of the will, and complied with every requirement of the law to give effect to that desire. What his subsequent purposes were is a matter of speculation. That a few weeks later he delivered the will to the testatrix has some tendency to show that he then regarded it as a valid instrument, although he must already have made the change, if he made it at all. In that event, as reasonable a supposition as any is that when he executed the will, he failed to notice the space left for his signature above the attestation clause, and therefore inad-

vertently signed below; that afterwards he discovered the inadvertence, and, in order to correct it, attempted to erase the original signature, and affixed the other in the more natural place, intending, not revocation, but ratification. Of course, a signing below the attestation clause was sufficient (17 L.R.A. (N.S.) 354, note); but the testator, on the matter being drawn to his attention, may easily have supposed otherwise. Upon this hypothesis it is not necessary to resort to the principle of "dependent relative revocation" to save the will, for the mutilation was without effect unless accompanied by a purpose to revoke. Another way of accounting for the condition of the will seems not unreasonable. The testator may have started to erase his signature, changed his mind before completing the erasure, and then re-written his name, not as a new execution, but as evidence that he did not intend revocation.

The judgment is affirmed.

All the Justices concur.

to testatrix discussed with her the provisions of her will containing a legacy in his favor, prepared a draft or memorandum of it, and selected the solicitor who prepared it, it was held that the onus was cast upon him of showing the righteousness of the transaction.

But in *Trubey v. Richardson*, 224 Ill. 136, 79 N. E. 592, it was held that where a bequest made by a codicil, to the attorney who drew it, was of articles of little value except as souvenirs, it was not sufficient to raise a presumption of fraud or improper influence upon the part of the attorney.

g. Sufficiency of proof to repel inference or presumption.

A presumption of undue influence arising from a will being drafted by a beneficiary, or by one in confidential relations, may be overcome by showing that it was executed fairly and under circumstances which rebut the inference of undue influence; and where the proof of execution is such as to convince the jury that the testator was not at that time under the control of the legatee, it is certainly not error to at least permit the jury to draw an inference in favor of the validity of the will from the circumstances. *Re Bromley*, 113 Mich. 53, 71 N. W. 523.

In *Re Reed*, 2 Connoly, 403, 20 N. Y. Supp. 91, it was held that whatever presumption of undue influence existed by reason of the legatee's being the draftsman of a will under which he took the entire estate was removed by proof of declarations of the decedent subsequent to the making of the will, extending over a period of two and one

half years, showing that the will conformed to his wish.

The rule that a presumption of undue influence arises where a will is drawn by a confidential adviser, who benefits thereby, for a testator who is in such physical and mental condition as to be easily influenced, is not applicable where the testator is shown to have been in a vigorous mental condition. *Stevenson v. Kingsley*, 8 Pa. Dist. R. 245.

In *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682, it was said that notwithstanding the fact that the infant children of the draftsman took a benefit under the will, yet if it appeared that the amount received by them was small in proportion to testator's property, that the draftsman himself was a nephew of the testator, that he had not been with his uncle during the sickness until he answered the summons to be present on the night of his death, that he was not then with him alone, and that he declined a legacy to himself, and made no request that one should be left to his children, the jury might well consider that such facts and circumstances would fully meet any presumption that might be raised by the fact that he prepared the will, and his infant children took a benefit under it.

But the presumption of undue influence arising where one in a confidential relation to testator is active in and about the preparation and execution of the will is not rebutted by evidence that the sister of the deceased carefully read the will over to deceased, who assented and agreed to all of its terms, where it is not shown that such sister was a competent person to give advice. *McQueen v. Wilson*, 131 Ala. 606, 31 So. 94.

E. S. O.

LOUISIANA SUPREME COURT.

W. F. TAYLOR COMPANY, Limited,

v.

O. H. P. SAMPLE, Impleaded, etc., Appt.

(122 La. 1016, 48 So. 439.)

Mortgage — wife's separate property — including husband's land — estoppel.

1. A man whose participation in an act of mortgage by his wife of her separate property is shown only by a recital that came the said woman, wife of the said husband, "herein joined, aided, and authorized by her husband," will not be held to have consented to the inclusion in the mortgage of his separate property so that it will be bound thereby as against the claim of his subsequent

mortgagee, although he may be personally estopped to deny that it is included.

Record — wife's mortgage — effect on husband's property.

2. The recordation of a mortgage which purports to relate exclusively to the property of a married woman is not notice to strangers of the fact that property of her husband is included therein, so as to prevent their securing a good title from him in case the property was so included without his authority.

(January 4, 1909.)

A PPEAL by defendant O. H. P. Sample from a judgment of the Judicial District Court for the Parish of Caddo in

Note. — Effect of one spouse joining in the execution of the other's deed or mortgage, to convey the former's separate property included in the deed.

This note does not purport to include cases where the deed is sufficient in form to convey the property in question, but the spouse contends that it was signed by mistake or by misapprehension. Cases which turn merely upon the question whether a deed purporting to convey marital rights is sufficient for that purpose, or upon the validity of the deed without reference to the property therein conveyed, have been excluded.

It is a general rule followed by nearly every case in which the question is presented, that a wife does not, by merely signing and sealing a deed or mortgage and by expressly relinquishing her dower rights in the property, without joining in the granting clauses thereof, convey any separate interest which she has in the property or any part thereof, and which may be included in the description of the property in the deed; and the same rule applies equally, where the husband joins in the same manner to release his marital rights, or to give his consent to the wife's conveyance of her property; and the rule is the same whether the spouse who joins in the deed has some separate interest in the property conveyed, or some of his or her separate property has been included by mistake in the deed, or whether the conveying spouse attempts to convey property, the fee of which is in the other. *Agricultural Bank v. Rice*, 4 How. 225, 11 L. ed. 949; *Batchelor v. Brereton*, 112 U. S. 306, 28 L. ed. 748, 5 Sup. Ct. Rep. 150; *Magness v. Arnold*, 31 Ark. 103; *Cox v. Wells*, 7 Blackf. 410, 43 Am. Dec. 98; *Hedger v. Ward*, 15 B. Mon. 116; *Hatcher v. Andrews*, 5 Bush, 561; *Kidd v. Bell* (Ky.) 122 S. W. 232; *Payne v. Parker*, 10 Me. 178, 25 Am. Dec. 221; *Melvin v. Proprietors of Locks & Canals*, 16 Pick. 137; *Bruce v. Wood*, 1 Met. 543, 35 Am. Dec. 380; *Raymond v. Holden*, 2 Cush. 264; *Wales v. Coffin*, 13 Allen, 213; *Kitchell v. Mudgett*, 37 Mich. 81; *Ellenmann v. Thompson*, 10 Mo. 587; *Whiteley v. Stewart*, 28 L.R.A. (N.S.)

art, 63 Mo. 360; *McFadden v. Rogers*, 70 Mo. 421; *Bradley v. Missouri P. R. Co.* 91 Mo. 493, 4 S. W. 427; *Flagg v. Bean*, 25 N. H. 49; *Doe ex dem. Kerns v. Peeler*, 49 N. C. (4 Jones, L.) 226, 67 Am. Dec. 286; *King v. Rhew*, 108 N. C. 696, 23 Am. St. Rep. 76, 13 S. E. 174; *Foster v. Dennison*, 9 Ohio, 121; *Cincinnati v. Newell*, 7 Ohio St. 37; *Burston v. Jackson*, 9 Or. 275; *Adamson v. Souder*, 205 Pa. 498, 55 Atl. 182; *Stone v. Sledge*, 87 Tex. 49, 47 Am. St. Rep. 65, 26 S. W. 1068.

A different form of the same proposition is presented in *Strawn v. Strawn*, 50 Ill. 33, where it was held that where a wife joined her husband as a party to the deed in compliance with the statute, in order to release her dower and for that purpose only, the deed is not evidence of a joint seisin in fee in the husband and wife at the time of the conveyance.

The rule is laid down in *Bradley v. Missouri P. R. Co.* supra, as follows: "The party in whom the title is vested must use appropriate words to convey the estate. Signing, sealing, and acknowledging a deed by the wife in which her husband is the only grantor will not convey her estate."

If a wife unites with her husband in a deed, she does it to release her contingent right of dower or to consent to the deed when it affects the homestead; and if the interest is to affect any independent interest of her own, it is reasonable to expect some such provision in the instrument which shows specifically in what manner and how far her separate interests were intended to be affected. *Kitchell v. Mudgett*, 37 Mich. 81.

So, a deed wholly in the name of the husband, except that the testimonium clause declares that the wife releases all her right in the premises, will not pass the fee of the wife, and after the husband's death she may maintain a writ of entry on her own seisin to recover the land. *Bruce v. Wood*, supra. Chief Justice Shaw said that in order to convey the wife's fee, the wife must join in the deed, that is, it must appear that both husband and wife were parties to the efficient and operative parts of the instrument of conveyance, and that it is not sufficient

plaintiff's favor in an action brought to have a certain mortgage established as a senior lien on certain real property. Affirmed.

The facts are stated in the opinion.

Messrs. Hall & Jack, for appellant:

The defendant's mortgage is binding on the 80 acres, because it belonged to the community and was given by the wife with the authority of her husband.

Pellerin v. Sanders, 116 La. 616, 40 So. 917.

Messrs. Alexander & Wilkinson, for appellee:

A mortgage made by the wife during the existence of the community, though made with the authorization of the husband, can-

not be opposed to the creditors of the latter as his act.

Cabrol v. Gourdain, 10 La. Ann. 686; Westmore v. Harz, 111 La. 305, 35 So. 578; Bachino v. Coste, 35 La. Ann. 570.

The mere recording of the mortgage did not convey knowledge to the public of any connection of the husband's separate property with that covered by the mortgage.

Brian v. Bonvillain, 52 La. Ann. 1794, 28 So. 261.

Provosty, J., delivered the opinion of the court:

In January, 1905, Mrs. Stringfellow, wife of H. C. Stringfellow, and Miss Robinson, owners in division of the Cotton Point

that her name was annexed as expressing her assent to the act of her husband, and without words showing her formal participation in the granting part of the deed.

And a deed executed and acknowledged by a husband and wife, but containing no words of grant or warranty on her part, does not operate to convey the wife's estate therein, which she inherited from her father, though the husband apparently had no interest therein except the freehold for his own life in consequence of the birth of issue of the marriage, and the terms of the grant were broad enough to convey a greater estate. *Melvin v. Proprietors of Locks & Canals*, supra.

Where land is conveyed to a husband and wife jointly, and she joins in a conveyance by him in token of her release of dower, and of her free consent thereto, without being named in the granting part of the deed, her estate will not pass, nor will she be estopped from asserting her title after the death of her husband. *Wales v. Coffin*, 13 Allen, 213. The court further said that the fact that as a release of dower the deed was entirely nugatory, inasmuch as the wife could have no dower in such an estate, did not require that the deed be construed to have an effect beyond what it declared. Under the circumstances, however, it was subsequently held that one who claimed under the deed had sufficient reason to believe his title good, to entitle him under the statute to compensation for improvements. *Wales v. Coffin*, 100 Mass. 177.

So, where the husband, who is a joint tenant of property, executes a quitclaim deed of the same, in which the wife joins for the express purpose of releasing her dower rights, the wife conveys nothing, as the husband had no interest in the property other than to the rents and profits during the life tenancy. *Magness v. Arnold*, supra.

If the title to lands is in married women and a deed of the land recites the names of the husbands only as grantors, purporting to convey in right of their wives, the deed is insufficient to convey the title of the wives; nor is such a deed made effective by its being signed and sealed by the wives. The interest of the husbands is conveyed, 28 L.R.A. (N.S.)

but nothing more. *Agricultural Bank v. Rice*, supra.

A deed purporting to be made by a wife, and "by and with the consent of her husband," and signed and sealed by both husband and wife, there being in some of the clauses reference to "parties" of the first part and in others to the "party" of the first part, does not pass the husband's life estate in the premises. *Ellenmann v. Thompson*, supra.

A deed in which a husband and wife joined, purporting to convey to a sister of the husband whatever interest the grantors had in the estate of a deceased brother of the husband, the deed being in general terms and referring to no particular property, does not operate to convey to the grantee the equitable interest of the wife in property to which the deceased held the legal title in trust for her. *Adamson v. Souder*, supra.

Notwithstanding the name of the wife appears in the introductory part of the deed in connection with her husband as "party of the first part," and she signed and acknowledged it with her husband, yet, if in the body of the deed the husband's name alone appears as grantor, his estate only is granted. *Whiteley v. Stewart*, supra.

The decision in *Dooley v. Greening*, 201 Mo. 343, 100 S. W. 43, seems to go even further than the general rule stated above. Here a quitclaim deed executed by a wife to her son on the same day a sale was made to him by the curator of the husband, who had been adjudged insane, purporting to convey "all of my right, title, and interest, whether dower or other interest, as the wife of Joseph C. Greene . . . hereby conveying and intending to convey all interest I may have in said land, whether of dower or otherwise," was held to convey only the marital interest of the wife, and not her estate in her own right in the property described, it appearing that the deed only expressed a nominal consideration which was never paid, and that her interest represented substantially all the property that she had. The court took the position that the general words in the second clause above quoted were limited by the particular words employed in the first clause.

and Grand Bend plantations, executed two mortgages on said plantations,—a first mortgage in favor of A. N. Sample for \$57,330, and a second in favor of Ardis & Company for \$15,762.

Said plantations are described in the act of the mortgage by the numbers of the sections and fractions of sections composing them, according to the maps of the United States surveys, and are said to contain 3,800 acres. Among the fractions of sections included in the description of the Cotton Point plantation is the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 10, township 14, range 11, containing 80 acres.

This 80 acres did not belong to the mortgagors, but to the husband of one of them, Mr. Stringfellow, and in reality formed no

part of said plantation. In July, 1906, Mr. Stringfellow mortgaged same to the plaintiff company.

In January, 1908, he and his wife and Miss Robinson joined in an act of giving in payment, by which they conveyed the two plantations (including the said 80 acres) to A. N. Sample in satisfaction of the said first mortgage of \$57,330.

In the instant suit the plaintiff company has cited O. H. P. Sample, who now holds the Ardis & Company, or \$15,762, second mortgage, A. N. Sample, and H. C. Stringfellow, and asks that its said mortgage be recognized and enforced, and be decreed to be paramount to the \$15,762 mortgage of O. H. P. Sample, for the reason that the latter mortgage, in so far as said 80 acres are con-

A different rule has apparently been adopted in the later decisions in Michigan.

Thus, in *Heinmiller v. Hatheway*, 60 Mich. 591, 27 N. W. 558, it was held that when the wife joins with her husband in the conveyance of land of which she is, in whole or in part, the sole owner, she conveys all of her interest therein, though she can only be held liable upon her covenants in such deed to the extent of her sole property conveyed. It is usual in such cases to designate in some way in the conveyance the extent of such sole interest, and it is very proper so to do. But it is not essential to its validity. The terms of the conveyance are not shown except that it is stated that the record showed that the husband and wife conveyed the property by a deed duly acknowledged by both, the wife having acknowledged the execution of the deed separate and apart from her husband. The respective interests of the husband and wife in the property do not appear. No reference is made to *Kitchell v. Mudgett*, 37 Mich. 81.

The doctrine of the *Heinmiller Case* was applied in *Clow v. Plummer*, 85 Mich. 550, 48 N. W. 795, to a warranty deed from a husband and wife purporting to convey land, the title of which was in the wife, notwithstanding the objection that the only covenant in the deed was that of the husband as follows: "With all the estate, right, title, and interest therein of said party of the first part; and the said Cyrus Andrews does hereby covenant."

Where, however, the wife's name is included in the granting clauses of the deed, as well as in the testatum clause, the courts generally hold that the deed is sufficient to pass her separate estate, if properly executed by her.

Thus, a deed of trust signed by a man and his wife, conveying, all and singular, the real and personal estate, and all other property of every nature and description, "of us," which deed recites that they were indebted to sundry persons and that it was for the benefit of "our" creditors, is not limited to their joint estates, but will convey the wife's separate property. *Roberts*

v. Roberts, 102 Md. 131, 1 L.R.A. (N.S.) 782, 111 Am. St. Rep. 344, 62 Atl. 161, 5 A. & E. Ann. Cas. 805.

So, where the wife joins with her husband in the words of conveyancing, and acknowledges the joint receipt of the purchase money, and joins her husband in the covenant of warranty, if the doctrine of presumptions is to be invoked at all, then the presumption is that the title was a joint one, and not that she joined in the deed only to release her dower and homestead. *McKenzie v. Houston*, 130 N. C. 566, 41 S. E. 780.

And in *O'Brien v. Brice*, 21 W. Va. 704, the court said: "The granting clause, which is the controlling and operative part of every deed, conveys the land absolutely, without any limitation or qualification whatever; and if the grantor had intended to grant her dower right only, the granting clause would have been the proper, if not the only, part of the deed where she could have expressed that intention."

A mortgage purporting to be made by husband and wife, covering property in which both husband and wife owned undivided interests, binds the wife's interest, and it is not competent to show by parol evidence what the mortgagee said to her as to the effect of her execution of the mortgage, for the purpose of showing that she executed it only for the purpose of releasing her inchoate right of dower in the husband's interest. *Snyder v. Ash*, 30 App. Div. 183, 51 N. Y. Supp. 772 (Herrick, J., dissenting).

So, where the wife joined in the granting part of a deed containing apt words to convey any title or interest she had in the entire property or in any part thereof, and in the testimonium clause released her inchoate right of dower in the whole, it was held in *Gregory v. Gregory*, 16 Ohio St. 560, that she conveyed all her title and interest whether legal or equitable, vested or inchoate, in and to the entire property.

And the wife's separate interests will pass by a deed in which both husband and wife's names appear in the granting part of the deed, and she, in a separate clause, released

cerned, and as against third persons, is null; it not having been given by H. C. Stringfellow, the owner of the said 80 acres.

To this the defendants answer that H. C. Stringfellow authorized his wife to mortgage the property; in other words that she did so as his agent, and that, therefore, the case stands just as if he himself had acted.

The issue thus made is one of fact, to be determined from the evidence in the case. The record contains no evidence on the subject, except that which is to be found in the act of mortgage itself. Forming part of this act of mortgage is the petition which Mrs. Stringfellow presented to the judge to obtain his authorization to execute the mortgage. In this petition the two plantations are described precisely as in act of mortgage (*i. e.*, including this 80 acres), and it is alleged that Mrs. Stringfellow "is owner, in her own separate, paraphernal right, of an undivided half" of the property thus described, and that she desires to mortgage her said interest. The act of mortgage declares that the property mortgaged is the same which the mortgagors acquired from Mrs. G. W. Stringfellow; and it makes no mention of H. C. Stringfellow except as follows: "Came and appeared Miss Georgie Robinson and Mrs. Howard C. Stringfellow, wife of Howard C. Stringfellow, herein joined, aided, and authorized by her husband."

From the foregoing the only possible conclusion is that the participation of the husband in the act was solely for the purpose of giving his marital authorization to the contract of his wife, that there was no intention that she should mortgage any other

property than her own, and that this 80 acres of land was included in the mortgage either through mistake, or because it was at that time erroneously supposed to form part of the plantation. A mistake of this kind easily occurs in a long description by numbers of sections and fractions of sections, and the probability of a mistake in the present case is all the greater from the fact that this 80 acres is in the center of the plantation, which is a large tract of land; it and Grand Bend containing together, as already stated, 3,800 acres. As to the land having been supposed to be part of the plantation, that is hardly probable in view of the fact that at that time it was in process of acquisition by H. C. Stringfellow under the Federal homestead law.

The act being one which on its face professes to relate exclusively to the wife's contract and to the wife's property, its recordation cannot be said to have operated the registry of a mortgage upon the property of the husband. Hence it cannot affect third persons subsequently accepting a mortgage upon the property of the husband. The husband himself is bound by it, on the principle that one who signs, even as a witness, an act creating a mortgage upon his property, is estopped from contesting the mortgage; but this estoppel cannot be extended to third persons dealing with the property. *Rev. Civ. Code, art. 3342; Brian v. Bonvilain, 52 La. Ann. 1794, 28 So. 261.*

Judgment affirmed.

Petition for rehearing denied February 15, 1909.

her dower rights, although all the covenants began with the form "I do hereby covenant." *Smith v. Carmody, 137 Mass. 126.*

Where a deed is in such form as to convey title to the property even had it belonged exclusively to the wife, it was held in *Reynolds v. Caldwell, 80 Ala. 232*, that it conveyed any equitable interest in the property which the wife may have had, unless the sale had been made in payment of the husband's debt.

A deed of land executed by husband and wife purporting to convey it "in her right" is valid to pass the whole, even though it appears that the husband was severally seised of a part and the wife of a part. *Emerson v. White, 29 N. H. 482.*

In *Malin v. Rolfe, 53 Ark. 107, 13 S. W. 595*, the granting clause in a deed by the husband which contained no other reference to the wife concluded with words to the effect that the wife, as such, for the consideration above set forth, assigned, released, relinquished, and quitclaimed "all my right, title, interest, and ownership" to the grantee, and the attestation clause stated that the parties set their hands and seals thereto as "man and wife." There was no ex-
28 L.R.A. (N.S.)

press reference to dower either in the deed itself or in the certificate of acknowledgment, and it was held that the deed was sufficient to pass the wife's separate interest in the property described in the deed.

The mere fact that one name is placed before another has been held in some cases not to limit the deed to a conveyance of the interest of the party first named.

Thus, the mere fact that the name of the wife is placed after that of her husband in naming the party of the first part to a deed in which she appears as one of the parties, conveying and quitclaiming all interest in the land, was held in *Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514, 28 L.R.A. 612, 46 Am. St. Rep. 355, 40 N. E. 1014*, to be insufficient to restrict the conveyance by her to a mere waiver of her right of dower.

So, the mere fact that the husband's name is placed after that of the wife, and he is mentioned as "her husband," was held in *Chapman v. Charter, 46 W. Va. 769, 34 S. E. 768*, not to operate to restrict the conveyance by him to his marital rights, where in the body of the deed both grant, convey, warrant, and covenant.

Some other cases may be noted which, although not strictly in point, may be of some value upon the question discussed above.

In *O'Connor v. Vineyard*, 91 Tex. 488, 44 S. W. 485, it was held that a deed executed by a wife for herself and as attorney for her husband conveyed all of their interests in the property, whether it was the separate property of either or the community property of both. It does not appear whether the wife's name appeared in the body of the deed or not. But in *Kin Kaid v. Lee* (Tex. Civ. App.) 119 S. W. 342, the *O'Connor* Case is held to foreclose the right of a wife to claim that her separate property was not passed by a deed which recites that the husband (by her as attorney) and she are "parties of the first part," and in her separate acknowledgment of which she says that she signed, sealed, and delivered the deed "as her own act and deed" and as attorney for her husband. *Kin Kaid v. Lee* (Tex. Civ. App.) 119 S. W. 345, is a companion case to *Kin Kaid v. Lee*.

In *Power v. Lester*, 23 N. Y. 527, it was held that a woman holding a mortgage upon certain property, who subsequently marries the mortgagor, does not, in joining her husband in a second mortgage, impair the lien of her mortgage, in the absence of words inserted for that purpose,—her dower interests only being affected. A similar principle was applied in *Gillig v. Maass*, 28 N. Y. 191. So, in *Kingman v. Dunspaugh*, 19 App. Div. 545, 46 N. Y. Supp. 602, it was said, citing the *Power* and *Gillig* Cases, that the fact alone that a wife joins with her husband in the execution of a mortgage upon the husband's real estate does not impair her right to priority as the holder of a prior mortgage. And to the same effect was the decision in *Hewitt v. Suits*, 22 App. Div. 210, 47 N. Y. Supp. 1038.

A wife who joins in the granting parts and covenants of a deed conveys her dower right thereby, although it is not specifically mentioned (*Edwards v. Sullivan*, 20 Iowa, 502; *Jones v. Des Moines*, 43 Iowa, 209), or any other inchoate interest which she may have (*Littell v. Hoagland*, 106 Ind. 320, 6 N. E. 645).

An agreement inserted in a deed given by a husband and wife, whereby the husband reserves the right to build a dam upon the stream running past the property, which privilege was, upon certain contingencies, to pass to the grantee, does not give the latter, upon the happening of the contingency, the right to construct the dam and flood the adjoining property of the wife, where her purpose in signing the deed was merely to release her dower rights, and the covenants in the deed were the personal covenants of the husband. *Gilbert v. Helmich*, 6 App. Div. 80, 39 N. Y. Supp. 629.

Where the deed expressly reserved the wife's separate interests, they are not passed, although the wife joins the husband 28 L.R.A. (N.S.)

in the deed. *Larison v. Dilts* (N. J. Eq.) 32 Atl. 1059.

In *Corr v. Porter*, 33 Gratt. 278, the court said that when the wife unites with her husband in conveying the property to a purchaser, the effect is not to vest in the latter the dower interest or any estate separate and distinct from that of the husband, but simply to relinquish a contingent right in the nature of an encumbrance upon the property conveyed, which, if not so relinquished, will attach and be consummate on the death of the husband. Similar language was used in *Nickell v. Tomlinson*, 27 W. Va. 697. But in these cases the question at issue was rather whether the wife's deed relinquishing her right of dower extinguished it or merely transferred it.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ALBERT BERNARD

v.

ADAMS EXPRESS COMPANY.

(205 Mass. 254, 91 N. E. 325.)

Carrier—fixing value—interstate commerce—Hepburn act.

A contract between shipper and carrier fixing the value of property to be transported as a basis for carrier's charges, which shall be binding on the shipper in case of loss, is not forbidden by the provision of the Carmack amendment of the Hepburn act of Congress, that no contract shall exempt the carrier from liability for loss of property caused by itself or by any connecting carrier.

(February 24, 1910.)

Note.—Validity of stipulation limiting carrier's liability to agreed valuation as affected by the Hepburn act.

By the great weight of authority a carrier cannot contract to exempt itself from liability or to limit its liability for losses due to the carelessness of itself or its servants, and any provision in the contract of carriage which limits its liability for losses to a stipulated amount without reference to the actual value of the goods is generally held to fall within this ban and to be of no avail to the carrier where the loss is due to the negligence of itself or its agents and servants. 1 Hutchinson, Carr. § 425. And see note to *Everett v. Norfolk & S. R. Co.* 1 L.R.A. (N.S.) 985.

Where, however, the carrier and the shipper stipulate by a contract fairly entered into that the goods are of a certain value, or that the loss, if any, shall not exceed a certain sum at which the goods are valued, such a contract is, by the weight of authority, valid, and the carrier will not be liable beyond that figure even though the

EXCEPTIONS by plaintiff to rulings of Superior Court for Suffolk County made during the trial of an action brought to recover damages for the loss of certain goods while in defendant's possession for transportation which resulted in a verdict for plaintiff for a less sum than was demanded. Overruled.

The facts are stated in the opinion.

Messrs. Lee M. Friedman, Morse & Friedman, and F. J. Sulloway, for plaintiff:

If a rate is conditioned upon the shipper's agreeing that the carrier's liability shall not exceed a certain value, the stipulation is void as against loss due to the carrier's negligence or other misconduct, if the specified amount, while purporting to be an agreed valuation, is in fact purely fictitious and represents an attempt to limit the carrier's liability to an arbitrary amount.

Re Released Rates, 13 Inters. Com. Rep. 550; Kansas City Southern R. Co. v. Carl, 91 Ark. 97, 121 S. W. 932; Louisville & N. R. Co. v. Warfield & Lee, 6 Ga. App. 550, 65 S. E. 308; Greenwald v. Weir, 59 Misc. 431, 111 N. Y. Supp. 235; Schutte v. Weir, 59 Misc. 438, 111 N. Y. Supp. 240; Shidlov-

sky v. Mallory S. S. Co. 60 Misc. 67, 111 N. Y. Supp. 778; Silverman v. Weir, 114 N. Y. Supp. 6; Vigouroux v. Platt, 62 Misc. 364, 115 N. Y. Supp. 880.

loss in question is due to its own negligence. Such a contract does not tend, according to these authorities, to exempt the carrier from liability for its negligence. The leading case asserting this rule is Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, which is cited and quoted at length in BERNARD v. ADAMS EXP. Co. It will be seen that if the contention of the shipper in the BERNARD CASE is correct, the Hepburn act would have the effect of changing materially the very generally accepted rule laid down by the Hart Case.

The cases hold very generally with BERNARD v. ADAMS EXP. Co., however, that the provision of the Hepburn act, as set out in that case, does not deprive the carrier of the right to make a fair contract with the shipper, fixing an agreed valuation upon the goods to be transported,—the provision having reference solely to contracts purporting to exempt the carrier for losses after the goods have passed into the hands of a connecting carrier.

The decision in Greenwald v. Weir, 130 App. Div. 696, 115 N. Y. Supp. 311, which is cited in the BERNARD CASE, was affirmed by the court of appeals in — N. Y. —, — L.R.A.(N.S.) —, 92 N. E. 218, where the court, in respect to the purpose of the provision of the Hepburn act in question, said: "The purpose of the provision which we have quoted from the Hepburn act was obvious. It was to render the initial carrier in the case of interstate transportation over connecting lines liable to the lawful holder of its receipt or bill of lading, for any loss or injury to the property shipped, whether such loss or injury occurred after the goods had passed out of

The statute makes an interstate common carrier liable to the shipper for the full value of any loss or damage to goods shipped, irrespective of any contract or receipt to the contrary.

Greenwald v. Weir, 130 App. Div. 696, 115 N. Y. Supp. 311; Hart v. Chicago & N. W. R. Co. 69 Iowa, 486, 29 N. W. 597; Lucas v. Burlington, C. R. & N. W. R. Co. 112 Iowa, 594, 84 N. W. 673; Adams Exp. Co. v. Walker, 119 Ky. 121, 67 L.R.A. 412, 83 S. W. 106; Chesapeake & O. R. Co. v. Beasley, 104 Va. 788, 3 L.R.A.(N.S.) 183, 52 S. E. 566; Schutte v. Weir, supra.

Mr. John L. Hall for defendant.

Knowlton, Ch. J., delivered the opinion of the court:

This is an action to recover for the loss of a package delivered to the defendant, a common carrier, for transportation from the plaintiff's tannery at Newark, in the state of New Jersey, to the plaintiff at his shop at Montello, in Massachusetts. The pack-

the hands of the initial carrier or not; and, furthermore, to prevent interstate carriers from exempting themselves from liability for the loss of property, or damage thereto, after it had passed into the hands of another carrier to be transported to its destination. The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper upon a valuation of the property carried."

Attention is called to the fact that an appeal to the United States Supreme Court in the Greenwald Case is now pending.

The decision of the New York court of appeals, of course, overrules earlier decisions of the lower courts of that state to the contrary. Schutte v. Weir, 59 Misc. 438, 111 N. Y. Supp. 240; Silverman v. Weir, 114 N. Y. Supp. 6; Vigouroux v. Platt, 62 Misc. 364, 115 N. Y. Supp. 880. And the decision in Shidlovsky v. Mallory S. S. Co. 60 Misc. 67, 111 N. Y. Supp. 778, is also overruled, at least so far as it has any bearing upon this question. In this case it was held that the damages properly recoverable from an initial carrier for an unreasonable delay in the delivery of the goods received for interstate transportation are not, under the Hepburn act, to be diminished by a statement put upon the record, even by the consent of the shipper's attorney, to the effect that the goods had been sold for a certain sum by the connecting carrier.

And in Travis v. Wells, F. & Co. (N. J. T.) 74 Atl. 444, it was held that the provision in question prohibited only contracts which exempted carriers from liability for losses caused by a connecting carrier to

age contained hides whose value was \$154.80, and the only question is whether the plaintiff can recover that sum or only \$50. The case was tried before a judge of the superior court, without a jury. A book containing blank receipts, to be filled out and signed by the defendant's agent when good were received for transportation, had been furnished to the plaintiff, and when this package was delivered, the plaintiff's agent, who was in charge of his office and shipping room, filled in the blank, with a description of the bundle and its address. In the column headed "Value" the words "Not given" had been written by the defendant's teamster when he took a previous shipment. The receipt was signed for the defendant by its employee. At the head of the receipt is this statement: "The company's charge is based upon the value of the property, which must be declared by the shipper." One of the provisions of the contract embodied in the receipt is as follows: "In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation not exceeding \$50, unless a greater value is declared, the shipper agrees that the value of said

property is not more than \$50, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than \$50 if no value is stated herein." From evidence introduced at the trial the judge made the following findings:

"(1) The method of carriage by the defendant varied with the value of the goods received for carriage.

"(2) The rates of carriage by the defendant were reasonably proportioned to the value of the goods to be carried, and packages of a greater value than \$50 were then, and a long time prior thereto, carried by the defendant in a manner and with precautions for caring for them which differed from and were more costly to the defendant than the manner and the precautions then and theretofore established, adopted, and used by the defendant for packages of a value not exceeding \$50."

"(4) The bundle in question was delivered by the plaintiff to the defendant without any statement of its value or contents in the said receipt and agreement, although the agent of the defendant asked if there was any value.

which the defendant had delivered over the goods.

So, in *Pittsburg, C. C. & St. L. R. Co. v. Mitchell* (Ind.) 91 N. E. 735, it was held that the common-law right to contract with respect to the value of an article to be transported is unaffected by the interstate commerce act.

And in *Re Released Rates*, 13 Inters. Com. Rep. 550, the Commission, after stating the general rule as to agreed valuations as laid down by the *Hart Case*, supra, says that a careful study of the provisions of the *Hepburn act* will show that the carrier's right in this respect has not been abrogated.

The decision in *Louisville & N. R. Co. v. Warfield & Lee*, 6 Ga. App. 550, 65 S. E. 308, is in line with the above in holding that there is nothing in the *Hepburn act* to abrogate the rule prevailing in the state, as to the validity of stipulations limiting the amount of recovery in case of loss. The stipulation in question, however, was held by the court to be a mere general limitation as to value, amounting to no more than an arbitrary preadjustment of the damages, and such limitations were invalid in Georgia before the enactment of the *Hepburn act* and were not affected in any way by it.

That the *Hepburn act* does not affect the rights of the parties under the state law was also asserted in *Latta v. Chicago, St. P. M. & O. R. Co.* 97 C. C. A. 198, 172 Fed. 659, but a different phase of the question is here presented. The case arose in Nebraska and the doctrine of the *Hart Case* does not prevail in that state. Consequently notwithstanding the fact that a contract contains a stipulation fixing an agreed valuation of the property, the ship-

per may in that state recover damages to the full amount of his injury. It was contended by the carrier that under the *Hepburn act*, the law of Nebraska, so far as it is sought to enforce the same against the provisions of a contract in relation to interstate commerce, is inoperative, but it was held that the right which the plaintiff had under the law of Nebraska to sue for the full value of his property, notwithstanding the stipulation fixing an agreed valuation, was not taken away by the *Hepburn act*, but was preserved to him. The court said that Congress, knowing of the conflicting decisions upon this question, wisely provided that the act should not deprive "any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

In *Kansas City Southern R. Co. v. Carl*, 91 Ark. 97, 121 S. W. 932, the court apparently takes the view that the *Hepburn act* invalidated all stipulations designed to limit liability for losses caused by the carrier, while the view taken by the *Greenwald Case* is that the act was designed simply to extend the liability of the carrier to losses occasioned by the connecting carrier, and to prevent the initial carrier from contracting to exempt himself from such losses. In the *Carl Case*, however, the liability was arbitrarily limited by the contract to a certain amount, without reference to the actual valuation of the goods, and consequently the stipulation might be considered invalid without reference to the *Hepburn act*. The decision in *Southern Exp. Co. v. R. H. Meyer Co.* (Ark.) 125 S. W. 642, is based upon the *Carl Case*.

"(5) The defendant was not further informed of the value or contents of the bundle, and there was no indication on the outside of what its contents were, if any, or of its value.

"(6) The defendant, at the time of receiving the bundle, was ignorant of its contents and of its value, and has remained ignorant of its contents and of its value to the present time.

"(7) The bundle was received by the defendant to be carried and delivered only under and upon the terms of the receipt and agreement.

"(8) The defendant received the bundle in the belief that the value of the bundle was not more than \$50.

"(9) The methods and precautions adopted by the defendant for safely carrying and delivering the said bundle were based upon the plaintiff's agreement that the value of the bundle did not exceed the sum of \$50.

"(10) The defendant, before the plaintiff sued out his writ, tendered to the plaintiff the sum of \$50.75, and has brought the same into court for the plaintiff."

"(12) The plaintiff, for a long time prior to the delivery of the said bundle, had delivered merchandise under exactly the same conditions as was delivered the bundle in question.

"(13) The plaintiff, at the time of the delivery of the said bundle and for a long time prior thereto, was familiar with the terms and conditions contained in the bill of lading or shipping receipt which was given to the plaintiff by the agent of the defendant.

"(14) The receipt was prepared by an agent of the plaintiff, and was handled to the agent of the defendant for signature at the time of the delivery of the bundle.

"(15) The plaintiff assented to the limitations of the defendant's liability contained in the receipt."

While the package was in the defendant's possession it was lost, and no explanation of its loss has been offered. The judge found for the plaintiff for the sum of \$50.75. The plaintiff made different requests for rulings to the effect that, under the Carmack amendment in the Hepburn act, so called (act Cong. Feb. 4, 1887, chap. 104, 24 Stat. at L. 386, § 20, U. S. Comp. Stat. 1901, p. 3169; act Cong. June 29, 1906, chap. 3591, 34 Stat. at L. 593-595, § 7, U. S. Comp. Stat. Supp. 1909, pp. 1163-1167), he was entitled to recover the full value of the property.

The statute provides "that any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful hold-

er thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Under the decisions in this commonwealth, and in the Supreme Court of the United States, there is no doubt that, before the enactment of this law, the plaintiff, upon the facts and findings in the present case, would be estopped from claiming more than \$50 as the value of the package. *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282; *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284, 10 N. E. 836; *Cox v. Central Vermont R. Co.* 170 Mass. 129-136, 49 N. E. 97; *Graves v. Adams Exp. Co.* 176 Mass. 280, 57 N. E. 462; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151. These decisions are founded on the common law as it is interpreted in this commonwealth, in the Federal courts, and in the courts of many of the states. The question is whether the statute quoted above has changed the law in its application to the facts before us.

One obvious purpose of the Congress was to extend the provisions of the common law so as to make a common carrier receiving property for transportation liable for loss, damage, or injury to it, not only while it is in transit over his own lines, but while it is in the hands of a connecting carrier. In *Greenwald v. Weir*, 130 App. Div. 696, 115 N. Y. Supp. 311, it is said that this last is the only liability imposed by the statute. Although the liability stated is made statutory by the enactment, the statement of it in the words, "for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass," includes nothing beyond the liability at common law, except that for the undertaking of other carriers into whose possession the property may come. The liability is only for loss, damage, or injury "caused" by the carrier, which, broadly interpreted, includes that resulting from neglect as well as that due to a positive act. It does not include the liability as an insurer against loss for which the common carrier is not culpably chargeable. The liability stated is for every kind of positive misconduct of the carrier affecting the property, and for negligence from lack of care or effort. Now, what is the prohibition imposed upon the carrier by the statute? It is from exempting one's self from this liability by

a contract, receipt, rule, or regulation; in other words, we have a statutory declaration that a contract of exemption from liability for negligence is against public policy, and void. This is no more than the court have frequently declared in proceedings at common law.

But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property, within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is intrusted to him. It is to describe and define the subject-matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage, or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes. The principle was clearly pointed out in *Graves v. Lake Shore & M. S. R. Co.* supra. The cases cited above do not go upon the ground that there is a contract of exemption from liability for negligence, but upon the ground that the contract relates directly to the elements and quality, as to value, of that which is to be transported.

In *Hart v. Pennsylvania R. Co.* 112 U. S. 331-340, 28 L. ed. 717-721, 5 Sup. Ct. Rep. 151, 156, the court said: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract for transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom

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of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." At the close of the opinion, on page 343 of 112 U. S., is this statement: "The distinct ground of our decision in the case at bar is that where a contract of the kind signed by the shipper is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire v. New York C. R. Co.* 98 Mass. 239, 245, 93 Am. Dec. 162."

An estoppel founded on the agreements of the parties as to the nature or value of the property is not an exemption from the liability recognized by the common law and affirmed in this statute as resulting from the ordinary undertaking of a carrier to transport property. The decision in *Greenwald v. Weir*, supra, is to this effect. A very elaborate discussion of the law, with a citation of many authorities, by the Interstate Commerce Commission, is found in *Re Released Rates*, 13 Inters. Com. Rep. 550, which reaches the same result. Upon the general doctrine, apart from this statute, see *Alair v. Northern P. R. Co.* 53 Minn. 160, 19 L.R.A. 764, 39 Am. St. Rep. 588, 54 N. W. 1072; *Barnes v. Long Island R. Co.* 115 App. Div. 44, 100 N. Y. Supp. 593, affirmed in 191 N. Y. 528, 84 N. E. 1108; *Rosenthal v. Weir*, 170 N. Y. 148, 57 L.R.A. 527, 63 N. E. 65.

The decisions in *Kansas City Southern R. Co. v. Carl*, 91 Ark. 97, 121 S. W. 932, and *Louisville & N. R. Co. v. Warfield & Lee*, 6 Ga. App. 550, 65 S. E. 308, do not seem important in their application to the facts of the present case.

The findings of the judge, which were well warranted by the evidence, established the proposition that the provisions of the contract as to the value were entered into in good faith by the parties, and were not an attempt of the defendant to obtain an exemption from liability for negligence, in evasion of the statute. It appeared that, if the value of the package had been given, an additional charge would have been made for transportation, and additional precautions would have been taken against loss, by having the package "handled under a signature passed by every man who handled the ship-

ment from the time it was accepted until it was delivered, . . . so that there would have been a constant supervision of it."

Exceptions overruled.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. CITY
OF MINNEAPOLIS, Appt.,

v.

ST. PAUL, MINNEAPOLIS, & MANITOBA
RAILWAY COMPANY et al., Respts.

(98 Minn. 380, 108 N. W. 261.)

Railway — highway crossing — construction — police power.

1. The state may, in the exercise of its police power, impose upon railroad companies whose lines intersect public highways laid out after the construction of the railroad the uncompensated duty of constructing and maintaining at such cross-

Headnotes by BROWN, J.

Note. — Power to compel railroad to establish or maintain at its own expense overhead or underground crossing, as affected by the fact that the street or highway is opened subsequently to construction of railroad.

The general question of the power to require the separation of grades at streets or highways crossed by railway tracks, irrespective of relative dates of construction, because of subsequent changes in surrounding conditions and volume of traffic, is beyond the scope of this note, which, as indicated in the title, is confined to the aspect of that question as affected by the fact that the railroad was constructed first.

As to the power of a municipal corporation to require a railroad company to keep a street or highway in repair at overhead or underground crossings, see the note to *People ex rel. Chicago v. Illinois C. R. Co.* 18 L.R.A. (N.S.) 915.

The case of *STATE EX REL. MINNEAPOLIS v. ST. PAUL, M. & M. R. Co.*, which has been affirmed by the United States Supreme Court in 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698, is sustained, as hereinafter shown, by the weight of authority.

Thus, a statute imposing one half of the cost of bridging its railway right of way so as to carry a street or highway across it, passed after a railroad company was incorporated under a charter which did not impose such burden upon it, but which, however, was subject to amendment, is, as to a new highway subsequently established, a valid exercise of the police power intended for the protection of the public. *New York & N. E. R. Co. v. Waterbury*, 60 Conn. 1, 22 Atl. 439. 28 L.R.A. (N.S.)

ings all such safety devices as are reasonably necessary for the protection of the traveling public.

Same — due process of law.

2. Such a requirement, being referable to the police power, is not a taking of private property for public use in violation of the Constitution.

Same — bridge — "safety device."

3. A bridge over the railroad tracks, when necessary to make the crossing safe for public use, is a "safety device," within the meaning of that expression.

Statute — construction — granting franchise.

4. Statutes granting franchises to corporations, involving rights of the public, are to be construed liberally in favor of the public and strictly against the corporation.

Railway charter — construction — highway crossing — rights.

5. The charter of the Minnesota & Pacific Railway Company, of which defendants are successors in interest, and subject to all its liabilities, contained the following provision:

"The said company shall have the right and authority to construct their said rail-

Nor does such statute unlawfully take the property of the railroad company, or impose damages upon it incident to the taking of its property. *Ibid.*

Nor is a railroad company, which owns the fee of its right of way, upon the opening of a highway across it, entitled to be compensated for one half of the cost of bridging it, in addition to the value of its land actually taken for street purposes. *Ibid.*

And it was held in *St. Louis & S. F. R. Co. v. Fayetteville*, 75 Ark. 534, 87 S. W. 1174, that upon the opening of a new street across a railway right of way the railway company was not entitled to the prospective cost of erecting an overhead crossing, as the legislature might at any time compel it without compensation to construct such a crossing and keep it in repair.

The duty of constructing a bridge so as to carry a newly opened street or highway across a railway right of way, notwithstanding it is opened long after the construction of the railroad, is imposed upon a railroad company by a statute declaring that "it shall be the duty of the company to erect and keep in order all bridges on any highway, at such points as bridges may be necessary to cross the railroad." *Illinois C. R. Co. v. Copiah County*, 81 Miss. 685, 33 So. 502; *Illinois C. R. Co. v. Swalm*, 83 Miss. 631, 36 So. 147.

And such statute, being within the police power, does not deprive a railway company which has constructed its road previous to the opening of such highway, of its property without due process of law. *Illinois C. R. Co. v. Copiah County*, *supra*.

Nor is such statute rendered objectionable as impairing the railway company's char-

road and branches upon and along, across, under, or over any public or private highway, road, street, plank road, or railroad, if the same shall be necessary; but the said company shall put such highway, road, street, plank road, or railroad in such condition and state of repair as not to impair or interfere with its free and proper use."

Held that this provision applies to streets and highways laid out over the railroad after its construction.

Railroad — new street — construction of crossing.

6. A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may from time to time require. That right on the part of the state attaches, by implication of law, to the fran-

ter, by the fact that the highway was opened subsequent to the construction of the railroad. *Ibid.*

But in *Illinois C. R. Co. v. State*, 94 Miss. 759, 48 So. 561, it was held that a railroad company could not be required to construct a bridge so as to carry a newly constructed road across its tracks, where there was no law permitting the opening of the highway.

Where it becomes necessary to repair a bridge which had been erected in order to carry a public street which was not opened until twenty years after the construction of the railroad, across a railway right of way, the railroad company is bound to make the necessary repairs to the framework and abutments of the bridge, under a statute subsequently passed providing that "when a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad company." *Yonkers v. New York C. & H. R. R. Co.* 165 N. Y. 142, 58 N. E. 877, affirming 32 App. Div. 474, 52 N. Y. Supp. 1074.

It was held in *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341, affirming 98 Minn. 429, 108 N. W. 269, that under the police power a municipal corporation could require a railway company to repair at its own expense a viaduct and its approaches, which carried a street over the railroad right of way, notwithstanding the fact that the street was opened after the construction of the railroad, and that the railroad company's charter did not expressly require it to construct or maintain crossings at streets thereafter opened.

A municipal corporation cannot contract away its police power, which is a continuing one, by an agreement with a railway company, so as to bind the former to build and maintain such viaduct for fifteen years: as the exercise of the police power cannot, for reasons of public policy, be thus limited by contract, nor be destroyed by compromising what is thought to be a

chise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed.

Contract — municipal corporation — abdication of police power — validity.

7. A contract by a city, by which the police power is attempted to be forever abdicated, is *ultra vires* and void.

Constitutional law — police power — right of municipality to divest.

8. Neither the state nor a municipal subdivision thereof, to which that power is delegated, can by affirmative action or by inaction permanently divest itself of the authority and power to exercise it.

(June 29, 1906.)

doubtful right; and it is immaterial upon what right such contract rests, as neither the state nor the municipality can abrogate such power, which is so necessary to public safety. *Ibid.*

Nor is the inhibition against the impairment of the obligation of contracts violated by the municipality's subsequent action requiring the railway company to repair such viaduct at its own expense. *Ibid.*

So, it was held in *Worcester, N. & R. R. Co. v. Nashua*, 63 N. H. 593, 4 Atl. 298, that a municipality may require a railway company to construct a bridge over a highway established long after the building of the railroad, before the highway is constructed and opened, under a statute requiring that "if any railroad shall intersect or cross a highway . . . [it] shall be secured by a bridge over said road or by the erection of gates," as the town may think expedient.

And under charter authority to "require the railroad companies to construct at their own expense such bridges and approaches . . . at public crossings, and such viaducts and their approaches over their tracks where the same cross or extend along public highways or streets, and to put such streets in such condition and state of repair as not to interfere with the free and proper use of said streets or crossings, as the city council may deem necessary, and when a viaduct or viaducts cross the tracks of such railroad companies to compel them to build their portion of a continuous viaduct or viaducts over said tracks, with their approaches,"—a municipal corporation may require a railway company to construct a bridge over its tracks when a public necessity, notwithstanding the municipality was incorporated and such street laid out long after the tracks were built, and the city had built and maintained a viaduct which now required rebuilding. *Harriman v. Southern R. Co.* 111 Tenn. 538, 92 S. W. 213. The court said that if such requirement would be excessive or unreasonable,

APPEAL by relator from a judgment of District Court for Hennepin County dismissing a petition for a writ of mandamus to compel the erection and maintenance of a highway bridge over defendants' right of way. Reversed.

The facts are stated in the opinion.

Mr. Frank Healy, for appellant:

Railroad corporations are within the operation of all reasonable police regulations that go to the protection of life and property.

Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864.

It is a lawful exercise of police power to require a railroad company to construct a bridge in passing over a public highway, instead of crossing it at the same grade:

2 Tiedeman, State & Federal Control of Persons & Property, p. 998; Elliott, Roads & Streets, §§ 778, 780; Freund, Pol. Power, § 631; Thomp. Corp. § 5505; 3 Elliott, Railroads, §§ 1102, 1103, 1111; State ex rel.

Minneapolis v. St. Paul, M. & M. R. Co. 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3; State ex rel. St. Paul, M. & M. R. Co. v. District Ct. 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7; Plymouth v. Pere Marquette R. Co. 139 Mich. 347, 102 N. W. 947; Louisville, N. A. & C. R. Co. v. Smith, 91 Ind. 119; Illinois C. R. Co. v. Copiah County, 81 Miss. 685, 33 So. 502; Illinois C. R. Co. v. Swalm, 83 Miss. 631, 36 So. 147; Boston & M. R. Co. v. York County, 79 Me. 386, 10 Atl. 113; Baltimore & O. S. W. R. Co. v. State, 159 Ind. 510, 65 N. E. 508; New York & N. E. R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122; Gillam v. Sioux City & St. P. R. Co. 26 Minn. 268, 3 N. W. 353.

As the construction of the bridge falls within the the police power, the duty rests upon the railroad company to erect it at its own expense.

State ex rel. Chicago, M. & St. P. R. Co. v. Shardlow, 43 Minn. 524, 46 N. W. 74; Lake Erie & W. R. Co. v. Shelley, 163 Ind. 36, 71

which it was not in the present case, the court would have plenary jurisdiction to adjudge it void.

But, on the other hand, a few decisions are found opposed to STATE EX REL. MINNEAPOLIS V. ST. PAUL, M. & M. R. Co., which, however, turn upon the absence of necessary legislative enactment, and not upon the want of inherent legislative power.

Thus, the decision in Northern C. R. Co. v. Baltimore, 46 Md. 425, which holds that upon the opening of a new street across a railway right of way the cost of constructing a viaduct to carry the street over its tracks cannot be imposed upon the railway company, was based upon the fact that the ordinance under which it was sought to impose such duty upon the railway company did not include within its scope the street in question, notwithstanding which the power of the municipality to require it by proper ordinance was recognized.

And in Albia v. Chicago, B. & Q. R. Co. 102 Iowa, 624, 71 N. W. 541, where it was held that the uncompensated duty of constructing bridges or viaducts across a railway right of way was not imposed by a statute requiring that "every corporation shall . . . construct at all points where such railway crosses any public highway good, sufficient crossings and safe cattle guards," it was said that the common-law rule undoubtedly was that upon opening a road across an existing one the crossing should be made with as little injury to the old road as possible, and that whatever structures are necessary for the crossing must be erected and maintained at the expense of the one under whose authority and directions they are made.

And under such circumstances upon the opening of a new street over or under a railway right of way, the damages to be assessed in the railway company's favor are not controlled by statute, but vest as at 28 L.R.A. (N.S.)

common law and include the expense of building necessary bridges and viaducts. Ibid.

So, it was held in Cincinnati, H. & D. R. Co. v. Troy, 68 Ohio St. 510, 67 N. E. 1051, that, in the absence of express enactment upon the subject, it was unnecessary for the court to determine whether the legislature could, under the police power, impose such burden upon a railway company, and that the duty to construct a bridge to carry its tracks over a subsequently opened street was not imposed by a statutory requirement that railway companies shall construct and maintain safe and sufficient crossings before it opens its road, which applied only where the construction of the highway or street preceded that of the railroad.

And a city cannot require a railway company to widen a bridge which carries a subsequently opened street across a railway right of way, under a requirement of the company's charter that it shall keep up at its own expense all bridges on or over incorporated roads which it has severally made necessary to be built by the establishment of the railroad, and to "cause the railway to be so constructed as not to impede the passage of travelers on the public roads," as such requirement applies to roads in existence at the time the railroad was constructed. State v. Wilmington & W. R. Co. 74 N. C. 143.

As to the power to lay out streets or highways across railway property or right of way, see the note to Louisville & N. R. Co. v. Louisville, 24 L.R.A. (N.S.) 1213.

As to the necessity of making compensation upon laying out streets across railway property, and the measure thereof, including damages for constructing the crossing and necessary safety appliances, see the note to New York, C. & St. L. R. Co. v. Rhodes, 24 L.R.A. (N.S.) 1225.

N. E. 151; Woodruff v. Catlin, 54 Conn. 277, 6 Atl. 849; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; Detroit, Ft. W. & B. I. R. Co. v. Railroad Comrs. (Detroit, Ft. W. & B. I. R. Co. v. Osborn) 127 Mich. 219, 62 L.R.A. 149, 86 N. W. 842; New York & N. E. R. Co. v. Waterbury, 60 Conn. 1, 22 Atl. 439; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 438; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 994, 17 Sup. Ct. Rep. 992.

It is immaterial whether the railroad antedated the laying out of the street or not.

Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co. 30 Ohio St. 604; Chicago & A. R. Co. v. Joliet, L. & A. R. Co. 105 Ill. 388, 44 Am. Rep. 799; Evansville & T. H. R. Co. v. State, 149 Ind. 276, 49 N. E. 2; Harriman v. Southern R. Co. 111 Tenn. 538, 82 S. W. 213; Houston & T. C. R. Co. v. Dallas, 98 Tex. 396, 70 L.R.A. 850, 84 S. W. 648; State ex rel. Lancaster County v. Chicago, B. & Q. R. Co. 29 Neb. 412, 45 N. W. 469; Ft. Dodge v. Minneapolis & St. L. R. Co. 87 Iowa, 389, 54 N. W. 243; Clarendon v. Rutland R. Co. 75 Vt. 6, 52 Atl. 1057; English v. New Haven & N. Co. 32 Conn. 240; Westbrook v. New York, N. H. & H. R. Co. (Conn.) 16 Atl. 724; Lake Shore & M. S. R. Co. v. Sharpe, 38 Ohio St. 150; People ex rel. Denver v. Union P. R. Co. 20 Colo. 186, 37 Pac. 610; New Haven Steam Saw Mill Co. v. New Haven, 72 Conn. 276, 44 Atl. 229, 609; Southern R. Co. v. Atlanta R. & Power Co. 111 Ga. 679, 51 L.R.A. 125, 36 S. E. 873; Clark & M. Priv. Corp. p. 699; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624; Pierce, Railroads, p. 245; 8 Am. & Eng. Enc. Law, 2d ed. p. 377; Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co. 139 Ind. 297, 26 L.R.A. 337, 47 Am. St. Rep. 264, 38 N. E. 604; New York, N. H. & H. R. Co. v. Bridgeport Traction Co. 65 Conn. 410, 29 L.R.A. 367, 32 Atl. 953; State ex rel. Indianapolis v. Indianapolis Union R. Co. 160 Ind. 45, 60 L.R.A. 831, 66 N. E. 163; Indiana ex rel. Muncie v. Lake Erie & W. R. Co. 83 Fed. 284; Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540.

The alleged contract is not within the powers vested in the city council, and the action of the council in enacting the ordinance was *ultra vires*.

State ex rel. St. Paul v. Minnesota Transfer R. Co. 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32.

The provision of the charter of the railroad company requiring it to put streets and highways crossed by its tracks in good repair for public use includes streets and

highways laid out over the right of way after the construction of the railroad.

Manley v. St. Helen's Canal & R. Co. 2 Hurlst. & N. 840; R. v. Kent County, 13 East, 220; R. v. Lindsey, 14 East, 317; Com. v. Louisville & N. R. Co. 109 Ky. 60, 58 S. W. 478; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.; State ex rel. St. Paul, M. & M. R. Co. v. District Ct.; and Evansville & T. H. R. Co. v. State,—*supra*; Egbert v. Lake Shore & M. S. R. Co. 6 Ind. App. 350, 33 N. E. 659; Cincinnati, H. & I. R. Co. v. Claire, 6 Ind. App. 300, 33 N. E. 918; Baltimore & O. S. W. R. Co. v. State and Lake Erie & W. R. Co. v. Shelley, *supra*; Chicago, I. & L. R. Co. v. State, 158 Ind. 189, 63 N. E. 225; Chicago & S. E. R. Co. v. State, 159 Ind. 237, 64 N. E. 862; Farley v. Chicago, R. I. & P. R. Co. 42 Iowa, 236; Pittsburg, Ft. W. & C. R. Co. v. Dunn, 56 Pa. 280; Illinois C. R. Co. v. Copiah County; State ex rel. Lancaster County v. Chicago, B. & Q. R. Co.; Chicago, B. & Q. R. Co. v. State; Indiana ex rel. Muncie v. Lake Erie & W. R. Co.; and Illinois C. R. Co. v. Swalm,—*supra*; Cleveland v. Augusta, 102 Ga. 233, 43 L.R.A. 638, 29 S. E. 584; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Pierce, Railroads, p. 245; 2 Wood, Railroads, 1134; 1 Rorer, Railroads, 583; 1 Redf. Railroads, 418; Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co. *supra*; Elliott, Roads & Streets, §§ 41, 778-780; 3 Elliott, Railroads, §§ 1092, 1098, 1102-1105; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Cambridge v. Charlestown Branch R. Co. 7 Met. 70; Conklin v. New York, O. & W. R. Co. 102 N. Y. 107, 6 N. E. 663.

The obligation to construct and maintain safe crossings at streets and highways laid out over the right of way after the construction of the railroad is imposed upon the railroad company at common law.

Pavesich v. New England L. Ins. Co. 122 Ga. 190, 69 L.R.A. 103, 106 Am. St. Rep. 104, 50 S. E. 68, 2 A. & E. Ann. Cas. 561; Oliver v. North Eastern R. Co. L. R. 9 Q. B. 409; R. v. Kerrison, 3 Maule & S. 526; R. v. Kent County and R. v. Lindsey, *supra*; R. v. Ely, 15 Q. B. 827; R. v. Train, 2 Best & S. 640; R. v. Morris, 1 Barn. & Ad. 441; 1 Hawk. P. C. pp. 365, 408, 444; R. v. Scott, 3 Q. B. 549; R. v. Charlesworth, 16 Q. B. 1012; Louisville, N. A. & C. R. Co. v. Smith; Evansville & T. H. R. Co. v. State; Egbert v. Lake Shore & M. S. R. Co.; Cincinnati, H. & I. R. Co. v. Claire; and Baltimore & O. S. W. R. Co. v. State,—*supra*; State v. Gorham, 37 Me. 451; Dygert v. Schenck, 23 Wend. 446, 35 Am. Dec. 575; Manley v. St. Helen's Canal & R. Co. *supra*.

The bridge over the tracks is a safety device.

State ex rel. St. Paul, M. & M. R. Co. v. District Ct. and State ex rel. Chicago, M. & St. P. R. Co. v. Shardlow, *supra*; Lillstrom v. Northern P. R. Co. 53 Minn. 464, 20 L.R.A. 587, 55 N. W. 624; Morris & E. R. Co. v. Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363; Lake Erie & W. R. Co. v. Shelley, *supra*; Chicago & A. R. Co. v. Pontiac, 169 Ill. 155, 48 N. E. 485; Cleveland v. Augusta and Chicago, B. & Q. R. Co. v. Chicago, *supra*.

Messrs. Rome G. Brown and Charles S. Albert, for respondents:

Defendant railway companies are not obligated to carry a street, by means of a bridge, across their right of way and tracks, where they are the senior occupants.

State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3; State ex rel. Minneapolis v. Minneapolis & St. L. R. Co. 39 Minn. 219, 39 N. W. 153; State ex rel. St. Paul v. Minnesota Transfer R. Co. 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32; State v. Ensign, 54 Minn. 372, 56 N. W. 41; State ex rel. St. Paul v. Chicago, St. P. M. & O. R. Co. 85 Minn. 416, 89 N. W. 1; Albia v. Chicago, B. & Q. R. Co. 102 Iowa, 624, 71 N. W. 541; Hill v. Port Royal & W. C. R. Co. 31 S. C. 393, 5 L.R.A. 350, 10 S. E. 91; State ex rel. Ditch v. Morgan's L. & T. R. & S. S. Co. 111 Ia. 120, 35 So. 482; State v. Wilmington & W. R. Co. 74 N. C. 143; Chicago, M. & St. P. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118; Northern C. R. Co. v. Baltimore, 46 Md. 425; State v. Missouri P. R. Co. 33 Kan. 176, 5 Pac. 772; Rock Creek Twp. v. Joseph & G. I. R. Co. 43 Kan. 543, 23 Pac. 585; 1 Rorer, Railroads, 554; Kansas C. R. Co. v. Jackson County, 45 Kan. 716, 26 Pac. 394; Dyer County v. Chesapeake, O. & S. W. R. Co. 87 Tenn. 712, 11 S. W. 943; Grand Rapids v. Grand Rapids & I. R. Co. 58 Mich. 641, 26 N. W. 159; Chicago & G. T. R. Co. v. Hough, 61 Mich. 507, 28 N. W. 532; People v. Detroit, G. H. & M. R. Co. 79 Mich. 471, 7 L.R.A. 717, 44 N. W. 934; Parks & Boulevards v. Michigan C. R. Co. 90 Mich. 385, 51 N. W. 447; Parks & Boulevards v. Detroit, G. H. & M. R. Co. 93 Mich. 58, 52 N. W. 1083; San Antonio & A. P. R. Co. v. Belt, 24 Tex. Civ. App. 281, 59 S. W. 607.

The legislature would not have the power, either under its police powers or otherwise, to enact and enforce a statute compelling railroads, without any provisions for compensation, to bridge along streets laid out after the railroad was built.

State ex rel. St. Paul, M. & M. R. Co. v. District Ct. 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7; State ex rel. Chicago, M. & St. P. 28 L.R.A. (N.S.)

R. Co. v. Shardlow, 43 Minn. 526, 46 N. W. 74.

The contract by the city to construct all bridges and crossings is valid.

State v. Ensign and State ex rel. St. Paul v. Minnesota Transfer R. Co. *supra*; Brown v. Board of Education, 103 Cal. 531, 37 Pac. 503; 14 Enc. Pl. & Pr. p. 243; State ex rel. St. Paul v. Chicago, St. P. M. & O. R. Co. *supra*.

Under the common-law rule, when a person or corporation, municipal or otherwise, laid out a way across the land, way, highway, street, or railroad right of way of another person or corporation, it was the duty of the junior occupant to bear all the expense of constructing and maintaining the crossings; which duty was a continuing one.

Boston & A. R. Co. v. Cambridge, 159 Mass. 284, 34 N. E. 382; Illinois C. R. Co. v. Copiah County, 81 Miss. 685, 33 So. 502; Bloomington v. Illinois C. R. Co. 154 Ill. 542, 39 N. E. 478; Cleveland v. Augusta, 102 Ga. 233, 43 L.R.A. 638, 29 S. E. 584; Dyer County v. Chesapeake, O. & S. W. R. Co. *supra*; Northern C. R. Co. v. Baltimore, 46 Md. 445; Eyler v. Alleghany County, 49 Md. 269, 33 Am. Rep. 249; People ex rel. Bloomington v. Chicago & A. R. Co. 67 Ill. 118; Dygert v. Schenck, 23 Wend. 446, 35 Am. Dec. 575; Harriman v. Southern R. Co. 111 Tenn. 538, 82 S. W. 213; 1 Rorer, Railroads, p. 555; Hill v. Port Royal & W. C. R. Co. *supra*; Freund, Pol. Power, p. 631; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.; State ex rel. Minneapolis v. Minneapolis & St. L. R. Co.; State ex rel. St. Paul v. Minnesota Transfer R. Co.; State v. Ensign; and State ex rel. St. Paul v. Chicago, St. P. M. & O. R. Co.,—*supra*.

The bridge demanded over the tracks in this case is not a "safety device."

State ex rel. St. Paul, M. & M. R. Co. v. District Ct. *supra*; Morris & E. R. Co. v. Orange, 63 N. J. L. 252, 43 Atl. 738, 47 Atl. 363.

Brown, J., delivered the opinion of the court:

Proceedings in mandamus to compel defendants to erect and maintain a bridge over their right of way and railroad tracks as the same extend across University avenue in the city of Minneapolis. The facts, briefly stated, are as follows: The Minnesota & Pacific Railroad Company was incorporated by chapter 1, p. 3, Laws Minn. Terr. Ex. Sess. 1857; and defendants, St. Paul, Minneapolis, & Manitoba Railway Company and the Great Northern Railway Company, are successors in interest, entitled to all its rights and subject to all its obligations and liabilities, in so far as involved in this pro-

ceeding. The line of railroad was constructed through the city of Minneapolis many years ago, upon a right of way acquired by purchase, of which defendants are now the owners. Long after the construction of the railroad, in the year 1892, the council of the city of Minneapolis, pursuant to the provisions of its charter conferring authority to that end, duly laid out and opened the street in question over and across the railroad right of way, and it has since that time been used as one of the public thoroughfares of the city. At the time the street was opened, the city, at its own cost and expense, erected a bridge over the railroad tracks, and thereafter maintained the same until the year 1903, when it was partly burned and practically destroyed; since which time there has been no passage over the tracks at this point. Subsequent to the destruction of the bridge the city council, by resolution duly adopted, ordered and directed defendants to construct a good and suitable bridge over their tracks at the intersection of this new street, at their own cost and expense. Plans and specifications were prepared by the city engineer under the direction of the council. Defendants refused to comply with the order, and thereafter these proceedings were commenced to compel a compliance therewith. The matter came on for hearing before the court below, and was submitted for its determination upon a stipulation of facts, from which it appears, among other things, that the erection of the bridge is necessary to render the street crossing safe for public travel. This must be taken, for present purposes, as conclusive upon the question of the propriety and necessity of the proposed improvement. Of course, if this stipulation was entered into by counsel for defendants on the theory that this was not a grade crossing, and that the necessity for the bridge arises solely from the fact that the street was laid over the tracks, he is not bound by it, and the question of necessity will be open on a new trial. The court below held that, inasmuch as the street was laid out and opened subsequent to the construction of the railroad, the burden of erecting and maintaining the bridge rested upon the city, and not upon the railroad company. Judgment was entered, dismissing the proceedings, from which relator appealed.

The case is an important one, not only to the railway companies of the state, but to the numerous municipalities thereof as well. In a word, the turning point of the controversy is, Shall the railway companies or interested municipalities bear the burden and expense of constructing crossings at streets and highways intersected by railroads, and maintaining them in a safe

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and suitable condition for public use, where the street or highway is laid out after the construction of the railroad? The precise question was not involved in any previous case in this court, except in a measure in *State ex rel. St. Paul, M. & M. R. Co. v. District Ct.* 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7, which will be referred to hereafter; and whatever may be found in former opinions in analogous cases on the subject must be treated as mere *obiter* remarks. Some conflicting views are apparent, but we are not required, in disposing of the present case, to reconcile them. The court is confronted with the principal question for the first time. We have been assisted by exhaustive arguments by able counsel, have considered the subject thoroughly, and the result of our deliberations is, in our opinion, fully in accord with the legislative policy of this state respecting the matter in issue, and in harmony with the law and policy of other states. Several questions are presented by the record, which will be considered in their logical order.

1. It is contended on the part of defendants that the proceedings laying out and establishing the street in question did not vest in the city the right to open the same on a grade with the railroad track; that a proper view of such proceedings, taken as a whole, will permit of no conclusion other than that the street was laid out up to the right of way and then over the same by means of a bridge which was erected by and at the expense of the city. A strict construction of the proceedings might sustain this contention; but we are of opinion that, fairly construed, a street was laid out across the right of way, and the city authorities thereby became vested with power to open the same at grade, or by an overhead crossing, as propriety, necessity, and public safety required. It is unnecessary to go further into this phase of the case, and we pass to other more vital and important questions.

2. We come, then, to the question whether the state, in the exercise of its police power, may require railroad companies to construct, at their own cost and expense, suitable crossings at street and highway intersections, in cases where the street or highway was laid out subsequent to the construction of the railroad; and further, if that power be vested in the state, whether the legislature has, by any statutory enactment, imposed the obligation upon the respondents, or whether it rests upon them at common law. It is insisted by defendants that there is no such obligation at common law; that the state has no power to cast the burden upon the railroads; and that if any statute exists which may be so construed, it is in violation

of both state and Federal Constitutions, in that it denies to such companies the equal protection of the law, and operates to take from them their private property for public use, without compensation first paid or secured.

3. The question as to the power of the state, as respects streets and highways existing at the time of the construction of a railroad and over which it passes, to require the latter to construct and maintain suitable crossings, by bridges, viaducts, or otherwise, at its own expense, has been before the courts in numerous cases, and the uniform rule, so far as our examination of the authorities has extended, is that the state possesses that power. The obligation of the company in such cases arises from the rule of the common law that, where a new highway is laid out across one already in existence and use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary for the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way. *Northern C. R. Co. v. Baltimore*, 46 Md. 445; *Dyer County v. Chesapeake, O. & S. W. R. Co.* 87 Tenn. 712, 11 S. W. 943. The obligation exists in such cases independent of statute, and, as observed, the authorities enforce it in all cases where the streets were laid out and in existence before the advent of the railroad, and it extends to grade crossings, bridges, and viaducts, or whatever may be essential and necessary to make the crossing safe. If the duty to construct and maintain the bridge in question rests upon the railroad company, either by force of the provisions of its charter or at common law, it is clear that the city may enforce it. Its specially delegated supervision and control over streets and highways, with authority to lay out and open new ones, vest in it authority to enforce all appropriate regulations sanctioned by the police power of the state. The obligation was enforced by the city of Minneapolis in the case of *State ex rel. Minneapolis v. Minneapolis & St. L. R. Co.* 39 Minn. 219, 39 N. W. 153, without special statutory authority, the obligation existing, as it is contended it does in the case at bar, by force of the provisions of the charter of the railroad company.

4. The authorities are not fully agreed upon the question whether the state may, in the exercise of the police power, compel a railroad company, without compensation, to construct and maintain suitable crossings at streets extended over the right of way subsequent to the construction of the railroad. Our examination of the books, however, leads to the conclusion that the great

weight of authority sustains the affirmative of that proposition. The right of the state so to act is maintained in the states of Maine, Connecticut, Illinois, New York, Tennessee, Indiana, Texas, Mississippi, Ohio, Nebraska, New Jersey, Vermont, Wisconsin, and by the Supreme Court of the United States. It involves an exercise of the police power, and the inquiry is whether such a requirement is a proper exercise of that power. It is unnecessary to enter into an extended discussion to show the extent to which the legislature may go in the exercise of this governmental prerogative. The property rights and liberty of the citizen are to be enjoyed in subordination to the general public welfare, and all reasonable regulations for the preservation and promotion thereof are uniformly sustained by the courts. "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient." *Com. v. Alger*, 7 Cush. 53, 85; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471. The reasonable limits of the exercise of the power are not readily defined, but generally speaking it extends to all matters where the general public welfare, morals, and health of the community are involved. *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308.

A reference to a few of the adjudged cases will show the general trend of judicial opinion upon the subject before us. In *Boston & M. R. Co. v. York County*, 79 Me. 386, 10 Atl. 113, the court had before it a statute imposing upon the railroad companies of that state the duty of constructing crossings at subsequently laid out highways, and its validity was affirmed. The court there said: "The power of the legislature to impose uncompensated duties and even burdens upon individuals and corporations for the general safety is fundamental. It is the 'police power.' Its proper exercise is the highest duty of government. The state may in some cases forego the right to taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty and consequent power override all statute or contract exemptions; the state cannot free any person or corporation from subjection to this power. All personal as well as property rights must be held subject to the police power of the state."

In the case of *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109, the court had before it a case where the city instituted condemnation proceedings for the purpose of opening and extending a street across a railroad already in existence, and the question presented was whether the company owning the railroad was entitled, as a part of its compensation for opening the street across its tracks, to the cost of constructing and maintaining the crossing. It appeared that the railroad was constructed prior to the passage of a statute which required all railroad companies thereafter to construct and maintain such crossings and all approaches thereto. It was insisted that the statute was invalid, and had no application to the defendant, because its road was constructed prior to the opening of the street and prior to the enactment of the statute. In that case the court said: "Government owes to its citizens the duty of providing and preserving safe and convenient highways. From this duty results the right of public control over public highways. Railroads are public highways, and in their relations as such to the public are subject to legislative supervision, though the interests of their shareholders are private property. Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way. . . . If railroads, so far as they are public highways, are, like other highways, subject to legislative supervision, then railroad companies in their relations to highways and streets which intersect their rights of way are subject to the control of the police power of the state; that power of which this court has said that 'it may be assumed that it is a power coextensive with self-protection, and is not inaptly termed the law of overruling necessity.' *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71. The requirement embodied in § 8 [2 Starr & C. Anno. Stat. 1885, chap. 114, p. 1937], that railroad companies shall construct and maintain the highway and street crossings and the approaches thereto within their respective rights of way, is nothing more than a police regulation. It is proper that the portion of the street or highway which is within the limits of the railroad right of way should be constructed by the railroad company and maintained by it, because of the dangers attending the operation of its road. It should control the making and repairing of the crossing for the protection of those passing along the street and of those riding on the cars. . . . The items of expense for which appellant claims compensation are such only as are involved in its compliance with a police regulation of the statute. It

is well settled that 'neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare.' *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.* 105 Ill. 388, 44 Am. Rep. 799. It has been held by this court in a number of cases that railroad corporations may be required to fence their tracks, to put in cattle guards, to place upon their engines a bell, and to do other things for the protection of life and property, although their charters contained no such requirements. *Galena & C. Union R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471; *Galena & C. Union R. Co. v. Dill*, 22 Ill. 264; *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Peoria & P. Union R. Co. v. Peoria & F. R. Co.* 105 Ill. 110. . . . Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging without just compensation of private property, or of private property affected with a public interest." "The language of § 8 is broad enough to include streets to be thereafter opened or extended as well as existing streets. . . . There is no reason for supposing that the legislature intended to refer exclusively to a railroad crossing created by running a new railroad across an existing street. The language includes also a railroad crossing created by running a new street across an existing railroad."

The Supreme Court of the United States, in 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, in reviewing the case of *Chicago, B. & Q. R. Co. v. Chicago*, 149 Ill. 457, 37 N. E. 78, after quoting the above excerpt from the prior Illinois decision, said: "We concur in these views. The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated,—if all that should be required,—necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchise granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state." See also *Detroit, Ft. W. & B. I. R. Co. v. Osborn*, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437. In *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418, 72 N. W. 1118, the supreme court of Wisconsin reviewed the subject at length, and reached the conclusion that the subject of crossings at streets laid out after the construction of the railroad was a proper sub-

ject for legislative control, within the police power, and the obligation to construct them might be imposed upon the railroad company without compensation. The opinion in that case points out that the decisions of the supreme court of the state of Massachusetts, which apparently laid down a different doctrine, were founded upon a statute of that state, by which the expense of such crossings was imposed upon the municipality. In the course of the discussion the court said: "The correct policy, in our judgment, is that held by the courts of New York, Maine, Illinois, and Iowa, that the probable results of a failure of duty respecting the safety of railroad crossings are so serious that the public interests require, as between municipalities and railway corporations, that such duty be lodged in some one place, undivided, absolute and with certainty, and that such place be the one where, in the estimation of legislative authority, it can be most readily, economically, certainly, and efficiently performed. Whichever place is designated, the municipalities owning the highways, or the railway corporations, the expense directly or indirectly falls on the public. These considerations are abundantly sufficient, judicially considered, to legitimately locate the whole subject of maintaining safe crossings within the domain of police regulations, so far as the legislative branch of the government may see fit to exercise its authority. It needs no extension of well-settled principles to reach this conclusion. But if it did, the increase of railroad operations, the growth of population and social and business activities, with consequent increasing dangers to persons and property, might reasonably warrant the extension. The tendency of modern development is in the direction of greater, rather than more restricted, use of police power, and necessarily so in order to meet the new dangers and increase of old dangers, constantly occurring as natural incidents of advancing civilization. We think the weight of modern authority is in accord with the views just expressed, and to the effect that everything that goes to make up a crossing safe for public use is as essentially within police regulations as any part of it."

It was held immaterial, as respects the right of the state to require those things to be done, whether the highway be laid out before or after the construction of the railroad. Their statutes were, however, strictly construed, and held not broad enough to include subsequently laid out streets, though an "obvious legislative policy" so imposing the obligation upon the railroads was recognized. In *People ex rel. Kimball v. Boston & A. R. Co.* 70 N. Y. 569, the railroad 28 L.R.A. (N.S.)

company, long after it had constructed its road, was required by statute to construct a bridge over its track at an intersecting highway, and the act was sustained as a proper exercise of the police power. The court in that case said, in substance, that while the legislature could not confiscate property under a pretense of an exercise of the police power, yet it might impose upon railroad corporations such reasonable restrictions, regulations, and burdens as the public good required; could regulate the speed of trains, the way in which they should cross highways, and make all regulations proper to protect the lives of persons carried by them or passing upon the highways across the track. See also *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *Boston & A. R. Co. v. Greenbush*, 5 Lans. 461. It was held by the supreme court of Tennessee, in *Harriman v. Southern R. Co.* 111 Tenn. 538, 82 S. W. 213, that an act of the legislature of that state empowering cities to require railroad companies to construct bridges at places where their tracks crossed the public streets, being referable to the police power, applied to railroads whose tracks were laid before the streets were opened or the city was incorporated. In that case the railroad was constructed and in operation many years before the city of Harriman, which sought therein to compel the company to construct a bridge, was founded. It was incorporated by the legislature long after the appearance and location of the railroad, and numerous streets were laid out over the railroad right of way. In *Illinois C. R. Co. v. Swalm*, 83 Miss. 631, 36 So. 147, the court held that a railway company might be required to place a bridge over its road and to grade approaches thereto for a highway crossing it, though the railroad was in operation for many years before the highway was laid out. It appeared, in that case, that the proposed new highway crossed the tracks of the railroad company at a point where there was a cut 15 feet deep and 50 feet wide, in which the double tracks of the road were located. The court applied the rule of the cases already referred to, following a prior decision of that court. *Illinois C. R. Co. v. Copiah County*, 81 Miss. 685, 33 So. 502. The same doctrine is affirmed in *Texas, Gulf, C. & S. F. R. Co. v. Milam County*, 90 Tex. 355, 38 S. W. 747. The court in that case sustained an act of the legislature imposing the duty upon railroad companies of constructing crossings over public highways, and held that it applied to cases where the highways were laid out by the county subsequent to the building of the railroad, as well as to previously existing highways, and that the expense of grading such crossings,

putting in cattle guards, drain pipes, signboards, and crossing planks formed no part of the damages which the company was entitled to recover on account of the condemnation of its right of way for highway purposes. Such is the law in Connecticut (*Woodruff v. Catlin*, 54 Conn. 277, 6 Atl. 849), in Nebraska (*State ex rel. Lancaster County v. Chicago, B. & Q. R. Co.* 29 Neb. 412, 45 N. W. 469; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624), in Ohio (*Lake Shore & M. S. R. Co. v. Sharpe*, 38 Ohio St. 150), in Vermont (*Thorpe v. Rutland & B. R. Co.* 27 Vt. 141, 62 Am. Dec. 625), and in Indiana (*Evansville & T. H. R. Co. v. State*, 149 Ind. 276, 49 N. E. 2; *Lake Erie & W. R. Co. v. Cluggish*, 143 Ind. 347, 42 N. E. 743; *Lake Erie & W. R. Co. v. Shelley*, 163 Ind. 36, 71 N. E. 151). See also *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175.

5. A contrary doctrine may be said to be the law in the states of Kansas, Louisiana, and Michigan, but the great weight of authority, as shown by the foregoing citations, sustains the general proposition that the police power will uphold legislation of this kind. That the state has such authority, as respects all devices necessary for the safety and protection of the public, has been held by this court. *State ex rel. St. Paul, M. & M. R. Co. v. District Ct.* 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7; *State ex rel. Minneapolis v. Minneapolis & St. L. R. Co.* 39 Minn. 219, 39 N. W. 153; *State ex rel. St. Paul v. Minnesota Transfer R. Co.* 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32. In the case first cited the court held that, where the highway was laid out over and across the railroad tracks, the company was not entitled to compensation for providing and maintaining cattle guards and signboards at the new crossing, but was entitled to compensation for planking the roadway where it crosses the railroad tracks, and for the maintenance of the same. The decision in that case is in harmony with the rule laid down in Kansas and Massachusetts, but is at variance with all other courts whose decisions we have cited. The theory of this court in that case was that planking the tracks was a part of the work of constructing the highway, and in no sense a safety device or necessary for the protection of the traveling public, and did not come within a proper exercise of the police power. That case, however, sustains the general proposition that safety devices may be required at new streets; and sustains the contention of relator, if the bridge in question comes within the meaning of a safety device. But the decision rested upon the general statutes re-

quiring cattle guards and gates to be constructed, and is not here directly in point. What was said in *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3, with reference to the construction of the statute there before the court, as respects streets laid out after the location of the railroad, was not intended as a decision of the question. That question was not involved in the case, and the remark was made for the purpose of indicating that the decision was intended to be limited to existing streets only.

6. Counsel for defendants attempted to distinguish many of the cases cited, as supporting the contention of the relator, on the ground that they involved grade crossings only. The cases cited from Tennessee, Indiana, and Mississippi involved the construction of bridges over the tracks of the railroad company, but, as urged by counsel, the other cases concerned only grade crossings. But there can be no difference on principle, in so far as an exercise of the police power is concerned, between a grade crossing and a bridge over the tracks. The difference between the two is one of degree, relating solely to the matter of expense. But the expense incident to a compliance with police regulations is not an element of consideration, except, perhaps, where arbitrary and unreasonable, or resulting in a practical confiscation of property. Cases where one railroad crosses another have no application, because both stand on an equality respecting rights and obligations, while in cases like that at bar the rights of the public are superior.

7. If, then, it is within the authority of the state, in the exercise of its police power, to require railroad companies to construct and maintain crossings, either at grade or above or below the tracks, at streets laid out after the construction of the road, it becomes necessary to inquire whether the legislature of this state has so declared or ordered by any statute, or whether the obligation rests upon the railroad company at common law.

The charter of the Minnesota & Pacific Railroad Company, predecessor of defendants, provides as follows: The said company shall have the right and authority to construct their said railroad and branches upon and along, across, under, or over any public or private highway, road, street, plank road, or railroad, if the same shall be necessary; but the said company shall put such highway, road, street, plank road, or railroad in such condition and state of repair as not to impair or interfere with its free and proper use. Laws Extra Sess. 1857, chap. 1, p. 6, § 7. A statute very similar to this was held applicable to new streets

by the Indiana supreme court (Louisville, N. A. & C. R. Co. v. Smith, 91 Ind. 119), and the rule announced by that court may be said to have been applied, in effect, by other courts, as shown by the cases cited (Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109). While the statute on its face might be construed as intended to apply to existing highways only, a fair and reasonable construction thereof, in view of the legislative policy of the state on this subject, and the propriety and necessity for some specific regulation, will bring within its scope and purpose streets and highways subsequently laid out and opened. It is elementary that charters of public corporations, in which the rights of the public are involved, are to be construed with strictness against the corporation, and liberally in favor of the public. *St. Louis River Dalles Improv. Co. v. C. N. Nelson Lumber Co.* 51 Minn. 10, 52 N. W. 976; *Com. v. Erie & N. E. R. Co.* 27 Pa. 339, 67 Am. Dec. 471. Or, as said by the New York court of appeals, in *Tracy v. Troy & B. R. Co.* 38 N. Y. 433, 98 Am. Dec. 54, an act of the legislature, induced by public considerations, the purpose of which is to protect the traveling public, should receive a liberal construction to effectuate the purpose of its framers. "A rigid and literal reading would in many cases defeat the very object of the statute and exemplify the maxim that 'the letter killeth, while the spirit keepeth alive.'" The operation of statutes is often extended, by construction, to matters of subsequent creation, and applied to conditions that accrue after their passage, as well as to those that existed before. *Statute Law* (Wilberforce) 166; *Kline v. Minnesota Iron Co.* 93 Minn. 63, 100 N. W. 681; *Schus v. Powers-Simpson Co.* 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68. In those cases we construe the fellow-servant statute, which, on its face, applied to commercial railroads, to apply to "logging" railroads, though they were unknown when the statute was enacted; and the construction there given was sustained by the Supreme Court of the United States in *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159.

The language of statutes, when under liberal construction, is flexible, and general words admit of more than one interpretation. The court may carry the statute beyond the natural import of its words when essential to answer the purpose of the legislature. *Black, Constr. & Interpretation of Laws*, 307, 315; 2 *Sutherland, Stat. Constr.* 2d ed. 582 et seq.; *Avery v. Groton*, 36 Conn. 304; *Smith v. Stevens*, 82 Ill. 554; *Vigo's Case* (Ex parte United States) 21 Wall. 648, 22 L. ed. 690. It is "an old and unshaken rule in the construction of statutes, 28 L.R.A. (N.S.)

to wit, that the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore when the expression is special or particular, but the reason is general, the expression should be deemed general." *Brown v. Pendergast*, 7 Allen, 427. A large construction is to be given to statutes having for their end the promotion of important and beneficial public objects. *Wolcott v. Pond*, 19 Conn. 597. In *Silver v. Ladd*, 7 Wall. 219, 19 L. ed. 138, the Supreme Court of the United States applied this rule to an act of Congress granting lands to certain settlers, and held that the words "single man" included unmarried women. A statute of Alabama provided that whenever an officer required by law to give an official bond acts under a bond "which is not in the penalty payable and conditioned as prescribed by law," such bond is not void, but stands in the place of the official bond, subject, on its conditions being broken, to all the remedies which the person aggrieved might have had upon the bond, had it been executed in conformity with the law. The court held that the statute, being a remedial one, should be construed to apply to a bond properly conditioned, but defectively executed. *Sprowl v. Lawrence*, 33 Ala. 685. Numerous illustrations of the application of this rule to various statutes will be found referred to in 2 *Sutherland on Statutory Construction*, 2d ed. §§ 593 et seq. See also *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773, 938.

The purpose of incorporating this particular provision in the charter of the railroad company was in the interests of the public, and to require the railroad company to keep in good repair all crossings at the intersection of highways; and, though it may be said to be declaratory of the common law, the general rules of statutory construction apply to its interpretation. At the time the legislature granted the charter of the railroad company in 1857, the city of Minneapolis was a small village, and the territory to the north and west through which the proposed line of railroad was to extend was a vast wilderness, occupied by roving bands of Indians. It was in the mind of the legislature, at that time, that the city of Minneapolis would increase in population and ultimately become a large city; that the state through which the road was to be constructed would develop and improve; that settlers would make their homes upon the public lands; and that villages and cities would spring up along the line of the railroad, thus rendering new streets and highways an absolute necessity for public use. Respondents' charter was granted with the reserved right on the part of the state

to construct new highways and streets over its line of railroad, wherever made necessary by the future development of the state. It is not, therefore, in view of this condition, which was in the mind of the legislature and the railroad company, unreasonable to believe that they contemplated, when providing for the care of highway and street crossings, not only those then existing, but such as might thereafter, in the course of the growth and development of the state, become necessary to be laid across the railroad's right of way. The evils intended to be guarded against are the same, and apply equally to both new and old streets. There was no reason why the legislature should deem it prudent to provide for existing highways only; and we do no violence to the rules of statutory construction in holding that the provisions of defendants' charter were intended to include all streets and highways intersected by railroads, whether laid out before or after the building of the railroad. The expression of the statute is special, perhaps; but the reason therefor is general. The expression must therefore be deemed general. *Brown v. Pendergast*, supra.

A railroad company accepts and receives its franchise subject to the implied right of the state to lay out and open new streets and highways over its tracks, and must be deemed, as a matter of law, to have had in contemplation at the time its charter was granted, and is bound to assume, all burdens incident to new, as well as existing, crossings. This feature of the case was before this court in *State ex rel. St. Paul, M. & M. R. Co. v. District Ct.* 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7. That case involved the general statutes requiring cattle guards and signboards to be erected at crossings, which, on their face, like the provisions of respondents' charter, have at least apparent reference to highways crossed by railroad lines. It was there insisted that the requirement had no application to new streets, and that the railroad company was entitled to compensation for their construction, to be allowed as damages for opening the new street over the right of way. The court held that the statute applied to new streets, but that the company was entitled to compensation for planking the crossing. In the course of the opinion, the court said, in substance, that, although the street involved in that case was not in existence when the railroad was constructed, and hence the requirement of the statute referred to did not impose the duty of putting in cattle guards and signboards at the particular place at that time, yet as soon as the street was laid out and opened, the existing statute became applicable and required those things to

be done; that the circumstances with reference to which the statute as a police regulation applied came into existence by the location of the new street, and the requirements of the statute became operative. "When the railroad company accepted its charter, it received its franchise subject to the authority and power of the state to impose such reasonable regulations concerning the use, in matters affecting the common safety, of its dangerous enginery, and not merely subject to the then existing regulations as applicable to then existing conditions; and whether the obligation now in question had been imposed at this time by direct act of the legislature, or, as is the case, arises from the laying out of a new highway, to which the previously existing law becomes applicable, can make no difference." The court further said that, when the franchise was granted to the railroad company to construct and operate its railroad, it was not contemplated either by it or by the state that no more public highways should be laid out which would increase the number of places where the ordinary police regulations would have to be complied with by the railroad company to its inconvenience and expense; on the contrary, that it must have been understood and contemplated, especially in a new state, rapidly advancing in population and in the development of its resources, where new towns were springing up and new avenues for travel and traffic were becoming necessary, that new streets and roads would and must be laid out, and that many of these would necessarily cross existing railroad lines; and "we cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the state to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement,"—citing *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.* 105 Ill. 388, 44 Am. Rep. 799; *Hannibal v. Hannibal & St. J. R. Co.* 49 Mo. 480; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63. The reasoning of the court in that case applies to the case at bar. In conclusion, on this branch of the case, we say, as was said by the Indiana supreme court in *Louisville, N. A. & C. R. Co. v. Smith*, 91 Ind. 119, that the provisions of the railroad charter should not receive the literal and restricted construction contended for by respondent. Neither the interest of the railroad company nor of the public require it.

8. Again, we are clear that the obligation

is imposed upon the railroads at common law. The common-law doctrine that where a street or highway is laid over one already in existence, the expense of making the crossing safe rests upon the company or corporation using the new way, had its origin when railroads were unknown, at a time when the use of all highways, generally speaking, was of the same general nature, the traffic or use of either not being inherently dangerous to the free use and enjoyment of the other. Not so where a railroad crosses a public street, or a street a railroad. In such a case the operation of trains over the latter, particularly in our large cities, is highly dangerous and a menace to the public using the intersecting street. The railroad company is alone responsible for this condition, and, though it has an unquestioned right to operate its trains in such manner as the practical conduct of its business may require, the dangers resulting therefrom are of its own creation, and on every principle of right and wrong it should bear the burden of protecting the public so far as practicable from accident or injury. The common law is not a codification of exact or inflexible rules for human conduct, for the redress of injuries, or protection against wrongs, nor yet a mere figment of judicial genius; but, on the contrary, is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent for the regulation and government of the affairs of men. It is the growth of ages, and an examination of many of its principles, as enunciated and discussed in the books, discloses a constant improvement and development in keeping with advancing civilization and new conditions of society. Holmes, *Common Law*, 1-5, 36, et seq. Its guiding star has always been the rule of right and wrong, and in this country its principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs. The principles governing the rights and liabilities of individuals are often inapplicable to railroad companies, or other corporations, clothed as they are by the state with special rights, powers, and privileges not enjoyed by individuals. The nature and character of the business of railroad companies, the numerous hazards and dangers connected with the conduct of their affairs, render the law for the individual inappropriate and inefficient; and the courts, in testing the various pertinent principles in connection with their peculiar features, have, by methods of differentiation an analogy, evolved new and appropriate rules for the determination of their rights and liabilities. 5 *Harvard L. Rev.* 189.

It is insisted that the rule of the common 28 *L.R.A.* (N.S.)

law above referred to applies to and governs the position of relator in the case at bar, imposing the obligation of constructing the bridge in question upon the city, because the street was laid over the existing railroad. The rule in its abstract form can have no application to facts and conditions such as here shown, and cannot be held to impose upon the municipality the burden of constructing safety devices to protect pedestrians from dangers caused solely by the railroad company. In view of the fact that the railroad company takes its franchise subject to the reserved right of the state to lay new streets over and across its track, and in contemplation that it may do so (*Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *State ex rel. St. Paul, M. & M. R. Co. v. District Ct. supra*), and the further fact that the company is solely responsible for the necessity of safety devices at street crossings, the same being occasioned by the operation of its trains over and across the street, and the further elementary principle that he who creates and maintains upon his premises a condition dangerous and inimical to others is under legal obligation to so guard and protect it that injury to third persons may not result therefrom, the rule of the common law as to existing, must be held to apply equally to new, streets. The right of the state to lay out and open new streets is a condition attached by implication of law to the charter and franchise of the railway company, and the obligation to maintain the street intersections in good repair is a continuing one, follows the franchise, and applies to new streets or highways as soon as they come into existence.

9. It follows, from what has been said, that the obligation to construct and maintain the bridge in question rests upon defendant, unless it is a part and portion of the crossing, for which, within *State ex rel. St. Paul, M. & M. R. Co. v. District Ct.* 42 Minn. 247, 7 *L.R.A.* 121, 44 N. W. 7, it is entitled to compensation, and in no sense a safety device. The court, in the case just referred to, held that the railroad company might be required to construct safety devices at new streets, the planking for the crossing being held in that case not to come within the scope of that expression. So, if the proposed bridge constitutes a safety device, within the meaning of that term, relator's contention must be sustained, and the order of the court below reversed. That it comes within the meaning of that expression we have no serious doubt. It appears from the record that a number of railroad tracks cross this particular street, which is in a

populous part of the city and constantly used by the citizens; that trains are frequently operated over and across the same, rendering the crossing dangerous and unsafe for public use. The purpose of planking between the rails is to make the street passable over the track. But the purpose of a bridge over the tracks is for safety, and for safety alone. There can be no distinction between it and gates or signboards. They answer the same purpose. "Everything that goes to make up a crossing safe for public use is as essentially within the police regulations as any part of it." *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418, 72 N. W. 1118.

10. In the year 1892 the city council of the city of Minneapolis enacted a certain ordinance requiring the respondents to construct certain bridges and approaches there-to at the intersection of certain streets with the railroad tracks. By § 8 of that ordinance, the city council, on behalf of the city, expressly agreed that, in consideration of the performance of the conditions of the ordinance by the respondents, the city would thereafter construct and maintain all crossings or approaches made necessary by the opening of new streets. It is contended by respondents that this ordinance constituted a valid contract with the city, and, having been complied with on their part, it is beyond the power of the city to now require them to construct the bridge in question; that to require it to do so would impair the obligations of the contract, in violation of both state and Federal Constitutions. In this we do not concur. The power of the state to require the defendants to construct the bridge in question, or any other bridge, at streets crossing the right of way, is an exercise of the police power, which can be neither contracted away nor lost by inaction on the part of the public authorities. The contract was beyond the authority of the city council and *ultra vires* and void. *State ex rel. St. Paul v. Minnesota Transfer R. Co.* 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32; 5 Current Law, 637, note 71; *Rochester v. Rochester R. Co.* 182 N. Y. 99, 70 L.R.A. 773, 74 N. E. 953; 36 Century Dig. cols. 1160, 1161, § 1315. See also *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513, where the subject is fully considered. Though the contract before the court in the case last cited was held valid so long as acted on by the parties, the court said that it might be repudiated at any time by the municipality. In the case at bar, the contract was repudiated by the city when its council adopted the resolution requiring defendants to construct the bridge. The resolution was sufficient for that purpose. *Alma v. Guaranty* 28 L.R.A. (N.S.)

Sav. Bank, 8 C. C. A. 564, 19 U. S. App. 622, 60 Fed. 203; *Board of Education v. De Kay*, 148 U. S. 591, 37 L. ed. 573, 13 Sup. Ct. Rep. 706; *Quincy v. Chicago, B. & Q. R. Co.* 92 Ill. 21.

It is probable that this whole matter was set at rest by the last legislature, for the future at least, by the enactment of chapter 280, p. 413, Gen. Laws 1905. But that statute is not here involved, for this proceeding was commenced prior to its passage.

Judgment appealed from is reversed, and a new trial granted.

Affirmed by Supreme Court of United States, April 26, 1909, 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698.

MISSISSIPPI SUPREME COURT.

HARLEY METCALF, Exr., etc., of J. B. Conly, Deceased, Appt.,

v.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

(— Miss. —, 52 So. 355.)

Railroad — passenger — visiting depot to leave baggage.

One who goes to a railroad station a few minutes before the arrival of his train is entitled to the rights of a passenger, although his intention is merely to leave his hand baggage and depart again to transact some personal business before train time, where by statute the railroad company is required to keep its station open at least an hour before the arrival of trains; and he may therefore hold the railroad company liable for an injury due to the unsafe condition of the premises.

(May 23, 1910.)

Note. — Rights of one going to station to deposit baggage.

There is very little authority upon the particular question presented in the foregoing case. The decision, however, is supported by *Hrebrik v. Carr*, 29 Fed. 298, where it was held that a passenger who has gone aboard of an outgoing vessel may return to the wharf without losing his character as a passenger and his right to protection as such, although his purpose for going is merely to purchase tobacco.

In *Abbot v. Oregon R. & Nav. Co.* 46 Or. 549, 1 L.R.A. (N.S.) 851, 114 Am. St. Rep. 885, 80 Pac. 1012, 7 A. & E. Ann. Cas. 961, it was held that a passenger is guilty of contributory negligence which will bar his recovery for injuries received by a fall from a station platform, where, having been provided by the carrier with a well-lighted car in which to await the arrival of his train, he leaves it on a very dark night to walk

APPEAL by plaintiff from a judgment of the Circuit Court for Bolivar County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Shields & Boddie for appellant.

Messrs. Mayes & Longstreet for appellee.

Mayes, Ch. J., delivered the opinion of the court:

In 1908 J. B. Conly instituted suit against the Yazoo & Mississippi Valley Railroad Company for the purpose of recovering damages for injuries alleged to have been sustained by him some time in September of that year, by falling into an excavation made by the company around its depot at Duncan, Mississippi, which, it is claimed, was negligently left open without warning light or safety guard. Mr. Conly alleges that he fell while at the depot for the purpose of taking passage on a train, due about ten or fifteen minutes after he entered the depot, and about 7:20 P. M. After the institution of the suit Mr. Conly died, and the suit is prosecuted by the executor.

The facts are substantially as follows: Mr. Conly left Round lake, Mississippi, in a buggy about 5 o'clock, and drove to the town of Duncan, intending, as it seems, to take passage on the 7:20 P. M. south-bound passenger train on defendant's road. After arriving at the town of Duncan he proceeded to the hotel to get supper. After supper, and fifteen or twenty minutes before the train was due, he left the hotel for the depot, with his grip in his hand and a mileage book in his pocket, having in view the purpose of taking passage on the train, when it should arrive. It was the double purpose of Conly to deposit his grip in the waiting room of the depot in preparation of his contemplated trip, and then to go over to the store of a Mr. Wynn, which was but a short distance from the waiting room, as he desired to speak to Mr. Wynn on a matter of business. Conly proceeded to the

depot, and entered the waiting room safely, and, after depositing his grip, turned to go out to see Mr. Wynn, and as he stepped out of the door fell into an excavation in front of same, and sustained painful injuries at least. It appears that the excavation was made by reason of the fact that the company was repairing its depot. The excavation seems to have been immediately in front of the waiting room entrance, and from 3 to 5 feet deep, and some 2 or 3 feet wide. Across this trench, and for the purpose of getting into the waiting room, some planks were placed leading into the door; but they were unguarded and without warning light. Conly said he could not see the excavation when he entered, because there was no light. As he entered, he says the light in the waiting room was shining in his eyes and blinded him, and when he came out the light was behind him, and the excavation so close to the door that, while it was bright enough to make the gravel walk visible, it did not light up this excavation. It is not our purpose to intimate how serious were the injuries Conly received. That question is left to the jury. The question before this court is simply whether or not the facts make out a case of liability on the part of the company. The court below gave a peremptory instruction to find for defendant, holding that Conly was not a passenger at the time of the injury, and from this action of the trial court an appeal is prosecuted by the executor.

Let us first review the statutes of the state on the subject of the railroad's duty in respect to its depots and waiting rooms. By § 4854 it is made the duty of every railroad to establish and maintain such depots as shall be reasonably necessary for the public convenience; and by § 4867 it is made the duty of every railroad to keep rooms open for the reception of passengers at least one hour before the arrival, and one-half hour after the departure, of all passenger trains. Thus it is that the law requires that the railroads shall have depots, and that they shall make them comfortable and accessible at reasonable times to intending pas-

merely for exercise on an unlighted platform, knowing that the slope of the land is such that some portions of the platform must be some distance from the ground. This case is not of much value upon the question, as, although it might be conceded that the injured person was a passenger, yet he would be unable to recover because he was not acting with due care.

A passenger does not lose his rights as such by going from the waiting room or ticket office to the baggage room for the purpose of checking his baggage. *Exton v. Central R. Co.* 63 N. J. L. 356, 56 L.R.A. 28 L.R.A. (N.S.)

508, 46 Atl. 1099; *Pineus v. Atlantic Coast Line R. Co.* 140 N. C. 450, 111 Am. St. Rep. 856, 53 S. E. 297.

Upon the somewhat analogous question of rights and liabilities of parties when passenger temporarily leaves vehicle before completion of the journey, see note to *Finnegan v. Chicago, St. P. M. & O. R. Co.* 15 L.R.A. 399.

Upon the general question, when does a person who has started for a train become a passenger, see note to *Webster v. Fitchburg R. Co.* 24 L.R.A. 521.

sengers. It would be useless for the statute to require the railroads to keep rooms open for the reception of passengers an hour before the arrival of the train, unless intending passengers could make lawful use of the rooms, within that limit of time, for any necessary or convenient purpose which is in furtherance of the bona fide intention to become a passenger. This is the manifest purpose of the statute, and the very object of having the waiting room open is to receive intending passengers and their hand baggage. When an intending passenger avails himself of the convenience which the law has established for his benefit, and which the railroad must provide, within a reasonable time before the arrival of the train, his object being to facilitate and further his purpose to take passage, even though it be to place his hand baggage in the waiting room as a matter of convenience to himself and in furtherance of his ultimate object, such person, while on the depot grounds or in the waiting room, is a passenger, and entitled to all the protection of a passenger, though he have a purpose to leave again before the arrival of the train on a matter of convenience, pleasure, or business. To hold otherwise would place the rights of persons accepting the conveniences provided by law for their use, in a precarious and uncertain condition under the law, and relieve railroads from a duty which they stand under to the traveling public, for which no sensible or just reason can be assigned. It is a matter of common knowledge that intending passengers use the waiting rooms for depositing their hand satchels and such like, many minutes before a train is due to arrive. Some may loiter around the grounds and the platforms, while others may find it convenient and necessary to cross a street on a matter of business or pleasure; but because of this it is none the less the duty of a railroad to keep its grounds and rooms in a safe condition, both for the intending passenger who imprisons himself within the four walls of the waiting room and the passenger who is on the grounds for the purpose of relieving himself from the burden of his baggage in order that he may go out for some purpose, it being certain that both come to the depot for the ultimate purpose of taking a train.

It is argued by counsel for appellee that, before there can arise the relation of carrier and passenger, there must not only be an intent on the part of a person to become a passenger and to avail himself of the facilities offered by the carrier for transportation, but there must be an express or implied acceptance by the carrier of the person so intending as a passenger. Many authorities

are cited to sustain this proposition, and we find no fault with the law there announced; but the question is, What constitutes this acceptance? Must the person go to the agent of the carrier and formally announce his arrival and intention to take passage? Must the agent then and there formally accept such person, in order to establish the relation? Clearly no such formality is required, in view of the fact that it is the lawful right of every citizen to establish this relation, with or without the consent of the railroad. The true rule is that, when the railroad has opened its waiting room for the reception of passengers as required by law, and any person intending to take passage on the train next to come has resorted to the depot in lawful furtherance of that purpose and in a proper condition to be received as a passenger, there arises from these acts, as a matter of law, the relation of carrier and passenger.

The contention of counsel for appellee that the relation of carrier and passenger could not arise until after Conly had entered the depot grounds on his return from Wynn's store is unsound and too narrow. Conly had gone to the depot to deposit his satchel in the waiting room only fifteen minutes before the arrival of his train. His resort to the depot was for a lawful purpose and in furtherance of his intention. The depot was open for the reception of passengers and for their convenience. If he had hunted up the agent, and told him that he contemplated taking the next train, and desired to place his baggage in the waiting room and go out to see Wynn, the agent would doubtless have told him that the waiting room was there for the full convenience of one situated as he was. He was making the very use of the waiting room that the railroad and the law designed should be made of it. Conly was no loiterer on the depot grounds. He was no idler or trespasser; but he was there on the lawful business of an intending passenger.

We have found no case precisely like the case now on trial, but in the note to the case of *Alabama G. S. R. Co. v. Godfrey*, 130 Am. St. Rep. 76, will be found many authorities discussing this subject and sustaining the principle here announced. In § 997, vol. 2, *Hutchinson on Carriers*, it is said: "It would be impossible to frame a clear, precise, legal definition of the word 'passenger,' which would embrace all its essential elements." In 6 Cyc. Law. & Proc. p. 536, it is said that the relation of carrier and passenger exists, as to railroad companies, "not merely when the passenger enters the train with the ticket already purchased, giving him a contract right to ride, but when he enters upon the premises of the

carrier, with intention to take a train in due course."

The case of *Andrews v. Yazoo & M. Valley R. Co.* 86 Miss. 129, 38 So. 773, is no authority for any question involved in this case. In the *Andrews Case* it is shown that Andrews went to the depot more than two hours before the train he desired to take was due. He went into the private office of the agent, and requested the privilege of doing some writing on account of his own affairs, thus going to the depot and making use of its private office as an office in which to transact some business of his own. While so engaged in his own business in the private office of the depot, the depot agent and Andrews got into a personal difficulty about a private matter, and the court stated in the opinion that Andrews had gone to the depot in order that he might have a comfortable and convenient place in which to transact his own business, and was not, therefore, a passenger; that Andrews was knowingly violating the rules of the company, and could not claim its protection under the facts of that case. But the very object of Conly's visit to the depot was in furtherance of his purpose to take passage. Everything he did while there was in accordance with the rules of the company, and he was merely availing himself of those facilities which the company had placed there for the use of passengers, and which, under the law and rules of the company, he had a right to use.

In view of what we have heretofore said, we deem it unnecessary to further discuss the questions argued on behalf of appellee.

Reversed and remanded.

WASHINGTON SUPREME COURT.

W. K. MACFARLANE, Respt.,

v.

ALLAN-PFEIFFER CHEMICAL COMPANY,
NY, Appt.

(— Wash. —, 109 Pac. 604.)

Master — employment by month — loss of time through sickness — recovery.

A servant employed by the month can recover no compensation for the time during which he was prevented from performing services by sickness.

(June 23, 1910.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover an amount alleged to be due under a contract for personal services. Reversed.

The facts are stated in the opinion.
28 L.R.A. (N.S.)

Mr. J. W. Russell, with Mr. Leopold M. Stern, for appellant:

Under a contract for hiring at a specified monthly wage, the servant is entitled to pay for the time actually devoted to the master's service, but is not entitled to pay for time lost on account of sickness.

Hunter v. Waldron, 7 Ala. 753; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Nichols v. Coolahan*, 10 Met. 449; *Fuller v. Brown*, 11 Met. 440; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Dunlap v. Montgomery*, 123 Pa. 27, 16 Atl. 41; *Parker v. Macomber*, 17 R. I. 674, 16 L.R.A. 858, 24 Atl. 464; *McClellan v. Harris*, 7 S. D. 447, 64 N. W. 522; *McDonald v. Montague*, 30 Vt. 357.

A custom among wholesale dealers to allow their salesmen pay for time lost on account of sickness is unreasonable.

Sweet v. Leach, 6 Ill. App. 212.

Mr. James A. Dougan for respondent.

Morris, J., delivered the opinion of the court:

In January, 1906, respondent was employed by appellant as a traveling salesman at a wage of \$125 per month and expenses. He was discharged July 2d following, and in January, 1909, he brought this action to recover \$208.40, claimed to be due on account of unpaid wages. The answer admitted the employment, but denied the service for the full period of six months; alleged about fifty-five days' lost time in the months of April, May, and June, and an overpayment of \$16.40. The court below found in favor of plaintiff, and defendant appeals.

There can be no question but that respondent performed no service during the time claimed by appellant. He does not claim to, except that between April 12th and 22d, when he admits he was at home ill, he says he sent in an order for a Seattle house, and that between May 7th and 31st, when he admits being at home, he mailed about 500 postal route cards. The question then presented is, Can a servant employed by the month recover for lost time? It is well settled that he cannot. Under the old common-law rule, when the servant was employed for a fixed time, the contract was considered as an entirety, and no recovery could be had except for complete performance. The rule was early modified by the American courts, and it was held that, when, because of sickness or other reason not the fault of the servant, he was unable to continue in his employment, he could nevertheless recover *pro rata* for the service actually performed, less any damage caused by reason of failure of complete perform-

ance. *Dunlap v. Montgomery*, 123 Pa. 27, 16 Atl. 41. The same reasoning which protects the servant in permitting him to recover for service actually performed protects the master in not holding him liable except for services actually performed; and the servant cannot recover for time lost through his own illness or other inability to perform the required service. 20 Am. & Eng. Enc. Law, pp. 19, 43; *Hunter v. Waldron*, 7 Ala. 753; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Nichols v. Coolahan*, 10 Met. 449; *Fuller v. Brown*, 11 Met. 440; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Parker v. Macomber*, 17 R. I. 674, 16 L.R.A. 858, 24 Atl. 464; *McClellan v. Harris*, 7 S. D. 447, 64 N. W. 522; *McDonald v. Montague*, 30 Vt. 357; *Hughes v. Toledo Scale & Cash Register Co.* 112 Mo. App. 91, 86 S. W. 895. The court below was therefore in error in allowing re-

spondent full time for the months of April, May, and June.

Respondent cites a number of cases where a recovery has been permitted because of some waiver by the master. Such cases are not in point here, as there is no waiver either alleged or proved. In fact, it appears from the correspondence of the parties that appellant had informed respondent that it was neither willing nor was it its custom to pay its salesmen for lost time, which would seem to have been acquiesced in by respondent, as in one of his letters to the company in which he refers to his illness he says: "I don't know what your system is in regard to sickness, but I am willing to stand by it."

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

Rudkin, Ch. J., and Gose, Fullerton, and Chadwick, JJ., concur.

Petition for rehearing denied.

Note.—Right of servant to compensation in case of incomplete performance of his contract caused by physical disability.

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I. Performance permanently interrupted by reason of the physical disability of the servant.

a. In general.

1. Abandonment by servant.

In a South Carolina case the court, proceeding upon the broad doctrine that wages may be "apportioned," allowed the plaintiff in an action on the contract to recover remuneration *pro tanto*.¹ The doctrine is manifestly untenable. It has been explicitly rejected in two jurisdictions,² and its un-

¹ *Woodruff v. Thomas*, 2 Speers, L. 148. Compare *Bacot v. Parnell*, 2 Bail. L. 424.

² In *Greene v. Linton*, 7 Port. (Ala.) 133, 31 Am. Dec. 707, where plaintiff had covenanted to serve defendant twelve months as master in a smith's shop, and was to receive as his remuneration one fourth of the net proceeds of the shop during that time, a declaration which stated that he was prevented by sickness from discharging his duty under the contract for the space of four months, and claimed the one fourth of the

soundness is taken for granted in all the cases reviewed below, in which the appropriate remedy is declared to be an action on a *quantum meruit*. These cases, however, although they are in full accord with respect to this point, disclose some divergence of views regarding the precise extent to which the contract should be treated as a controlling element in such an action.

Some of them merely assert in general terms the right of the servant to recover on this footing, and do not embody any definite

theory concerning the evidential significance to be ascribed to the contract.³

In Vermont the *prima facie* measure of recovery is defined as being a proportionate part of the stipulated wages for the period which preceded the supervention of the disability.⁴ In this state the situation is apparently regarded as falling within the scope of the general rule of pleading that a person may bring suit on the common counts for the value of services rendered under a special contract, if he has performed the con-

net proceeds which accrued during the eight months, was held defective. Compare the decision of the court in *Givhan v. Dailey*, 4 Ala. 336.

In *American Pub. House v. Wilson*, 63 Ill. App. 463, where a servant hired for a year had been incapacitated by sickness after three months' work, the court cited the case of *Cutler v. Powell*, 6 T. R. 320, 6 Eng. Rul. Cas. 627, as being controlling. The actual ground upon which the judgment entered by the lower court in the servant's favor was set aside was that the jury had been erroneously instructed that, "if the contract between the plaintiff and the American Publishing House does not provide for a forfeiture of the plaintiff's salary as damages in case plaintiff should not work for the entire time stated in the contract, the plaintiff would be entitled to recover for the time she actually did work, if she did not work the entire time." The criticism of the court of appeals was that the contract contained no express provision for a forfeiture of the plaintiff's salary in any event, and that to instruct the jury in the language used was in effect to tell them that the plaintiff was entitled to recover, as a matter of law, for the time she had worked, irrespective of the terms of the contract.

³ *Hunter v. Waldron*, 7 Ala. 756; *Lake-man v. Pollard*, 43 Me. 463, 69 Am. Dec. 77.

In *Stolle v. Stuart*, 21 S. D. 643, 114 N. W. 1007, where a woman who was engaged, together with her husband, to perform services on a farm, was held entitled to recover the value of her services, the decision was rendered with reference to S. D. Comp. Laws, § 3773, regarding the effect of the incapacity of an employee in terminating the contract.

The rule laid down in *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560, is that, where the contract is for the personal services of the person hired, and cannot be performed by the agency of another, there is an implied condition that an inability to labor during a part of the time so far constitutes an excuse for not laboring during such time that the party hired is not thereby deprived of the right to a reasonable compensation for the services actually performed. A distinction was drawn between contracts of personal service for a definite period, and contracts to do a specific piece of work, such as building a house or constructing a ma-

chine; the ground of the distinction being that the performance of the former class of contracts cannot be delegated, while the performance of the latter class may be effected by the agency of a person other than the contractor. The nondelegable quality of the service rendered under the former description of contracts was to be regarded as operating to the advantage of the servant as well as of the master. Accordingly, the reasonable implication is that, if the master accepts the benefits of a contract involving this incident, it is on the understanding that he accepts its drawbacks also, and one of those drawbacks is that the servant may be disabled, without any fault of his own, from completing his contract. For the reason that the case did not necessarily require a decision upon the point, the court declined to express a definite opinion regarding the correctness of the Vermont doctrine, and say whether the servant "would necessarily be entitled to a proportional part of the sum agreed to be paid for the whole time, and that it should not be reduced so as to indemnify the employer for the loss which he has sustained by the nonfulfilment of the agreement."

That a person who is prevented by sickness from completing the performance of an independent contract is entitled to sue on a *quantum meruit* for the value of the part completed was held in *Hillyard v. Crabtree*, 11 Tex. 264, 62 Am. Dec. 475; *Green v. Gilbert*, 21 Wis. 396.

⁴ In *Fenton v. Clark*, 11 Vt. 557, an action of book account for wages at a stipulated monthly rate, the court laid it down that, where a servant is discharged from his contract by the act of God, the contract may be "apportioned," and that he is "entitled to recover, as upon a *quantum meruit pro rata*." The court argued as follows: Viewing the present as a contract for the personal services of the plaintiff, which could only be performed by himself, we think that, from its nature, a condition was impliedly attached to it, that an inability to labor during a part of the time stipulated, produced by inevitable necessity, should so far constitute an excuse for not laboring during that period that he should not thereby be deprived of a right to a reasonable compensation for the service performed by him under it; and that the rule that where a person by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any ac-

tract on his part. For the purposes of the application of that rule, partial performance, accompanied by a valid excuse for the failure to perform completely, is deemed to be equivalent to complete performance, so far as regards the period during which services were actually rendered.

The New York doctrine is that the measure of recovery is the value of the services rendered, "not exceeding the rate of compensation secured by the terms of the contract."⁵ So far as its practical results are concerned, this doctrine is essentially the same as that adopted in Vermont. But its rationale is that, in order to do justice between the parties, a definite evidential value should be attributed to the contract, and not that the contract should be regarded as having been fully performed *pro tanto*. The writer is of opinion that both the doctrines just stated are unsatisfactory, for the reason that in numerous instances they must operate unfairly either for the employer or the employed.

cident by inevitable necessity,—which, properly understood, we do not intend to impugn,—is not applicable to such a contract. The court then cited several old English authorities regarding the effect of an act of God in discharging contracts of various descriptions, and proceeded thus: "These services being of a personal character, the contract could not be performed by another; and, as the plaintiff was disabled to perform it himself, by reason of sickness, which was the act of God, upon the authority of the foregoing cases the contract was discharged. The inquiry then arises, What is the result? It appears to me apparent that the plaintiff must, at least after the expiration of the four months, be permitted to recover, as upon a *quantum meruit pro rata*, for the services rendered. Common justice requires this, and I should be sorry to find that it was not tolerated by the principles of the common law. To hold, in a case like this, where the plaintiff has been discharged of his contract by the act of God, that there can be no apportionment, upon the technical ground that the contract is entire and its performance a condition precedent, is, to my mind, leaving the substance, and adhering to the shadow. If the plaintiff is relieved from the contract, how can the defendant interpose it as a reason why the plaintiff should not recover for the labor actually performed, though performed under the contract and while it was in force? Suppose a minor was to contract to labor for another for a given time and for a given sum, could he not at any time repudiate the contract, and recover for such services as he might have rendered?"

In *Seaver v. Morse*, 20 Vt. 620, the above case was cited as an authority for the doctrine that recovery may, under the circumstances in question, be had *pro rata* on a 28 L.R.A. (N.S.)

In Vermont it has been laid down that the servant is not entitled to prosecute his remedy by way of a suit on a *quantum meruit* until the time when he would have been entitled to receive the stipulated wages, if he had remained in the employment until the expiration of the agreed term.⁶ This consequence is unavoidable if it be assumed that the contract may properly be treated as an existent and controlling factor. But obviously it cannot be predicated if the contract is regarded as being wholly discharged; and this, it is submitted, is the correct view of the juridical situation.⁷

Whatever theory may be adopted regarding the nature of the servant's remedial rights, there is manifestly no ground upon which a right of action can be predicated in a case where his disability supervened before he had performed any service under his contract.⁸

Where a servant has died after a period of sickness, it is evident that, if the effect of his absence from work upon the ability of

contract to be "apportioned" It was also followed in *Hubbard v. Belden*, 27 Vt. 645. See note 11, *infra*.

In *Patrick v. Putnam*, 27 Vt. 759, the same doctrine applied in the above cases was again applied, but a counterclaim for damages was allowed.

⁵ *Wolfe v. Howes*, 20 N. Y. 202, 75 Am. Dec. 388, affirming 24 Barb. 174.

⁶ *Tebo v. Ballard*, 36 Vt. 612. The court said: "Without entering upon any discussion of the cases involving the subject of the right to recover compensation for the work actually performed under such contracts as this, when the party engaged to do the service fails to complete the stipulated term of service, it is quite obvious that the other party ought not to be subjected to any greater disadvantage than is involved in the loss of service for the residue of the term. In contracts of this kind, where there is no time stipulated when payment for service is to be made, the law implies that it is to be made at the end of the term. If, in this case, the boy had continued in the service of the defendant, no duty of payment, and no right to demand or sue for the payment, would have accrued till the expiration of the term. Because he found occasion, in his temporary misfortune, to cease from service without performing the contract, we think it would be difficult to assign a reason why he should thereby be invested with the right to demand and sue for his pay at an earlier day than he would have had if he had performed his part of the contract."

⁷ In *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560, it was held that the servant's right of action accrues immediately.

⁸ *Powell v. Newell*, 59 Minn. 406, 61 N. W. 335 (no action maintainable for amount of note given for services to be performed *in futuro*).

his personal representatives to recover compensation in respect to that period is considered merely with reference to the right of the master to rescind, they will be entitled to recover if he refrained from exercising that right.⁹ This rule is obviously applicable whatever may have been the duration of the incapacity, and the nature of the bodily or mental conditions by which it was produced. But with reference to the doctrine that permanent incapacitation produces of itself an actual dissolution of the contract, it has been held that, in the case of a mortal sickness, such a dissolution takes effect at the beginning of the sickness, even though in its earlier stages it may have been regarded both by the servant and his physician as merely temporary. In this point of view it is clear that no wages would accrue during the sickness. But the doctrine is one of questionable soundness.

In a case where the wages are payable in instalments, the servant is clearly entitled to recover such instalments as were already due and payable when he was incapacitated from work.¹⁰

2. Dismissal by master.

In cases where the physical incapacity of

the servant is so serious or so prolonged as to justify the master in terminating the employment, and it is terminated by him on that ground, the amount recoverable will be computed on the same footing as in cases where the servant himself abandoned the contract.¹¹ But manifestly no compensation could be recovered in respect of the residue of the term.¹²

If the physical incapacity of the servant was not of such severity or duration as to justify the master in terminating the contract, the remedial rights of the former are, of course, similar to those predicated in cases of wrongful dismissal.

3. Servant released from engagement.

Where a servant, after having been incapacitated for some time by sickness, is released from his engagement, he is entitled to recover on a *quantum meruit* for the value of the work performed by him.¹³

b. Doctrine of the maritime law.

By the maritime law the wages of a seaman for the whole voyage are recoverable, where he is permanently disabled by sickness or injury.¹⁴

⁹ Caden v. Farwell, 98 Mass. 137. The court stated its conclusions as follows: "The son's sickness during the time for which the plaintiff seeks to recover the amount of his wages is agreed not to have been occasioned by his fault. His illness by visitation of God was no breach of his father's covenant with the defendants that he should well and faithfully serve them, and give and devote to them his whole time and labor for three years, at the expiration of which he would come of age, and no ground for abatement or diminution, during his life, of the wages which the defendants had covenanted to pay him. The defendants never undertook to terminate the contract while he lived, and it was not determined by the law until his death." This case relates to an apprentice; but in the present point of view that circumstance is clearly immaterial.

¹⁰ Johnson v. Walker, 155 Mass. 253, 31 Am. St. Rep. 550, 29 N. E. 522.

¹¹ In Hubbard v. Belden, 27 Vt. 645, a farm hand hired for six months was entirely disabled for about one week by an injury. After that he was able to do light work, but did not recover his full capacity for about six months. On account of the severity of his injury and the remoteness of the prospect of his recovery, the defendant had hired a substitute. Held (citing Fenton v. Clark, 11 Vt. 557), that the plaintiff was entitled to recover remuneration to the extent of the benefits derived by the defendant from the partial performance.

¹² In McGarrigle v. McCosker, 83 App. 28 L.R.A. (N.S.)

Div. 184, 82 N. Y. Supp. 494, affirmed in 178 N. Y. 637, 71 N. E. 1133, the plaintiff was hired as a salesman for a term of five years beginning in May, 1898. In July, 1898, the defendant made an assignment for the benefit of his creditors, but the plaintiff continued, at the request of the defendant, to work, at a lower salary, for the assignee as long as the business remained under his control. In August, 1899, the defendant was again given control of the business, and discharged the plaintiff in February, 1901. The plaintiff had been absent, by reason of sickness, for two weeks before his discharge, and for another period of two or three weeks within the preceding six months. Held, that the plaintiff, since he had not shown either a substantial performance of his contract or a condonation by the defendant of defective performance, could not recover damages on account of his discharge.

¹³ Fahy v. North, 19 Barb. 341.

¹⁴ Abbott on Shipping, 14th ed. p. 250, citing various marine ordinances; Chandler v. Grieves, 2 H. Bl. 606, note; and a statement of Lord Mansfield in the unreported case of Paul v. Eden (1785).

The rule laid down in Chandler v. Grieves, supra, was adopted in Walton v. Neptune, 1 Pet. Adm. 152, Fed. Cas. No. 17,135; Ex parte Giddings, 2 Gall. 56, Fed. Cas. No. 5,404.

By the English merchant shipping act of 1894, § 158, a sick or disabled seaman who is left behind at some wayport is entitled to wages *pro rata*.

II. Performance temporarily interrupted by reason of the physical disability of the servant.

a. Doctrine of common-law courts.

1. Servant's rights in respect of work actually done.

In order to entitle a servant to recover compensation under an entire contract, he must show that he had substantially performed his part of the agreement. But he need not prove that his health was such during the whole of his term, as to enable him to devote all his time actively to his employer.¹ This rule is applicable whatever may be the length of the period during which he was incapacitated from work. The most that the master can demand is that some allowance should be made on account of the absence of the servant.

A servant who resumes work after having been temporarily disabled by sickness is entitled to recover a proportionable part of the stipulated wages in respect of the services rendered by him before he fell sick.²

2. Servant's rights in respect of the period during which he was disabled.

In some of the older English text-books

and decisions, it is laid down that if the servant falls sick, or is otherwise disabled by the act of God, the master must not abate any part of his wages for the time during which he was incapacitated.³ But the later authorities show that this doctrine is subject to some limitations, the precise extent of which has not yet been determined with precision.

(1) One limitation is obviously necessitated by the rule which empowers the master to rescind the contract, in some instances, on account of the servant's disability, even when it is merely temporary. A statement which takes due account of that rule will assume something like this form: A servant temporarily prevented by sickness or injury from discharging his duties is entitled to recover his wages for the period during which his disability continued, unless his physical condition was such as to justify the master in dismissing or suspending him, and he was, as a matter of fact, dismissed or suspended.⁴

(2) It would seem necessary to predicate a special limitation as regards cases where the duration of the disability is considerably larger than the period for which the parties are bound by the contract. It is difficult to suppose that a court would hold that, if a servant hired by the week has

¹ See especially *Hunter v. Waldron*, 7 Ala. 756.

² *Hargrave v. Conroy*, 19 N. J. Eq. 281.

³ *Dalton's Country Justice*, chap. 141, cited in *T. Burn's J. P.* p. 222.

In one case Lord Mansfield observed that the master "cannot deduct wages in proportion to the continuance of the servant's sickness." *R. v. Christchurch*, Burr. Sett. Cas. 494.

⁴ In *Cuckson v. Stones*, 1 El. & El. 248, plaintiff agreed to serve the defendant for the term of ten years in the capacity of a brewer. In consideration of the premises, and of the due, full, and complete service of the plaintiff, the defendant agreed to pay him £20 on execution of the agreement, to furnish him with a house and coal during the whole of the term of ten years, and to pay him the weekly sum of £2 10s during the term. Some years after entering the service, the plaintiff fell ill, and was confined to his room for about six months. His wages were paid for about three months, and then suspended. After he was able to attend again personally to business, he was paid as before under the agreement. To an action by the plaintiff to recover wages for the period during which he had been ill, the defendant pleaded that the plaintiff was not, during any part of the time for which such wages were claimed, ready and willing or able to render, and did not in fact during any part of such time render, the agreed or any service. On showing cause against a rule to

enter a verdict for the plaintiff on the plea, it was held that the averment that the plaintiff was not ready and willing or able was not supported by his physical inability, for a time only, and not through his own default, to attend personally to the business; and that, the contract not having been rescinded, the defendant was not entitled to suspend the weekly payments during that time; and the plaintiff was therefore entitled to the verdict. Lord Campbell, Ch. J., said: "[The plaintiff] could not be considered incompetent by illness of a temporary nature; but if he had been struck with disease so that he could never be expected to return to his work, we think the defendant ought to have dismissed him, and employed another brewer in his stead. Instead of being dismissed, he returned to the service of the defendant when his health was restored, and the defendant employed him and paid him as before. At the trial, the defendant's counsel admitted that the contract was not rescinded. The contract being in force, we think that here there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work. It is allowed that, under this contract, there could be no deduction from the weekly sum in respect of his having been disabled by illness from working for one day of the week; and while the contract remained in force, we see no difference between his being so disabled for a day, or a week, or a month."

been disabled for several weeks, the master will be bound to pay him the wages for the whole of that period unless he has been formally dismissed or suspended. But the writer has not found any decisions which furnish any explicit information concerning this phase of the subject. Having regard to the actual facts which they involve, the first two cases cited under the next paragraph might be viewed as pointing, more or less distinctly, to the existence of a rule which will preclude recovery under the circumstances mentioned. But this, as will be seen, was not the *ratio decidendi* in either case.

(3) A third limitation is that which was admitted in two cases which proceeded upon the ground that employees hired by the week or any shorter time are not entitled to compensation for periods during which they are disabled.⁵ The soundness of this qualification, however, in so far as the courts may have intended to propound it as one of general application, seems to be very questionable. The conception of the servant's rights which it represents is inconsistent with that

which is exemplified by another decision which was based upon the theory that the wages of an employee hired by the week should be disallowed or allowed, in respect of a period of disability, according as he is or is not engaged in one of those kinds of work which are commonly described as "manual."⁶

But the decision is itself not entirely satisfactory, if it imports an adoption of the broad position that the question of the master's liability or nonliability can be solved in every instance by the test suggested. The character of the work, it is apprehended, is simply one of the elements to be considered in determining that question. All that can warrantably be asserted in this connection is that the payment of wages in respect of periods of disability is by usage much less common in the case of servants who are, than in the case of servants who are not, engaged in manual work.

(4) Another limitation is indicated by a decision to the effect that, if the servant's disability is so prolonged that his master's interests will suffer unless someone else is

This decision was followed in *Warren v. Whittingham*, 18 Times L. R. 508 (plaintiff, who had covenanted to devote the whole of his time to his employer's business, was absent for ten weeks).

For other cases in which the doctrine that wages may be recovered in respect of a period during which the servant was temporarily unable to work, see *Dartmouth Ferry Commission v. Marks*, 34 Can. S. C. 366 (*arguendo*); *Goode v. Downing*, 5 Terr. L. R. 505 (bartender hired by the month was absent for five days).

In *Hughes v. Toledo Scale & Cash Register Co.* 112 Mo. App. 91, 86 S. W. 895, it was laid down broadly, without any special reference to the length of the absence from work in the given instance (six weeks out of a term of one year), that a person hired for a definite period is not entitled to recover wages for the time during which he is sick and unable to fulfil his contract. The general rule thus formulated was clearly opposed to the weight of authority. The case upon which the court relied, *Patrick v. Putnam*, 27 Vt. 759, was one in which plaintiff had left altogether after working thirty days out of the year for which he was hired, and was therefore not in point.

For cases embodying the rule that, until some action has been taken by the authorities, the right of a public officer to his salary is not affected by his permitted absence on account of sickness, see *O'Leary v. Board of Education*, 93 N. Y. 1, 45 Am. Rep. 156, reversing 9 Daly, 161; *Devlin v. New York*, 41 Hun, 281.

A court which is administering a railroad through a receiver may direct the wages of an employee injured, without any fault on his part, in the line of his duty, 28 L.R.A. (N.S.)

to be paid for the period during which he is incapacitated from working. *Freundlich's Case*, cited in 33 Fed. 701, followed in *Missouri P. R. Co. v. Texas & P. R. Co.* 41 Fed. 319.

⁵ In a Canadian case, where the foreman of a shop hired by the week had been disabled for several weeks, it was laid down that there is no rule of law to the effect that a servant engaged by the week or day is entitled to wages during absence through illness. *Miller v. Morton*, 8 Manitoba L. Rep. 1. This statement was made with reference to a judgment rendered in favor of the defendant by a trial judge sitting without a jury. No cases were cited by the court in its very brief judgment.

In *Adlets v. Progressive Shoe Co.* 84 Mo. App. 288, where a salesman in a store hired by the week had been sick for five months, the court proceeded upon the doctrine that the employment of the plaintiff contemplated actual services, and that, as he was unable by reason of sickness to render these, he was not entitled to compensation.

⁶ In *Mott v. Baxter*, 13 Colo. App. 63, 56 Pac. 192, it was laid down that, in the absence of proof of an agreement to that effect, it will not be presumed, in an action for wages by a stenographer hired at fixed sum per week, that she was to lose her wages for the time she was necessarily absent on account of sickness. The court observed that a deduction from wages on account of sickness is not customary in the case of employees performing clerical work. The length of the period of absence is not stated. Presumably it was short, as the deduction claimed is referred to as a "small item."

hired to perform his duties, the master may engage a substitute, and deduct the sum required for his remuneration from the wages of the disabled servant.⁷

In view of the uncertain effect of the authorities regarding the extent of the obligation of the master to pay remuneration in respect of periods of disability, in cases where the obligatory term of the contract is short, the practical conclusion to be drawn is that a master who finds that a servant is disabled by a sickness or injury so serious that it is likely to continue for a considerable period ought, if he desires to secure himself from liability, to exercise the right of dismissal, which under such circumstances he undoubtedly possesses.

Where the contract is terminable by notice, and notice is given after the servant is disabled, he is entitled to recover the wages accruing to the date when the period of no-

tice expires,⁸ but the master's liability does not extend any further.⁹

A master who has settled with a servant without keeping back any of his wages on account of time lost by reason of his physical incapacity is precluded from afterwards asserting any right which he might otherwise have possessed in the premises to make a deduction on that ground.¹⁰ On the other hand, a servant may by his own pleadings estop himself from asserting any rights which he might otherwise have possessed in the premises.¹¹

If it is a general rule of the given employment that an employee is only to be paid for the actual time that he is on duty, it is manifest that the sole question to be determined in an action for wages in respect of a period of incapacity is whether he had notice of the rule.¹²

It has been held in England that a work-

⁷ Hunter v. Waldron, 7 Ala. 756. There the plaintiff, who had been hired as overseer of a plantation for a year, had been incapacitated by sickness—on one occasion for four weeks, on another for two weeks. The court said: "The fair mode of adjusting compensation in such case is to allow a deduction to the defendant for any loss he may have sustained in consequence of the plaintiff's illness, and pay him the remainder of the sum agreed for the year." It was held to be error to give an instruction which would lead the jury to suppose that a deduction in respect of the period of absence could be made only by virtue of an express agreement; that, in the absence of a contract, the law gives the master the right to recoup damages for that period; and that the burden lies on the servant to show that he is entitled to be paid for that period. The broad language thus used is presumably to be construed with relation to the facts involved. It can hardly be supposed that the court intended to repudiate the original doctrine of the common law, as stated at the beginning of this section, and to substitute, as applicable to all cases, a converse theory to the effect that the master is prima facie entitled to deduct from the servant's wages a sum proportioned to the time lost by reason of his sickness. Such a theory would, it is submitted, be opposed to the general current of the authorities.

⁸ R. v. Raschen, 38 L. T. N. S. 38.

⁹ Ritchie v. Hall, 23 New Zealand L. R. 1107, affirming 23 New Zealand L. R. 409.

¹⁰ Prussing Vinegar Co. v. Meyer, 26 Ill. App. 564. There the evidence shows that during the plaintiff's sickness it was the defendant's intention to pay him his salary without deduction; that it was in pursuance of such intention that the credits proved were given, and the balance of the current salary paid in full, and that it was not until the time of the plaintiff's discharge that the defendant conceived the idea of charging back to him the amount of

his salary during his sickness, and of claiming on this ground a set-off in an action on a promissory note given to the servant.

In Dickinson v. Norwegian Plow Co. 101 Wis. 157, 76 N. W. 1108, the defendant had kept no record of the time lost on account of sickness by a servant he employed by the year, and made no charge against him therefor, but at the end of each year settled with him and paid him the balance due. On a final settlement the employer sought only to retain a certain sum by which he claimed the salary for the last year had been reduced. The court, citing the above decision, held that he thereby waived any claim for said loss of time.

¹¹ In Nichols v. Coolahan, 10 Met. 449, a contract was made by N. and C. that N. should have \$11 per month and board so long as he should work for C.; C. informing N. that he (C.) might not have two days' work for him. N. worked for C. several months, and brought an action for his wages, and annexed to his writ a bill of particulars, in which he charged the price agreed on per month, and gave C. credit for a certain sum on account of three weeks' sickness of N., during which time he was unable to work. C. filed in offset an account against N. for board during his sickness. Held, that the contract was a hiring by the month; that C. was not entitled to payment for N.'s board during his sickness; but that N. could not recover wages during any part of the time of his detention from work by sickness.

¹² In Dartmouth Ferry Commission v. Marks, 34 Can. S. C. 366, a finding which negatived notice was considered by one of the judges to be unwarrantable, where the evidence showed that the servant had accepted and signed a receipt for a month's wages from which the pay for two days on which he was absent from duty was deducted, and that his conversations with other employees showed that he was aware of the rule. In the judgment delivered for the

man engaged at a weekly salary, who has claimed and received compensation under the workmen's compensation act of 1897 in respect of partial incapacity for work resulting from injury received by him during the course of his employment, is not entitled to claim his wages during the time for which he has been incapacitated.¹³ But this decision merely embodies the conclusion of the court with regard to the effect of the statute in question. It is not to be regarded as enouncing a general rule applicable to every case in which the servant has been indemnified by his master for a disabling injury. As a claim based on the obligation of the master to pay the stipulated wages, and a claim for indemnity for an injury received in the course of the employment, constitute independent and distinct causes of action, it seems clear that, apart from the operation of some statute, the satisfaction of a claim of the latter description is not a bar to an action for wages.

3. Servant not bound to make up for lost time.

A servant whose contract covers a definite term is under no obligation to continue

working after the expiration of the term, in order to make up for time lost by reason of illness or conditions of the weather which rendered it impracticable to perform his duties.¹⁴

4. Servant's rights as affected by specific stipulations.

In order to protect the employer against the possible damage which may be caused by the unexpected absence of a disabled servant, it is sometimes stipulated in the contract of hiring that a certain amount of wages shall be forfeited by any servant who fails to give notice of his disability.¹⁵ By a more uncommon description of agreement, resorted to only in those employments which demand an unusually high degree of physical efficiency, the master reserves the right of suspending the servant for a definite period, if he fails to keep himself in the sound condition required for the satisfactory performance of the given work. Such stipulations are valid, and from the time when the right of suspension is exercised the master's obligation to pay the agreed compensation ceases, either partly or entirely, according as it may be provided in the contract.¹⁶

court, this aspect of the case was not discussed, the decision being put upon another ground.

¹³ Elliott v. Liggins [1902] 2 K. B. 84.

¹⁴ Rickard v. Couto, 5 Haw. 507.

¹⁵ In Noon v. Salisbury Mills, 3 Allen, 340, the plaintiff had agreed to forfeit his wages if he should fail to comply with certain printed regulations, one of which was that persons employed "are not allowed to be absent from their work without the consent of their overseer, except in case of sickness, and then they are required to send him word of the cause of their absence." Held, that he could not maintain an action to recover for his labor, if he left his work by reason of sickness, and, though able to send word of the cause of his absence to the overseer, omitted to do so.

In Corsi v. Maretzek, 4 E. D. Smith, 1, where the plaintiff, a singer, had stipulated to conform strictly to the regulations of the opera company "commonly in use," it was held that, as a condition to his right of salary, he was bound, in case of anticipated indisposition, to give notice thereof to the director on or before 1 o'clock on the day of performance, evidence having been adduced establishing the existence of a general regulation to that effect in this and similar establishments. The contract also provided for forfeiture of a month's salary in case the plaintiff should fail to attend at any stated performance, except in the event of sickness certified to by a doctor to be appointed by the director. Held, that the provision was binding upon the plaintiff, although the person appointed by the director was a homeopathic practitioner. 28 L.R.A. (N.S.)

The court said: "The fact of the plaintiff's nonattendance at the concert in question having been proved, it rested with him to show by Dr. Quin that he was incapable of attending from sickness. He was either required to do this, or prove that he had in due time notified the doctor or the manager of his illness. He offered no such testimony; but, having shown that Dr. Quin practised upon principles of homeopathy, he insisted that he was not a doctor, and that, the defendant having failed to appoint a doctor, he was at liberty to show by general testimony that he was ill upon the night in question. . . . By the terms of the contract, the selection of the doctor was left entirely to the defendant, and it was for him to judge of the fitness or capacity of the person to be selected. All that he was required to do, in the fair interpretation of the contract, was to appoint a person who made it his business to practise physic, and it was wholly immaterial to what school of medicine the person so selected belonged, or whether he belonged to any. The legal significance of the term 'doctor,' when employed as it is in this contract, means simply a practitioner of physic. The system pursued by the practitioner is immaterial. The law has nothing to do with the merits of particular systems."

¹⁶ In Russell v. National Exhibition Co. 60 App. Div. 40, 69 N. Y. Supp. 732, the plaintiff was engaged to play baseball, under a contract which authorized his discharge without pay for a definite period for lack of sound physical condition, and required him to keep himself in the best physical condition to play ball during the

Where one of the regulations of a friendly society which a servant has joined in compliance with the rules of his employer explicitly provides that he shall be entitled to sick pay during sickness, but not while receiving wages from his employer, he clearly cannot recover any wages in respect of a period during which he was in receipt of the sick pay.¹⁷

5. Effect of specific statutory provisions.

An employer who, when sued for wages alleged to be payable in respect of a period of sickness, seeks to escape liability on the ground of the claims being barred by a regulation made by an executive official in pursuance of the terms of a statute, must, of course, show that the regulation in question was authorized by the statute relied upon.¹⁸

playing season, providing that, if he failed to do so, the defendant might, on reasonable notice, deduct from the amount due or to become due a proportional part of plaintiff's consideration while his disability continued. In an action by the plaintiff for his salary, after he had been suspended under the stipulation, it was held that an instruction stating that a discussion of plaintiff's condition was not necessary because plaintiff was entitled either to a cancellation of his contract or to suspension for a definite period was erroneous as eliminating a proper defense, since plaintiff's physical condition was an essential element of the contract. It was also held that a notice that plaintiff was suspended without pay until he was in a fit condition to play according to his contract constituted a suspension for a definite period, within the meaning of the contract, since it was as definite as the cause assigned for suspension would permit.

¹⁷ Niblett v. Midland R. Co. [1907] K. B. 96. The court characterized the claim of the plaintiff as "an attempt to apply general principles of law to a special contract which they would not fit."

¹⁸ Young v. Tockassie, 2 Austr. Comm. L. R. 470. In that it appeared that the amendment of the Queensland Pacific Island labor act provides (§ 3) that all agreements made with islanders, whether the stipulated time for their return to their native islands has arrived or not, shall be in a certain form prescribed by schedule G to the act. In that schedule there is a provision to the effect that no wages shall be deducted for medical attendance. In the principal act there is a section which empowers the governor in council to make regulations "not inconsistent with the provisions of the act, for the due and effectual execution of the provisions thereof, and respecting any matter or thing necessary to give effect to the objects of this act, etc." A regulation

28 L.R.A. (N.S.)

b. Doctrine in civil-law jurisdictions.

1. Scotland.

The Scotch decisions are obscure and conflicting, and possibly different rules are applicable, according as the servant's incapacity was due to sickness or to injuries received in the course of his employment.

With regard to the former description of incapacity, it is laid down by the older authorities that a servant who is hired for a fixed period is entitled to his full wages, though he should by sickness be disabled from his service for a part of that time.¹ This broad doctrine, however, has not been accepted by all the authorities.² The only reported decision which bears on the subject is one in which a farmer was held not to be entitled to deduct any part of the wages of a servant hired for a year, on account of his having been disabled from work by sickness

purporting to be made in pursuance of this section provided that "no employer of any time-expired islander shall be required to pay the wages of any such islander during sickness." In a proceeding by a time-expired islander to recover a sum deducted from his wages for a period during which he was sick, it was held (affirming the decision of the Queensland supreme court) that this regulation did not fall within the enabling words of § 47 of the act, and was consequently ineffective to exclude the operation of the common law in the case of such agreements as were made in the statutory form. Accordingly, as the written agreement for service contained no stipulation regarding such a deduction, the respondent was held to be entitled to recover. The court expressed its inability to see how the power to make regulations could be treated as authorizing regulations which altered the law regarding the obligations of masters and servants under agreements drawn up in the form prescribed by the statute.

¹ Fraser on Mast. & S. p. 141, referring to Erskine, Principles, 3, 3, 16, 2 Hutch. p. 166; Bankt. 1, 20, 19.

² In Bell's Principles of the Law of Scotland, § 179, it is laid down that sickness will excuse nonperformance for a short time, but that, if the inability should continue long, and a substitute should be required, the master will be discharged from his counter obligation to pay wages.

This also is the opinion of Pothier, who says (Louage, art. 168) that when a servant hired for a year, month, or other fixed period is disabled by sickness for any considerable portion of the term, the master is entitled to deduct a proportionate part of his wages; but that, if the indisposition is slight, and only prevents the servant from working for a few days in the year, no deduction can be made. See Fraser, Mast. & S. p. 141.

during eleven weeks of that period.³ We also find a judicial expression of opinion, which is relevant in this connection in a *dictum* that "it was shameful in any master to say that he was entitled to compensation for a period of sickness during which his servant was incapacitated from labor."⁴ According to Lord Fraser (*Master and Servant*, p. 142), this statement cannot be taken, and was possibly not intended, as a general statement of legal doctrine. But one of the judges of the court of sessions has declined to indorse this criticism.⁵

Apparently the only conclusion that can be drawn from this curiously nebulous body of authorities is that a servant has ordinarily no right to be paid wages for time during which he was not fulfilling his part of the contract, the only exception to this rule being predicated where the disability is of a very short duration in proportion to the period of hiring.⁶

With regard to the effect of injuries received by a servant in the course of his employment, it is laid down in one text-book that a disability arising from this cause will excuse his nonperformance of the contract, and will not entail a forfeiture of his wages for the period of incapacity.⁷ In another treatise it is stated broadly that "if a man be disabled in the course of his service, and in consequence of doing his duty, as where a groom is kicked by his master's horse, he is entitled to full wages till the covenanted issue of the service, however remote."⁸

In the opinion of Lord Fraser, this doctrine, in so far as it draws a distinction between sickness caused by hurts received in the master's service, and sickness caused by other accidents, is contrary to principle. His conclusions are summed up in the following passage (*Mast. & S.* p. 141); "If an injury occurring to a servant in the discharge of his duty can be imputed to the recklessness or negligence of his master, then the servant's true remedy is an action for damages. On the other hand, if the injury is due to pure accident, there seems no reason why

the master should be required to make compensation therefor. As wages are the counterpart for service given, and none is given, it is not only hard on the master, but not reconcilable with the law of contract, that he should be obliged to pay just the same as if the contract were fulfilled. It is thought that the better rule is that a servant disabled without fault on his part, and without fault on the part of the master, has no claim for wages during disablement, though this may have been caused by injury sustained when in the performance of his work."

2. Louisiana.

In this state the doctrine applied in the case of overseers of plantations, who are nominally engaged by the year, is similar to that which has been adopted in common-law jurisdictions. Protracted sickness is deemed to be a sufficient cause for discharging them. But until an overseer has been discharged, his wages continue to accrue, unless the contrary has been stipulated.⁹ Presumably a like rule prevails with regard to other classes of servants hired for a fixed period, and remunerated in money. If a servant whose remuneration is to consist of a share of the crop raised by him is discharged on account of long-continued sickness, the master is required to pay him a proportionable part of the value of the crops for the time during which he has actually been employed.¹⁰

3. Quebec.

Apparently the only reported case directly in point is one in which it was held that a servant hired by the month, who abandons his employment on account of sickness while one of the months is still incomplete, is entitled to his wages for the time during which he has worked.¹¹ In another case the question whether the employer was liable for a portion of the servant's wages which had been kept back during a long period of disability was alluded to, but not determined.¹²

³ *White v. Baillie* (1794) *Morr.* 10147. In his treatise on *Master and Servant* (p. 142), Lord Fraser asserts that this case is not of high authority, as it appears to have been decided on its own circumstances, and "without laying down any general rule on the subject."

⁴ Lord Meadowbank in *Maclean v. Fyfe* (1813) *F. C. (Sc.)* 698, the remark being made with reference to an allegation of the defendant that there was an understanding that the plaintiff was to make up for time lost by his indisposition.

⁵ Lord Moncrieff in *Manson v. Downie*, 12 *Sc. Sess. Cas.* 4th series, 1103.

⁶ See Fraser, *Mast & S.* p. 142. 28 *L.R.A.* (N.S.)

⁷ *Bell's Principles of the Law of Scotland*, § 179.

⁸ *Tait's Justice*, *sub. voc.* "Servant."

⁹ *Miller v. Gidiere*, 36 *La. Ann.* 201.

¹⁰ *Jeter v. Penn*, 28 *La. Ann.* 230, 26 *Am. Rep.* 98.

¹¹ *Fortin v. Tremblay* (1832) 10 *Legal News (L. C.)* 230.

¹² In *Prevost v. L'Association de Bienfaisance*, *Rap. Jud. Quebec*, 9 *C. S.* 381. There the plaintiff, a police constable, was retained on the force during a long illness, by the superintendent, but about half his pay was deducted by the latter and handed over to the defendant, a benefit society founded for the assistance of the police, of

III. Effect of physical disability considered with reference to circumstances importing fault on the servant's part.

a. Disability anticipated when contract was made.

It has been held that no recovery in respect of the services actually rendered can be had in a case where the disability by which complete performance was prevented was of such a nature that the servant must necessarily have foreseen that it would accrue before the end of the period covered by the contract.¹³

But the mere fact that a disease which temporarily rendered the servant incapable of discharging his duties had been contracted before he was hired will not preclude him from claiming compensation for the period of incapacity, unless it is shown that he was aware, at the time of the hiring, that the effect of the disease would be to incapacitate him.¹⁴

b. Disability caused by injury sustained by reason of the servant's own negligence.

The writer has not found any decisions by courts of common law which show to what extent a servant's remedial rights are

affected by the circumstance that his disability was due to his own negligence. The few authorities which bear upon the point are cited in the note below.¹⁵

IV. Duty of servant to resume work after removal of his disability.

One of the general rules of the law of contracts is that, whenever any special matter does not operate to annul a contract, but only to suspend performance temporarily, it is the duty of the obligor to resume performance after the cause of the suspension has been removed.¹ Ordinarily, therefore, a servant who has been compelled by physical incapacity to discontinue his work is bound, after the removal of that incapacity, to return to his master and complete the stipulated services. Unless this duty is fulfilled, he will stand, in respect to the recovery of compensation, in the position of one who has wrongfully abandoned the contract. But this consequence is not predicable where ill health constituted, under the express terms of the contract, a sufficient ground for terminating it;² nor where his sickness was of such severity, and its duration a matter of such uncertainty, that his master was justified in refusing to await his recovery, and in engaging a substitute;³ nor where the servant's capacity for work was

which the superintendent was president. The plaintiff acquiesced in this arrangement as long as he was on the force. It also appeared that constables are subject to a stoppage of part of their pay if the superintendent thinks proper to make such deduction. Held, that plaintiff had no action against the benefit society for the money deducted from his pay, and that his remedy, if any, would be against the city for non-payment of his full wages.

¹³In *Jennings v. Lyons*, 39 Wis. 553, 20 Am. Rep. 57, the plaintiff agreed that he and his wife should work for the defendant, a farmer, for one year for a lump sum. The wife was pregnant at the time when the contract was made, and, after working about four months, left the employment in anticipation of her confinement. Both the plaintiff and his wife were then discharged, and about six weeks afterwards her child was born. Held, that the nonperformance of the contract was not excused by a sickness of this character, and that no action on a *quantum meruit* could be maintained.

¹⁴*R. v. Raschen*, 38 L. T. N. S. 38.

¹⁵In a Scotch case it was held that a servant hired for a year, who, through his own recklessness, receives in the course of his employment an injury which disables him from work, is not entitled to recover his wages for the remainder of the term of service. *M'Ewan v. Malcolm* (1867) 5 Scot. L. R. 62; *Fraser, Mast & S.* p. 140.

In § 160 of the English merchant ship-
28 L.R.A. (N.S.)

ping act of 1894 (§ 8 of the act of 1854), it is provided that a seaman disabled by sickness which was due to his own fault is not entitled to full wages.

In *Johnson v. Huckins*, 1 Sprague, 67, Fed. Cas. No. 7,390, the court proceeded upon the assumption that this was the rule of admiralty law.

But under the doctrine applied in two more recent cases, a seaman disabled in the service of the ship during a voyage is entitled to wages for the remainder of the voyage after he is removed to a hospital on shore, whether he is injured by the negligence of the officers or crew or through his own contributory negligence. *The City of Alexandria*, 17 Fed. 390; *The Governor Ames*, 55 Fed. 327.

¹See *Baylies v. Fettyplace*, 7 Mass. 325 (a case of embargo).

²*Seaver v. Morse*, 20 Vt. 620, where it was stipulated that the contract might be terminated if either party should become dissatisfied, provided that, when the cause of dissatisfaction was made known, it could not be removed. The position of the court was that it clearly would not be in the power of the master to "remove the cause" if sickness should be the ground of dissatisfaction.

³*Hubbard v. Belden*, 27 Vt. 645. The absence of any obligation on the servant's part to return was predicted upon the ground that, under the given circumstances, the master would not be bound to take him back.

not restored until after the expiration of the agreed term;⁴ nor where, having regard to the circumstances, the portion of his wages to which he would have been entitled, under his contract, for the work done after returning, would not have constituted a fair remuneration;⁵ nor where his master refused his offer to resume the performance of his duties, unless he would assent to a condition which it was unwarrantable to impose;⁶ nor where, after his sickness began, he requested and obtained from his master a conditional release from his obligations, and the circumstances under which it was to be subject to revocation have not supervened;⁷ nor where the master has so acted as to be chargeable with a waiver of any claim, which he might otherwise have had, to forfeit the wages.⁸

The wrongful refusal of the master to allow the servant to resume work after his recovery will justify the servant in treat-

ing the contract as rescinded, and claiming the reasonable value of his services.⁹

V. Master's right of recoupment for damage caused by servant's death or disability.

In one case the court in its argument took it for granted that the compensation found to be recoverable in respect of work performed by a deceased employee should be reduced to the extent of the damages sustained by the employer in consequence of the loss of profits which would have accrued to him through the services of the employee, if they had not been interrupted by the death of the latter.¹ There is also authority for the doctrine that the master is entitled to deduct from the wages of a servant who has been unable, by reason of physical incapacity, to attend to his duties for a portion of the stipulated term, the damages caused by his imperfect performance of the contract.²

⁴ Fenton v. Clark, 11 Vt. 557. The court said: "His services were of a personal character, and the time of performance material to the rights of the parties. The defendant could not be required to accept of the services at another time, and the plaintiff was as much excused from their performance by reason of his sickness as he would have been in case of death; and the contract being annulled by this act of God, and not simply suspended for a time, there is no reason why the plaintiff should have proffered to work for the defendant after being restored to health. Such proffer the defendant might have rejected, and it could have had no possible effect upon the rights of the parties upon what was already past."

⁵ In Dickey v. Linscott, 20 Me. 453, 37 Am. Lec. 66, where an entire contract to work on a farm for seven months at a monthly rate began at the season when the days were shortest, and extended over the long days of harvest time, and the servant, owing to sickness, had been disabled from work during a period of about six months, it was held that he was not bound to labor at the stipulated wages during the remaining month, when the days were long and labor valuable.

⁶ Fahy v. North, 19 Barb. 341. There the condition deemed to be unjustifiable was that the servant should agree to pay a certain sum as damages for the time lost by his sickness. In some states this condition would be deemed valid.

⁷ Laton v. King, 19 N. H. 280.

⁸ Seaver v. Morse, 20 Vt. 620 (defendant had offered plaintiff, after he left the service, the amount which was due to him at the stipulated rate of compensation).

⁹ Ryan v. Dayton, 25 Conn. 188, 65 Am. Dec. 560.

¹ Clark v. Gilbert, 26 N. Y. 279, 84 Am. Dec. 189.

² In Patrick v. Putnam, 27 Vt. 759, Redfield, Ch. J., after stating that the only 28 L.R.A. (N.S.)

question in the case was whether a person who contracts to labor for a definite time, and "fails to fulfil his contract by reason of sickness, is liable to have the amount of his recovery reduced by the damages sustained by the employer in consequence of his not being able to complete the full term of service," proceeded as follows: "It is certain that in most analogous cases, where one is allowed to recover for part performance of an entire contract, unless hindered in the performance of his contract by the other party, . . . he is liable to such deduction. He is allowed to recover only what his services have benefited the other party, as compared with full performance. The other party is not liable to divide the loss sustained by the innocent misfortune even of the plaintiff. This is so held in the case of clearing land, building wall and other erections upon the land of the employer, as decided in the cases cited in argument. So, too, an infant even, who is of course not bound to full performance of his contract, and who may abandon it at any time, and recover upon a *quantum meruit*, is still held liable to have deducted from his wages any damages his employer may have sustained in consequence of not serving the full term stipulated. Thomas v. Dike, 11 Vt. 273, 34 Am. Dec. 690, and subsequent cases." Reliance was also placed upon the following remarks of Bennett, J., in Fenton v. Clark, 11 Vt. 557: "It is not the object of the law to punish the party for a violation of his contract, but to make the other party good for all damages he may sustain by such violation. Common justice required that the plaintiff should have been permitted to recover so much as the defendant had been benefited by the labor, after deducting any damages he may have sustained by reason of the violation of the contract." Judgment was rendered against the plaintiff in accordance with the report submitted by a referee to the effect that, in

But a doctrine which involves the acceptance of the theory that a person may be liable in a positive sense for a loss which, *ex hypothesi*, has been sustained without any fault on his part, seems to be so essentially inconsistent with the fundamental principles by which juridical responsibility is determined, that its soundness may be regarded as highly questionable, to say the least.³ With all deference to the authority of the courts which consider that the employer should be allowed to recoup damages, the writer ventures to suggest that the most that he can reasonably demand is that, in computing the amount recoverable, regard should be had to the average value of the given services during the whole of the term, so that his liability may be adjusted on such a footing as will prevent the employee or his personal representatives from deriving any actual advantage from the interruption or suspension of the work.⁴

consequence of the defendant's being unable to hire another hand at as low a rate of wages after the plaintiff left, as he could have done at the time when the plaintiff was hired, his damages from the nonperformance of the contract were more than the amount claimed by the plaintiff.

In *Hunter v. Waldron*, 7 Ala. 753, and *Wilson v. Smith*, 111 Ala. 170, 20 So. 134, the master is said to have a right to "recoup damages" on account of loss caused by the servant's absence. But possibly the court merely meant that a deduction proportioned to the length of the absence might be made from his wages.

³ It will be observed that in the Vermont case cited in note 2, *supra*, Chief Justice Redfield made no attempt to cope with the difficulty created by the consideration that his doctrine operated so as to attack the consequences of culpability to an extent wholly beyond the control of the employee. But apart from the general consideration, his reasoning appears to be in some respects extremely unsatisfactory. He laid much stress upon the analogy of the rule applied in cases where an entire independent contract is not fully performed, owing to the innocent misfortune of the contractor. This rule, it is submitted, is wholly irrelevant in determining the reciprocal rights and liabilities of master and servant in the present connection. Those rights and liabilities are an outcome of the peculiar incidents of the relationship created by a contract of hiring, and must always be considered with due reference to the original doctrine, which rendered the master responsible for the full amount of the servant's wages, whatever the duration of his disability. Moreover, the rule relied upon has, it is apprehended, never been so construed as to charge the contractor with any liability other than the loss of the remuneration which his misfortune has prevented him from earning. The other rule adverted to by the chief justice, 28 L.R.A. (N.S.)

viz., that applied in cases where a minor abandons his employment, is equally irrelevant. Between cases in which nonperformance is caused by *vis major*, and those in which nonperformance results from the voluntary act of the defaulting party, there is such a fundamental difference that it is unjustifiable to argue, by way of analogy, from one class of cases to the other. In the one instance there is no element of culpability involved. In the other the essence of the juridical situation is that, although there is culpability involved, the policy of the law with regard to the protection of minors operates so as to qualify the consequences which, when adults are concerned, result from a breach of such contracts as those now in question.

⁴ In *McLellan v. Harris*, 7 S. D. 447, 64 N. W. 522, it was explicitly laid down that the administrator of a deceased servant is "entitled to recover for his services upon a *quantum meruit* without recoupment."

C. B. L.

KANSAS SUPREME COURT.

FIRST NATIONAL BANK OF LINCOLN,
NEBRASKA, Plff. in Err.,

v.

ELIAS DUNCAN.

(80 Kan. 196, 101 Pac. 992.)

Estoppel — theory advanced on former trial.

1. Where a demurrer to a petition is sustained and the case is thereupon dismissed without prejudice, at the request of the plaintiff, a theory of the law advanced by counsel for the defendant on the argument is not conclusive upon him in a subsequent action on the same matter between the same parties.

Same — assertion in prior action.

2. Where a litigant, as a part of his cause of action or defense, asserts that he is indebted to a third person not a party to the litigation, such assertion is not conclusive upon him when subsequently used by such person.

(May 8, 1909.)

Headnotes by MASON, J.

Note. — Conclusiveness of judicial admission as to strangers.

This note presupposes that a judicial admission is receivable as evidence against the party in a subsequent suit between him and a stranger, and simply presents the question whether in such suit such admission is conclusive against him.

For reasons sufficiently stated in *FIRST NAT. BANK v. DUNCAN*, the vast majority of cases have held or at least recognize that a judicial admission made by a

ERROR to the District Court for Sheridan County to review a judgment in defendant's favor in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. E. R. Sloan, Hall, Woods, & Pound, and R. H. Smith for plaintiff in error.

Messrs. R. V. Chambers and Burch & Litowich, for defendant in error:

The admissions were competent evidence, but did not work an estoppel.

Solomon R. Co. v. Jones, 30 Kan. 601, 2 Pac. 657; Leavenworth Light & Heating Co. v. Waller, 65 Kan. 522, 70 Pac. 365.

party to a suit is not conclusive against him in a subsequent suit against him by a stranger. *McLemore v. Nuckolls*, 37 Ala. 662; *Booth v. Lenox*, 45 Fla. 191, 34 So. 566; *Wilkinson v. Thigpen*, 71 Ga. 497; *Harris v. Amoskeag Lumber Co.* 101 Ga. 641, 29 S. E. 302; *Robb v. Robb*, 134 Iowa, 195, 111 N. W. 803; *Murphy v. Hindman*, 58 Kan. 184, 48 Pac. 850; *Morgan v. Kinnard*, 23 La. Ann. 645; *Lachman v. Block*, 47 La. Ann. 514, 28 L.R.A. 266, 17 So. 153; *Brown, C. & Co. v. Haigh*, 113 La. 563, 37 So. 478; *Parsons v. Copeland*, 33 Me. 370, 54 Am. Dec. 628; *Carradine v. Carradine*, 33 Miss. 698 (see quotation from this case in the DUNCAN CASE); *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; *Meissner v. Standard R. Equipment Co.* 211 Mo. 112, 109 S. W. 730; *Nichols, S. & Co. v. Jones*, 32 Mo. App. 664, *Quinby v. Carhart*, 133 N. Y. 579, 44 N. Y. S. R. 666, 30 N. E. 972; *Bowers v. Smith*, 28 N. Y. S. R. 346, 8 N. Y. Supp. 226; *Limerick v. Lee*, 17 Okla. 165, 87 Pac. 859; *Buzard v. McAnulty*, 77 Tex. 438, 14 S. W. 138; *Tabb v. Cabell*, 17 Gratt. 160; *Morrison v. Householder*, 79 Va. 627; *Grippen v. Benham*, 5 Wash. 589, 32 Pac. 555; *Wilson v. Phoenix Powder Mfg. Co.* 40 W. Va. 413, 52 Am. St. Rep. 890, 21 S. E. 1035; *Dahlman v. Forster*, 55 Wis. 382, 13 N. W. 264; *Yeska v. Swendrzynski*, 133 Wis. 475, 113 N. W. 959; *Blanks v. Klein*, 1 C. C. A. 254, 2 U. S. App. 363, 53 Fed. 436; 11 Am. & Eng. Enc. Law, 2d ed. p. 449.

In *Morgan v. Kinnard*, 23 La. Ann. 645, it was held that a judicial admission in the defense to the payment of a note given for the price of land, that the defendant had no title, will not estop him from setting up title to the land as against one who had illegally secured possession of the land.

So, in *Water Supply Co. v. Georgetown*, 26 Ky. L. Rep. 327, 81 S. W. 660, where a water company, in an action between an individual and the city in regard to taking water from a spring, and in which the company was made a party, adopted the answer of the city, pleading prescription, it was held that such company was not thereby estopped from showing, in a subsequent suit between it and the city, a title independent of the grant from the city.

Mason, J., delivered the opinion of the court:

Elias Duncan executed two promissory notes, one payable June 1, 1905, the other June 1, 1906, secured by a real-estate mortgage which contained a clause providing that a failure to pay the first note promptly should render the other at once due. The first note was not paid at maturity. The First National Bank of Lincoln, Nebraska, purchased the second note between June 1, 1905, and June 1, 1906, and after the latter date brought action upon it, and, having failed to recover, now prosecutes error. Duncan pleaded matters constituting a sufficient defense against the original payee,

However, in Tennessee it seems to be held that a judicial admission is conclusive against the party even in a subsequent suit against him by a stranger. *Stillman v. Stillman*, 7 Baxt. 174; *Watterson v. Lyons*, 9 Lea, 566; *Chilton v. Scruggs*, 5 Lea, 308.

And this has been applied even as against a married woman. *Cooley v. Steele*, 2 Head, 605; *Stephenson v. Walker*, 8 Baxt. 289.

So, in *McEwen v. Jenks*, 6 Lea, 289, it was held that an admission under oath made in a deposition in a suit, although the deponent was not a party, operated as an estoppel in a subsequent suit. It does not appear in this case whether the parties in the subsequent suit and in whose favor the admission was made were strangers to the first suit.

But even in Tennessee, it has been held that where statements in pleadings are made inconsiderately or without due knowledge of the facts, the party making them will not be estopped. *McLemore v. Memphis & C. R. Co.* 111 Tenn. 639, 69 S. W. 338.

Conclusiveness of plea of guilty in subsequent civil action.

The rule that a judicial admission is not conclusive against the party in a subsequent suit brought by a stranger to the first suit has been frequently applied in cases where it was sought to hold as conclusive a plea of guilty in a criminal prosecution in a subsequent civil action. These cases, however, have uniformly held that a plea of guilty in a criminal prosecution is not conclusive against the defendant in a subsequent civil action. *Risdon v. Yates*, 145 Cal. 210, 78 Pac. 641; *Young v. Copple*, 52 Ill. App. 547; *Rudolph v. Landwerlen*, 92 Ind. 37; *Hauser v. Griffith*, 102 Iowa, 215, 71 N. W. 223; *Crawford v. Bergen*, 91 Iowa, 675, 60 N. W. 205; *Jones v. Cooper*, 97 Iowa, 735, 65 N. W. 1000; *Wisniewski v. Vanek*, 5 Neb. (Unof.) 512, 99 N. W. 258; *Clark v. Irvin*, 9 Ohio, 131; *Hendricks v. Fowler*, 9 Ohio C. D. 209; *Meyers v. Dillon*, 39 Or. 581, 65 Pac. 867, 66 Pac. 874; 11 Am. & Eng. Enc. Law, 2d ed. p. 449.

and maintained that the bank stood on no better footing, because it had acquired the second note after it had matured by virtue of the accelerating clause, through the non-payment of the first note. For present purposes this may be treated as the only issue that was tried, and the only question here presented is whether the pleadings filed or tendered by the bank alleged facts sufficient to preclude Duncan from denying its right to claim as an innocent purchaser.

The court refused to allow the bank to amend its reply during the trial by adding allegations, the substance of which may be thus stated: On October 25, 1905, the original payee sued Duncan on the first note, asking also a foreclosure of the mortgage. The bank intervened in the action and filed a cross petition asking a recovery on the note held by it. Duncan demurred to the cross petition on two grounds, namely, that the bank had no capacity to sue, and that sufficient facts were not stated to constitute a cause of action. At the hearing on the demurrer, Duncan's counsel argued that the note sued on by the bank was not due because the bank could not take advantage of the accelerating clause of the mortgage. The court sustained the demurrer without indicating upon what ground the ruling was based. The bank then asked an order, which was granted, dismissing the cross petition without prejudice to a future action. Apart from any question of discretion, no error was committed in refusing to allow the amendment, for the reason that its allegations were immaterial. They were offered on the theory that they showed that Duncan, in previous litigation with the bank, had derived an advantage from taking the position that the second note had not been matured in June, 1905, by the nonpayment of the first note; the argument being that he could not thereafter assert that the second note did become due at that time. The argument fails at several points. The allegations of the proffered amendment merely amount to this, that in the course of an argument in the earlier case an attorney for Duncan expressed the opinion that the bank could not avail itself of the accelerating clause of the mortgage,—a pure question of law. This is not enough in itself to estop Duncan from maintaining that the bank, having received the second note after a default in the payment of the first, was not a purchaser before maturity. *Leavenworth Light & Heating Co. v. Waller*, 65 Kan. 514, 70 Pac. 365. And it receives no aid from the other averments. No advantage is shown to have resulted to his client from the suggestion of the attorney. Nothing in the proposed amendment indicated that the demurrer was sustained on the theory so pre-

sented, or why it was sustained. Moreover, the ruling culminated in nothing. No judgment was rendered upon it. The case having been dismissed without prejudice, the bank could at any time have begun a new action in which it could have required the court to consider again every question presented. There was no adjudication against it at any point. Under the circumstances, the dismissal having been permitted, the ruling on the demurrer was of no more effect than an expression by the court of an opinion upon an abstract question,—an intimation of the kind of judgment it would be likely to render on the matter argued, should occasion therefor arise. The sustaining of the demurrer having been announced, the court might have refused to allow a dismissal and have entered a final judgment against the bank. *Pugsley v. Chicago, R. I. & P. R. Co.* 69 Kan. 599, 77 Pac. 579. In exercising its discretion in favor of permitting the case to be disposed of without a final judgment, it in effect vacated the ruling on the demurrer, and left the parties exactly where they were before the action was begun.

The court also sustained a demurrer to a portion of the bank's reply, of which the following is the substance: In the action already referred to, brought by the original payee on the first note, the petition alleged that the second note had been transferred to the bank before maturity. Duncan in his answer alleged that he had been damaged by breach of warranty and by fraud and deceit in connection with the transaction in which the notes were given. During the trial his attorneys, to enhance his damages, stated that the bank had bought the note before maturity, and argued to the jury that, for that reason, he would have to pay it. The court instructed the jury that the bank was an innocent holder of the note. These facts are relied upon as precluding Duncan from disputing the bank's claim to be an innocent holder of the note, both because the matter had been already adjudicated and on the ground of equitable estoppel. Neither phase of the contention is sound. The doctrine of *res judicata* cannot apply, for the parties were not the same in the two actions. Although the bank intervened in the first action, it afterward voluntarily withdrew from it. No principle of equity forbade Duncan to deny in the action brought by the bank what he had asserted in that brought by the original payee, to which it was not a party. No estoppel against Duncan can arise in favor of the bank on account of his conduct toward the payee, by which it was not affected. "If a record or judicial proceeding contains material declarations or admissions of a party to the same, it may be offered in

evidence in behalf of one who was not a party; but it will not be conclusive against the party who made the declarations or admissions." *Murphy v. Hindman*, 58 Kan. 184, 48 Pac. 850. A number of cases to the same effect are collected in notes in 16 Cyc. Law & Proc. p. 1050, to which may be added *Limerick v. Lee*, 17 Okla. 165, 87 Pac. 859, and *Com. v. Monongahela Bridge Co.* 216 Pa. 108, 64 Atl. 909, 8 A. & E. Ann. Cas. 1073. In volume 2 of *Wigmore on Evidence*, § 1065, it is said: "The moment we leave the sphere of the same cause, we leave behind all questions of judicial admissions. A judicial admission is a waiver of proof (ante, § 1057); and a pleading is, for the purpose of the very cause itself, a defining of the lines of controversy, and a waiver of proof on all matters outside these lines of dispute. But this effect ceases with that litigation itself; and when we arrive at other litigation, and seek to resort to the parties' statements as embodied in the pleadings of prior litigations, we resort to them merely as quasi admissions, i. e., ordinary statements which now appear to tell against the party who then made them."

The principle involved is thus stated in *Carradine v. Carradine*, 33 Miss. 698: "Admissions made in the progress of a suit, as a substitute for proof of any material fact, or by pleading and setting forth particular facts as grounds of complaint or of defense, amount in law to estoppels; but they are only so as to the parties to the suit, and in the same suit in which they are made. It would be contrary to all principle to hold a party absolutely concluded by allegations which he had seen fit to make, or by grounds of defense which he thought fit to set up, in one suit, when he was afterwards sued by another party in an action involving the same matter. Such allegations or admissions are made with reference to the particular suit, and cannot operate as estoppels beyond it, because, as to strangers to it, there is no privity or mutuality; and as their rights are wholly unaffected by such allegations, admissions, or defenses, so must his rights as against them not be concluded thereby. It is a common thing for parties sued for the recovery of property to plead property in a stranger, and rely upon that as a defense, and successfully; but it was never heard of that the stranger brought his action against the defendant founded on that evidence alone, and the defendant was held to be estopped by it." Page 733.

The judgment is affirmed.

All the Justices concur.
28 L.R.A. (N.S.)

MICHIGAN SUPREME COURT.

JOSEPH POWERS

v.

JAMES D. HOUGHTON et al., Plffs. in Err.

(159 Mich. 372, 123 N. W. 1108.)

Malicious prosecution — replevin — want of title.

One in possession of chattels without title cannot maintain an action for damages for malicious prosecution against one who wrongfully institutes a replevin action against him for them.

(December 30, 1909.)

ERROR to the Circuit Court for Shiawassee County to review a judgment in plaintiff's favor in an action brought to recover damages for alleged malicious prosecution. Reversed.

The facts are stated in the opinion.

Mr. Albert L. Chandler, for plaintiffs in error:

The judgment for defendant in replevin includes defendant's damages for taking and detention of the replevied property and costs of suit.

Wells, Replevin, § 764; *Cobbey, Replevin*, § 1170; *Drewyour v. Merrell*, 112 Mich. 681, 71 N. W. 486.

Malice cannot be made from the fact that plaintiffs in replevin failed to get a verdict. 1 *Cooley, Torts*, 3d ed. pp. 350, 352.

Mr. Samuel G. Houghton also for plaintiffs in error.

Messrs. Kilpatrick & Pierpont, with Mr. Odell Chapman, for defendant in error.

Brooke, J., delivered the opinion of the court:

On October 6, 1905, defendants herein

Note. — Right of one having possession but no title to property to maintain an action for malicious prosecution for seizure of the property in an action against him.

In *Cooley, Torts*, at page 349, the statement is made that, in some cases, it has been held that an action may be maintained for the malicious prosecution, without probable cause, of any civil suit which has terminated in favor of the defendant, and a number of cases in support of this rule are cited. And the same author goes on to say that recently the question has been much litigated, and many learned opinions on the subject have been handed down, with the result that the preponderance of the authority seems now to be in favor of the right to maintain the action, and a large number of recent cases are cited as authority for this proposition. There is, however, much authority for the proposition that an

sued out a writ of replevin against the plaintiff herein, before a justice of the peace for Shiawassee county, under which sixteen lambs were, by the officer, taken and turned over to defendants. That action resulted in a verdict in favor of plaintiff herein, and the lambs in question were returned to him, the costs were paid by defendants herein, and no appeal was taken. In December, 1906, plaintiff brought suit against defendants, in an action of trespass on the case, for malicious prosecution. Upon the trial, plaintiff herein testified that he had sold the lambs in question on October 3, 1905, to one Collister, receiving from Collister \$5 upon the purchase price thereof. This was three days before the writ of replevin was issued. The lambs were taken from him under the writ, when he was in the act of delivering them to Collister. Plaintiff recovered a judgment, and defendants have sued out a writ of error.

We have, then, in the case at bar, this situation: The plaintiff seeks to recover damages for the malicious prosecution of a civil action, by which he was deprived of neither his liberty, reputation, nor property, but simply of the possession of property belonging to another. Pollock, in his work on Torts, 8th ed., at page 316, states the rule as follows: "Generally speaking, it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even if malice be proved. For, in contemplation of law, the defendant who is unreasonably sued is sufficiently indemnified by a judgment in his favor, which gives him his costs against the plaintiff,"—citing *Quartz Hill Consol. Gold Min. Co. v. Eyre*, L. R. 11 Q. B. Div. 674, 52 L. J. Q. B. N. S. 488, where it said: "In the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution." This is the English rule, which has been somewhat modified in America. In *Cooley*

on Torts, 3d ed., at page 345, the rule is stated to be that "in some cases an action may be maintained for the malicious institution of a civil suit, but the authorities are not entirely agreed what cases are embraced within the rule." Among those malicious civil suits giving a right of action, he enumerates arrest, attachment, garnishment, insanity cases, injunctions, receivers, and other suits that interfere with person or property. Under the last class of cases, he says (page 348): "So a suit for malicious prosecution will lie where the plaintiff's property or business has been interfered with by the appointment of a receiver, the granting of an injunction, or by writ of replevin." As supporting the text touching writs of replevin, he cites *Brounstein v. Sahlein*, 65 Hun, 365, 20 N. Y. Supp. 213; *McPherson v. Runyon*, 41 Minn. 524, 16 Am. St. Rep. 727, 43 N. W. 392. Both of these cases have been examined. In the first, not only was the plaintiff's property interfered with, but his business was largely injured. In the second, property of the plaintiff had been taken on the writ. In our own state, the case of *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, 36 N. W. 664, is to some extent applicable. There, an attachment was sworn out by defendant Hinchman, and placed in the sheriff's hands for service. A deputy visited Brand's store, but made no actual levy, the subject-matter of the suit being adjusted. This court found, however, that there was at least a technical taking and possession of Brand's property, and the proofs showed that damage resulted to his business as a result of the swearing out of the writ (without probable cause). The case of *Antcliff v. June*, 81 Mich. 477, 10 L.R.A. 621, 21 Am. St. Rep. 533, 45 N. W. 1019, is authority for the proposition that a gross and fraudulent abuse of the process of the court, resulting in damage, gives a right of action to the person sustaining the damage.

But we have been unable to find a single adjudicated case (and counsel for plaintiff

action will not lie for the malicious prosecution of a civil suit where there is no interference with the person or property of the defendant, and the conclusion reached by the court in the foregoing case is not without many able precedents tending to support it.

In jurisdictions where such an action will lie, it would seem that the mere fact that the defendant in the replevin action did not have the title to the goods seized would not preclude him from maintaining an action for malicious prosecution, if the other essential elements were present. And, in fact, it might be argued that the fact that the title to the property was not in the defendant, but in a third person, would tend to show malice and lack of probable

cause. There would seem to be nothing in the general nature of such an action, at least, which would take it out of the rule, if such a rule did prevail.

A search of the authorities, however, has failed to disclose any other case in which an action for malicious prosecution has been brought where the plaintiff had been made the defendant in a suit to replevin property of which he had no title.

A somewhat similar situation was presented in *Duncan v. Griswold*, 92 Ky. 542, 18 S. W. 354, where it was held that malicious prosecution would not lie for the attachment of the plaintiff's goods as the property of a third person.

has called our attention to none), where it is held that the defendant in a replevin suit, having no property in the goods taken, may maintain an action for malicious prosecution against the unsuccessful plaintiff in the original action. The authorities are not harmonious upon the question where the property of the defendant in the original action is taken, and upon that question we express no opinion.

The judgment is reversed and a new trial ordered.

MINNESOTA SUPREME COURT.

ALEXANDER DAVIDSON, Respt.,
v.
FLOUR CITY ORNAMENTAL IRON
WORKS, Appt.

(107 Minn. 17, 119 N. W. 483.)

Master — emery wheel — duty to guard.

1. Emery wheels are included within the machinery required to be guarded, as provided by § 1813, Rev. Laws 1905.

Same — negligence.

2. Where it is practicable to maintain a guard over emery wheels, it is negligence *per se* to operate the same without a guard.

Same — injury to servant — failure to guard.

3. The statutory duty is a continuing one, requiring the guard to be maintained while the wheel is in operation, and that duty is not discharged by merely furnishing a suitable guard and exercising reasonable care in the selection of an operator.

Same — fellow servants — nonassignable duty.

4. In this case the duties of the operator required him to change wheels from time to time to meet the exigencies of the work, and in making the change it was necessary to take off the guard. The operator removed the guard and made the change, but neglected to replace the guard, and while revolving the wheel burst and caused the injuries sustained by respondent. Held, the operator and respondent were not fellow servants. The defenses, contributory negligence and assumption of risk, have no application, and appellant was responsible for the failure to maintain the guard.

(Elliott, J., dissents.)

(January 22, 1909.)

Headnotes by LEWIS, J.

Note. — The question of a master's duty to guard machinery as delegable one is discussed in the note to Flynn v. Prince, C. & M. Co. 17 L.R.A.(N.S.) 568.
28 L.R.A.(N.S.)

APPPEAL by defendant from an order of the District Court for Hennepin County denying a new trial after verdict for plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Lancaster & McGee and G. A. Lyon, for appellant:

The servant was injured by the negligence of a fellow servant while both were aiding in the common business of the same master, and he cannot maintain an action for such injury against the master, who was not chargeable with any personal negligence or wrong.

McMahon v. Davidson, 12 Minn. 357, Gil. 232; Foster v. Minnesota C. R. Co. 14 Minn. 360, Gil. 277; Brown v. Winona & St. P. R. Co. 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484; Pasco v. Minneapolis Steel & Machinery Co. 105 Minn. 132, 18 L.R.A.(N.S.) 153, 117 N. W. 479; Corneilson v. Eastern R. Co. 50 Minn. 23, 52 N. W. 224; Gittens v. William Porten Co. 90 Minn. 512, 97 N. W. 378.

The fact that a duty is imposed by statute does not change the rules of law as to contributory negligence or to assumption of risks, unless there is some provision in the statute clearly expressing or implying an intention to do so.

Knisley v. Pratt, 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 986; O'Maley v. South Boston Gaslight Co. 158 Mass. 135, 47 L.R.A. 161, 32 N. E. 1119; Anderson v. C. N. Nelson Lumber Co. 67 Minn. 79, 69 N. W. 630; Swenson v. Osgood & B. Mfg. Co. 91 Minn. 509, 98 N. W. 645; McGinty v. Waterman, 93 Minn. 242, 101 N. W. 300, 3 A. & E. Ann. Cas. 39; Schutt v. Adair, 99 Minn. 7, 108 N. W. 811; Endlich, Interpretation of Statutes, § 5; Black, Interpretation of Laws, § 4; Dresser, Employers' Liability, § 82; 2 Labatt, Mast. & S. § 649; Langlois v. Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910; Martin v. Chicago, R. I. & P. R. Co. 118 Iowa, 148, 59 L.R.A. 698, 96 Am. St. Rep. 371, 91 N. W. 1034; Powell v. Ashland Iron & Steel Co. 98 Wis. 35, 73 N. W. 573; Browne v. Siegel, C. & Co. 191 Ill. 226, 60 N. E. 815; Denver & R. G. R. Co. v. Norgate, 6 L.R.A.(N.S.) 981, 72 C. C. A. 365, 141 Fed. 247, 5 A. & E. Ann. Cas. 448; E. S. Higgins Carpet Co. v. O'Keefe, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; Central Coal & Coke Co. v. Gregory, 78 Ark. 43, 93 S. W. 56; Forbes v. Dunnavant, 198 Mo. 193, 95 S. W. 934; Clark v. Riter-Conley Co. 39 App. Div. 598, 57 N. Y. Supp. 755; Walters v. George A. Fuller Co. 74 App. Div. 388, 77 N. Y. Supp. 681; Rotondo v. Smyth, 92 App. Div. 153, 86 N. Y. Supp. 1103; Pius

dorf v. Kellogg, 108 App. Div. 209, 95 N. Y. Supp. 617; Glenmont Lumber Co. v. Roy, 61 C. C. A. 506, 126 Fed. 524; Nottage v. Sawmill Phoenix, 133 Fed. 979; American Linseed Co. v. Heins, 72 C. C. A. 533, 141 Fed. 45; Hutton v. Holbrook, C. & D. Contracting Co. 139 Fed. 734; Roskee v. Mt. Tom Sulphite Pulp Co. 169 Mass. 528, 48 N. E. 766.

Messrs. Lind, Ueland, & Jerome, for respondent:

The neglect to guard the wheel as required by statute constituted negligence *per se*.

Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; Rosse v. St. Paul & D. R. Co. 68 Minn. 216, 37 L.R.A. 591, 64 Am. St. Rep. 472, 71 N. W. 20; Klatt v. N. C. Foster Lumber Co. 97 Wis. 641, 73 N. W. 563; Perry v. Tozer, 90 Minn. 431, 101 Am. St. Rep. 416, 97 N. W. 137; Osborne v. McMasters, 40 Minn. 103, 12 Am. St. Rep. 698, 41 N. W. 543; Schutt v. Adair, 99 Minn. 7, 108 N. W. 811.

The master could not delegate his nonassignable duty to guard the wheel.

Drymala v. Thompson, 26 Minn. 40, 1 N. W. 255; Tierney v. Minneapolis & St. L. R. Co. 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229; Lindvall v. Woods, 41 Minn. 212, 4 L.R.A. 793, 42 N. W. 1020; 12 Am. & Eng. Enc. Law, p. 959; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; Rincicotti v. John O'Brien Contracting Co. 77 Conn. 617, 69 L.R.A. 936, 60 Atl. 115; Christianson v. Northwestern Compo-Board Co. 83 Minn. 27, 85 Am. St. Rep. 440, 85 N. W. 826; McGinty v. Waterman, 93 Minn. 245, 101 N. W. 300, 3 A. & E. Ann. Cas. 39; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; Monteith v. Kokomo Wood Enameling Co. 159 Ind. 149, 58 L.R.A. 944, 64 N. E. 610; Sipes v. Michigan Starch Co. 137 Mich. 258, 100 N. W. 447; Marino v. Lehmaier, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572; Stewart v. Ferguson, 164 N. Y. 553, 59 N. E. 662.

Lewis, J., delivered the opinion of the court:

Appellant is engaged in the manufacture of ornamental iron work in the city of Minneapolis. One Sandstrom, who had been in the employ of appellant for about a year, was operating an emery wheel about 24 inches in diameter, which revolved at the rate of about 1,000 revolutions per minute. The guard provided for this wheel had been temporarily removed by Sandstrom, and while running without the guard the wheel burst, and one of the pieces struck respondent, who was at work some 40 feet distant, and inflicted a compound fracture of the thigh bone. Respondent recovered a verdict, and 28 L.R.A. (N.S.)

it is argued here: (1) That the statute (§ 1813, Rev. Laws 1905) had no application to emery wheels; (2) that the evidence conclusively established the fact that Sandstrom and respondent were fellow servants; (3) that the verdict was excessive.

1. The first part of § 1813 reads: "All saws, planers, . . . all set screws, drums, and machinery, . . . as far as practicable, shall be fenced or otherwise protected." And the last reads: "No grindstone, emery wheel, or machine in any factory, mill, or workshop, shall be used when the same is known to be cracked or otherwise defective." This provision is not exclusive of and inconsistent with what precedes, but is an addition thereto. Emery wheels are fairly within the first part of the section; but, notwithstanding the fact that such wheels must be guarded, there is an additional prohibition against using such wheels when they are cracked or defective.

2. Sandstrom had been employed to work upon the emery wheel, and we shall assume that he had been properly instructed not to use it without a guard. In the course of his duties it became necessary for him to change wheels to suit the implements he was required to polish, and in making such change he was obliged to remove the guard. On the occasion in question he had changed the wheel, but proceeded to use it without restoring the guard, when, after about a day's time, it exploded. A failure to comply with the statute constitutes negligence *per se*, but contributory negligence and assumption of risks are defenses which may be interposed in proper cases. Christianson v. Northwestern Compo-Board Co. 83 Minn. 25, 85 Am. St. Rep. 440, 85 N. W. 826; Wuotilla v. Duluth Lumber Co. 37 Minn. 153, 5 Am. St. Rep. 832, 33 N. W. 551; Tvedt v. Wheeler, 70 Minn. 161, 72 N. W. 1062; Gray v. Commutator Co. 85 Minn. 463, 89 N. W. 322; Seely v. Tennant, 104 Minn. 354, 116 N. W. 648; Callopy v. Atwood, 105 Minn. 80, 18 L.R.A. (N.S.) 593, 117 N. W. 238; Anderson v. C. N. Nelson Lumber Co. 67 Minn. 79, 69 N. W. 630; Swenson v. Osgood & B. Mfg. Co. 91 Minn. 509, 98 N. W. 645; McGinty v. Waterman, 93 Minn. 242, 101 N. W. 300, 3 A. & E. Ann. Cas. 39; Schutt v. Adair, 99 Minn. 7, 108 N. W. 811. The statute requires such machinery to be guarded so as to protect workmen, whether operating the machinery or engaged in the discharge of any other duties in the factory. Christianson v. Northwestern Compo-Board Co. *supra*. In that case the party was injured while working about an unguarded saw, but not directly in connection with it. In Seely v. Tennant, *supra*, the deceased was caught by an unguarded revolving shaft

while passing by it in the performance of duties not directly connected with it.

There is no dispute as to the facts, and the question of contributory negligence and assumption of risk have no place in this case. Respondent was engaged in other duties at some distance, and was entirely ignorant of the failure to replace the guard on the wheel. The question at issue is one of statutory construction. If the duty imposed by statute was a continuing one, and the master was required to maintain the guard while operating the wheel, in addition to installing it in the first place, then the operator charged with the control and management of the wheel and guard was the representative of the master. On the other hand, if the master discharged his duty by furnishing a suitable guard and by exercising reasonable care in the selection of an operator, and gave him suitable instructions, then the operator was a fellow servant of respondent at the time he negligently failed to replace the guard. Cases of this kind differ from those where, under the common law, the master is charged with the duty of providing a safe place and proper tools and instrumentalities. In those cases the exercise of reasonable care only is required. But with reference to dangerous machinery which it is practicable to guard, the rule has no application. The statute has adopted the rule of absolute duty. The master cannot delegate the performance of the act to another and thus avoid responsibility. *Baddeley v. Granville*, L. R. 19 Q. B. Div. 423, 17 Eng. Rul. Cas. 212, 19 Eng. Rul. Cas. 52; *Britton v. Great Western Cotton Co.* L. R. 7 Exch. 130, 19 Eng. Rul. Cas. 42; *Groves v. Winborne*, L. R. 2 Q. B. Div. 402; *Sommer v. Carbon Hill Coal Co.* 32 C. A. 156, 59 U. S. App. 519, 89 Fed. 54; *Lore v. American Mfg. Co.* 160 Mo. 608, 61 S. W. 678.

It is unnecessary for the purposes of this case to consider what the limitations of the application of this rule may be in cases where those intrusted with the duty of maintaining such guards negligently remove them contrary to instructions. There is much room for discussion and difference of opinion upon that branch of the subject. Whether there be any logical distinction we need not now determine. So far as the facts of this case are concerned there should be no hesitancy in applying the rule of absolute nondelegable duty. The operator was required, in the performance of his duties, to remove the guard in order to put on another wheel. It then became the duty of the master to furnish the new wheel with a guard, to the same extent as in the first instance, when the guard was furnished. To that extent the master selected the op-

erator as his representative, and his failure to attach the guard was the master's act. The instructions to the jury were quite as favorable as appellant was entitled to, and we discover nothing prejudicial in the reference by the court to the master's duty to provide a reasonably safe place for the employees.

The verdict was large, but we cannot see that it was excessive.

Affirmed. i

Elliott, J., dissenting:

I am not able to see why Sandstrom and the respondent Davidson were not fellow servants. They were ordinary operatives, each engaged in his own work. Neither had any control over the other. Sandstrom removed the cover from the emery wheel, for the purpose of changing the wheel, and carelessly started the machine without replacing the cover. The appellant had complied with the statute, and but for the negligence of Sandstrom the accident could not have occurred. The employer had done everything it was possible to do, and if the fellow-servant rule is in force in this state, the plaintiff should not have recovered a verdict. I therefore respectfully dissent.

OHIO SUPREME COURT.

STATE OF OHIO

v.

J. M. LYNCH.

(81 Ohio St. 336, 90 N. E. 935.)

Intoxicating liquor — right to bring into dry territory by agent.

It is not a violation of the act entitled, "An Act Further to Provide against the Evils Resulting from the Traffic in Intoxicating Liquors, by Providing for Local Option in Counties" (99 Ohio Laws, 35), for one who lives in a county in which the traffic in intoxicating liquors is prohibited under the provisions of the said act, to go into a county where such traffic is not pro-

Headnote by the COURT.

Note. — Intoxicating liquors: is one who obtains liquor for and delivers it to another, using the latter's money, guilty of selling the same.

As shown by the following cases, as well as those cited in the note to *Reed v. State*, 24 L.R.A.(N.S.) 268, to which this note is supplemental, the general rule is that one who, at the request of another and with money furnished for that purpose by him, purchases from a third person, and delivers to the former, intoxicating liquors, is not guilty of making a sale, as he acts merely as agent for the real purchaser, unless it

hibited, and purchase intoxicating liquor in any quantity for his own use, and bring the same into the county where he lives to be used therein by him as a beverage; and such a person may, under said statute, not only himself purchase intoxicating liquor as, and for the specific purpose, aforesaid, but he may also do so by another, whom he has constituted his agent for that purpose.

(January 18, 1910.)

EXCEPTIONS by the State to instructions given by the Court of Common Pleas for Champaign County in a prosecution for illegally selling intoxicating liquors which resulted in a verdict of guilty. Overruled.

The facts are stated in the opinion.

Mr. George Walte, for plaintiff:

A person in dry territory cannot receive money from another, and go into wet territory, purchase intoxicating liquors with the money, carry the liquor back to the place

appears that he is personally interested in the sale or acts for the seller: Reynolds v. State, 52 Fla. 409, 42 So. 373; State v. Turner (Kan.) 109 Pac. 983; Givens v. State, 49 Tex. Crim. Rep. 267, 91 S. W. 1090; Givens v. State (Tex. Crim. Rep.) 91 S. W. 1091; Killman v. State, 53 Tex. Crim. Rep. 512, 112 S. W. 90; Killman v. State, 53 Tex. Crim. Rep. 570, 112 S. W. 92; Schoenherstedt v. State, 55 Tex. Crim. Rep. 638, 117 S. W. 829; Lafrentz v. State (Tex. Crim. Rep.) 125 S. W. 32.

On proof by unimpeachable witnesses that the defendant received money from another person, accompanied by a request to procure whisky with it, which he bought from a third person and delivered as requested, the defendant cannot be convicted of having on hand intoxicating liquor for the purpose of illegal sale. Bray v. Commerce, 5 Ga. App. 605, 63 S. E. 596.

So, where the defense to a charge of violating the prohibitory liquor law is that the defendant purchased intoxicating liquors for those who advanced him money for that purpose, and that he acted merely as their agent, it is error to refuse to instruct the jury to acquit the defendant if they believe the evidence in support of such defense. State v. Turner, supra.

But a prima facie case of a violation of a prohibitory liquor law is made by evidence that the defendant was requested by other persons to procure liquor for them, receiving money from them therefor, which he shortly afterwards delivered to them, as the burden of explaining where and from whom he obtained the liquor rests upon the defendant. Ibid.

It was held in Johnson v. State (Tex. Crim. Rep.) 77 S. W. 225, that a conviction for violating the local option law would be sustained where it appeared that the defendant, upon being asked if he could obtain whisky for another, said he did not

of receiving the money, and deliver it to the person who furnishes the money, to be used by him as a beverage, and not be guilty of "furnishing" as the term is used in this statute.

Lamma v. State, No. 44 of the Ohio Law Rep. for Feb. 8, 1909, p. 69; Nisi Prius Rep.; State v. Freeman, 27 Vt. 520; People v. Neumann, 85 Mich. 98, 48 N. W. 290; Dukes v. State, 77 Ga. 738; State v. Munson, 25 Ohio St. 381.

Messrs. C. B. Helserman and Joseph W. Flaughner for defendant.

Davis, J., delivered the opinion of the court:

The defendant in error and one Bennett were inmates of the Champaign county infirmary. In Champaign county it was, under the provisions of the county local option statute, unlawful for any person, personally or by agent, to sell, give away, or furnish intoxicating liquors to be used as a beverage,

know, but would try, and, taking the price of a pint, departed and returned in about ten minutes with the liquor.

A conviction for an illegal sale in a district where the sale of liquor is prohibited cannot be sustained on proof that the defendant, at the request of and with money furnished by a third person, purchases liquor for, and delivers it to, the latter within such district, as such facts show that the defendant was merely agent for the purchaser, and was not the seller or agent for the seller. DuBois v. State, 87 Ala. 101, 6 So. 381; People v. Converse, 157 Mich. 29, 121 N. W. 475; Tate v. State, 91 Miss. 382, 44 So. 836; STATE v. LYNCH; State v. Wirick, 81 Ohio St. 343, 90 N. E. 937; Way v. State, 36 Tex. Crim. Rep. 40, 35 S. W. 377; Brignon v. State, 37 Tex. Crim. Rep. 71, 38 S. W. 786; Phillips v. State (Tex. Crim. Rep.) 40 S. W. 270; Kirby v. State, 46 Tex. Crim. Rep. 584, 80 S. W. 1007; Dupree v. State (Tex. Crim. Rep.) 91 S. W. 578. See also cases cited in the note to Reed v. State, 24 L.R.A. (N.S.) 268.

And the doctrine just stated is not affected by the fact that the defendant advanced the necessary money to purchase the liquor, which was refunded by the one for whom the liquor was purchased upon its delivery to him. DuBois v. State; Tate v. State; and Brignon v. State,—supra. See also Potts v. State, infra.

Nor is it affected by the fact that the defendant, upon the receipt of the liquor in the dry territory, placed it in his cold storage, from which his principal withdrew it as desired. People v. Converse; Way v. State; Phillips v. State; and Kirby v. State,—supra.

Nor by the fact that the defendant received pay for storing the liquor, from the one for whom it was purchased. Kirby v. State and Dupree v. State, supra.

Where an express agent in a local option

age. Bennett gave money to the defendant for the purpose of going into an adjoining county in which the local option law was not then operative, to purchase for him, Bennett, a quart of whisky to be used by him as a beverage. The defendant did go into the other county, purchased the whisky, returned with it to Champaign county, delivered it to Bennett, and it was there consumed by both Bennett and the defendant. The defendant was indicted and tried in Champaign county on the charge of furnishing intoxicating liquor to be used as a beverage. On the trial the court charged the jury, in substance, that it was not a violation of the statute for a person in a "dry" county to go into a "wet" county and purchase liquor in any quantity for his own use, to be used as a beverage, and that such a person may, under this statute, not only go himself into a wet county and purchase intoxicating liquor in any quantity, to be used as a beverage by himself in a dry county, but that he may do so by another whom he has, in good faith, constituted his agent for that purpose.

The prosecuting attorney excepted to the charge, and although the defendant was found guilty by the jury, and was sentenced

by the court, the prosecuting attorney has brought the case here, as provided by Rev. Stat. 1908, §§ 7305, 7306, 7307, 7308, for an answer to the sole question, as stated by himself: "Can a person in dry territory receive money from another, and go into wet territory, purchase intoxicating liquors with the money, and deliver it to the person who furnishes the money, to be used by him as a beverage, and not be guilty of furnishing as the term is used in this statute?" The prosecuting attorney argues for a negative answer to this question, and his argument in brief is this: That the word "furnish" in its ordinary and generally accepted meaning signifies to "provide" or "supply." Yet, if we substitute either of these alleged equivalent words for the one used in the statute, the application of the statute to the facts of this case is not made any clearer than when we consider it with the legislature's own chosen word, "furnish." In fact, the abstract meaning of words rarely affords decisive aid in determining the construction of a document or a statute. When attempting to arrive at the meaning and specific intent of a given phrase or sentence, we are generally obliged to consider words in their concrete use, having regard to the general

county sold an express order for the price of a case of beer, and, because the purchaser did not know the name of a liquor dealer in a county where the local option law was not in force, wrote an order for beer for him, the beer being left in a shed at the rear of the express office, from which it was taken as the purchaser desired it,—the agent of the express company was not guilty of violating the local option law, as no sale was made by him. *People v. Converse, supra.*

So, where one in a prohibition state, at the request of, and with money furnished by, another, ordered for the latter intoxicating liquor from a dealer in another state where the sale thereof was authorized by law, and, upon a receipt of several bottles, delivered one of them to the former, the sale occurred in the latter state, and there was no violation of a statute making it an offense to aid in an unlawful sale, purchase, or other unlawful disposition of liquor, or to act as the agent of the purchaser in procuring an unlawful sale thereof. *Vernon v. State*, 161 Ala. 83, 50 So. 57.

But in a prosecution for violating a statute declaring it an offense "if any person shall act as agent or assistant of either the seller or purchaser in effecting the sale of any liquor, bitters, or drinks, the sale of which without license is unlawful," where the defendant is not charged with selling liquor, but with violating such statute, the place where the sale is consummated becomes immaterial, notwithstanding the defendant ordered it for another person who furnished the money therefor, as the offense defined by 28 L.R.A. (N.S.)

such statute is committed whenever assistance is rendered either the seller or purchaser in effecting a sale in a place where the sale of liquor is prohibited by law. *Powell v. State* (Miss.) 51 So. 465.

One who, with money furnished by a minor, purchases for and delivers intoxicating liquor to him, will be guilty of violating a statute against selling liquor to minors, as the furnishing liquor to such persons by anyone except a parent, or without special written direction from the father or guardian, constitutes a violation thereof. *Com. v. Davis*, 12 Bush, 240.

So, one who acts as agent for a minor in obtaining intoxicating liquor will be guilty of furnishing it to a minor, unless he honestly believes, after making a proper and reasonable inquiry into the facts, that the minor was of age. *Burnett v. State*, 92 Ga. 474, 17 S. E. 858.

But it was held in *Cox v. State* (Miss.) 3 So. 373, that one who, at the request of and with money furnished by a minor, purchases and delivers to him intoxicating liquor, is not guilty of making a sale.

And where the defendant, at the request of a minor, made out for him an order for a dozen bottles of beer, which he sent to another state to be filled, and upon its receipt paid the C. O. D. charges and took the beer to his cold storage, and about ten days later the minor paid him for it and withdrew the beer as he desired it, the defendant is not guilty of selling liquor to a minor. *Potts v. State* (Tex. Crim. Rep.) 96 S. W. 1084.

purpose which the draftsman had in view, together with any other circumstances which may aid us in attaining his mental point of view.

Now in the study of this statute (act March 5, 1908 [99 Ohio Laws, pp. 35-38]), and especially of its title and § 2, which is directly under review in this proceeding, it is very clear that it is aimed at the repression of "the evils resulting from the traffic in intoxicating liquors," and the punishment of dealers conducting such traffic. The significant language of § 2 is as follows: "Whoever . . . violates any of the provisions of this act, or in any manner, directly or indirectly, sells, furnishes, or gives away, or otherwise deals in any intoxicating liquors as a beverage," etc. The statute seeks to prohibit the traffic or dealing in intoxicating liquors in counties in which a majority of the electors have voted "in favor of prohibiting the sale of intoxicating liquors, and therefore it provides that not only those who sell intoxicating liquors, but also those who furnish, give away, or otherwise deal in them in evasion of the law against the sale of liquors, shall likewise be guilty of a misdemeanor. This was the construction, and no more, which was given to the word "furnish" in *State v. Munson*, 25 Ohio St. 381; *State v. Freeman*, 27 Vt. 520, and *People v. Neumann*, 85 Mich. 98, 48 N. W. 290, cited by the prosecuting attorney.

For the foregoing reasons, we are unable to accept the construction of the statute, which is claimed on the part of the state, to justify its contention that the charge of the court in this case was erroneous; and we may add a few other considerations leading to the same conclusion.

Admittedly Bennett could have gone in person to another county where the traffic in intoxicating liquors was not prohibited, and there could have bought liquors for his own use in any quantity, and could have transported them to the county of his residence, where the traffic was prohibited, and could have there consumed them. We frankly confess that we are entirely unable to understand why one may not lawfully do by the agency of another that which he may lawfully do himself. The prosecuting attorney contends that the maxim, "*Qui facit per alium, facit per se*," cannot apply in criminal law. Why not in a case like this? There can be no aiders or abettors where there is no crime. When the liquor was purchased and paid for in a place where the traffic was not prohibited, it thereupon became Bennett's property. The defendant did not, and could not, sell or give it to Bennett, for it was not his to sell or give

away. For the defendant to carry and deliver to Bennett his own was not furnishing it to him. If it be conceded that the mere delivery to the purchaser under such circumstances constitutes furnishing within the meaning of the statute, then one who has in his house, in dry territory, liquor which he has lawfully obtained, makes his servant or member of his family liable to indictment under this statute, whenever, in obedience to his request, some of it is brought to the owner. In the absence of a clear expression to that effect, we are not willing to adopt such an extreme construction.

Exceptions overruled.

Summers, Ch. J., and Crew, Spear, Shauck, and Price, JJ., concur.

OKLAHOMA SUPREME COURT.

GERMAN ALLIANCE INSURANCE COMPANY, Plff. in Err.,

v.

T. H. NEWBERN.

GERMAN AMERICAN INSURANCE COMPANY, Plff. in Err.,

v.

SAME.

COMMERCIAL UNION ASSURANCE COMPANY, Plff. in Err.,

v.

SAME.

SCOTTISH UNION & NATIONAL INSURANCE COMPANY, Plff. in Err.,

v.

SAME.

PHOENIX INSURANCE COMPANY OF BROOKLYN, Plff. in Err.,

v.

SAME.

(— Okla. —, 106 Pac. 826.)

Insurance — iron-safe clause — construction.

1. Failure of an insured to produce the books and inventory, as required by a policy of fire insurance, under penalty of forfeiture, means a failure to produce them if they

Headnotes by TURNER, J.

Note. — Insurance: loss or destruction of books, inventory, etc., as excusing their production as required by policy.

This question is discussed in the note to *Connecticut F. Ins. Co. v. Jeary*, 51 L.R.A. 706, where it is declared to be the law that the destruction of the books and papers re-

are in existence when called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured.

Same — stolen inventory — effect.

2. Where the inventory in question was stolen from an unlocked safe while the store building mentioned in the policy was actually open for business, and where, under the terms of the policy, the insured had a right, during that time, to keep it, held, that its loss and a consequent failure to produce the same will not invalidate the policy, notwithstanding a provision that a failure to produce the same shall render the policy null and void, where the insured used such care on the occasion as prudent men, acting in good faith, would exercise.

(January 11, 1920.)

ERROR to the District Court for Garvin County to review judgments in plaintiff's favor in consolidated actions brought to recover the amounts alleged to be due on certain fire insurance policies. Affirmed.

The facts are stated in the opinion.

Messrs. Fulton, Stringer, & Grant and Henry M. Carr for plaintiffs in error.

Messrs. S. T. Bledsoe and J. B. Thompson, for defendant in error:

The iron-safe clause is not a warranty, as the clause is without consideration, and is, in its essential features, merely a provision for the preservation of testimony.

Phoenix Ins. Co. v. Angel, 18 Ky. L. Rep. 1034, 38 S. W. 1067; Mechanics' & T. Ins. Co. v. Floyd, 20 Ky. L. Rep. 1538, 49 S. W. 543; Citizens' Ins. Co. v. Crist, 22 Ky. L. Rep. 47, 56 S. W. 658; Niagara F. Ins. Co. v. Heflin, 22 Ky. L. Rep. 1212, 60 S. W. 393;

quired to be produced by a policy of fire insurance will excuse a noncompliance with the requirement if due to no fault of the insured. Such proposition finds support not only in the cases there cited, but also in the following decisions: Liverpool & L. & G. Ins. Co. v. Kearney, 180 U. S. 132, 45 L. ed. 460, 21 Sup. Ct. Rep. 326, affirming 36 C. C. A. 265, 94 Fed. 314, affirming 2 Ind. Terr. 67, 46 S. W. 414; Capital F. Ins. Co. v. Kaufman, 91 Ark. 310, 121 S. W. 289; Phoenix Ins. Co. v. Schwartz, 115 Ga. 113, 57 L.R.A. 752, 90 Am. St. Rep. 98, 41 S. E. 240; Franklin Ins. Co. v. Culver, 6 Ind. 137; Aurora F. Ins. Co. v. Johnson, 46 Ind. 315; Miller v. Hartford F. Ins. Co. 70 Iowa, 704, 29 N. W. 411; Brookshier v. Chillicothe Town Mut. F. Ins. Co. 91 Mo. App. 599; Arnold v. Indemnity F. Ins. Co. 152 N. C. 232, 67 S. E. 574; German Ins. Co. v. Kistner, 26 Ohio C. C. 569; Coleman v. New York Bowery F. Ins. Co. 177 Pa. 239, 35 Atl. 729; McNutt v. Virginia F. & M. Ins. Co. (Tenn.) 45 S. W. 61; East Texas F. Ins. Co. v. Harris, 7 Tex. Civ. App. 647, 25 S. W. 720; Underwriters' Fire Asso. v. Palmer, 32 Tex. Civ. App. 447, 74 S. W. 603.

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Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295, 65 S. W. 611.

Even if the iron-safe clause is to be construed as a promissory warranty, it must be regarded as in the nature of a condition subsequent.

Western Assur. Co. v. Redding, 15 C. C. A. 619, 30 U. S. App. 442, 68 Fed. 708; Georgia Home Ins. Co. v. Allen, 119 Ala. 436, 24 So. 399; Hanover F. Ins. Co. v. Crawford, 121 Ala. 258, 77 Am. St. Rep. 55, 25 So. 912; Kingman v. Lancashire Ins. Co. 54 S. C. 599, 32 S. E. 762; McNutt v. Virginia F. & M. Ins. Co. (Tenn.) 45 S. W. 61; Liverpool & L. & G. Ins. Co. v. Kearney, 36 C. C. A. 265, 94 Fed. 314.

Such clauses must receive a reasonable interpretation which will not work injustice or lead to absurd consequences.

United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 23 L. ed. 995; Church of the Holy Trinity v. United States, 143 U. S. 457, 460, 461, 36 L. ed. 226, 228, 229, 12 Sup. Ct. Rep. 511; Scott v. Latimer, 33 C. C. A. 1, 60 U. S. App. 720, 89 Fed. 843; Thurber v. Miller, 14 C. C. A. 432, 32 U. S. App. 209, 67 Fed. 371; Davis v. Bohle, 34 C. C. A. 372, 92 Fed. 325.

The loss of the inventory, through no fault of the insured, did not void the contract.

Sneed v. British-America Assur. Co. 73 Miss. 279, 18 So. 928; Underwriters' Fire Asso. v. Palmer, 32 Tex. Civ. App. 447, 74 S. W. 603; Pelican Ins. Co. v. Wilkerson, 53 Ark. 353, 13 S. W. 1103; Merchants' Nat.

But if the destruction of such papers was due to the negligent failure of the insured to preserve them as required by the "iron-safe clause," his failure to produce them in accordance with the requirement of the policy will preclude any recovery thereon. Arkansas Ins. Co. v. Luther, 85 Ark. 579, 109 S. W. 1022; Shawnee F. Ins. Co. v. Knerr, 72 Kan. 385, 83 Pac. 611, 613; Goldman v. North British Mercantile Ins. Co. 48 La. Ann. 223, 19 So. 132; King v. Concordia F. Ins. Co. 140 Mich. 258, 103 N. W. 616, 6 A. & E. Ann. Cas. 87; Aetna Ins. Co. v. Mount, 90 Miss. 642, 15 L.R.A. (N.S.) 471, 44 So. 162, 45 So. 835; Cobb & S. Shoe Store v. Aetna Ins. Co. 78 S. C. 388, 58 S. E. 1099; Western Assur. Co. v. Kemendo, 94 Tex. 367, 60 S. W. 661, reversing (Tex. Civ. App.) 57 S. W. 293; Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705, reversing (Tex. Civ. App.) 78 S. W. 378; Rives v. Fire Asso. of Philadelphia (Tex. Civ. App.) 77 S. W. 424; Allred v. Hartford F. Ins. Co. (Tex. Civ. App.) 37 S. W. 95; Fire Asso. of Philadelphia v. Calhoun, 28 Tex. Civ. App. 409, 67 S. W. 153.

Ins. Co. v. Dunbar, 88 Ill. App. 574; Liverpool & L. & G. Ins. Co. v. Kearney, supra.

Turner, J., delivered the opinion of the court:

On July 21, 1906, T. H. Newbern, defendant in error, sued the German Alliance Insurance Company, a corporation, plaintiff in error, in the United States court for the Indian territory, southern district, at Pauls Valley, to recover the amount alleged to be due on a fire insurance policy issued by said company May 11, 1905, covering such losses as might be sustained by plaintiff in consequence of the destruction by fire of his store building, stock of general merchandise, and office furniture and fixtures therein contained, in the town of Byers, Indian territory. Four other suits on similar policies, pending here on appeal, and presented by this record, have been consolidated with this suit and abide the event. Each of said policies contain the following, called the "iron-safe clause:"

"Warranty to keep books and inventories, and to produce them in case of loss. The following covenants and conditions on the part of the German Alliance Insurance Company of New York are hereby made a part of the policy to which this clause is attached:

"First. The assured will take an itemized inventory of stock hereby insured at least once in each calendar year, and, unless such inventory shall have been taken within twelve calendar months prior to the date of this policy, the same shall be taken in detail within thirty days after said date, or this policy shall be null and void from and after the expiration of said thirty days, and upon demand of the insured, within three months from date of this policy, the unearned premium for the unexpired time of this policy shall be returned.

"Second. The assured will keep a set of books which shall clearly and plainly present a complete record of the business transacted, including all purchases, sales, and shipment of such stock, both for cash and credit, from the date of the inventory provided for in the first section of this clause, and during the continuance of this policy.

"Third. The assured will keep such books and inventory, and also the last preceding inventory, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy, or the portion thereof containing the stock described therein, is not actually open for business; or, failing in this, the assured will keep such books and inventories at night, and at all such times, in some place not exposed to fire which would ignite or destroy the aforesaid building; and, in case of loss, the assured specifically warrants, agrees, and cove-

nants to produce such books and inventories for the inspection of the company.

"In the event of failure on the part of the assured to keep and produce such books and inventories for the inspection of said company, this entire policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

After answer filed in which the company, in effect, insisted in defense thereto that the terms and conditions of said clause were conditions precedent to plaintiff's right to recover, and had not been kept and performed by him, there was trial to a jury. At the close of plaintiff's testimony, defendant demurred to the evidence, which was overruled and exceptions saved, whereupon defendant introduced its testimony. There was verdict and judgment for plaintiff, and, after motion for a new trial filed and overruled, defendant brings the case here, and assigns as error the overruling of said demurrer.

The facts and inferences therefrom reasonably deducible are few and undisputed. They disclose that the inventory provided for in the policy was taken in due time preceding the fire, but was not thereafter produced; that the fire which destroyed the stock and building covered by the policy occurred on the night of March 5, 1906; that about 8 o'clock that night, and while said store was open for business, the insured took the same out of his safe, which was kept in the office, for the purpose of consulting the same with a view to writing a letter; that, after writing the letter, he set the invoice book in which it was contained back into the safe, and went to wait on some customers in another part of the store, leaving the safe unlocked; that he locked it about two hours thereafter, when he closed up for the night. The fire occurred about midnight, and the next morning, on opening the safe after it had cooled, the inventory was not there. The theory upon which the case was tried was that it had been stolen from the safe, and this we think is fairly inferable from the evidence. It is not claimed that the loss of the inventory was due to the bad faith of plaintiff, neither is it relied on in the briefs that there was error in the charge of the court.

In support of defendant's contention, it is in effect urged that this "iron-safe clause" is a promissory warranty, and that plaintiff has not substantially complied with its terms. Whether promissory warranty, or not, we think this contract, like all others, should be reasonably interpreted and construed so as to work no injustice or lead to absurd consequences. We do not think it was intended to make plaintiff's right of recovery depend in every instance on the ac-

tual production of the inventory. There are exceptions. We think all required by the "clause" is that the insured shall produce the inventory after the fire, if within his power; and that it should be construed as charging him with responsibility for its loss and consequent inability to produce in all cases where such loss has been due to a wrongful, fraudulent, or negligent act on his part. *East Texas F. Ins. Co. v. Harris*, 7 Tex. Civ. App. 647, 25 S. W. 720; *Phoenix Ins. Co. v. Schwartz*, 115 Ga. 113, 57 L.R.A. 752, 90 Am. St. Rep. 98, 41 S. E. 240. Or, as stated in the syllabus in *Liverpool & L. & G. Ins. Co. v. Kearney*, 180 U. S. 132, 45 L. ed. 460, 21 Sup. Ct. Rep. 326: "Failure of an insured to produce the books and inventory, as required by a policy of fire insurance, under penalty of forfeiture, means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured." It cannot be said that the failure to produce in this instance was due to either of the causes enumerated, but was rather due to the result of an unavoidable casualty, and that, too, while the insured was acting within his rights under the terms of the policy. The policy provides: "The assured will keep such books and inventory, and also the last preceding inventory, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy, or the portion thereof containing the stock described therein, is not actually open for business,"—thereby clearly implying that, when the building is actually open for business, the inventory may be kept in an unlocked safe. In the case last cited it was held, in effect, that where a loss of the inventory occurred during the confusion incident to the exercise by the insured of a right under the policy, a failure to produce it will not vitiate the policy, when the insured uses that degree of care on the occasion that a prudent man, acting in good faith, would exercise.

Liverpool & L. & G. Ins. Co. v. Kearney, supra, was error to the United States court of appeals for the eighth circuit to review a decision affirming a judgment in favor of plaintiff in an action on insurance policies covering property in Ardmore, Indian territory. The facts were that on the night of April 18, 1905, between the hours of 1 and 3 A. M., a fire accidentally broke out in the town of Ardmore some 300 yards from plaintiffs' place of business. Efforts were made to check the flames, which failed, and when so near to said place of business that the windows of the store were cracking from

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heat, and the building was about to take fire, one of the plaintiffs entered the building for the purpose of taking therefrom and removing to a safe place the books of the firm, thinking it better to remove them than to take the chances of having them destroyed by fire. He opened the safe in which they were deposited for the night, and removed them to his residence, some distance away. In the hurry and confusion incident to the removal, the inventory was lost, and could not be produced after the fire. It was not claimed that its loss was due to either fraud or bad faith on the part of plaintiffs or either of them. It was insisted in that case, as in this, that the terms of this clause of the policy had not been kept and performed by plaintiffs, and it was complained most that the last inventory of their business had not been produced. The court in effect held that the insured, in attempting to remove the books from the safe to a place of safety, were acting within their rights under the terms of the policy, and in passing said: "We are of opinion that the failure to produce the books and inventory referred to in the policy means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured. Under any other interpretation of the policies, the insured could not recover if the books and inventory had been stolen, or had been destroyed in some other manner than by fire, although they had been placed 'in some secure place, not exposed to a fire' that would reach the store. If the plaintiffs had the right, under the terms of the policy, as undoubtedly they had, to remove their books and inventory from the safe to some secure place not exposed to a fire which might destroy the building in which they carried on business, surely it was never contemplated that they should lose the benefit of the policies if, in so removing their books and inventory, they were lost or destroyed, they using such care on the occasion as a prudent man, acting in good faith, would exercise,"—and affirmed the judgment of the trial court.

And so, paraphrasing, we say that if plaintiff had the right, as undoubtedly he had, to keep his inventory in an unlocked safe during the time his store building mentioned in the policy was actually open for business, surely it was never contemplated that he should lose the benefit of his policy if, in so doing, it was lost, he using, as it has been found in this case he did use, such care on the occasion as a prudent man, acting in good faith, would exercise.

We are therefore of opinion that the court

did not err in overruling the demurrer to the evidence, and for that reason the judgment of the trial court in this and each of the causes abiding the event is affirmed.

All the Justices concur. , ,

WASHINGTON SUPREME COURT.

ARCHIE R. GALBRAITH, Appt.,

v.

ADAM WEBER et al., Respts.

(— Wash. —, 107 Pac. 1050.)

Principal and agent — agent's authority — reliance upon.

1. One purchasing a horse which has been placed in the hands of an agent for sale has

Note. — Implied or apparent authority of agent to take note payable to himself.

Although an agent is conceded to be a general agent with general power to sell or collect, or both, and take payment either in cash or credit, yet he does not possess all the power and authority over the property of his principal which the principal possesses and may exercise, and such general power gives an agent no authority to substitute himself as creditor in place of his principal, or transfer a debt of his principal to himself by taking in payment thereof a note payable to himself. This general proposition finds support in the following cases: *Scott v. Gilkey*, 153 Ill. 168, 39 N. E. 265; *Evarts v. Lawther*, 165 Ill. 487, 46 N. E. 233; *Corning v. Strong*, 1 Ind. 329; *Summers v. Hutson*, 48 Ind. 228; *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. 12; *Franklin Sav. Bank v. Colby*, 105 Iowa, 424, 75 N. W. 346; *Baldwin v. Tucker*, 112 Ky. 282, 57 L.R.A. 451, 65 S. W. 841; *McCulloch v. McKee*, 16 Pa. 289; *Hoffman v. John Hancock Mut. L. Ins. Co.* 92 U. S. 161, 23 L. ed. 539.

Most of the foregoing cases involved the authority of an agent to accept a note running to himself in payment of a pre-existing debt which he was authorized to collect, rather than authority to accept such a note in payment of property sold and delivered by him contemporaneously with the giving of the note, he being in possession of the property for the purpose of sale. *Baldwin v. Tucker* (cited and commented on in *GALBRAITH v. WEBER*), however, involved this precise point, and it was held that authority to an agent to sell pianos for cash or on credit gave rise to no apparent authority in him to sell such property for his principal and take in payment therefor a note payable to himself. The court said that the purchaser was bound to know that there was a limitation upon the agent's authority

a right to rely upon the agent's having authority to fix the price.

Same — agent's statements — contradiction — effect.

2. The mere fact that an agent for the sale of a horse for \$3,000 took \$1,000 for it is not sufficient, as matter of law, to charge the purchaser with notice that he is exceeding his authority, although he at first said he had no authority to accept the latter sum, where he subsequently states that he has received such authority.

Trial — agent's authority — question for jury.

3. The jury must determine whether or not the authority of an agent in possession of a horse for purposes of sale includes apparent authority to take notes payable to himself for the purchase price, where there is nothing to show that he might not have taken cash in payment.

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which would prevent him from taking a note payable to himself for purchase money.

In *Robinson v. Anderson*, a local agent of a machine company who acted as its agent in the sale of a machine, taking notes in payment therefor running to the company, was held to have no authority, by reason of these facts, together with the possession of the notes so taken, to cancel same and take in lieu thereof substantially similar notes, except that they were payable to himself, and not to his principal. The court said that an agent could not thus substitute himself as creditor in the room of his principal.

In *Summers v. Hutson*, it was held that an assignee of a non-negotiable note payable to an agent, accepted by him in payment of the purchase price of chattels intrusted with him to sell, had no title thereto as against his principal, the assignee holding under an assignment by the agent.

As to the facts *Clark v. Haupt*, 109 Mich. 212, 68 N. W. 231, is somewhat similar to *GALBRAITH v. WEBER*. It was, however, disposed of upon a different proposition. The person who assumed to act as agent in the sale of a piano had, in a conversation prior to the sale in the presence of his principal, represented to the buyer that he was the general manager of the principal's piano business. Later, however, and when the question of reduction in price arose, he told the buyer that he would see his principal and see what they could do. He thereafter returned and represented to the buyer that he was authorized to make a reduction of about 50 per cent from the price theretofore asked for the piano, and upon that basis sold the same, taking in payment therefor part cash, and a portion in a note, but it does not clearly appear whether the note was payable to his principal or to himself, as the court did not reach a point where that question was important, it being held that, after the agent had informed the buyer that he would see the principal in

APPEAL by plaintiff from a judgment of the Superior Court for Douglas County in defendants' favor in an action brought to recover possession of a horse. Affirmed.

The facts are stated in the opinion.

Messrs. Peacock & Ludden and M. B. Malloy, for appellant:

When the purchaser has knowledge of the agent's instructions he is as much bound by them as the agent.

Rosendorf v. Poling, 48 W. Va. 621, 37 S. E. 555; Mechem, Agency, § 279; 2 Benjamin, Sales, p. 959; Robinson v. Anderson, 106 Ind. 152, 6 N. E. 12; Graton & K. Mfg. Co. v. Redelsheimer, 28 Wash. 376, 68 Pac. 879; Comegys v. American Lumber Co. 8 Wash. 661, 36 Pac. 1087; Wright v. Calhoun, 19 Tex. 412; Fitzsimmons v. Joslin, 21 Vt. 129, 52 Am. Dec. 46; O'Donnell & D. B. Brewing Co. v. Farrar, 62 Ill. App. 471, 163 Ill. 471, 45 N. E. 283.

In the absence of any trade usage to the contrary, a power given to an agent to sell does not carry with it or imply the power to barter or exchange.

Kearns v. Nickse, 80 Conn. 23, 10 L.R.A. (N.S.) 1118, 66 Atl. 779, 10 A. & E. Ann. Cas. 420; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Thames S. B. Co. v. Housatonic R. Co. 24 Conn. 40, 63 Am. Dec. 154; Woodward v. Jewell, 140 U. S. 247, 253, 35 L. ed. 478, 481, 11 Sup. Ct. Rep. 784; Hayes v. Colby, 65 N. H. 192, 18 Atl. 251; Drury v. Barnes, 29 Ill. App. 166; Cleveland v. Ohio State Bank, 16 Ohio St. 236, 88 Am. Dec. 445; Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795; Brown v. Smith, 67 N. C. 245.

An agent cannot take notes payable to himself without special instructions to so do by the principal.

Hoffman v. John Hancock Mut. L. Ins. Co. 92 U. S. 161, 23 L. ed. 539; Benjamin v. Benjamin and Thames S. B. Co. v. Housatonic R. Co. supra; Martin v. United States, 2 T. B. Mon. 90, 15 Am. Dec. 129; Vanada v. Hopkins, 1 J. J. Marsh. 287, 19 Am. Dec. 92; Dehart v. Wilson, 6 T. B. Mon. 581; Spalding v. Tucker, 21 Ky. L. Rep. 224, 51 S. W. 2; 1 Am. & Eng. Enc. Law, 2d ed. p. 987; Mechanics' Bank v. New York & N.

H. R. Co. 13 N. Y. 632; Tidrick v. Rice, 13 Iowa, 214; Snow v. Warner, 10 Met. 136, 43 Am. Dec. 417; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Dozier v. Freeman, 47 Miss. 660; Brown v. Johnson, 12 Smedes & M. 398, 51 Am. Dec. 118; North River Bank v. Aymar, 3 Hill, 262.

It was incumbent on the defendants, in order to put themselves in an attitude of innocence, to produce the notes or give the best of reasons for not producing them, and for the verdict to stand, they must show a purchase in the utmost good faith.

Hoffman v. John Hancock Mut. L. Ins. Co. supra; Mechem, Agency, § 375; McCulloch v. McKee, 16 Pa. 289; Robinson v. Anderson, 106 Ind. 152, 6 N. E. 12; O'Conner v. Arnold, 53 Ind. 203; McCormick v. Walter A. Wood Mowing & Reaping Mach. Co. 72 Ind. 518; Williams v. Johnston, 92 N. C. 532, 53 Am. Rep. 428; Baldwin v. Tucker, 112 Ky. 282, 57 L.R.A. 451, 65 S. W. 841; J. G. Murdock & Co. v. National Tube Works Co. 7 Ohio Dec. Reprint, 465; Benny v. Pegram, 18 Mo. 191, 59 Am. Dec. 298; Pioneer Gold Min. Co. v. Baker, 10 Sawy. 84, 20 Fed. 4; Aultman v. Lee, 43 Iowa, 404; Sioux City Nursery & Seed Co. v. Magnes, 5 Colo. App. 172, 38 Pac. 330; Rice v. Lyndeborough Glass Co. 60 N. H. 195; Cowan v. Adams, 10 Me. 374, 25 Am. Dec. 242; Thomas v. Joslin, 30 Minn. 388, 15 N. W. 675; Eckhart v. Roehm, 43 Minn. 271, 45 N. W. 443; Scott v. McGrath, 7 Barb. 53; Robertson v. Ketchum, 11 Barb. 652; Dunham v. Jackson, 6 Wend. 22; Livermore v. Johnson, 27 Miss. 284; McNair v. McLennan, 24 Pa. 384; Kearns v. Nickse, supra.

Messrs. Arthur McGuire and Sam B. Hill, for respondents:

A principal is not only bound by the acts of his agent, whether general or special, within the authority which he actually has given him, but is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing.

Heath v. Stoddard, 91 Me. 499, 40 Atl. 547; Stewart v. Cowles, 67 Minn. 184, 69

reference to the transaction, that was notice to the buyer that he did not then have authority to sell in the manner proposed, and that any statements thereafter made by him as to his authority were incompetent to prove same, and that there was no other proof thereof; the court not treating the fact that the piano was at the time in the possession of the buyer, having been placed in his possession by the agent, as any proof of authority to sell, at least, on substantially different terms than those theretofore proposed, in view of the admission of the 28 L.R.A. (N.S.)

agent to the buyer that before making the sale he would have to consult his principal for authority to do so.

A case which apparently supports the doctrine of GALBRAITH v. WEBER is Schleicher v. Armstrong (Tex. Civ. App.) 32 S. W. 327, which holds that where an agent was in the lawful possession of an engine under authority to sell it, the fact that in making the sale he took purchase-money notes payable to himself did not invalidate the purchaser's title to the engine.

N. W. 694; First Nat. Bank v. Robinson, 105 Iowa, 463, 75 N. W. 334; Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086; Columbia Land & Min. Co. v. Tinsley, 22 Ky. L. Rep. 1082, 60 S. W. 10; Hermann Saw Mill Co. v. Bailey, 22 Ky. L. Rep. 552, 58 S. W. 449; Plano Mfg. Co. v. Nordstrom, 63 Neb. 123, 88 N. W. 164; Lebanon Sav. Bank v. Blanke, 2 Neb. (Unof.) 403, 89 N. W. 169; 1 Am. & Eng. Enc. Law, 2d ed. p. 989, note 1, 31 Cyc. Law & Proc. p. 1352.

When the principal has clothed his agent with the *indicia* of authority to receive payments, as by intrusting him with the possession of the goods to be sold, the purchaser is warranted in paying the price to the agent at the time of sale.

1 Am. & Eng. Enc. Law, 2d ed. p. 1014; 31 Cyc. Law & Proc. p. 1358.

One in lawful possession of a chattel, with authority to sell, gives good title, though he violates his principal's instruction by taking purchase-money notes in his own name.

Schleicher v. Armstrong (Tex. Civ. App.) 32 S. W. 327.

Parker, J., delivered the opinion of the court:

This is an action to recover possession of a horse. There is involved the question of the authority of an agent of plaintiff on making the sale of the horse to the defendants. Upon a trial before the court and a jury, a verdict was returned in favor of the defendants. Plaintiff's motion for a new trial being denied, judgment was entered upon the verdict. Plaintiff thereupon appealed to this court.

There is competent evidence tending to show the following facts: The appellant resides near Spokane, and the respondents reside near the town of Quincy, more than 100 miles distant from Spokane. Prior to this controversy appellant and respondents were entire strangers to each other. Early in February, 1906, one W. C. Bouquet came to Quincy with the horse in his possession, and offered it for sale for \$3,000. He had in his possession, with the horse, two certificates of registration, one issued by the secretary of the American Shire Horse Association, the other issued by the secretary of the Shire Horse Society of London, showing the pedigree of the horse. Bouquet exhibited the horse in and about Quincy, and continued his efforts to find a purchaser for a period of six or eight weeks. Respondents knew of this, and then offered him \$1,000 for the horse. Bouquet then told respondents that he had not authority to take \$1,000, that he would have to consult Mr. Galbraith, and that he would go into town and telegraph to Galbraith. The next day he informed respondents that he had a tele-

gram from Galbraith saying it would be all right to accept \$1,000. The sale was then consummated for that sum on the 27th day of March, 1906. The horse, the two certificates of registration, and a bill of sale executed upon a form which Bouquet evidently had in his possession for that purpose, were delivered by him to respondents. The bill of sale was signed "Archie R. Galbraith, W. C. Bouquet, Agent." In payment of the horse respondents gave their two promissory notes for \$500 each, payable to W. C. Bouquet, which they delivered to him. The appellant never had any communication whatever with respondents until he visited Quincy a year later. The only knowledge respondents had concerning Bouquet's authority was such as they might infer from the facts as above related. We now turn to the facts occurring at the other end of the line. The horse, being the property of appellant, was by him placed in the possession of Bouquet for the purpose of taking it to Quincy to sell, where it was taken by Bouquet, as we have stated. Appellant also then gave to Bouquet the two certificates of registration, to be delivered to the purchaser. Appellant valued the horse at \$3,000, and evidently desired to sell it for that sum, but it is not shown that Bouquet was instructed by appellant to sell it for no less sum. Bouquet was authorized to sell it on time and take good notes in payment. Appellant says Bouquet was not authorized to sell it for cash, but we think the circumstance shown would warrant the jury in believing Bouquet did have authority to sell it for cash. Soon after the sale, Bouquet returned to appellant at his home near Spokane, and delivered to him three promissory notes for \$900 each, purporting to be signed by respondents; Bouquet representing they were given in payment of the horse. These were accepted by appellant, he believing them to be genuine, and no objection was made to the price. Appellant made inquiry by correspondence with banks where respondents were known, and received favorable reports as to their financial worth. Soon thereafter Bouquet disappeared. Appellant's counsel state in their brief that Bouquet cashed or discounted the two \$500 notes at a bank before disappearing, though the evidence does not clearly so show. This fact, however, is of little consequence, since it is not denied but that the notes have been paid, or are still legal obligations against respondents. Upon the falling due of the first of the \$900 notes in March, 1907, they were discovered to be forgeries, and appellant then first learned of the sale of the horse for \$1,000 and the giving of the two \$500 notes to Bouquet in payment thereof. Thereupon appellant visited respondents at

Quincy, and demanded the possession of the horse, claiming that Bouquet had no authority to sell it for \$1,000, and also that he had no authority to take the notes payable to himself.

Learned counsel for appellant assign error upon certain instructions given and refused by the trial court, relating to general and special agency, and the exercising of apparent authority by an agent. Error is also assigned upon the court's refusal to direct a verdict in favor of appellant. The substance of counsel's contention upon these assignments, as we understand them, is that the evidence did not warrant the giving of any instruction upon the question of general agency, or upon the question of the exercise of apparent authority by an agent, and that the evidence does not support the verdict. It is argued that the evidence does not show that Bouquet possessed the authority assumed by him in making the sale, and that his apparent authority was not such as to justify the respondents in dealing with him in the manner they did.

The difficulty in a case of this character is in applying the general rule of apparent authority to the facts of the particular case. From the foregoing statement of the facts, which the evidence tends to show, and which we think the jury were warranted in believing, it will be seen that this case presents a question of apparent authority in the agent, rather more than one of actual authority, so far as the question of price and manner of payment thereof are concerned. The authority to take the horse to Quincy for the express purpose of selling it to whomsoever Bouquet could induce to buy it is conceded. The question of Bouquet's apparent authority to agree upon the price, and to receive payment by notes payable to himself, are the questions concerning which we are to inquire as to whether or not the evidence was such as to make them questions of fact for the jury. Let us first notice the general principles of law governing cases of this character. We find them well stated by Justice Wiswell in *Heath v. Stoddard*, 91 Me. 499, 503, 40 Atl. 547, 549, as follows: "A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing. 1 Am. & Eng. Enc. Law, 2d ed. p. 969, and cases cited. Whether or not a principal is bound by the acts of his agent, when dealing with a third person who does not know the extent of his authority, depends not so much upon the actual authority given or in-

tended to be given by the principal, as upon the question, What did such third person dealing with the agent believe, and have a right to believe, as to the agent's authority, from the acts of the principal? *Griggs v. Selden*, 58 Vt. 561, 5 Atl. 504; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Walsh v. Hartford Ins. Co.* 73 N. Y. 5. For instance, if a person should send a commodity to a store or warehouse where it is the ordinary business to sell articles of the same nature, would not a jury be justified in coming to the conclusion that at least the owner had by his own act invested the person with whom the article was intrusted with an apparent authority which would protect an innocent purchaser? In *Pickering v. Busk*, 15 East, 43, quoted by Mellen, Ch. J., in *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220, Lord Ellenborough says: "Where the commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe." Along the same line, in the text of 31 Cyc. Law & Proc. p. 1333, we find the following: "The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority." We will first notice Bouquet's apparent power to fix the purchase price. Where the agent has exclusive possession of the property of his principal, with authority and for the express purpose of selling it to any purchaser he may find, as in this case, we think a purchaser from such agent would clearly have the right to rely upon the agent having power to agree upon the purchase price. 2 Enc. L. & P. 1001; *Mechem, Agency*, § 362; 1 *Clark & S. Agency*, § 245; *Bass Dry Goods Co. v. Granite City Mfg. Co.* 113 Ga. 1142, 39 S. E. 471.

It is argued that, since Bouquet had informed respondents before the sale that he did not have authority to sell the horse for \$1,000, this was notice to them that he exceeded his authority in selling for that price. But this argument loses its force when we are reminded that Bouquet told respondents the following day that he had a telegram from appellant saying it would be all right to accept \$1,000. So, after all, respondents had no information as to the price Bouquet had authority to sell for, other than what Bouquet himself told them. It is further argued that the great difference between \$3,000 previously asked, and \$1,000 finally accepted, was sufficient to suggest to respondents that Bouquet was probably exceeding his authority. There is no evidence in the

record to the effect that Bouquet ever told respondents that he was not authorized to sell for less than \$3,000. Indeed, the acceptance of the three \$900 forged notes by appellant indicates that Bouquet was authorized to sell for less than \$3,000. All that Bouquet ever said to respondents as to the limit of his authority was that he did not have authority to take \$1,000, informing them the next day he did have such authority. It is true the appellant testified the horse was worth \$3,000; but the jury were not required to believe it was worth that sum, especially in view of other testimony as to its earning power. So we do not think that these circumstances were so extraordinary as to enable us to say, as a matter of law, they showed want of authority on the part of Bouquet to agree upon a sale at \$1,000.

We will now notice Bouquet's apparent authority to receive notes in payment, payable to himself. We have seen that Bouquet was clearly authorized to sell the horse on time and take payment in notes. We have no evidence of any special instructions as to the form in which the notes were to be made. In view of the conceded power of sale in Bouquet as agent, and his exclusive possession of the horse for that express purpose, it would seem clear that respondents would have the right to regard him as also having authority to sell for cash and collect the purchase price. *Mechem, Agency*, § 338; 1 *Clark & S. Agency*, § 239; 2 *Enc. L. & P.* 1003; 31 *Cyc. Law & Proc.* p. 1358. We then conclude that the jury were fully warranted in believing that Bouquet, so far as the rights of respondents are concerned, had authority to sell the horse and receive either cash or notes in payment. Many authorities have been cited to the effect that power in an agent to sell does not give power to barter or exchange, or take notes in payment payable to the agent. We will notice two of these which are most favorable to plaintiff's contention. In the case of *Hoffman v. John Hancock Mut. L. Ins. Co.* 92 U. S. 161, 23 L. ed. 530, cited by appellant, a note was taken by an insurance agent payable to himself, with other property, in payment of premiums, when he had no authority to receive anything but cash. It was held that such action on his part was without real or apparent authority, and the company was not bound thereby. That case we think differs from this, in that the insurance agent had no power to accept anything but cash, while in this case the jury might believe from the evidence Bouquet had power to accept either notes or cash. Counsel also cite *Baldwin v. Tucker*, 112 Ky. 282, 57 L.R.A. 451, 65 S. W. 841. That case is apparently much like this, and, were we in-

clined to follow it, would serve as authority here. The decision, however, was rendered by a divided court, decided by four justices as against three dissenting. It involved the taking of a note in payment of a piano by an agent, payable to himself, and not thereafter accounted for to his principal. The piano appears to have been in possession of the agent for purpose of sale at the time of the sale and delivery by him. The question was as to whether or not the act of the agent in taking the note payable to himself was sufficient to warrant the court in taking the case from the jury, and deciding as a matter of law that the agent exceeded his apparent authority. The majority held that it was. We are impressed, however, with the remarks of Justice Hobson, in his dissenting opinion, concurred in by two of his brethren, as follows: "No authority can be found for the proposition, so far as I am aware, that the taking of a note by an agent in his own name is, as a matter of law, conclusive to the purchaser that the agent is exceeding his authority.

. . . As between two innocent persons one of whom must suffer, the loss should fall on the principal who has armed the agent with apparent authority, and thus enabled him to obtain the advantage of the person with whom he trades, rather than on the purchaser, where the agent acts within the apparent scope of his authority, and there is nothing in the transaction to put the purchaser on notice that he is exceeding his authority. Where authority is conferred by parol, the rule is that the apparent scope of it is a question for the jury. It seems to me the same rule should be applied where the agent is sent to take charge of his principal's interest in a territory distant from his principal, and the secret arrangements between the principal and the agent are unknown to the public dealing with him."

Like the learned dissenting justice in that case, we have had no authority called to our attention to the effect that the mere taking of a note by a sales agent, payable to himself, in payment upon a sale made by him of property in his exclusive possession for the purpose of sale and delivery, authorizes the taking from the jury the question of the agent's apparent authority in so doing. The case of *Schleicher v. Armstrong* (Tex. Civ. App.) 32 S. W. 327, supports this view, though the question does not seem to have been elaborately discussed. It may be conceded that where an agent has authority to sell for cash only, he cannot take payment in notes payable in the future, either to himself or the principal, and it may be also conceded that, where the agent has authority to sell upon credit only, he is not authorized to take such credit except in the name of

his principal. We mean such authority as a purchaser is bound to notice. This case presents a different situation since the jury would be fully warranted in believing that Bouquet had authority to take either notes or cash in payment, as we have seen. The only sound reason that can be assigned for prohibiting the giving of notes payable to Bouquet for this horse is that, by so doing, it placed within his power the ability to convert such notes to his own use, and defraud his principal. This reason might apply if Bouquet was at the time of the sale without authority to sell for cash; but since the evidence was such that the jury might believe he had the authority to receive cash as well as notes in payment, it at once becomes plain that respondents, by giving notes payable to Bouquet, were not thereby placing it in his power to defraud his principal any more than as if they had paid him in money.

In view of the power of sale vested in Bouquet, the fact that he had exclusive possession of the horse for that express purpose, the fact that the transaction occurred a hundred miles or more distant from the residence of the owner, the owner not being present at any time during the whole six or eight weeks his agent was attempting to make the sale, the fact that respondents and appellant were entire strangers to each other, the fact that Bouquet had also in his possession certificates of registration showing the pedigree of the horse, ready for delivery with the horse to whomsoever he might sell, leads us to the conclusion that the jury were warranted in believing from all the circumstances that Bouquet was acting within his apparent authority, as respondents had a right to view it.

We are of the opinion that the evidence was not such as to enable the court to dispose of the question of Bouquet's apparent authority as a matter of law, and that the cause was properly left to the jury.

The judgment is affirmed.

Rudkin, Ch. J., and Mount, Crow, and Dunbar, JJ., concur.

MINNESOTA SUPREME COURT.

HIRAM CAMPBELL, Respt.,

v.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Appt.

(108 Minn. 104, 121 N. W. 429.)

Railroad — crossing — injury — negligence.

1. Plaintiff saw a horse and wagon with-

Headnotes by JAGGARD, J.
28 L.R.A. (N.S.)

out a driver approach the railroad tracks at a constantly used crossing of a busy city street. He took hold of the reins suspended from the top of the vehicle. Defendant's railroad train, while the engine whistle was being blown and the train was running at the rate of 35 miles an hour, came suddenly into view around a sharp curve some 200 feet away. The horse became frightened, plunged forward, and jerked plaintiff on the track. The oncoming train struck him, and produced the injuries for which the jury awarded damages. Its verdict is sustained, despite objection based on the absence of proof of defendant's negligence, on plaintiff's contributory negligence, on the instructions given by the trial court, and on other grounds.

Same — duty of traveler.

2. One who goes near enough to a railway track to be in danger from any cause is required by law to exercise due care to avoid harm. This rule does not, however, amount to a hard and fast requirement that such a person must stop, look, and listen, and continue to look under all circumstances and at all times; nor is such person bound to anticipate negligence on the part of persons operating trains on such a track.

(May 28, 1909.)

Note. — Right of one going on railroad crossing to rescue property to recover for injury.

The rule as to the right of recovery for an injury received on a railroad crossing while attempting to rescue property seems to be that one is entitled to run some risk in attempting to save his property from damage, and that he may recover for any injury received in so doing, provided he has not recklessly exposed himself to danger.

Thus, in *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608, the act of plaintiff's intestate in attempting to rescue his horse and wagon from a railroad track running through a city street, although he saw a train approaching, was held not to prevent a recovery. The court said: "The horse and wagon had some value, and we may assume, from the humble occupation in which the intestate was engaged, that they were of great value to him. He had the right, and was under some sort of duty, to rescue them from danger if he could. He therefore had business in the place where he was when he was killed. It cannot be said that he went there for no purpose, and that he unnecessarily placed himself in danger. The whole transaction took but a moment. He saw the train coming. The impulse to save his property was a natural one. He had no time for reflection. He saw how distant the train was, and, supposing that he could rescue his horse, started. He got across the track, and would have been safe, but for the sliding of the wagon wheel in consequence of the elevated rail. It is easy enough now to see that his effort was a

A PPEAL by defendant from an order of the District Court for Mower County denying its alternative motion for judgment notwithstanding the verdict or for a new trial in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Lafayette French, A. G. Briggs, and H. Loomis, for appellant:

The obligation to exercise care is not alone upon one who expects to cross a railway, but is equally upon one who goes near to it, so as to be in danger therefrom from any cause.

Flagg v. Chicago, D. & C. G. T. Junction R. Co. 96 Mich. 30, 21 L.R.A. 835, 55 N. W. 444; Moore v. Kansas City & C. Rapid Transit R. Co. 126 Mo. 265, 29 S. W. 9; Ft. Worth & D. C. R. Co. v. Taliaferro, 4 Tex. App. Civ. Cas. (Willson) 545, 19 S. W. 432; Olson v. Chicago, M. & St. P. R. Co. 81 Wis. 41, 50 N. W. 412, 1096; Hargis v. St. Louis, A. & T. R. Co. 75 Tex. 19, 12 S. W. 953; Illinois C. R. Co. v. Buckner, 28 Ill. 299, 81 Am. Dec. 282; Deville v. Southern P. R. Co. 50 Cal. 383; Cornell v. Detroit Electric R. Co. 82 Mich. 495, 46 N. W. 791; Louisville & N. R. Co. v. Schmidt, 81 Ind. 264; Philadelphia, W. & B. R. Co. v. Stinger, 78 Pa. 219.

The fact that plaintiff's attention may have been diverted by attempting to control the horse would not relieve him from the charge of negligence.

Lee v. Chicago, St. P. M. & O. R. Co. 68 Minn. 49, 70 N. W. 857; Williams v. Chicago, M. & St. P. R. Co. 139 Iowa, 552, 117 N. W. 957.

Messrs. S. D. Catherwood and Dunn & Carlson for respondent.

hazardous and unsafe one. But can we say, as matter of law, that he, situated just as he was, with no time for cool reflection, failed in that care which men of ordinary prudence would exercise under the same circumstances? We think not."

So one is not, as a matter of law, negligent in going upon a crossing, in the face of an approaching train, for the purpose of driving off his sheep, where, unless his foot had caught because of a defect in a plank, he would have had time to get off the track in time. Lake Shore & M. S. R. Co. v. Beall, 13 Ohio C. C. 605.

But one who goes upon a railroad track to save his team, when he has been warned of and must have seen a train approaching, is guilty of such negligence as to preclude recovery. McManamee v. Missouri P. R. Co. 135 Mo. 440, 37 S. W. 119.

And one who, against the warning of his companions, leaves a position of safety to go to the rescue of his horse and his buggy, 28 L.R.A. (N.S.)

Jaggard, J., delivered the opinion of the court:

Plaintiff saw a wagon with a horse attached, but without a driver, approaching defendant's railroad tracks at a constantly used crossing of a busy city street. As the horse was about to step on the tracks, plaintiff took hold of the reins, which were suspended from the top of the wagon by a hook. At this point, if he had looked, he could not have seen up defendant's tracks towards the north more than about 200 feet, because the tracks there curved sharply as they passed "a little wooden building" about that distance from the crossing. While plaintiff was backing this horse away from the railroad track, and when he was safe under ordinary circumstances, defendant's train, running 35 miles an hour, burst into view some 200 feet to the north. Sharp blasts of the whistle were blown, the horse became frightened, plunged forward, jerked plaintiff upon the track, and ran on across the tracks. Defendant's train hurled plaintiff aside and inflicted the injury for which recovery is here sought. The jury found a verdict for him in the sum of \$1,500. This appeal was taken from the order of the trial court denying the defendant's usual motion in the alternative.

1. The facts have been stated, as they must be, under the circumstances, in accordance with the construction of the testimony introduced most favorable to the plaintiff. On argument in this court, defendant's negligence was frankly admitted for the purposes of this appeal. The speed at which the train was running the jury might have found was wrongful. It was contended, however, that the affirmative testimony that the bell was ringing so overbalanced plaintiff's testimony that he did not hear the ringing of the bell as to exclude

which was overturned on a railroad crossing, assumes the hazard; and where he is run over by a passing engine, no action can be maintained by his representatives. Baltimore & O. S. W. R. Co. v. Driskell, 101 Ill. App. 137.

And in Deville v. Southern P. R. Co. 50 Cal. 383, one who went upon a railroad crossing to rescue his team was held guilty of negligence which proximately contributed to his injury.

And the act of going upon a farm crossing to hurry cattle across in front of an approaching train precludes recovery. Morris v. Lake Shore & M. S. R. Co. 148 N. Y. 182, 42 N. E. 579.

In the case of CAMPBELL v. CHICAGO G. W. R. Co. it will be noticed that the person injured went upon the crossing to rescue property with whose presence on the track he had no original connection; but notwithstanding this fact, a recovery was allowed.

this consideration from the determination of negligence. This, however, is a consideration which, under the present circumstances, affects plaintiff's contributory negligence, not defendant's actionable wrong.

2. The gist of this appeal upon the merits is that plaintiff was shown to have been guilty of contributory negligence as a matter of law, or that the circumstances in connection with this contributory negligence were such as to require a new trial to be granted. We are of opinion that the trial court properly refused to accept either of these views. Plaintiff was engaged in caring for the property of another, then in a position of peril to itself and of probable danger to defendant's property and to the passengers it was engaged from time to time in transporting. According to his testimony,—which for present purposes must be assumed to be true,—he was not standing on the railroad track, nor near enough to be struck by the train, before the train came into view. He did not intend to go dangerously near it. He expected to back the horse to a place of safety.

Plaintiff was not required to exercise the care of a person approaching and about to cross the railroad tracks. It will be assumed that, under the circumstances of this case, plaintiff was within the rule of law requiring one who goes near enough to a railroad track as to be in danger from any cause to exercise due care to avoid harm. That obligation must, however, vary with circumstances. It does not amount to a hard and fast requirement that such persons must stop, look, and listen, and continue to look at all times and under all circumstances. Plaintiff's testimony on direct examination as to looking and listening the jury might have found exonerated him from contributory negligence. His cross-examination was not so favorable to his interests. The result was for the jury.

The jury might properly have found from the testimony that plaintiff had glanced up the track at one time and had seen nothing. The train would have covered in four or five seconds the distance he could have seen it, because of the curve previously stated. The duty to exercise care is, in the nature of things, continuous, but due vigilance did not require plaintiff to keep his eye fixed in the direction from which the train came. If stress be laid upon the signals which defendant insists plaintiff should have heard, then the emergency element becomes conspicuous. In any view, the situation of the horse and the vehicle constituted to a limited extent a distraction of his attention, the effect of which as a justification was for the jury.

Finally, plaintiff put himself in no posi-

tion of danger. He could have safely accomplished his humane purpose if it had not been for the negligence of the defendant. He did not anticipate, and as a matter of law was not required to have anticipated, that negligence. He was not bound to have foreseen that defendant would run its train around the sharp curve which prevented its observation at an unlawful and dangerous rate of speed, across a much-used thoroughfare. He had the right to rely upon the exercise of commensurate care on defendant's part, in exposing either persons or property to unnecessary and great peril from so dangerous an instrumentality as a rapidly moving train. On principle, the question of contributory negligence was for the jury. Its conclusion is sustained by the record.

The authority most nearly resembling the present case is *Lorenz v. Burlington, C. R. & N. R. Co.* 115 Iowa, 377, 56 L.R.A. 752, 88 N. W. 835. There deceased was struck by a train on defendant's road at a street crossing. At the time he was attempting to head off and drive back a cow. In considering the question of contributory negligence, McClain, J., said: "In determining what constitutes contributory negligence, . . . only whether the person injured did use the care which the circumstances required of him. Now, while the rule is well settled in this state, and generally elsewhere, that it is contributory negligence for a person to go upon a railway track without looking or listening to ascertain whether there is danger from an approaching train, yet his duty in that respect is to exercise the care which reasonably prudent persons would exercise under such circumstances. The duty to look and listen is not an absolute one, but one the exercise of which is dependent on conditions." A verdict for plaintiff was affirmed.

The authorities cited by defendant to sustain the contention that "the obligation to exercise care is not alone upon one who expects to cross a railway, but is equally upon one who goes near to it, so as to be in danger therefrom from any cause," without exception involve circumstances so different from the circumstances in the case at bar that they are not controlling. In *Flagg v. Chicago, D. & C. G. T. Junction R. Co.* 96 Mich. 30, 21 L.R.A. 835, 55 N. W. 444, plaintiff, instead of alighting, remained in a wagon to which a young horse was attached while a train was approaching. In *Moore v. Kansas City & I. Rapid Transit R. Co.* 126 Mo. 265, 29 S. W. 9, plaintiff drove a team of horses which he knew were easily frightened by the cars, on defendant's right of way. while there was nothing to prevent him

from driving down a safe street. In *Ft. Worth & D. C. R. Co. v. Taliaferro*, 4 Tex. App. Civ. Cas. (Willson) 545, 19 S. W. 432, plaintiff attempted to drive in front of an engine which he saw coming. In *Olson v. Chicago, M. & St. P. R. Co.* 81 Wis. 41, 50 N. W. 412, 1096, plaintiff left, unhitched and unattended, within 19 feet of the track, a young, high-lived team of horses. In *Hargis v. St. Louis, A. & T. R. Co.* 75 Tex. 19, 12 S. W. 953, plaintiff, having crossed the track in safety, voluntarily and unnecessarily stopped. In *Illinois C. R. Co. v. Buckner*, 28 Ill. 299, 81 Am. Dec. 282, a deaf person drove an unmanageable horse across a track and when a train was approaching. In *Dewille v. Southern P. R. Co.* 50 Cal. 383, plaintiff left a span of horses unhitched at train time. In *Cornell v. Detroit Electric R. Co.* 82 Mich. 495, 46 N. W. 791, plaintiff drove a young horse along a street railway for the purpose of testing the horse. In *Louisville & N. R. Co. v. Schmidt*, 81 Ind. 264, plaintiff attempted to lead his horse across a track in front of an engine. In these cases, plaintiff's own conduct initiated the peril. In the case at bar, the plaintiff had no connection with the original presence of the horse and wagon on the track. He should not be penalized for undertaking an errand of mercy.

3. Defendant has laid especial stress upon the instruction by the court to the effect that as plaintiff was not on the crossing, but was jerked upon it by the action of the horse, then plaintiff was not negligent, and defendant was liable if it was negligent. If stress were laid upon the emergency feature of this case, it might be that this instruction was correct in itself. The charge of the trial court must be approved, however, on other grounds; for, after the court had practically completed its charge, it inquired whether counsel desired to call attention to other matters. Counsel for the plaintiff then suggested that the ruling as to plaintiff's contributory negligence in the respect here involved was "stated a little broader than might be warranted." The court thereupon charged that the plaintiff was bound to exercise ordinary care at all times up to the time of the accident, and that if he had notice or knowledge that the train was approaching, or, in the exercise of ordinary care, should have taken notice, it would have been negligent for him to have gone upon the railroad track, and that in such event he would be guilty of contributory negligence, and could not recover. This instruction appears to be as favorable to defendant as properly might be. If defendant thought otherwise, it should have then pointed out its impropriety to the court.

28 L.R.A. (N.S.)

We have examined the other assignments of error, and have found them to be without merit.

Affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

RE THEODORE NEFF.

(84 C. C. A. 561, 157 Fed. 57.)

Statute of frauds — signature of one party — effect.

1. A promise signed by the promoter of a corporation to pay for stock taken by a subscriber upon its surrender within a certain time is not invalid under the statute of frauds because not signed by the subscriber.

Bankruptcy — maturing contract.

2. The bankruptcy, before the time arrives, of one who has promised to return the amount paid for stock of a corporation if it is surrendered within a certain time, does not prevent the claim upon the contract from being a fixed liability, absolutely owing, at the time of the bankruptcy, so as to be provable under the bankruptcy act, since the promisee may treat the bankruptcy as a repudiation of liability and immediately bring an action for damages.

(November 20, 1907.)

Note. — Promise by bankrupt to pay a fixed sum conditional upon exercise of an option by promisee, the time for which had not expired at the time of bankruptcy, as basis of provable claim.

Section 63a of the bankruptcy act of 1898 provides that debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not; (4) founded upon an open account or upon a contract, express or implied. This section was considered and applied in the case of *RE NEFF*. When that case was before the district court, that court said that if the agreement there involved was to be regarded as a loan of money secured by collateral in the form of the stock which, upon payment of the loan, was to be surrendered or delivered up with the notes, then the claim based thereon represented a fixed liability, etc., within clause 1 of § 63a. But the court said that if the agreement was to be regarded as a contract to purchase the stock at the prices and upon the terms specified, the adjudication in bankruptcy disabled the promisor from performing the agreement, and was equivalent to an anticipatory breach thereof, and that coincident therewith rights of action arose in favor of the claimants to enforce the agreement, with the result that the claim became provable under § 63a (4).

A PPEAL by the trustee in bankruptcy of Theodore Neff from a decree of the District Court of the United States for the Southern District of Ohio allowing a claim against the bankrupt's estate. Affirmed.

The facts are stated in the opinion.

Argued before Lurton, Severens, and Richards, Circuit Judges.

Messrs. E. E. Clevenger and Cook Dandorf for appellant.

Mr. A. H. Mitchell for appellee.

Lurton, Circuit Judge, delivered the opinion of the court:

These three appeals have been heard together as they involve the provability of a number of claims against the bankrupt of like character. In tenor and substance the

contracts are alike. That presented by Emily M. Nichols is an example and is as follows:

\$2,500 Bellaire, Ohio, Feb. 7, 1905.

Two years after date, I, we, or either of us, promise to pay to the order of Miss Emily M. Nichols twenty-five hundred and no 100 dollars at the office of the Avery-Caldwell Mfg. Co., upon surrender of certificate No. 38 for 2,500 shares of preferred stock of said company, value received, interest 7 per cent per annum.

J. Brent Harding.

Theodore Neff.

Some of these contracts related to the stock of a manufacturing corporation known

It will be at once observed that one or the other of the two constructions so placed upon the agreement must prevail. It is also thought that no fault is to be found with the statement of the district court that if the agreement constitutes a loan, it is provable, if at all, under clause 1, and that if it constitutes a contract to purchase stock upon exercise of an option by the promisee, it is provable, if at all, under clause 4. If the district court be right, the method and reasoning by which the circuit court of appeals reaches its decision, which, considered as a result, is perfectly satisfactory, affords some difficulty. It will be noticed that the latter court in its opinion says that the contract is plainly an agreement to purchase the shares of stock named, at the time and price stated, and at another point in its opinion says that the creditor, by offering to file his claim, manifested his election to treat the bankruptcy as a breach of the agreement, which entitled him to maintain a right of action for damages. The source of the difficulty in this opinion arises from the fact that the court makes no reference to clause 4, but directs its discussion solely to answering the contention that the claim was not a fixed liability, absolutely owing, at the time of the filing of the petition. This, too, is done without reference to the disposal of the question as made by the district court. It would seem, however, that if the contract is to be regarded as an agreement to purchase stock, and if the bankruptcy constitutes an anticipatory breach thereof affording a right of action for damages,—and this is what the circuit court of appeals says,—a claim based upon such a situation cannot be regarded as a fixed liability. Loveland says in the third edition of his work on Bankruptcy, at page 345, that a fixed liability, absolutely owing, means that the obligation to pay exists at the time of the filing of the petition, and is sufficiently definite in amount to permit of computation. Now the damages accruing from the breach of this agreement to purchase stock cannot be determined by mere computation, but can be arrived at only by the prosecution of an action for the breach of the contract.

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Strictly speaking, therefore, the claimant is bound to rely upon the language of clause 4 for the enforcement of his claim.

Concerning contingent claims it is said in 1 Remington on Bankruptcy, page 382: "The test as to whether a claim is really contingent, or is simply unliquidated or unascertained by legal proceedings, would seem to be this: Have all the facts necessary to be proved to fasten liability already occurred? If so, the claim is not contingent, although the liability and the extent of damages may not yet have been ascertained by the consideration of a court, as evidenced by judgment or decree, nor even the full extent of damages arising been already suffered. The contingency, in other words, is a contingency of facts necessary to fasten liability at all, not a contingency of the court's judgment on the facts, nor a contingency as to the extent of the damages resulting from the injury. . . . The subject of contingent claims is an abstruse subject, and one that has not been clearly analyzed in the decisions. On the one hand it is to be borne in mind that neither the adjudication of bankruptcy nor the discharge affects merely contractual relations, unless such relations at the time of bankruptcy, or by virtue of the bankruptcy, have been merged in a 'debt, demand, or claim.' . . . On the other hand, it is equally to be borne in mind that if it has become thus merged at the time of bankruptcy, whether it amounts to the certain, liquidated, and definite money demand technically known as a 'debt', or constitutes merely a 'claim' or 'demand' against the debtor, it constitutes a 'provable debt,' as the term is used in bankruptcy."

To avoid the result which consistency would otherwise demand, of extending this note so as to embrace the whole question of contingent claims, it has been confined, as indicated by the title, to cases like *RE NEFF*, in which the contingency consists in the exercise by the promisee, of an option that could have been exercised before the bankruptcy. It will be observed that in the *NEFF CASE* the promisee could have rendered the obligation of the promisor absolute by

as the Avery-Caldwell Company, and others to the stock of the Federal Casket Company. It was agreed, as a fact, that the contract set out and others of like character were made by the persons signing the same as promoters, and to induce sales of the stock of the corporations named, and that, in consideration of this agreement, the claimants became subscribers to the stock of said companies, paying therefor the amount named in each contract, and received therefor the shares of stock mentioned. It was also agreed that both of these corporations were insolvent before the bankruptcy of said Neff, and that this stock was of no value. The stock certificates were filed as part of the proof in each case, and tendered to the trustee. The contracts are

plainly agreements to purchase the shares of stock named, at the time and price stated. They rest upon a sufficient consideration, and are written agreements to take and pay for the shares named and signed by the parties, to be charged and delivered to and accepted by the promisees. There is, therefore, nothing in the objection as to the contracts being invalid under the statute of frauds because not signed by claimants also. *Thayer v. Luce*, 22 Ohio St. 62; *Himrod Furnace Co. v. Cleveland & M. R. Co.* 22 Ohio St. 451; *Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. Rep. 800, 4 S. W. 835; *Browne*, Stat. Fr. § 345c. The status of a claim must depend upon its provability at the time the bankrupt petition was filed. At that time it must come within the definition of § 63 of

presenting the stock and demanding payment at any time within the two years there specified. Cases of conditional liability which is also unmaturing, in the sense that the promisor cannot be made liable until a certain date, are not included, although the date of maturity may be subsequent to that of the bankruptcy. For instance, cases involving the contracts of bankrupt sureties, guarantors, indorsers, and drawers present a somewhat different question, for in such cases the liability of the bankrupt is conditional not upon the exercise of an option at any time by the promisee, but upon the default of the person primarily liable, which cannot occur until a specified time. So, too, cases in which the person primarily liable on an instrument for the payment of money agrees to pay collection or attorneys' fees in case of default in payment of the principal sum are excluded, for the reason that such a promise is conditioned upon the default of the promisor, which also cannot happen before the date fixed for the maturity of the instrument.

The ultimate result, namely, that the debt is provable, reached in the NEFF CASE, finds support in other Federal decisions, although not many cases have been found in which that precise question was raised.

The case of *Re Pettingill*, 137 Fed. 143, 14 Am. Bankr. Rep. 728, is sufficiently set out in the NEFF CASE.

In *Re Swift*, 50 C. C. A. 264, 112 Fed. 315, it was held that upon the adjudication in bankruptcy of a broker who purchased stock upon a margin for a customer (such contract being construed under the local law as an undertaking to deliver the stock to the customer on demand and tender of the part of the price not already advanced), the customer might treat the contract as broken by the act of bankruptcy, and prove his claim for damages which related back to the time of the adjudication. The court in this case said: "It provides, without apparent restriction, for proof of debts founded on contracts, express or implied, and also, in a general way, for liquidating unliquidated claims; but, in the absence of any express provision for contingent engage-

ments, including those for property to be delivered on demand and payment of purchase money, there seems to be some difficulty in applying the statute. However, we need not go into the troublesome questions that are raised by this omission, because we have already seen that in the case at bar the proceedings in bankruptcy rendered unnecessary a demand and tender, and, like the great mass of matters affected by such proceedings we must hold that this proof of debt relates to the time when they were commenced. From that time the stocks in question were put beyond the power of the stockholders to deliver effectually. The contract ripened simultaneously with the beginning of the proceedings in bankruptcy, as the consequence thereof, in connection with the adjudication which followed. Of course, as everything related back to the filing of the petition, the ripening of the claim did not occur before it was filed, nor afterwards, but simultaneously with it, as already said. Consequently, by necessary effect, there was created and existed, when the proceedings commenced, a provable claim. Whether Dee had the option of withholding his claim and ripening it by a demand subsequently, . . . he waived that option by his proof of debt, and he thus elected, as he had a right to do, to assume that demand and tender had been rendered unnecessary, and to liquidate his claim accordingly." From the foregoing language it seems clear that the court regarded the claim as provable under § 63 a (4).

And it was held in *Re B. H. Gladding Co.* 120 Fed. 709, that where an employer gave "vacations with pay" to its employees, but withheld the payments until the following January with the understanding that if the employment should be severed before such time the vacation pay should be forfeited, the employees presenting a claim therefor against the employer's trustee in bankruptcy were entitled to priority under § 64b, which provides for payment in full of claims for wages due to workmen, clerks, etc., although the proceedings were commenced before January, since the bankruptcy defeated the object of the withholding of the pay-

the bankrupt act; it cannot be benefited by its status at a later date. The defense is that these claims were not "fixed liabilities," "absolutely owing," at the time of the filing of the petition against the bankrupt. This is based upon the fact that the liability of the bankrupt is made dependent upon the surrender of the stock certificate at a date which had not then arrived, and that it was optional with the promisees to surrender or keep the stock until that time, and that the liability of the promisor was undetermined and contingent until such surrender at the time named.

That the promisor might refuse performance until the time named is true. But if, before the time of performance, one absolutely repudiate liability and disavow unequivocally any purpose to perform at any time, the other party may treat such repudiation, at his election, as a breach of the agreement and sue for his damages. This is the rule as settled in *Hochster v. De la Tour*, 2 El. & Bl. 678, 6 Eng. Rul. Cas. 576, and approved by the Supreme Court in *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780, and by this court in *Foss-Schneider Brewing Co. v. Bullock*, 8 C. C. A. 14, 16 U. S. App. 311, 59 Fed. 83, and *Edward Hines Lumber Co. v. Alley*, 19 C. C. A. 599, 43 U. S. App. 169, 73 Fed. 603; *McBath v. Jones Cotton Co.* 79 C. C. A. 203, 149 Fed. 383; *Michigan Yacht & Power Co. v. Busch*, 75 C. C. A. 109, 143 Fed. 929. So, if one of the parties absolutely disables himself from performing the contract by putting performance out of his power, the other party may treat that as a repudiation and bring his action to recover damages then or wait the time of performance, at his election. This aspect of the question of an anticipatory breach is well put by Fuller, Chief Justice, in *Roehm v. Horst*, cited above, when he says: "It is not disputed that if one party to a contract has destroyed

the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly."

In *Lowell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 274, 28 L. ed. 423, 426, 4 Sup. Ct. Rep. 390, 395, the company had failed, and transferred its business to another company. The court held that this authorized one insured to treat the contract as at an end and to sue to recover back premiums paid, although the time of performance had not arrived. Mr. Justice Bradley, for the court, said: "Our third conclusion is that, as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby. We had occasion to examine this subject in the recent case of *United States v. Behan*, 110 U. S. 339, 28 L. ed. 168, 4 Sup. Ct. Rep. 81, to which we refer." See also *Carr v. Hamilton*, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295.

Bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation, subject only to

ments, which was merely to secure a continuance of service from the employees. While this case does not involve the provability of a claim under § 63a, it seems to present a sufficient analogy to warrant its citation in this connection.

Where, however, a son agreed to pay his father or his heirs or assigns a certain sum either during the latter's lifetime or five years after his death, in consideration of the father's promise not to make any disposition of his estate in such manner as to deprive the son of the share therein to which he would be entitled if the father should die intestate, it was held that, notwithstanding the intervention of the son's bankruptcy, the father had a contingent claim, and not a present enforceable one, and that, therefore, he could not assert it either as a fixed liability, absolutely owing, etc., or as founded upon a contract, express or implied. *Re* 28 L.R.A. (N.S.)

Hartman, 166 Fed. 776. The court pointed out that the contingency of the father's adherence to his promise could occur only by, and not until, his dying intestate, or having made a will complying with his agreement, and this fact would seem to be a distinguishing feature of the case, placing it within the category of those which have been heretofore expressly excluded. It is here cited for the purpose of accentuating the distinction upon which such exclusion is based.

The general question of what constitutes a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition, is considered in the note in 54 L.R.A. 369.

On effect of immaturity of claim at time of bankruptcy upon right of set-off, see note to *Richardson v. Anderson*, 25 L.R.A. (N.S.) 396.

the right of the trustee, at his election, to rehabilitate the contract by performance. In the case styled *Re Swift*, 50 C. C. A. 264, 112 Fed. 315, this consequence was considered by the court of appeals for the first circuit in a very satisfactory opinion by Putnam, Ch. J. There the obligation of a broker to deliver certain shares of stock on demand was held to be breached by bankruptcy, and that no prior demand was essential, a right of action accruing simultaneously with the bankrupt petition, which was the act of disablement to which the adjudication related. In *Re Pettingill* (D. C.) 137 Fed. 143, 147, Judge Lowell, in a very able and discriminating opinion in which the authorities are considered in the light of the requirements for a provable debt under the present bankrupt law, reached the conclusion that "if the bankrupt, at the time of bankruptcy, by disabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disablement and repudiation. For the assessment of damages, proceedings may be directed by the court under § 63b, act July 1, 1898, chap. 541 (30 Stat. at L. 562, U. S. Comp. Stat. 1901, p. 3447)."

In that case it was held that a contract guarantying "the redemption" of corporate shares three years after date of issue was a provable claim, although the time for redemption had not arrived at date of bankruptcy.

It is sufficient that a claim becomes provable as a consequence of bankruptcy. The right to sue for and recover damages then accrues. As Judge Lowell puts it in *Re Pettingill*, cited above: "For admission to proof, however, the claim need not arise before bankruptcy, nor need the contract be broken theretofore. It is sufficient for proof if the breach of contract and bankruptcy are coincident."

The creditor by offering to file his claim manifests his election to treat the contract as broken. This the court held he might do. The decree in each case is affirmed.

GEORGIA SUPREME COURT.

T. J. CRAWFORD

v.

J. M. CRAWFORD.

(— Ga. —, 67 S. E. 673.)

Fraud — fiduciary relation — brothers.

1. The fact that the plaintiff and the de-

Headnotes by HOLDEN, J.
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fendant are brothers does not of itself create a confidential or fiduciary relation between them. There is no presumption that such relation exists between brothers solely from the fact that they are so related. If a confidential or fiduciary relation exists between brothers, it must be shown by proof; and the burden is upon the party asserting the existence of such relationship to affirmatively show the same.

Limitation of action — fraud — injury to property.

2. Where one practises upon another fraud and deceit, whereby the latter is induced to accept property in settlement of a debt much greater in amount than the value of the property, an injury is done to property, and not to the person, and the statute of limitations in reference to actions for injuries to property applies.

Same — proper diligence — pleading.

3. Where an action is brought to recover damages alleged to have resulted to the plaintiff in consequence of the perpetration of fraud charged to have been practised upon him by the defendant, the cause of action, as stated in the declaration, being apparently barred by the statute of limitations, and it is sought to relieve such action of the bar of the statute by alleging that it was brought within the statutory period after the discovery of the fraud, if it does not appear from the petition that the plaintiff used proper diligence to discover the fraud, the petition should be dismissed upon appropriate demurrer thereto.

(February 23, 1910.)

CROSS WRITS of error to the Superior Court for Fulton County to review a judgment of nonsuit in an action brought to recover damages for alleged fraud in the settlement of a debt, the defendant by his cross writ seeking review of an order overruling a demurrer to the petition. Main writ dismissed. Judgment on cross writ reversed.

Statement by Holden, J.:

The plaintiff brought suit against the defendant, making substantially the following allegations: They are brothers, and were

Note. — Is action based on fraud governed by statute of limitations applicable to injury to property or injury to the person.

Aside from *CRAWFORD v. CRAWFORD*, but very little authority has been found on the question here presented.

In *Miller v. Wood*, 41 Hun, 600, it was held that an action brought to recover damages sustained by the plaintiff in consequence of fraudulent representations made by the defendant, whereby the former was induced to purchase at its face value a mortgage which was in fact worthless, was governed by the statute of limitations ap-

born and reared in the same county. The defendant is six years older than the plaintiff. The plaintiff came to Atlanta in 1892, and the defendant a number of years prior thereto, both for the purpose of engaging in the practice of medicine. Prior to the plaintiff's removal to Atlanta he loaned the defendant, in 1890 or 1891, \$2,500, and took his note for the same. After such removal, he loaned the defendant various other sums until January 1, 1896, which at that time, with the prior loan, aggregated \$5,000, on which date the defendant gave the plaintiff a note for \$5,000, due one day after date. The defendant asked the plaintiff to deal in stocks, with the latter's money, with the understanding that the defendant would sustain the losses, and they would equally divide any profits made. During the first six months of 1895 the plaintiff invested in stocks for a short time and made profits of \$70, one half of which was paid to the defendant. Later on plaintiff lost \$800, which defendant refused to pay, and has never paid. During the summer of 1896 defendant repeatedly told plaintiff's wife that "he was badly involved financially; that he intended to let his creditors take his property, for the reason that he was unable to pay what he owed." Plaintiff went to defendant on or about October 12, 1896, for the purpose of collecting the money due him. Defendant told plaintiff that "he owed large sums of money that he was unable to pay; that he was insolvent, and would lose everything that he had;" that defendant's wife owned a lot covered by a mortgage to secure \$2,000, which she would convey in settlement of the indebtedness; and that, if plaintiff did not accept this proposition, he would lose such indebtedness. Plaintiff was raised with defendant, and had gone to school to the defendant, and had implicit confidence in him. Plaintiff accepted the proposition, and on or about October 12, 1896, defendant's wife conveyed the lot to

plaintiff's wife; the latter assuming the mortgage thereon. The lot was worth \$3,500, less the amount secured by the mortgage, and plaintiff received only \$1,500, less \$35 interest paid on the debt secured by the mortgage. Defendant at the time of the conveyance stated that there was \$35 interest due on the note secured by the mortgage, and that he did not have the money with which to pay the same; and it was paid by the plaintiff. Plaintiff continued to rely on and believe the statements of the defendant until September, 1903. "Petitioner alleges that he continued to rely on and believe the statements of said defendant hereinbefore alleged and set forth, until September, 1903, when he went to defendant, knowing that he had been successful, and believing that he had emerged from the insolvency which he had declared to petitioner was hanging over him in 1896, and demanded of the said defendant the payment of the said balances due him. There were a number of conferences between defendant and petitioner. Your petitioner urged that he was entitled to the full payment of the money due him, and recalled the statements which defendant had made at the time of the settlement. Finally negotiations and conferences came to an end, when defendant denied that he had represented himself to be insolvent, and stated to your petitioner that he was 'twenty-one,' meaning that your petitioner was twenty-one years of age at the time of said settlement. For the first time petitioner's confidence in defendant was shaken. Petitioner had never doubted defendant's statements, nor the claim that he was insolvent in 1896, until he denied having made the statements. Your petitioner then employed an attorney and investigated the financial condition and responsibility of the defendant in 1896, when he claimed to be insolvent and unable to pay his debts. The result of this investigation disclosed to your petitioner for the first time since the

plicable to actions for "injuries to property." The court said: "As an action for damages, it is within the six years' limitation, and is consequently barred unless it is excepted by the statute from that limitation. The six years' limitation applies to an action to recover damages for an injury to property (Code Civ. Proc. § 382, sub. 3), and 'an injury to property' is defined by the Code to be 'an actionable act, whereby the estate of another is lessened, other than a personal injury or the breach of a contract.' § 3343, sub. 10. By this circumlocutory process, the Code brings an action to recover damages for fraud and deceit within the six years' limitation." This case was affirmed in 116 N. Y. 351, 22 N. E. 553.

So, in *Laufer v. Sayles*, 5 App. Div. 582, 39 N. Y. Supp. 377, it was said that if a 28 L.R.A. (N.S.)

claim as to a deed which was alleged never to have been executed was treated as an action for damages for the fraudulent procurement of a deed, and the consequent destruction of plaintiff's title, it would be an action for "injury to property," and governed by the statute of limitations applicable to such injuries.

In *Dunn v. Miller*, 96 Mo. 324, 9 S. W. 640, where an owner of property was dispossessed because of a suit of ejectment based upon a forged deed, it was held that a suit in equity, brought by him to cancel the forged deed and annul the judgment in ejectment, was governed by the statute of limitations applicable to "real actions," and not the statute applicable to "personal actions."

settlement was made that said defendant was solvent and able to pay all he owed, including his indebtedness to petitioner, at the time he claimed to be insolvent and unable to pay. Petitioner's attorney then took the matter up with defendant, and finally an agreement to arbitrate the matter was reached. Petitioner's counsel prepared a submission to arbitration in writing, which was satisfactory to petitioner, and presented the same to defendant for his signature. Said defendant refused to go further with the arrangement, saying that he had been advised by his attorney that the claims of petitioner were barred by the statutes of limitations. Petitioner avers that each and every statement made by defendant to petitioner's wife, as hereinbefore alleged, was false when made, and was known by said defendant to be false, and that said statements were made for the purpose of having them repeated to your petitioner, and to create alarm upon his part concerning the money due him by said defendant. Your petitioner alleges that the statements made to him by defendant, that he was owing large sums of money, that he was insolvent and unable to pay what he owed, and that he would lose everything he had, and that your petitioner would lose what defendant owed him unless he accepted the property aforesaid in settlement, were false when made, and defendant knew that they were false when made. Said statements were made for the purpose of deceiving and defrauding your petitioner, and did deceive and defraud him. As a result of the aforesaid false and fraudulent statements, your petitioner was defrauded, injured, and damaged to the amount and value of \$4,335; that at the time of said settlement defendant was due petitioner the principal sum of \$588; that in said settlement he received property of the value of \$1,500 only; that the statement of defendant that he was unable to pay the interest on the note was false, and was made as a part of the scheme and plan adopted by defendant to deceive and defraud your petitioner. Petitioner alleges that J. M. Crawford was solvent on the 1st day of January, 1896; that he has been solvent at all times since said date, and that he is solvent now; that defendant did not owe large sums of money which he was unable to pay in October, 1896; that he was able to pay all he owed on said date; and that he took advantage of your petitioner, and of their relations of confidence, friendship, and relationship which had existed from childhood. Petitioner alleges that on the 12th day of October, 1896, defendant did owe sums of money, but how much and to whom your petitioner does not know; but your petitioner alleges that said defend-

ant was able to pay all such sums, and that he did pay all such sums in full, and that he did not let his creditors take his property because he was unable to pay what he owed at the time, but that he retained his property and paid all he owed. Since the fall of 1903, when your petitioner first discovered the frauds herein alleged, numerous conferences have occurred between defendant and petitioner regarding the matter, and that on the 17th day of October, 1906, they entered into an agreement to arbitrate all differences of a financial nature between them; that the matters herein complained of comprise all differences of a financial nature between defendant and himself; and that the agreement or submission was entered into for the purpose of submitting these matters to arbitration. Petitioner attaches a copy of said submission hereto, marked 'Exhibit A,' and makes the same a part of this petition. Petitioner alleges that he has fully complied with the terms of said submission, that he selected an arbitrator within the time stipulated, and notified said defendant of the selection and of the name of the party selected, and requested him to make his selection and notify the party selected by your petitioner; but that said defendant refused, and still refuses, to make his selection. Petitioner avers that said defendant has committed a breach of said agreement. And your petitioner denies that his action is barred by the statute of limitations; but avers that, if there has been any question concerning the limitation, the conduct of the defendant, his agreement above referred to, and the breach thereof, brought the causes of action within the statute. Petitioner brings this action of deceit; and prays that he be awarded judgment against said defendant for amounts in damages equal to the sums of which the said defendant defrauded him, with interest thereon." The agreement to submit the matters between the plaintiff and the defendant to arbitration, signed by both of them, referred to no particular debt, but referred generally to "certain matters of financial differences" between them.

The defendant filed a demurrer upon the following grounds: "(1) That no cause of action is set out in said petition. (2) That said petition shows on its face that part of the sum claimed, to wit, \$800, is an alleged debt arising out of a transaction involving speculating in futures, and for that reason is illegal, and cannot be recovered in law. (3) That said petition shows that as to the other amount claimed to be due by this defendant, the same was long since settled by defendant with petitioner, and no indebtedness on account of same now exists. (4) That said petition shows on its face

that the statute of limitation has run against any and all of the indebtedness claimed to be due by defendant to petitioner. (5) Defendant further demurs to the petition on the ground that it is really an effort on the part of petitioner to rescind the trade or settlement made with defendant in reference to the claimed indebtedness of \$5,000, and that the petitioner discloses that no offer has ever been made by petitioner to rescind said trade or settlement, nor is there any offer in the petition to rescind said trade or settlement, and to give back to petitioner the property which was received under said trade or settlement." The demurrer was overruled. Upon the conclusion of the plaintiff's evidence, the court granted a nonsuit, and the plaintiff excepted. The defendant filed a crossbill of exceptions to the ruling on the demurrer.

Mr. Edgar Latham for plaintiff.

Messrs. McDaniel, Alston, & Black, for defendant:

Fraud which must have been discovered if usual and reasonable diligence had been exercised is not a good reply to the statute of limitations.

Sutton v. Dye, 60 Ga. 449.

It is not enough to show that fraud was not discovered. It must also be shown that it could not have been discovered if usual and reasonable diligence to discover it had been exercised.

Pledger v. Coulter, 26 Ga. 443; Marler v. Simmons, 81 Ga. 611, 8 S. E. 190; Freeman v. Craver, 56 Ga. 161; Little v. Reynolds, 101 Ga. 594, 28 S. E. 919; Massachusetts Ben. Life Asso. v. Robinson, 104 Ga. 272, 42 L.R.A. 261, 30 S. E. 918; Reynolds & H. Estate Mortg. Co. v. Martin, 116 Ga. 502, 42 S. E. 796; Edwards v. Smith, 102 Ga. 19, 29 S. E. 129; Maxwell v. Walsh, 117 Ga. 471, 43 S. E. 704; 2 Wood, Limitations, § 276.

Relationship, of itself, does not create any confidential relation.

Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257; 6 Enc. Ev. p. 10; Atkins v. Withers, 94 N. C. 581; McLeod v. Bullard, 84 N. C. 515; Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Lee v. Pearce, 68 N. C. 76; Goar v. Thompson, 19 Tex. Civ. App. 330, 47 S. W. 61; Robins v. Hope, 57 Cal. 493.

Holden, J., delivered the opinion of the court:

1. The fact that the plaintiff and the defendant are brothers does not of itself create a confidential or fiduciary relation between them. There is no presumption that such relation exists between brothers, arising solely from the fact that they are so 28 L.R.A. (N.S.)

related. If a confidential or fiduciary relation exists between brothers, it must be shown by proof; and the burden is upon the party asserting the existence of such relationship to affirmatively show the same. The facts that the defendant is six years the senior of the plaintiff, that they were reared together, and that the plaintiff attended a school taught by the defendant, are not sufficient to establish a confidential or fiduciary relation between them. Nothing appears showing a controlling influence by the defendant over the will, conduct, and interests of the plaintiff, nor does it appear that any trust relation existed between them, such as that of partners, or principal and agent, nor any other relation which would warrant the conclusion that they occupied towards each other what is known in law as a confidential relation. It appears from the petition that the plaintiff came to Atlanta some years prior to the transaction complained of, for the purpose of practising the medical profession, which would indicate that at the time the transaction occurred on which the suit is predicated, the plaintiff was not only a man of mature years, but engaged in a profession the practice of which requires more than ordinary intellectual capacity. On the subject of confidential relations, see Civil Code 1895, § 4030; Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257; Smith, Fr., § 102.

2. In the briefs filed by counsel for the defendant in error, it is insisted that the plaintiff is barred from his action in any event, inasmuch as the facts giving rise thereto were discovered in 1903, and suit was not commenced until 1906, three years thereafter. They contend that the statute of limitations applicable to the case is that prescribed in Civil Code 1895, § 3900, which requires the bringing of actions "for injuries done to the person" within two years after the right of action accrues. We do not consider that deceit practised upon another, whereby he is simply induced to incur a financial loss, can be classed as an "injury done to the person." Counsel cite the cases of Johnson v. Bradstreet Co. 87 Ga. 79, 13 S. E. 250; Hutcherson v. Durden, 113 Ga. 987, 54 L.R.A. 811, 39 S. E. 495; Gordon v. West, 129 Ga. 532, 13 L.R.A. (N.S.) 549, 59 S. E. 232, which they contend make it appear that deceit is an injury to the person. The Johnson Case, supra, was an action for libel, and this character of action was held to be an action for injury to the person, so as to fall within the provision of law that no action "for homicide, injury to person, or injury to property shall abate by death." In the Hutcherson Case, supra, it was ruled that an action for seduction was for an injury

"done to the person," and was barred unless brought within two years after the accrual of the right of action. And in the Gordon Case, supra, a similar ruling was made with respect to an action for false imprisonment, malicious use of process, or malicious abuse of process. All wrongs of the character dealt with in these decisions involve an infringement of one of the primary rights of man, namely, that of "security of person." This class of wrongs, notwithstanding the fact that the person upon whom they are inflicted may not suffer any actual injury, necessarily violate the right of the injured party to protection in the security of his person; and, as was pointed out in the cases above cited, are properly classed as "injuries to the person." Mr. Hilliard, in his work on Torts, classifies separately "torts to persons" and "torts to property," treating among the former wrongs of the same and kindred nature with those dealt with in the decisions referred to supra, while among the latter he includes "fraud" as a wrong to property. "Deceit" is, of course, a species of fraud. See 1 Hilliard, Torts, 464; 2 Id. 137. We cannot conceive of instances where fraud and deceit practised on another would result in an injury to the person; and perhaps it was for this reason that, in arranging the divisions of our Civil Code, fraud and deceit were dealt with in the chapter (Civil Code 1895, title 9, chap. 1) headed, "Injuries to Person or Property." In a New York case (Cleveland v. Barrows, 59 Barb. 364), which involved an action for fraud and deceit, the contention was made that "the term 'injury to property,' as used in the Code, must be construed to mean a direct, corporeal damage or wrong done to specific property, and not to the mere personal rights, or 'rights of property.'" On page 374 of 59 Barb., the court said: "By referring to the cause of action as stated in the complaint, it will be seen that it is there alleged that, in consequence of the defendant's false and fraudulent statements and representations, the plaintiff was induced to pay, and did pay, \$1,900 for the property, which was not worth at the time over \$900. The presumption is from the allegations in the complaint that the plaintiff paid the purchase price in money. What he has paid, therefore, over and above the value of the property purchased, the defendant has obtained wrongfully, by means of his fraud. Fraud is a wrong, and, if a party thereby obtains from another property, it is an injury to the property of such other, in the same sense precisely as though the wrongdoer had taken the property tortiously and converted it."

In Broom's Common Law, 9th ed. 782, it 28 L.R.A. (N.S.)

is said: "Torts to the person, . . . include (1) bodily injuries, whether direct, as assault and battery, or consequential, resulting from negligence or otherwise; (2) injuries to the health or comfort of an individual; (3) torts which affect personal liberty." On page 912 of the same work, when speaking of "Torts to Personal Property," the following text is employed: "It may readily be conceded that where a rightful possession of goods and chattels has once been gained, either by a just occupancy or by a legal transfer, whoever, whether by force or fraud, dispossesses the holder of them, is guilty of a tort, remediable by action; 'for,' as remarked by Blackstone, 'there must be an end of all social commerce between man and man unless private possession be secured from unjust invasion; and, if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong or the most cunning, and the weak and simple-minded part of mankind (which is by far the most numerous division) could never be secure of their possessions.'" The act of 1767, prescribing certain limitations for actions (Cobb's Dig. p. 559), made no reference to injuries to either person or property. It created a bar of four years for "actions upon the case," and this was the class of actions in which at common law relief might be had for damages resulting from fraud and deceit. Bishop, Non-Contract Law, § 343. Under that act, therefore, an action of the character we are now dealing with would not have been barred until the expiration of four years from the accrual of the right of action; and four years was treated as the period of limitation governing an action for deceit in the sale of promissory notes with a representation of the maker's solvency, in a case decided by this court in which the right of action accrued while the act of 1767 was of force. Pledger v. Coulter, 26 Ga. 443. That act was supplanted by the act of the general assembly approved March 6, 1856 (Acts 1855-56, p. 233), from which latter act the limitations now embodied in the Code were taken. The act of 1856 made no reference to actions upon the case, but, in prescribing therein certain limitations of actions, made the classifications of "suits for damages to real estate," "suits for injuries to personal property," and "suits for injuries done to the person," prescribing a bar of four years for the two former, and of two years for the last named. There is nothing in this act to indicate any intention on the part of the legislature to change the period of limitation of four years which previously applied to actions for fraud and deceit (as being actions upon the case) to one of two years,

unless it could be said that such actions could not be classed otherwise than as "injuries done to the person." It is the right of action which the statute bars. Deceit alone—which is practised on the person—gives no rights of action. There must be a resultant damage to create such right. Civil Code 1895, § 3813, is as follows: "Fraud by one, accompanied with damage to the party defrauded, in all cases gives a right of action." Section 3814 declares: "Wilful representation of a material fact, made to induce another to act, and upon which he does act to his injury, will give a right of action." The damage or injury (in the present case alleged to have been to the personalty of the plaintiff) is certainly one of the elements of the right of action, and it is this element which determines what limitation shall control. While we have been unable to find any case in our reports in which was raised the point made in the present case, namely, that deceit is an "injury done to the person," and therefore barred in two years, there are several decisions in suits for damages on account of fraud and deceit which treat the period in which this form of action can be brought as being governed by the nature of the damages suffered. See *Cade v. Burton*, 35 Ga. 280; *Knox v. Yow*, 91 Ga. 367, 17 S. E. 654; *Kirkley v. Sharp*, 98 Ga. 484, 25 S. E. 562; *Little v. Reynolds*, 101 Ga. 594, 28 S. E. 919; *American Nat. Bank v. Fidelity & D. Co.* 129 Ga. 126, 58 S. E. 867, 12 A. & E. Ann. Cas. 666. The headnote in the case of *Cade v. Burton*, supra, is as follows: "If one makes a sale of land by deed without warranty, but representing it to be his own, and afterwards convey the same land to a bona fide purchaser without notice, the period of limitations applicable to an action against him for the fraud is the same as that which would apply to an action for the land, to wit, seven years from the discovery of the fraud." We conclude that the plaintiff in the present case had a right to bring his action within four years from the time the statute commences to run against his alleged right of action, as the damages sued for resulted from an injury to the personal property of the plaintiff, and not from an injury to his person.

3. The defendant demurred to the petition on the ground that, if the plaintiff ever had any right of action, the same was barred by the statute of limitation, and contends that this demurrer should have been sustained. The plaintiff complains that the defendant, by falsely and fraudulently representing that his financial condition was such that he could not pay his debts, induced the plaintiff, who relied upon such representations, to accept property worth \$3,500 (and 28 L.R.A. (N.S.)

encumbered for \$2,000) for a debt amounting to \$5,000. The plaintiff alleged that these representations were false and were made for the purpose of deceiving, and did deceive, the plaintiff, and caused him the loss of the balance of his debt. This transaction occurred in 1896. The plaintiff alleges that he did not discover that the representations of the defendant were false, and that he was solvent and able to pay his debts in 1896 until seven years thereafter, in 1903. It is true that fraud by one, accompanied by damage to the party defrauded, gives a right of action; and it is generally true that, where the plaintiff has been deterred or debarred from his action by reason of fraud on the part of the other party, the statute of limitations does not run until the discovery of the fraud. However, fraud which tolls the statute of limitations must be such fraud as could not have been discovered by the exercise of reasonable diligence, where there is no confidential or fiduciary relation existing between the parties, or other facts which will excuse the failure to act. As hereinabove stated, the allegations in the petition do not set forth facts showing a fiduciary or confidential relation existing between the parties to this case. The petition shows on its face that the plaintiff's right of action was barred, unless it was true that he could not have discovered the fraud by the exercise of reasonable diligence. The suit was brought ten years after the time the fraud was alleged to have been perpetrated upon the plaintiff. He alleges that he did not discover the fraud until seven years after the time of its perpetration. There is no allegation that he could not have discovered it sooner by the exercise of reasonable diligence. It was held in the case of *Edwards v. Smith*, 102 Ga. 19, 29 S. E. 129: "Where an action is brought to recover damages alleged to have resulted to the plaintiff in consequence of the perpetration of a fraud charged to have been practised upon him by the defendant, the cause of action, as stated in the declaration, being apparently barred by the statute of limitations, and it is sought to relieve such action of the bar of the statute by alleging that it was brought within the statutory period after the discovery of the fraud, a mere declaration that the plaintiff 'used all diligence he could' to discover the fraud, without alleging that he was in fact diligent, how and in what manner he was diligent, and the extent of the efforts made by him to discover the fraud alleged, is not sufficient to relieve the case from the bar of the statute of limitations; and the action was properly dismissed upon demurrer." See also *Thornton v. Jackson*, 129 Ga. 700, 59 S. E. 905; *Sutton v. Dye*, 60 Ga. 449;

9 Enc. Pl. & Pr. p. 692; 13 Id. 245; 20 Cyc. Law & Proc. p. 102. We think the court committed error in overruling the demurrer on the ground that the cause of action was barred by the statute of limitations. As the court committed error in not sustaining the demurrer and dismissing the petition, everything occurring thereafter was nugatory; and the judgment in the cross bill of exceptions must be reversed, and the main bill, to the order of nonsuit, dismissed. There is no merit in the other grounds of demurrer, and the court committed no error in overruling them.

Judgment on cross bill of exceptions reversed. Main bill of exceptions dismissed.

All the Justices concur.

**UNITED STATES CIRCUIT COURT OF
APPEALS, SEVENTH CIRCUIT.**

HARRY G. CHENEY, Plff. in Err.,
v.

WILLIS P. DICKINSON et al.

(96 C. C. A. 314, 172 Fed. 109.)

**Corporation — false report — reliance
upon — liability.**

Officers of a corporation who issued a fraudulent prospectus to sell treasury stock are not liable in damages for the fraud to one who, in reliance upon it, purchases from an individual stock which is owned by him, and in which the corporation has no interest.

(April 13, 1909.)

ERROR to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois to review a judgment in defendants' favor in an action brought to recover damages alleged to have been caused by the issuing by defendants of a fraudulent prospectus. Affirmed.

Statement by Baker, Circuit Judge:

Plaintiff in error, who was plaintiff below, seeks the reversal of a judgment based on a directed verdict for the defendants. One Flagler was also named as a defendant in the declaration; but he was not served with process and did not appear, so the case was tried without him.

The declaration (in outline) charged that the defendants, including Flagler, organized a corporation with charter powers to manufacture and sell steel tubes and other steel and iron products; that they constituted themselves officers and directors; that they confederated and conspired to defraud the plaintiff and all others they could induce to purchase shares in said corporation, by making deceitful and fraudulent statements in prospectuses and otherwise; that to carry out their conspiracy they made certain statements and representations to the plaintiff which were material with respect to the value of the stock; that such statements were false and fraudulent, and were known at the time by the defendants to be false and fraudulent, and were made by the defendants for the express purpose of deceiving and defrauding the plaintiff; that the plaintiff believed said representations to be true; that, relying thereon, "he purchased from

Note. — Liability of officers or promoters of a corporation to one who purchases stock from an individual in reliance on a prospectus issued to induce purchase of treasury stock.

The conclusion reached in the above case, that officers of a corporation who issue a false prospectus to sell treasury stock are not liable therefor to one who, in reliance thereon, purchased from an individual stock which was owned by him, finds support in *Peek v. Gurney*, L. R. 6 H. L. 377, 7 Eng. Rul. Cas. 527, in which it was held that the directors of an intended company, who, for the purpose of selling stock, issued to the public a prospectus containing misrepresentations of fact, were not liable to one who, after the original allotment of shares had been made, purchased shares from an individual owner thereof, in reliance upon the prospectus. Lord Chelmsford declared that a purchaser of shares in the market, upon the faith of a prospectus which he had not received from those answerable for it, could not, by action upon it, so connect himself with them as to render them liable to him 28 L.R.A. (N.S.)

for the misrepresentations contained in it, as if it had been addressed personally to himself.

And the conclusion reached in *Peek v. Gurney*, supra, was approved by the court in *Greene v. Mercantile Trust Co.* 60 Misc. 189, 111 N. Y. Supp. 802 (affirmed without opinion in 128 App. Div. 914, 112 N. Y. Supp. 1131), in discussing the liability of the defendants for misrepresentations made in a prospectus issued and circulated by them for the purpose of inducing the public to purchase bonds, to one who, in reliance upon the statements contained in such prospectus, purchased stock in such corporation in the open market. It was declared to be the law that where a false prospectus was addressed to a limited class who only were the persons intended to be influenced, then, as a rule, persons outside that class, with whom those making the statements had no dealings, but who might have been injured by reliance thereon, could not maintain an action upon them for fraud and deceit. A demurrer, however, was overruled to a complaint which, in addition to the allegations of the issuing of the false pro-

the defendants 100 shares of the supposed treasury stock of the Flagler Iron & Steel Company, of the par value of \$10,000, and paid therefor the sum of \$10,000; that he now has in his possession certificates for said stock, ready to be produced in court, and surrendered to the defendants as the court may direct." The declaration also alleged that the entire issue of 30,000 shares of preferred stock and all of the 20,000 shares of common stock, except 10 shares, subscribed and paid for in money so as to qualify the subscribers to serve as directors, were issued by the present defendants, acting as a board of directors, to the aforesaid Flagler, as full-paid and nonassessable shares in payment for a worthless iron mine, and "that said stock was issued to Flagler, and divided between him and the other defendants; that the treasury of the company never did own the stock, and never received the money that was obtained from the sale of the stock, and none of the money paid by the plaintiff for his stock went into the treasury of the company;" and "that the stock was, at the time of the sale of the same to the plaintiff, absolutely worthless and of no value whatever."

The prospectus, after setting forth descriptions of the character and value of mineral lands and manufacturing plants (which the evidence tends to prove were false), proceeds: "The company has now in its treasury for sale stock (not taken) to the amount of 30,000 shares,—25,000 shares preferred, 5,000 shares common,—to be sold from time to time, as needed for construction purposes. For further information regarding terms of our securities and any other data, please address or call at the company's offices. Flagler Iron & Steel Company, Rooms 1322-23, First National Bank Building, Chicago, Illinois."

A letter from the plaintiff to the com-

pany reads as follows: "My attention has been called to your company as a good investment for funds, and I shall be glad if you will send me full particulars regarding terms of purchase of preferred stock and bonus of common stock, as well as price of common. I should like to know what would be the earliest date you expect to begin to pay dividends on the preferred. Please give me any other information I may require for proper consideration of purchase."

A long letter to the plaintiff signed by the company, "by W. P. Dickinson, V. P. & T.," contained the following: "Replying to your favor of December 19th, we regard the common and preferred stock a good investment. . . . Our mills Nos. 1 and 2 are built and we are now installing machinery. We shall sell about \$500,000 more stock for equipment purposes and working capital. . . . The price of the stock is par, common or preferred. We have not sold a share of stock to anybody for less than its face, and we have authorized no one to sell any stock for less than its face, and we have given no bonus to anybody. We aim to make this a manufacturing proposition worth the money. We want you to pay for what you get, and we expect to keep it good. . . . We shall be glad to have you come out (from your home in Connecticut) and look the proposition over, and make any investigation that you feel like, and take some of our stock if you are satisfied that we are all right. We are sending you under separate cover a prospectus of our company, which we would like to have you take the time to read." The omitted parts of the letter relate to representations of the character and value of the company's assets.

Other matters of evidence, as well as of lack of evidence, so far as they are deemed pertinent to the decision, are stated in the opinion.

spectus and the purchase of stock by the complainant, alleged that the prospectus was prepared and issued "with intent that the statements contained in said prospectus should be believed and relied on by the public and by the plaintiff, and that the public and the plaintiff should be thereby induced to purchase the bonds and stocks of the . . . company."

In *Andrews v. Mockford* [1896] 1 Q. B. 372, it was held that the promoter of a company who issued a false prospectus, not merely to induce the application of an allotment of shares, but also to induce persons to purchase shares in the market, and who followed up such prospectus with published false representations to the same effect as those in the prospectus, with the direct intent of inducing persons to purchase the shares of the company, was li- 28 L.R.A. (N.S.)

able to one to whom the prospectus was sent, and who, in reliance upon the prospectus and the subsequent publication, purchased shares in the open market after the allotment. *Peek v. Gurney*, supra, was relied upon by the defendants, but the court held it inapplicable to the facts of that case, though the correctness of its conclusion under the circumstances was not questioned. Lord Justice Rigby declared that it was undoubted that if a prospectus was issued for the sole purpose of obtaining subscriptions for the original capital of the company, or for any subsequent issue of shares, people who did not respond to that invitation, and did not act upon it in the way in which it was intended to be acted upon, but who afterwards bought shares in the open market, could not, in an action for fraud, rely on false statements in the prospectus.

Argued before Baker, Seaman, and Kohl-saat, Circuit Judges.

Mr. Almon W. Buckley for plaintiff in error.

Messrs. John J. Herrick, Horace H. Martin, Charles L. Allen, Horace K. Tenney, and Frank E. Harkness, for defendants in error Head and Simpson:

A director of a corporation is not liable in an action for deceit for false representations made in a prospectus or other statement with reference to the affairs of the corporation, unless he actually participates in the fraud.

Kountze v. Kennedy, 72 Hun, 311, 25 N. Y. Supp. 682, 147 N. Y. 124, 29 L.R.A. 360, 49 Am. St. Rep. 651, 41 N. E. 414; Moffat v. Winslow, 7 Paige, 124; Lyon v. James, 97 App. Div. 385, 90 N. Y. Supp. 28, affirmed in 181 N. Y. 512, 73 N. E. 1126; Arthur v. Griswold, 55 N. Y. 400; Holdom v. Ayer, 110 Ill. 448; Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432; Nelson v. Luling, 4 Jones & S. 544.

Representations, in order to create a legal liability for damages, must relate to a past or existing fact, and not to the effect of transactions or to results which may be expected, or to the cost or value of property.

Tuck v. Downing, 76 Ill. 71; Southern Development Co. v. Silva, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881; Banta v. Palmer, 47 Ill. 99; Gordon v. Butler, 105 U. S. 553, 26 L. ed. 1166.

Where the plaintiff does not rely solely upon the representations, but afterward investigates the matter, he is held to rely upon his investigations, and not upon the representations; and if he is not prevented by the defendant from making a full investigation, he cannot hold the latter liable for the falsity of the original statement.

Southern Development Co. v. Silva, 125 U. S. 247, 259, 31 L. ed. 678, 683, 8 Sup. Ct. Rep. 881; Tooker v. Alston, 16 L.R.A. (N.S.) 818, 86 C. C. A. 425, 159 Fed. 599; Billings v. Aspen Min. & Smelting Co. 2 C. C. A. 252, 10 U. S. App. 1, 51 Fed. 338.

Messrs. E. W. Froelich, Warren B. Wilson, and Samuel M. Sutloff for other defendants in error.

Baker, Circuit Judge, delivered the opinion of the court:

A person who finds that he has parted with his money through being fraudulently led into a purchase may pursue either one of two remedies at law. He may repudiate the purchase, surrender the property to the vendor, and recover the consideration. Such an action manifestly can be maintained only against the party from whom he purchased the property, and to whom (or to whose order) he paid the consideration. Or he may

affirm and abide by the purchase, retain the property, and recover the difference between what he paid and the value of what he received and is retaining. Such an action can be maintained against anyone (vendor or third party, indifferently) who intentionally deceived the plaintiff into making the purchase. In such an action it is immaterial whether the defendant did or did not receive the consideration or other benefit, because the gravamen of the action is that the plaintiff has been deceived to his injury, not that the defendant has profited by the transaction. The difference between the two actions is not merely technical; in substance they are as far apart as affirmance and repudiation. Wilson v. New United States Cattle Ranch Co. 20 C. C. A. 244, 36 U. S. App. 634, 73 Fed. 994; Kingman & Co. v. Stoddard, 29 C. C. A. 413, 57 U. S. App. 379, 85 Fed. 740; Simon v. Goodyear Metallic Rubber Shoe Co. 52 L.R.A. 745, 44 C. C. A. 612, 105 Fed. 573; Westerfeld v. New York L. Ins. Co. 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

The declaration in this case bears some evidence that it is an attempted mixture of the two irreconcilable theories. The allegations that the defendants' fraud led the plaintiff to purchase the shares from the defendants, and that the plaintiff brings the certificate of shares into court for surrender to the defendants, point to an action to recover from the defendants the consideration paid to them on a sale which plaintiff repudiates on account of fraud. If these allegations are ignored, as being surplusage, there may remain enough in the declaration to state a good cause of action for deceit. And inasmuch as the declaration was not questioned by motion or otherwise, and the motions for directed verdict were based solely on the contention that the evidence failed to establish a cause of action (without regard to the theory of the declaration), we have examined the evidence to determine its sufficiency to make a prima facie case on either theory.

The undisputed evidence shows that the plaintiff received the stock from and paid his money to one Costelo, a Boston broker of stocks and bonds; that Costelo was not the agent or representative of the company, or of any of the present defendants; that the stock sold through Costelo was the property of Flagler, and that Flagler received the consideration; that the defendants knew nothing of the sale from Flagler to the plaintiff, were not interested directly or indirectly in the shares that were so sold, and received no part of the consideration. In short, there was an utter failure of proof to sustain the first above stated theory of liability.

Evidence was introduced which tended to prove that a charter was legally obtained; that the defendants, as directors, carried through a bargain with Flagler by which all the stock (except 10 qualifying shares) was issued to Flagler as full paid and nonassessable, in consideration whereof Flagler turned into the company's treasury at least 15,000 of said shares, and agreed to convey to the company a certain so-called mine; that the company held options on certain grounds and buildings which the defendants hoped would be useful in creating the business for which the company was chartered; that, of the stock which Flagler retained, certain amounts were distributed among the defendants gratuitously; that the defendants intended that the stock in the treasury should be sold by the treasurer to the public for the purpose of raising money with which to try the experiment of making their otherwise worthless stock valuable; that the treasurer, in endeavoring to sell treasury stock, issued a prospectus which consisted mainly of false and misleading statements; that some of the defendants actually knew the statements were false, and others were conscious that they had no knowledge that the statements were true (*Lehigh Zinc & I. Co. v. Bamford*, 150 U. S. 665, 673, 37 L. ed. 1215, 1217, 14 Sup. Ct. Rep. 219); that the plaintiff, in buying, relied on the truthfulness of the statements in the prospectus and in the treasurer's letter; and that plaintiff was damaged to the extent of the purchase money because the stock was valueless.

As already stated, the plaintiff bought of a broker who was selling stock owned solely by Flagler. Not only was no purchase made by the plaintiff of treasury stock, or of stock in which the defendants were otherwise interested, but the record fails to show any legal ground for the plaintiff even to claim that he was buying treasury stock. On the contrary, the letter of the treasurer was explicit notice that the broker, in offering stock to the plaintiff at 50 cents on the dollar, must be dealing in stock that had already left the treasury.

Only one inference can be drawn from the prospectus. The defendants were inviting everyone into whose hands the prospectus should come to buy treasury stock. This was in aid of the conspiracy, and the only conspiracy, which the evidence tended to sustain. And to all persons who bought treasury stock,—who paid their money into the fund over which the defendants had a control and interest in common,—relying on 28 L.R.A. (N.S.)

the truth of the statements of fact in the prospectus, all of the defendants who were parties to the false statements might well be held answerable in damages. But the plaintiff, so far as the defendants were concerned, was a purchaser on the market. And while the sponsors for false prospectuses that are issued to bring in money to the common treasury are justly made to respond to all persons who take the invited action, yet the law recognizes no right of action in one who relies without invitation on a statement addressed to a particular class which he stays out of. *Peek v. Gurney*, L. R. 6 H. L. 377; *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436; *Hunnewell v. Duxbury*, 154 Mass. 286, 13 L.R.A. 733, 28 N. E. 267; *Hindman v. First Nat. Bank*, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 931. "It has never been a ground of action that the defendant made a dishonest representation, and that the plaintiff had relied upon it and sustained injury. The moral obligation to speak the truth is not ground for a civil action unless the misrepresentation was intended to induce the very action by the plaintiff which has resulted in his damage." By the prospectus the defendants intended merely to induce the plaintiff or any other reader of it to pay his money into the treasury, and receive stock from the company as seller. And the letters between the plaintiff and the company do not change the situation in the slightest. The plaintiff did not frankly disclose what he was thinking of doing. On the contrary, he asked the company to name the price at which it would sell him stock,—just what the company would expect from anyone who had been attracted by seeing or being told of the prospectus. The company's letter in reply incloses another copy of the prospectus, repeats the representations thereof largely, and invites the plaintiff to buy some of the stock which the company is selling "for equipment purposes and working capital." Plaintiff's purchase of Flagler stock at 50 cents was not only outside of the action invited by the prospectus and letter, but was destructive of the defendants' endeavor to place treasury stock at 100 cents. So the case, on the evidence touching this branch of it, comes to this: While the defendants' deceit may afford a ground of action in favor of those who were misled into paying their money (or property) into the treasury for stock sold by the company, the deceit does not run with the stock into the hands of subsequent transferees.

The judgment is affirmed.

KENTUCKY COURT OF APPEALS.

LOUISVILLE DRY GOODS COMPANY,
Appt.,
v.

J. W. LANMAN et al.

(135 Ky. 163, 121 S. W. 1042.)

Sale — fraud of purchaser — remedy.

1. The purchase by an insolvent of goods on credit without disclosing the facts that he has given a mortgage upon his present and future property, to secure an existing indebtedness, is such fraud as to give the vendor a right to avoid the sale and sue to recover the property, or to recover the value of the goods from the purchaser in an action for fraud, with the remedies afforded by statute in such cases, or to proceed against him in bankruptcy.

Bankruptcy — discharge — effect on fraudulent debt.

2. A debtor who has secured goods with the fraudulent intention not to pay for them cannot avoid an action in the state court for fraud by securing a discharge in bank-

Note. — Is state court's jurisdiction of creditor's attack on preference ousted by bankruptcy proceedings commenced more than four months after preference.

The question as to the right of a creditor of a bankrupt to set aside a transfer in fraud of creditors is considered in the note to *Ruhl-Koblegard Co. v. Gillespie*, 10 L.R.A. (N.S.) 305. Attention should be called, in this connection, to the difference between preferences and fraudulent conveyances. This difference will become apparent when it is considered that, with respect to preferences, the bankruptcy act makes them voidable only, whereas, in the case of fraudulent transfers, the statute makes them absolutely void, and provides that the trustee shall, upon his appointment and qualification, be vested by operation of law with the title of the bankrupt to all property transferred by him in fraud of creditors. See § 70a (4).

The word "preference," as used in the foregoing title, has reference to transactions which enable any one of the debtor's creditors to obtain a greater percentage of his debt than other creditors of the same class, within § 60a of the bankruptcy statute, but which are not voidable by the trustee, for the reason that the preference is not given within four months before the bankruptcy. So, too, the word "preference" is so used as to apply to transactions denominated preferences by a state statute, which are likewise not voidable by a trustee in bankruptcy.

Now, so long as no bankruptcy proceedings are instituted, the creditor has the unquestioned right to pursue any remedy which a state statute defining a preference may grant him. But does he lose this right by virtue of the institution of bankruptcy proceedings, where the very transaction that he is attacking as a preference is not, under

bankruptcy upon a voluntary petition presented by him.

Same — jurisdiction of state court.

3. Where bankruptcy proceedings are not begun within four months of the filing of a preferential mortgage, so that the Federal court has no jurisdiction thereof, the state court may, if the proceedings are begun within the prescribed time, act under a state statute which makes such mortgage, when properly attacked, operate as a voluntary assignment for the benefit of all creditors; and it is immaterial that the bankrupt has, in the meantime, secured a discharge from the bankruptcy court.

(October 26, 1909.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Mercer County dismissing an action for fraud brought to recover the value of goods sold and delivered. Reversed.

The facts are stated in the opinion.

Mr. C. E. Rankin for appellant.

Mr. E. H. Gaither for appellees.

the bankruptcy statute, a preference voidable by the trustee? This is the question which is indicated by the foregoing title.

It would seem at the first glance that if a creditor has the right to attack a preference in a state court, and by virtue of the provisions of a state statute, his right could not be affected by the institution of bankruptcy proceedings, where the bankruptcy act, by its very terms, excludes the transaction from attack by the trustee. But, upon the other hand, it might be contended by a preferred creditor whose preference has been attacked by another creditor in the state court, that the institution of bankruptcy proceedings operates to suspend state insolvency laws and all proceedings thereunder, and that therefore the rights of creditors are confined to such as are afforded them by the express provisions of the bankruptcy act.

Let it be supposed that there is some virtue in this contention. Is there any provision in the bankruptcy act expressly authorizing an action by a creditor in a state court? Section 60b, as amended, provides: "If a bankrupt shall have given a preference . . . it shall be voidable by the trustee, and he may recover the property or its value. . . . And for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." 32 Stat. at L. 799, chap. 487, § 13, U. S. Comp. Stat. Supp. 1909, p. 1313. Section 23b provides, among other things, that suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, except suits for the recovery of property under § 60b. It will be noted that § 60b authorizes the

O'Rear, J., delivered the opinion of the court:

J. W. Lanman was a merchant doing business at Cornishville, in Mercer county. The petition alleges: That the plaintiffs were wholesale merchants, and had sold him bills of merchandise from April to June, 1908, amounting to \$473.82, and from June 23, 1908, to July 28, 1908, of \$50.46; that on April 28, 1908, the defendant Lanman, being then insolvent, and with the design to prefer some of his creditors to the exclusion of the others, executed a mortgage to the Union Bank of Cornishville, Kentucky, upon a storehouse and lot situated in Cornishville, "and the stock of merchandise now within or to be within said storeroom, consisting of dry goods, boots, shoes, notions, and what-

ever articles there may be therein, including furniture and fixtures," to secure the bank in the sums of \$1,495.75 on a note due March 8, 1908, \$1,323 on a note due June 4, 1908, and \$148.42 overdraft then due the bank; that these debts were in existence prior to the execution of the mortgage, and were secured by a prior pledge of thirty shares of the stock of the bank as collateral; that one S. P. De Baun had, since the filing of the suit, been subrogated to the rights of the bank by an assignment of the mortgage to him by the bank; and that the mortgage was fraudulent, and executed with the design to prefer the bank and De Baun. It is also alleged that De Baun was bound as surety on the original notes to the bank, and that the

avoidance of a preference only by the trustee. Therefore the provision of § 23b can be construed to authorize an action in a state court to set aside the preference only when it is brought by the trustee. Therefore we have, by combining the two sections, the result that, as far as express authority is given, only the trustee may set aside the preference, and the only suit to set aside the preference of which the state court has jurisdiction is one instituted by the trustee.

It seems, then, that about the only question raised, if any real question can be raised, as to the right of a creditor to attack a preference which a trustee is not authorized to avoid, is this: Does the fact that the preference was given more than four months before the filing of the petition operate, upon the filing of the petition, to give the preferred creditor a vested right to the so-called preference, so as to preclude or oust an attack thereon by another creditor, upon the theory that the state insolvency laws and proceedings thereunder are superseded or suspended when the provisions of the bankruptcy act are invoked?

But one other case has been found in which this question has been considered,—*Moore v. Green*, 76 C. C. A. 242, 145 Fed. 472.

In this, as in *LOUISVILLE DRY GOODS CO. v. LANMAN*, the question was discussed in a general way, and the conclusion was not expressly made to depend upon such provisions of the statute as have been cited above. In the *Moore Case* there was a proceeding in the state court under the state statute which enabled a creditor to an insolvent debtor to apply to a court of equity to vacate a preference in favor of a particular creditor, and to have the conveyance declared to be for the benefit of all creditors properly joining in such suit. After the lapse of the four months' period, the debtor availed himself of the bankruptcy act. As a matter of fact, the debtor was "engaged chiefly in farming or tillage of the soil," within § 4b of an act which enumerates the persons who may become voluntary bankrupts, and the creditors were therefore without right to have them adjudicated an in-

voluntary bankrupt, so their only recourse was to the state court, under the state statute. It was held that the creditor prosecuting such suit thereby acquired a statutory lien on the property covered by such deed, which was not affected by the commencement of bankruptcy proceedings. This lien was held to exist under the provisions of § 64a (5), which gives priority to debts owed to any person who, by the laws of the state, is entitled to priority. The court said: "As to whether the relief to which the petitioner herein is entitled should have been afforded him by proceedings in the bankruptcy court, or that court should have suspended its administration so far as the portion of the assets of the bankruptcy is concerned, properly applicable to the lien of the deed, . . . is largely a matter of discretion, in the view we take. Either course could have been adopted. No question of jurisdiction was involved. The bankruptcy court clearly had jurisdiction to proceed, and, if needs be, to have stayed the prosecution of the suit in the state court for the time being; but the state court likewise, at the time of the institution of the suit therein and the commencement of the bankruptcy proceedings, had and still has jurisdiction, and we think, as a matter of convenience, aside from any question of comity, the better plan would have been and is to proceed with the litigation in the state court, to the end that all creditors who may desire to do so may appear therein, and assert their rights to such fund; and, in the meantime, the bankruptcy proceeding would, as to that portion of the estate, remain in abeyance: the bankruptcy court carrying out the judgment of the state court, when duly informed thereof, in said proceeding. No inconvenience would arise from this except as to this part of the fund. The bankrupt's discharge need not be withheld. Creditors have the right to assert their claim of lien irrespective of discharge; and but for the fact of its being optional with them to appear in said suit, it would really be better for the trustee in bankruptcy to interpose therein in their behalf."

mortgage covers all the property of the mortgagor. The mortgage was acknowledged on April 28, 1908, but was not recorded until July 28, 1908. This suit was begun by the filing of the petition and issual of summons on January 14, 1909. The summons was executed by personal service on Lanman, De Baun, and the Union Bank of Cornishville on January 16, 1909. On January 27, 1909, the day on which an appearance and answer were due, the defendants filed a joint answer which they term a "plea in bar," stating that on January 25, 1909, the defendant J. W. Lanman filed in the district court of the United States for the eastern district of Kentucky his petition in bankruptcy; that said Lanman was thereupon on that day adjudged a bankrupt by said court, and that the affairs of the bankrupt had been referred by that court to its referee in bankruptcy. Upon that showing they prayed to be dismissed. A demurrer was filed to the answer by the plaintiffs. The circuit court overruled the demurrer. The plaintiffs declined to plead further, and their petition was dismissed. The plaintiffs have prosecuted this appeal from that judgment.

We have concluded that the judgment is erroneous, when considered upon either of several grounds. The allegations of the petition in this case are not denied. They are confessed as true. It follows that J. W. Lanman was insolvent when he gave the mortgage, and inferentially, when he bought the goods for which he is sued in this case; that he designed by the mortgage to prefer the bank and De Baun to the exclusion in whole of his other creditors. What were the rights of the plaintiffs when they filed this suit? Depending upon the whereabouts of the goods, they had a choice of four courses open to them: (1) To avoid the sales to Lanman, on the ground of his actual fraud in buying the goods without intention or means of paying for them, but intending that they should, the moment they came into his possession, pass to his preferred creditor, the bank, or his favored surety at the bank, De Baun. This was such fraud as in law, at the election of the sellers, would have avoided the sale, and they could have regained their goods by detinue, or, what is the same practice under our Code, an action of claim and delivery; but perhaps the goods had been disposed of to innocent purchasers before the plaintiffs learned of the fraud. At any rate, it was at the election of the plaintiffs whether they pursued that remedy, or (2) to proceed in an action at law to recover the value of the goods from the fraudulent vendee,—not upon the contracts of sale, but upon the deceit practised upon them. And (3) the plaintiffs might pursue the addition-

al remedy afforded by the laws of this state to sequester the debtor's property for the payment of his debts under the act of 1856 (Ky. Stat. §§ 1910-1917 [Russell's Stat. §§ 2104-2111]), or (4) proceed against him in involuntary bankruptcy proceedings in the United States district court. The last-named course would depend for its efficacy upon whether, at the time the plaintiffs learned of the deceit and of the debtor's transfer of his property, the United States court had the power, under the limitation of time prescribed by the act of Congress, to grant them full relief. These remedies are at the election of the creditors, the vendors. The plaintiffs elected to sue in the state court to pursue the second and third of the remedies outlined above. The question is: Does national bankruptcy act July 1, 1898, chap. 541, 30 Stat. at L. 544 (U. S. Comp. Stat. 1901, p. 3418), give the United States courts exclusive jurisdiction of the affairs and property of a voluntary bankrupt under the circumstances recited above? It is remarked that the existing act defines more clearly the demarcation of the jurisdictions of the Federal and state courts, and shows more disposition to not interfere with the local jurisdiction of the latter than did act March 2, 1867, chap. 176, 14 Stat. at L. 517. Certain it is that Congress did not intend to aid fraud in any of the provisions of the act. In truth, the fraudulent were placed beyond its intended benefits, and held to the strictest accountability when their acts came within the jurisdiction of the courts of the United States.

No debtor can be discharged in bankruptcy of a liability which grows out of his fraud. Section 17, act 1898. It was held in *Classen v. Schoenemann*, 80 Ill. 304, and *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535, that if a debtor buys goods for cash on delivery, obtains possession of them without payment, and immediately ships them beyond reach of the seller, and then refuses to pay, his conduct is such as to make the debt a fraudulent one within the meaning of the bankrupt law. It is equally fraudulent, in law and morals, for one to buy goods with a positive intention not to pay for them; for if such intention were known to the vendor, he certainly would not sell. "Its suppression, therefore, is a legal fraud." *Benjamin on Sales*, 442, and cases collected by that author. The cases hold that such design may be inferred from the conduct and circumstances of the vendee. It is admitted here that he was insolvent, and intended to set over to certain favored persons the very goods he purchased from the plaintiffs on credit, leaving nothing with which he could pay for them, or out of which they could make their debt. That is very

black fraud. As the United States district court could not have discharged Lanman from the plaintiffs' debts created by his fraud, they were at liberty to pursue him in the state courts, and obtain a personal judgment against him, even though he had been adjudged bankrupt, upon which, after the Federal court had exercised its jurisdiction, the writ of fieri facias might issue; but, pending the proceedings in bankruptcy, the state court should have stayed its execution until the United States courts had finally adjudicated the bankrupt's case.

But there is still another branch of this case, of more importance than the one just discussed. That is the right of the state court to proceed to a judgment *in rem*, as against the property embraced in the mortgage, and as affecting the bank and De Baun. The determination of that question involves the nature of the mortgage, as it affected the debtor's property covered by it, and the rights of the plaintiffs created by that instrument in relation to that property. The statute of Kentucky (Ky. Stat. § 1910 [Russell's Stat. § 2104]), commonly known as the "act of 1856," concerning the conveyance by insolvents in contemplation of insolvency, is not a bankrupt or insolvency statute. *Ebersole v. Adams*, 10 Bush, 83; *Downer v. Porter*, 116 Ky. 423, 76 S. W. 135. It does not declare that the transaction shall be void. It operates independently of motives of fraud by the parties. It is voidable only for a specific purpose, at the instance only of creditors of the debtor making the mortgage or conveyance, and then only if they take action to that end in a court of equity within six months from the execution or recordation of the instrument. The effect of such mortgage or conveyance, if so attacked, is made by the statute to operate as voluntary assignment of all the debtor's property for the benefit of all his creditors. It is precisely as if he had executed voluntarily a deed of trust in behalf of all his creditors, conveying the title to all his property (except exemptions) to a trustee upon the express trust that the latter would sell it and pay the proceeds *pro rata* to his creditors. *Linthicum v. Fenley*, 11 Bush, 131.

It is true the act of Congress of 1898 makes both a preference by an insolvent debtor of some one or more creditors to the exclusion of others, and the execution of a voluntary deed of assignment, acts of bankruptcy; but, unless they are proceeded on as such within four months from the time when filed for record, they are not affected by the bankrupt statute. Sections 3 and 60, act Cong. 1898. But the Federal statute does not prohibit or invalidate either a preferential mortgage by an insolvent debtor, or his voluntary deed of assignment. If such mort-

gage is not attacked within the time which will give the bankrupt court jurisdiction of the matter, or if the assignor is not proceeded against by his creditors, or does not file his petition to be adjudged a bankrupt, within the four months allowed by the Federal statute, those instruments may be enforced, and the parties to them granted all appropriate relief by the state courts. Or, further, if the jurisdiction of the state court has been invoked, and the latter has taken jurisdiction and possession of the property, it may proceed to a final adjudication of the rights of the parties, although the United States district court may also have taken jurisdiction of the bankrupt and his affairs. *Ibid.*; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293. It was held in *Linthicum v. Fenley* that the filing of the petition in the state court gave that court possession of the *res*, and entitled it to proceed with the case. However, there can scarcely be apprehended any conflict of jurisdiction in this matter, for, while the state court had jurisdiction of the subject-matter and parties when the suit was begun down there, the Federal court did not have when the bankrupt filed his petition in that court January 25, 1909, more than four months after the mortgage had been recorded in the proper office of registry. While then the debtor may have been adjudged a bankrupt, and the United States district court had jurisdiction of his estate, it would have had to administer it, except as to conveyances and encumbrances executed or suffered within four months of the filing of the petition in that court, subject to existing liens and conveyances. Neither the act of Congress nor the statute of this state (the act of 1856) makes a preferential conveyance by an insolvent debtor void, or deems it a fraud. Each statute gives to it, if the remedy is invoked within the prescribed times, the effect of a voluntary assignment by the debtor for the benefit of all his creditors. The state statute allows two months more of time in which the conveyance may be attacked.

While this transaction was such that the bankrupt court might have acquired jurisdiction of it, and have administered the estate embraced as if the mortgage did not exist, yet it did not within the time when it might, consequently the trust created by our statute survives unaffected by the provisions of the act of Congress. The state court can and should proceed to execute the trust, by requiring the property to be sold and the proceeds applied to the payment ratably of all the debts of Lanman then in existence. Property since acquired by him, and before his application in bankruptcy, will be subject alone to the bankrupt proceedings. And,

in addition, the state court may adjudge a recovery by the plaintiffs against the defendant Lanman *in personam*, staying the execution till his application for discharge in bankruptcy has been acted on by the United States district court.

Wherefore the judgment is reversed, and cause remanded for proceedings consistent herewith.

NEBRASKA SUPREME COURT.

MALISSA WAXHAM

v.

ROBERT O. FINK, Appt.

(86 Neb. 180, 125 N. W. 145.)

Appeal — error — assignments — sufficiency.

1. The purpose of the act of 1907 (Laws 1907, chap. 162) was to further simplify the practice in taking appeals to this court in civil actions at law. No assignment of errors in this court is necessary except in the printed brief; and ordinarily the court will not reverse the judgment of the district court for errors not so assigned. Plain errors not so assigned, especially if they involve jurisdictional questions, may, under some circumstances, be considered. Each error complained of must be assigned separately and "particularly."

Same — necessity for technical assignments.

2. The assignment in this court that "the court erred in overruling the motion for a new trial," and similar technical assignments, are no longer required. If the particular ruling of the trial court which is complained of is separately assigned in the brief, and plainly and definitely stated, the statute is complied with. This court, however, will not ordinarily discuss in the opinion assignments that are not argued in the brief and supported by authorities.

Same — sufficiency.

3. When, at the close of the evidence, the defendant moves the court to instruct the jury to find a verdict in his favor, and the motion is overruled and an exception duly taken, the assignment in the brief that "the court erred in overruling the motion of the defendant, made at the close of the evidence, that the jury be directed to return a verdict for defendant," is sufficient.

Headnotes by SEDGWICK, J.

Note. — No other case has been found presenting the question whether a child of the employer is a fellow servant of an employee.

As to the liability in general of a parent for the torts of his child, as well as where the relation of master and servant exists between them, see note to *Broadstreet v. Hall*, 10 L.R.A.(N.S.) 938.
28 L.R.A.(N.S.)

Same — motion for new trial — review.

4. The practice in the district court is unaffected by this statute. The motion for new trial must give the trial court an opportunity to correct all errors complained of. No alleged error can be considered in this court as ground for reversal unless so brought to the attention of the trial court.

New trial — grounds — assignment — sufficiency.

5. The assignment of error in the motion for new trial, that "the verdict is not sustained by sufficient evidence," or "the verdict is contrary to law," is sufficient to challenge the attention of the trial court to its ruling in refusing to direct a verdict for defendant, since there should be an instruction to find for defendant if the evidence is not sufficient to sustain a verdict for plaintiff, and the same question is raised by either suggestion.

Appeal — error — assignments — sufficiency.

6. It is not necessary that the assignment in this court should be in precisely the same language used in the motion for new trial in the district court. If the ruling is identified and plainly defined, it is sufficient.

Trial — motion for directed verdict — sufficiency.

7. The suggestion in a motion to instruct the jury to find a verdict for defendant, that "the facts proven are not sufficient to entitle the plaintiff, as matter of law, to recover," is equivalent to assigning that the evidence is insufficient to justify a verdict for plaintiff.

Fellow servants — who are.

8. If two servants of the same employer are associated together in the same service, and neither is in any manner under the control or direction of the other, they are fellow servants, and one of them cannot recover damages from the employer, caused solely by the negligence of his fellow servant.

Same — domestic servant and employer's child.

9. A woman of mature age was employed as housekeeper and in general charge of the housework, and was injured by an accident caused by the negligence of the son of her employer, a boy of fourteen years, who was also performing ordinary household service, in the absence of his father, but pursuant to the general directions of his father to perform such service. Held, that the woman and the boy were fellow servants, and that she could not recover from her employer damages so sustained.

(Fawcett, J., and Reese, Ch. J., dissent from proposition 9.)

(February 26, 1910.)

A PPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover damages for personal injuries al-

leged to have been caused by the negligence of defendant's son. Reversed.

The facts are stated in the opinion.

Messrs. H. C. Brome and Clinton Brome, for appellant:

The fellow-servant rule is applicable, as a son who performs duties at the direction of his father, for the benefit of his father, is, in so far as those duties are concerned, a servant of that father.

Schaefer v. Osterbrink, 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922; Lashbrook v. Patten, 1 Duv. 316; Norfolk Beet-Sugar Co. v. Koch, 52 Neb. 197, 71 N. W. 1015; Kitchen Bros. Hotel Co. v. Dixon, 71 Neb. 293, 98 N. W. 816; McCarty v. Rood Hotel Co. 144 Mo. 397, 46 S. W. 172; Stevens v. Chamberlin, 51 L.R.A. 513, 40 C. C. A. 421, 100 Fed. 378; Hamby v. Union Paper-Mills Co. 110 Ga. 1, 35 S. E. 297; Brush Electric Light & P. Co. v. Wells, 110 Ga. 192, 35 S. E. 365; Cooper v. Mullins, 30 Ga. 146, 76 Am. Dec. 638; Bain v. Athens Foundry & Mach. Works, 75 Ga. 718; Wharton, Neg. § 232; Hough v. Texas & P. R. Co. 100 U. S. 214, 25 L. ed. 612; Ellington v. Beaver Dam Lumber Co. 93 Ga. 53, 19 S. E. 21.

The test of fellow service is whether or not employees are alike subject to direction and control by the same general master, in the same common undertaking.

Ingram v. Hilton & D. Lumber Co. 108 Ga. 194, 33 S. E. 961; Hough v. Texas & P. R. Co. supra; McAndrews v. Burns, 39 N. J. L. 117; Ohio & M. R. Co. v. Hammersley, 28 Ind. 371; Columbus & I. C. R. Co. v. Arnold, 31 Ind. 174, 99 Am. Dec. 615; Slatery v. Toledo & W. R. Co. 23 Ind. 81; Whaalan v. Mad River & L. E. R. Co. 8 Ohio St. 249; Pittsburgh, Ft. W. & C. R. Co. v. Lewis, 33 Ohio St. 196; Hodgkins v. Eastern R. Co. 119 Mass. 419; Foster v. Minnesota C. R. Co. 14 Minn. 360, Gil. 277; Coon v. Syracuse & U. R. Co. 5 N. Y. 492; Baulec v. New York & H. R. Co. 59 N. Y. 356, 17 Am. Rep. 325; Sammon v. New York & H. R. Co. 62 N. Y. 251; Kielley v. Belcher Silver Min. Co. 3 Sawy. 500, Fed. Cas. No. 7,761; Cooper v. Milwaukee & P. du Ch. R. Co. 23 Wis. 668; Chicago & A. R. Co. v. Murphy, 53 Ill. 336, 5 Am. Rep. 48; St. Louis & S. E. R. Co. v. Britz, 72 Ill. 256; Ryan v. Cumberland Valley R. Co. 23 Pa. 384.

Messrs. W. F. Wappich and Joel W. West for appellee.

Sedgwick, J., delivered the opinion of the court:

The plaintiff began this action in the district court of Douglas county to recover damages which she alleges she suffered because of the negligence of the defendant. The plaintiff was employed as a domestic by

the defendant. The defendant's family consisted of himself and his son, about fourteen years of age, and the plaintiff had general care of the house, and performed the ordinary duties of a housekeeper. At the time of the accident which caused the plaintiff's damage, the defendant was away from home, and the boy, in getting some coal from the cellar for the evening, left the small trap-door in the floor open, through which the plaintiff fell, causing her injuries. There was a verdict for the plaintiff, and the defendant appeals. The brief of the defendant in this court is devoted entirely to the proposition that the plaintiff and the boy were, in the absence of defendant, fellow servants, and that the defendant is not liable for the carelessness of the boy. This proposition is not discussed at all in the brief of the plaintiff. The argument on behalf of plaintiff is addressed entirely to reasons for supposing that the main question insisted upon by defendant cannot be considered by this court, and several reasons are urged for that conclusion.

The question presented by the plaintiff is wholly one of practice, and becomes of more than usual importance because of the change in the method of obtaining a review in this court of judgments and final orders of the district courts in civil actions at law. The act of 1905 (Laws 1905, chap. 174) was intended to provide a complete procedure in such cases. It was a radical departure from the procedure then provided, and under that act this court held that "it was the intention of the legislature to simplify the practice in bringing cases to this court," and the former rule, which had been universally enforced, that "an assignment of error directed against a group of instructions is insufficient, and will be considered no further than to ascertain that any one of such instructions was properly given," was abrogated. First Nat. Bank v. Adams, 82 Neb. 801, 118 N. W. 1055. It will be observed, further, that under the act of 1905 this court adopted the rule that upon docketing the appeal, a printed or typewritten brief of the errors relied upon must be filed in this court with the transcript. But the legislature, at its next session, amended the statute, repealing nine several sections of the Compiled Statutes then in force, and enacting five sections in their stead. Laws 1907, chap. 162. The title of the new act is: "To Provide for Appeals to the Supreme Court in All Cases except Criminal Cases," etc. The manifest purpose of the act is to further simplify the practice, and the result, we are satisfied, is to do away with many of the technical rules which have been supplied by the court. The fourth section of the act amends § 675c of the Code. That

section was: "The supreme court shall by general rule provide for the filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation, or modification of the judgment, decree, or final order alleged to be erroneous; but no petition in error or other assignment of errors shall be required. . . . The supreme court may, however, at its option, consider a plain error not specified in appellant's brief." The section was re-enacted, and to the clause, "but no petition in error or other assignment of errors shall be required," were added the words, "beyond or in addition to the foregoing requirements." We must give force to this amendment, and we can discover no other meaning than that only one brief, and that the printed brief which had always been required, was to be filed in the case, and the assignments of error in that brief were sufficient if they "set out particularly each error asserted and intended to be urged." Each error of the trial court relied upon must be assigned in the brief, and must be set out with particularity. The party complaining of the judgment will not be supposed to have any reason to ask for a reversal except the errors committed by the trial court which he specifies in his brief and so defines that this court may know from his brief the particular ruling of which he complains. If this is done, nothing further is required to obtain a review of the rulings so specified.

The brief of appellant in this case contained but one assignment of error. It is in these words: "The court erred in overruling the motion of the defendant, made at the close of the evidence, that the jury be directed to return a verdict for defendant." Under the statutes now in force and the rules of this court framed in compliance with the amendments above discussed, this assignment presents the only question for us to review. Under the former practice it was held, perhaps not necessarily, that the petition in error in this court must contain the assignment that "the court erred in overruling the motion for a new trial." The rule so established appears to be inconsistent with the simplified practice introduced by the recent legislation above referred to. At the close of the evidence the defendant asked the court to direct a verdict in his favor. This the court refused to do, and the defendant excepted to the ruling. This is the specific error of the district court which is "asserted and intended to be urged for reversal," and it is "set out particularly" in the brief filed in this court. This is an exact compliance with the statute as to the assignment of errors in this court. The amendments of the statutes under considera-

tion have nothing to do with the practice in the district courts, and, of course, the well-settled rules of those courts are in no way affected thereby. The motion for new trial filed in the district court is unaffected by these amendments. It must give the trial court an opportunity to correct all errors complained of, and no alleged error can be considered as ground for reversal that is not so brought to the attention of the trial court. It is contended by the plaintiff that the defendant's motion for new trial was insufficient to challenge the attention of the trial court to the error now relied upon. The motion for new trial contained the following assignments: "First. The verdict is not sustained by sufficient evidence. Second. The verdict is contrary to law. Third. Errors of law occurring at the trial, duly excepted to." Then follow seven assignments, each assigning error in giving a specified instruction. Bearing in mind that the defendant's contention is that the whole evidence shows that the plaintiff and the son of defendant are fellow servants, and that upon this evidence the law is that the plaintiff cannot recover, it would seem that either the first or second assignment in the motion for new trial must bring the real matter in controversy to the attention of the court. *Houston v. Omaha*, 44 Neb. 63, 62 N. W. 251. If "the verdict is not sustained by sufficient evidence," the court erred in not sustaining the defendant's motion to so instruct the jury.

In *Albright v. Peters*, 58 Neb. 534, 78 N. W. 1063, the court said: "At the close of plaintiff's testimony, the defendants asked the court below to instruct the jury to return a verdict in their favor, which request was denied, and the ruling is assigned as error. The decision cannot be considered at this time for the reason the attention of the trial court was not called thereto in the motion for a new trial." The opinion does not set out the assignments in the motion for a new trial, but it appears that one of them was that "the verdict is contrary to the evidence." This assignment would be substantially equivalent to the one considered in this case,—"The verdict is not sustained by sufficient evidence." The opinion in the case referred to discusses the evidence, and concludes that it was sufficient to support the verdict. When the evidence was all in before the jury, the question of its sufficiency to support a verdict would be directly raised by a motion to instruct for the defendant; and so in the motion for a new trial, either assignment that the verdict was not supported by sufficient evidence, or that the court erred in not instructing for the defendant, would raise precisely the same question, and bring precisely the same mat-

ter to the attention of the trial court. The matter is not discussed at large in the opinion referred to, and the distinction, if in fact there is any distinction, is too technical to furnish a precedent.

In the motion to instruct for defendant, which was made at the close of the evidence, the reason given for the motion is "that the facts proven are not sufficient to entitle the plaintiff, as a matter of law, to recover." The plaintiff now contends that this is defective, in that it is not equivalent to assigning that the evidence is insufficient; but we are not able to see the distinction. The sufficiency of the evidence is to be tested by what it proves, and, if it does not establish sufficient facts to justify a verdict, then the evidence is insufficient. We think that we are called upon by this record to determine whether this evidence was sufficient to support a verdict in favor of the plaintiff, and this depends wholly upon whether the plaintiff and the son of defendants were fellow servants. Upon this question the plaintiff has given us no assistance in the brief. The plaintiff alleged and contended upon the trial that it was no part of her duties to bring the coal from the cellar or to direct or superintend the son, and that the defendant undertook to do it himself, or to procure his son to perform this service. These contentions were denied by defendant, but it appears that the jury has decided this contention in favor of the plaintiff. From her testimony it appears that the trapdoor through which she fell is located in the pantry, a small room about 4 feet by 6 feet inside, as she said, opening directly from the kitchen, which was also not large, and in which she had finished her evening's work but a few minutes before the accident occurred. The sitting room also opened from the kitchen, and she says that the coal for the base-burner for the sitting room was kept in the cellar. There was an outside entrance to the cellar which was ordinarily used. The trapdoor in question was only used, according to the plaintiff's testimony, in very cold and stormy weather. The boy testified that at the time of the accident the plaintiff was at work in the kitchen, and that she requested him to get some coal for the evening; that he procured one hodful, which was not sufficient to fill the base-burner, and he left the trapdoor in the pantry open while he went to the base-burner, intending to immediately return for some more coal, and that just as he was returning to the pantry, the accident occurred.

The verdict having been in plaintiff's favor, we will consider her testimony upon this point for the purpose of the present discussion. She testified that both the kitchen and pantry were dark, the gas having

been turned off, and another light, which they sometimes used there, having been removed from the kitchen to the sitting room, and that under these circumstances she went into the pantry, not knowing that the boy had left the trapdoor open, and so fell and received her injuries. If the boy and the plaintiff were both the employees of the defendant, and associated together in the same service, and neither was in any manner under control or direction of the other, they must be considered as fellow servants, and each in law must be presumed to take such risk as might follow from the negligence of the other in performing the duties incident to such service. There is nothing in the record to show that it was intended or supposed by anyone that the son, being a boy of only fourteen years of age, should control or direct the plaintiff in performing her duties. It would be more reasonable to suppose that he would be subject to plaintiff's suggestions as to his conduct. No authorities have been cited by plaintiff nor any argument advanced for concluding that, under such circumstances, the "fellow-servant rule," so well established, should not be applied. In *Debus v. Armour & Co.* 84 Neb. 224, 120 N. W. 1110, the case is made to turn upon the question as to whether the plaintiff was the fellow servant of the employee whose negligence caused the injury, and, under the circumstances in that case, it was held that they were not fellow servants. In *Anthony v. Leeret*, 105 N. Y. 591, 12 N. E. 561, under somewhat, though not entirely, similar circumstances, the fellow-servant rule was applied. In another case, under somewhat similar circumstances, the court of appeals of Kentucky held the defendant liable. *Vandyke v. Memphis, N. O. & C. Packet Co.* 24 Ky. L. Rep. 1283, 71 S. W. 441.

The defendant was a tenant of the house in which they lived. The plaintiff was familiar with the house, and knew the condition and use of the trapdoor in question. She does not explain why she was performing her services in the pantry in the dark, nor does she satisfactorily explain why the bringing up of the coal, and the use of the trapdoor upon that occasion, and its condition at the time, should be unobserved by her. If the question of her contributory negligence may be said to be settled in her favor by the verdict of the jury, and if her injuries were caused solely by the negligence of this young boy, it must be held, under the law so well established in this state, that he was a fellow servant, and that the defendant is not liable for his negligence in this action.

The judgment of the District Court is reversed and the cause remanded.

Fawcett, J., concurring:

I concur in the judgment of reversal, but not upon the ground stated in the majority opinion. The doctrine of "fellow servant" has been made to "work overtime" during late years by the courts of the country. So much so that even Congress has taken notice and given some relief along that line. While I concede that under some circumstances a minor son will be held to be a servant of his father, it is in my judgment extending the rule beyond the bounds of reason and common experience to hold that a fourteen-year-old son is, in his father's home, a fellow servant of the kitchen girl or housekeeper. Such a theory is to my mind not only unsound, but repulsive.

I think the judgment of the court below should be reversed on the ground of assumption of risk. Plaintiff is a mature woman. She knew all about the trapdoor leading into the cellar, and the use often made of it. She understood fully the construction and dangers of the place where she was required to work. She made no complaint to defendant, nor did she ask for any change of conditions, but continued in her employment. She thereby assumed the risk of her employment and environment. The majority opinion is in error in stating that the brief of defendant is devoted "entirely" to the fellow-servant proposition. In his brief appellant says: "Appellee knew, or was in a position to know, the risk of suffering injury through the carelessness of the son of appellant. It was her privilege to refuse to perform duties which would cause her to run the risk of suffering injuries through the carelessness of appellant's son. By failing to do so, then, she must be held to have assumed the risk attendant upon those duties." In that statement I concur.

Reese, Ch. J., concurs in the first paragraph of the above.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK
EX REL. WACLARK REALTY COMPANY,
NY, Respt.,

v.

CLARK WILLIAMS, State Comptroller,
Appt.

(198 N. Y. 54, 91 N. E. 266.)

Tax — holding corporation — liability.

A corporation organized for the personal convenience of its largest stockholder, to take and hold title to his real estate, upon one parcel of which a dwelling house is in process of construction, is within the opera-
28 L.R.A. (N.S.)

tion of a statute requiring every corporation to pay an annual tax computed upon the basis of the amount of its capital employed in the state, although it transacted no business.

(March 4, 1910.)

APPEAL by the State Comptroller, from an order of the Appellate Division of the Supreme Court, Third Department, reversing an assessment against relator of a franchise tax. Reversed.

The facts are stated in the opinion.

Messrs. Edward R. O'Malley, Attorney General, and Edward H. Letchworth, for appellant:

A corporation acting as landlord, and collecting rents on properties which it holds, is taxable as employing its capital.

People ex rel. Steinway & Sons v. Kelsey, 108 App. Div. 138, 96 N. Y. Supp. 42; People ex rel. Hubert Apartment Asso. v. Kelsey, 110 App. Div. 617, 96 N. Y. Supp. 745, 184 N. Y. 573, 77 N. E. 1194; People ex

Note. — When is capital of corporation invested in real estate deemed "employed" within meaning of statute taxing amount of capital stock employed within state.

When a franchise tax is imposed upon every corporation, foreign or domestic, doing business in a state, based upon the amount of its capital stock "employed" within the state, it is sometimes a difficult matter to determine when its capital stock, when invested in realty, is "employed" within the meaning of the taxing statute.

In People ex rel. Singer Mfg. Co. v. Wemple, 150 N. Y. 46, 44 N. E. 789, a foreign manufacturing corporation invested a part of its surplus earnings in real estate in New York, then under lease, and not occupied by it, but the intention was to erect a new building when the existing leases expired, and to use a small portion of it for the offices of the company, and lease the remainder to tenants. It was held that the amount represented by the real estate was no portion of the capital stock employed within the state, within the meaning of such a statute, even if the amount so invested should be considered a part of the capital stock. The court said: "It was an independent investment, and was in no sense employed within this state in the transaction of the ordinary business of the relator."

Where a corporation authorized by its articles to purchase and hold and lease real estate bought an island consisting of unimproved swamp land, giving its stock in payment therefor, and held it for many years, deriving no revenue therefrom except a small sum for the grass crop, such corporation was held not subject to the franchise tax. People ex rel. Niagara River Hydraulic Co. v. Roberts, 30 App. Div. 180, 51 N. Y. Supp. 771, affirmed on opinion below in 157 N. Y. 676, 51 N. E. 1093.

rel. Fourteenth Street Realty Co. v. Kelsey, 110 App. Div. 797, 97 N. Y. Supp. 197; People ex rel. Wall & H. Street Realty Co. v. Miller, 181 N. Y. 328, 73 N. E. 1102; People ex rel. Vandervoort Realty Co. v. Glynn, 194 N. Y. 387, 87 N. E. 434.

Mr. Edward L. Blackman, with Messrs. Atwater & Cruikshank, for respondent:

The mere act of receiving the title to the properties and issuing corporate stock did not constitute carrying on a business.

People ex rel. Ft. George Realty Co. v. Miller, 179 N. Y. 49, 71 N. E. 463; People ex rel. Niagara River Hydraulic Co. v. Roberts, 30 App. Div. 180, 51 N. Y. Supp. 771, affirmed in 157 N. Y. 676, 51 N. E. 1093; People ex rel. Hans Rees' Sons v. Miller, 90 App. Div. 591, 86 N. Y. Supp. 193; People ex rel. Mutual Trust Co. v. Miller, 177 N. Y. 51, 69 N. E. 124.

The court said: "If capital can be invested without being employed, the case before us seems to be a fair instance of it." This remark was also quoted with approval in People ex rel. Ft. George Realty Co. v. Miller, *infra*.

Where all the real estate of a corporation was condemned for public use, which it then ceased to use, and did nothing save to retain its corporate organization until it should receive the price of its condemned land, it was held in People ex rel. Jerome Park Villa Site & Improv. Co. v. Roberts, 41 App. Div. 21, 58 N. Y. Supp. 254, that the corporation did not employ its capital in business, within the meaning of the taxing laws. The court said: "What it did was in the nature of discontinuing business instead of 'doing business' within the meaning of the act. It did not employ its capital in business."

Money invested by a domestic corporation organized for conducting and managing ferries, in a house not used by the corporation in its business, nor in any way connected therewith, was held in People ex rel. Union Ferry Co. v. Roberts, 66 App. Div. 157, 72 N. Y. Supp. 950, not to be a part of its capital employed in business, within the meaning of the tax laws. The court said: "Capital, to be employed within this state, must be actively employed; and a nominal employment or investment of the same was not intended by the statute."

In People ex rel. Ft. George Realty Co. v. Miller, 179 N. Y. 49, 71 N. E. 463, it was held that a corporation which was organized by tenants in common of unimproved city real estate solely for the purpose of transferring title to the property to it, in order to raise money to pay off past-due mortgages, taxes, and assessments thereon, which threatened to cause a loss of the property, and of holding it until it could be advantageously disposed of, was not liable to the tax, since the stock of the corporation was not "employed within this state," within the meaning of the statute. Three judges dis-

As relator has done no business, it has therefore employed no capital within the state, and is not subject to any franchise tax.

People ex rel. Brooklyn Rapid Transit Co. v. Morgan, 57 App. Div. 335, 68 N. Y. Supp. 21, affirmed in 168 N. Y. 672, 61 N. E. 1132; People ex rel. Hans Rees' Sons v. Miller and People ex rel. Mutual Trust Co. v. Miller, *supra*.

The franchise tax is a tax upon business actually done, and not upon the unexercised right to do business.

People ex rel. Brooklyn Rapid Transit Co. v. Morgan, *supra*.

The mere passive holding of real estate does not constitute the employment of capital stock.

People ex rel. Ft. George Realty Co. v.

sented on the ground that the relator is a corporation whose sole business is to acquire, hold, and sell real estate.

But in People ex rel. Wall & H. Street Realty Co. v. Miller, 181 N. Y. 328, 73 N. E. 1102, where the language of the charter of a corporation was broad enough to authorize unlimited dealing in property of every kind, real or personal, anywhere within the United States, though the immediate object was to take title to a particular tract of land in the financial center of New York city, on which was situated a large office building, owned by thirty-two tenants in common, who became the incorporators, and where all its capital was invested in such building, and it was engaged in leasing the offices, collecting rents, operating elevators, etc., it was held that the corporation was subject to the tax on its capital so invested. This decision was placed on two grounds: first, that the criterion was the use to which the property might be put by the charter of the corporation, and not the use to which it was actually put; and second, that even if the court should look not at the unexercised powers of the corporation, but only at those actually used, there was warrant for the tax, as the capital was being actively used. On the first ground, the court, by Werner, J., said: "And when we appeal to the reason of the thing, it seems plain that the chartered privileges of a corporation, as defined in its certificate of incorporation, which is invariably framed in the language of the corporators, should be the index to its relations to the state, rather than the possibly sporadic and shifting exercise of any one or more of a larger number of the powers delegated to it." Three judges dissented on the ground that the case was ruled by People ex rel. Singer Mfg. Co. v. Wemple; People ex rel. Niagara River Hydraulic Co. v. Roberts; and People ex rel. Ft. George Realty Co. v. Miller, *supra*.

Where a corporation engaged in the manufacture and sale of pianos owned a tract of

Miller and People ex rel. Niagara River Hydraulic Co. v. Roberts, *supra*.

The capital stock of a corporation can be invested without being employed.

Ibid.; People ex rel. Singer Mfg. Co. v. Wemple, 150 N. Y. 46, 44 N. E. 787.

The relator, not having begun its regular business, is not taxable.

People ex rel. Mutual Trust Co. v. Miller and People ex rel. Hans Rees' Sons v. Miller, *supra*.

Willard Bartlett, J., delivered the opinion of the court:

The Waclark Realty Company was incorporated on April 11, 1904, under the business corporations law (Consol. Laws, chap. 4). Its purposes, as set forth in the articles of incorporation, were to acquire, hold, improve, lease, and sell real estate; to erect

250 acres, on 50 acres of which its plant was located, and on part of the remaining 200 acres, thirty-four dwelling houses had been erected and rented, and the vacant part of the 200 acres was divided into lots, and ready for sale, it was held in People ex rel. Steinway & Sons v. Kelsey, 108 App. Div. 138, 96 N. Y. Supp. 42, that the whole of the 200 acres must be deemed to be employed.

On the authority of People ex rel. Wall & H. Street Realty Co. v. Miller, *supra*, it was held in People ex rel. Hubert Apartment Asso. v. Kelsey, 110 App. Div. 617, 96 N. Y. Supp. 745, affirmed without opinion in 184 N. Y. 573, 97 N. E. 1194, that a corporation whose only business is owning and managing an apartment house is employing its capital stock within the state, within the meaning of such tax law.

People ex rel. Wall & H. Street Realty Co. v. Miller, *supra*, was also followed in People ex rel. Fourteenth Street Realty Co. v. Kelsey, 110 App. Div. 797, 97 N. Y. Supp. 197, which held that a corporation whose charter authorizes it to acquire by purchase, exchange, lease, or otherwise, to hold, improve, develop, operate, sell, lease, mortgage, or exchange real estate, chattels real, mortgages, and any interest in real property, to erect buildings, deal in bonds, etc., was liable to the franchise tax, although all its property was invested in one building, leased to a single tenant, and the corporation was formed by the original owners of the property, to take title to the property, to avoid complications due to numerous dower rights, etc.

Where a corporation purchased from four owners in common the real estate which it was organized to acquire, and issued stock to the vendors in payment therefor, and the property was occupied as coal, brick, and lumber yards by tenants who paid large rentals therefor, which were used in paying dividends, it was held in People ex rel. Vandervoort Realty Co. v. Glynn, 28 L.R.A. (N.S.)

and repair buildings of all kinds; to carry on the business of builders, general contractors, and dealers in building materials; to take, purchase, and hold bonds and mortgages; to lend money on bond and mortgage; to lay out for public use, roads, streets, avenues, and highways through its lands, and, if unable to agree with the owners of property required therefor, to acquire title thereto by condemnation; to manufacture, buy, and sell bricks, stone, building materials and supplies; and, finally, to mine, quarry, buy, and sell ores, minerals, oil, and other valuable substances found in any of its lands.

According to the report of the corporation, made to the comptroller for the year ending October 31, 1905, the total authorized capital stock of the company was \$1,500,000, represented by 15,000 shares, of which 14,-

194 N. Y. 387, 87 N. E. 434, that its capital stock was employed rather than invested, within the meaning of the taxing law. The court said: "The capital stock has been applied to the very use contemplated by the incorporators as the object of the organization. If this is not the employment of the capital stock, then it is impossible to conceive how the capital stock of such a corporation can ever be regarded as being employed at all."

A corporation authorized to purchase lands and erect buildings thereon employs its capital stock within the state when it purchases a tract of land for the purpose of erecting a store and office building thereon, and begins the erection of the building, though it is not far enough advanced to receive rents and profits therefrom. People ex rel. Fifth Ave. Bldg. Co. v. Williams, 198 N. Y. 238, 91 N. E. 638. Referring to People ex rel. Vandervoort Realty Co. v. Glynn and People ex rel. Wall & H. Street Realty Co. v. Miller, *supra*, the court said: "There is nothing to distinguish these cases from the case at bar, except that there the corporations purchased properties which were immediately productive of rentals, while here there was no prospect of income until the new structure would be rented. That is a mere detail, however, which cannot affect the principle that the latter, no less than the former, was employing its capital within this state in the conduct of the only business for which it was organized."

Capital stock of a foreign corporation, though invested in structures on leased lands in the taxing state, which may become the property of the landlord, is nevertheless capital employed within the state, within the meaning of the taxing laws. People ex rel. Long Dock Mills & Elevator v. Wilson, 121 App. Div. 376, 106 N. Y. Supp. 1, affirmed without opinion in 193 N. Y. 671, 87 N. E. 1125.

000 had been issued for real estate situated in the borough of Manhattan, in New York county, at Ravenswood, in Queens county, and at Mt. Vernon. The report further stated that the company was organized merely for the purpose of holding title to certain real estate, and not with the object of transacting any business for profit. "Since its organization it has received deed to, and holds in its name title to, seven plots of land, five being within the state of New York, transferred to it by Hon. William A. Clark, and stock has been issued to him for said properties." In the application for the revision of the franchise tax, made by the corporation to the comptroller, it was stated that "said William A. Clark is the owner of nearly all of the shares of stock of said company, and that the same was organized for his personal convenience, and to take over said properties owned by him individually, which, for matters of convenience, he preferred to have held by a corporation." Among the lands thus held was a plot on the corner of Seventy-Seventh street and Fifth avenue, in the borough of Manhattan, with an unfinished dwelling house thereon, the assessed value of which is \$2,200,000. The premises at Ravenswood, in Queens county, were used for the storage and preparation of materials for the house in course of erection upon this Fifth avenue plot. The secretary and treasurer of the corporation, in his testimony before the second deputy comptroller, stated that the object of the incorporation was to promote the personal convenience of Mr. W. A. Clark; that the company had no offices, employees, clerks, or servants of any kind; that it paid no wages or salaries to anybody, and was not in the receipt of any moneys of any kind; that it expended no moneys, and had no bank account; and that the only connection with the real estate mentioned had been to hold the title to the property. Mr. Clark paid the taxes on the real estate owned by the company, and the witness repeated, what appears over and over again in the papers in this proceeding, that "Senator Clark preferred to have these enormous properties owned by him in New York and elsewhere held by a corporation."

The tax under review was levied for the year ending October 31, 1905, at which time the tax law provided as follows: "Every corporation, joint-stock company or association, incorporated, organized, or formed under, by, or pursuant to law in this state, shall pay to the state treasurer annually, an annual tax, to be computed upon the basis of the amount of its capital stock employed within this state, and upon each dollar of such amount." Laws 1896, chap. 908, § 182.

28 L.R.A. (N.S.)

It will be noted that the statute as then in force did not require that the capital stock of a corporation should be employed in business in order to render it liable to taxation. It was sufficient if the capital stock was employed at all. Under the circumstances disclosed by this record we think that the capital stock of the Waclark Realty Company, which was represented, as has been stated, by the several pieces of real estate belonging to the corporation, with the structures thereon, must be deemed to have been employed within the meaning of that expression in the tax law as it then existed. The relator was really a holding corporation for Senator Clark. It employed its capital in the precise way contemplated by the incorporators, in holding the title to a large quantity of real property which it had acquired from its principal stockholder to promote the personal convenience of that gentleman. Where a corporation devotes its capital stock to the very purpose for which it was formed, it will hardly do to say that such stock is not employed. The cases in which a distinction has been made between capital employed and capital invested have no application here. If a corporation were formed for the sole purpose of the investment of capital, such investment would clearly be an employment of its capital. It is only where the organization has been for a different purpose that the mere investment or passive use of capital has not been deemed an employment thereof.

It is argued that the statute should be construed so as to exempt the relator from this tax, because, if we look behind the corporation to the owner, Senator Clark, he has received no advantage for which the tax might be said to be due. He has personally paid the tax upon the real estate, and also the organization tax for the corporation, and it is contended that it is inequitable and unjust to require him to pay any more, inasmuch as he has received no equivalent from the state. The obvious answer to this argument is that he has chosen, for some undisclosed reason which he denominates his personal convenience, to transfer his property to a corporation which appears to be employing that property just as he would employ it if the title remained in himself; and that when capital is thus employed, the legislature of the state has commanded that it shall be taxed in this manner. There is no apparent hardship in compelling a person to pay for employing his capital through the agency of a corporation, if he sees fit to organize one for his own convenience. Even if there were, this would be a matter for the consideration of the legislature, and not for the courts.

The order of the Appellate Division

should be reversed, and the determination of the state comptroller confirmed, with costs to the appellant in both courts.

Cullen, Ch. J., and Haight, Vann, Werner, Hiscock, Chase, JJ., concur.

NEW YORK COURT OF APPEALS.

CITY OF NEW YORK, Resp.,
v.

ISAAC L. RICE et al., Appts.

(198 N. Y. 124, 91 N. E. 283.)

Municipal corporation — structure on street — power to authorize.

1. A municipal corporation which owns the fee of its streets has no implied authority to permit the erection by an abutting owner of a solid wall of masonry extending 6 or 7 feet onto the sidewalk, for the convenience of its building and in keeping with its architectural design, although by reason of its decorative and artistic appearance it enhances the attractiveness of the street.

Same — revocation of permit — notice.

2. A demand by a municipal corporation which has given an illegal permit to maintain a structure on the sidewalk, that it be removed, is sufficient notice of revocation of the permit.

Equity — structures in street — removal.

3. Equity has jurisdiction of a suit to compel the removal of a structure from a sidewalk, which the owner claims the right to maintain under the authority of the municipality.

(Edward T. Bartlett, J., dissents.)

(March 15, 1910.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term, Part 3, for New York County in plaintiff's favor in an action brought to compel the removal of a certain masonry wall which extended upon a public sidewalk. Affirmed.

Statement by Gray, J.:

The city of New York brought this action to restrain the defendant Rice from maintaining, and to compel him to remove, a masonry wall about his property, at the southeast corner of Eighty-Ninth street and Riverside Drive, which had been constructed beyond the house or building line and upon the public streets aforesaid. From the findings made by the trial court it appears that Rice, being the owner of a plat of land, which he had terraced up from the street level, in 1899, constructed about it a solid masonry wall, over 7 feet in height. It was supported on the outside by six stone piers, or pillars, about 15 feet in height, and upon the wall was a stone coping a foot and a half in width. This wall, with its piers, or pillars, on Eighty-Ninth street, extended 6 feet into the street, beyond the house or building line, and on Riverside Drive 7 feet. Rice obtained the following permission, by a resolution of the municipal assembly of the city of New York: "Resolved, that permission be and the same hereby is given to Isaac L. Rice, of Number 400 West End avenue, borough of Manhattan, and city of New York, who is about to build a residence at the southeast corner of Eighty-Ninth street and Riverside Drive, in the said borough and city, to erect up to and upon the stoop line

Note. — Power of municipality to permit abutting owners to extend structures into street.

This note is confined to cases of encroachments by permanent structures. It does not cover the power to permit the erection of signs, awnings, overhead bridges or arches, area ways, or the right to permit merchants to use the streets for the purpose of business.

It is a general rule that a municipal corporation cannot, in the absence of express authority from the legislature, permit abutting owners to extend their buildings, and parts thereof, into the street.

Thus it was held in *First Nat. Bank v. Tyson*, 133 Ala. 459, 59 L.R.A. 399, 91 Am. St. Rep. 46, 32 So. 144, that a municipal corporation had no power to authorize the erection of pillars of a bank building 26 inches beyond the property line. The court said: "It is again well settled that a municipal corporation cannot license the erection or commission of a nuisance in or on

a public street. 'A building,' says Dillon, 'or other structure of like nature, erected upon a street without the sanction of the legislature, is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy streets, without express power to this end conferred on them by the charter or statute. The usual power to regulate and control streets has even been held not to authorize the municipal authorities to allow them to be encroached upon by the adjoining owner, by erections made for his exclusive use and advantage, such as porches extending into the streets, or flights of stairs leading from the ground to the upper stories of buildings, standing on the line of the streets. The person erecting or maintaining a nuisance upon a public street, alley, or place is liable to the adjoining owner or other person who suffers special damages therefrom.'"

And the rule that a municipality has, in the absence of express legislative authority, no power to authorize abutting owners to extend buildings or structures into the

of the said premises at Eighty-Ninth street and Riverside Drive, a terrace wall, approximately 8 feet high, to be composed of rough stone faced with marble or limestone, such terrace wall to constitute a part of the architectural motive of the stoop and entrance leading to the said contemplated residence." Thereafter, and about the time of the completion of the wall, he further obtained from the commissioner of parks, of the borough of Manhattan, the following consent: "Consent is hereby given to the

maintenance of a terrace wall by Isaac L. Rice, New York city, in front of his premises, on the stoop line, at the southeast corner of Riverside Drive and Eighty-Ninth street, as shown on plan filed with this department, by Henry B. Hertz, architect. This consent is not to be considered a precedent for favorable action upon application for permits to erect similar walls upon the stoop line. In this case, a confusion in the provisions of the charter, and the fact that the street front and park front are both in-

street, was approved and applied in the following cases, where the authority attempted to be conferred was held invalid: *John Anisfield Co. v. Edward B. Grossman & Co.* 98 Ill. App. 180; *People ex rel. Faulkner v. Harris*, 203 Ill. 272, 96 Am. St. Rep. 304, 67 N. E. 785 (bay windows); *Chicago Cold Storage Warehouse Co. v. People*, 224 Ill. 287, 79 N. E. 692 (platform higher than sidewalk erected to facilitate the loading of wagons); *Chicago, R. I. & P. R. Co. v. People*, 120 Ill. App. 306, affirmed in 222 Ill. 427, 78 N. E. 790 (depot, sheds, and platforms); *Pettis v. Johnson*, 56 Ind. 139 (authority to lessor, in lease of building for purpose of city offices, to erect and permanently maintain stairway for reaching upper stories, invalid); *Caldwell v. George* (Miss.) 50 So. 631 (erecting warehouse on sidewalk, where no walk had actually been constructed).

And in *People ex rel. Mark Cross Co. v. Ahearn*, 124 App. Div. 844, 109 N. Y. Supp. 249, where it was claimed that a platform and portico extending into an avenue over 15 feet, erected substantially on the space formerly occupied by a courtyard, was a nuisance, the court said that such structures were unlawful, and that it was beyond the power of the legislature or the common council to authorize them.

And a city not specially authorized by the legislature has no power to permit the erection of a depot which extends across a street. *State ex rel. Atty. Gen. v. Louisville & N. R. Co.* 158 Ala. 208, 48 So. 391.

And an ordinance attempting to legalize the erection of a building extending into the street 4 feet beyond the building line, and which enhances the value of the builder's property alone, and withdraws a portion of the street from public use, and diminishes the easements of an adjoining owner, and imposes an additional burden upon the street, is void as an invasion of private property rights without compensation. *McMillan v. Klaw & E. Constr. Co.* 107 App. Div. 407, 95 N. Y. Supp. 365.

In *People v. Carpenter*, 1 Mich. 273, where a stairway within the limits of a street was claimed to be a nuisance, the court said that the city council had no power or authority to grant the exclusive use of any of the streets or alleys to individuals.

But under certain charter or statutory provisions, municipalities have the power to authorize erections of this kind.

Thus, under a section of the consolidation act, conferring power on the common council

to regulate the use of streets for sidewalks, signs, signposts, awnings, etc., "and other purposes," the council may authorize the building of a bay window and stoop. *Broadbelt v. Loew*, 15 App. Div. 343, 44 N. Y. Supp. 159, affirmed in 162 N. Y. 642, 57 N. E. 1114.

And a subsequent subdivision of the same act, providing that the city council shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except for temporary occupation, does not prevent the operation of the first express provision. *Ibid.*

And under a section of the consolidation act, providing in substance that certain parts of streets shall be subject to such rules and regulations in respect to the uses thereof, and erections and projections thereon, as the department of public works shall authorize, that department has power to issue a permit for a bay window extending over the building line into the street. *Wormser v. Brown*, 149 N. Y. 163, 43 N. E. 524.

And columns of a building extending into the street 24 inches are not nuisances where it appears that the street was originally a state road, and that the abutting owners own only to the street line, and that the city council, acting under a provision of the city charter authorizing it to permit columns, pilasters, etc., to encroach upon any street, passed an act permitting the erection of the columns in question, stating that they would not interfere with the reasonable and substantial use of the streets. *Sautter v. Utica City Nat. Bank*, 119 App. Div. 898, 104 N. Y. Supp. 1139, affirmed in 193 N. Y. 661, 87 N. E. 1126.

The charter of Baltimore gives the board of estimates power to grant permits for the erection of bow or bay windows, hitching posts, area ways, steps, and other minor privileges, upon service of notice upon adjoining property owners, and such board may permit a fence to extend 3 inches into an alley. *Fralinger v. Cooke*, 108 Md. 682, 71 Atl. 529.

And in *Garrett v. Janes*, 65 Md. 260, 3 Atl. 597, where an act conferred power on the mayor and council to regulate the limits within which it should be lawful to erect steps, porticos, porches, etc., an entrance to a house taking up a portion of a highway was held lawful.

In *Livingston v. Wolf*, 136 Pa. 519, 20

volved, led to the construction of the wall in good faith under the provisions of an ordinance of the municipal assembly." The wall was erected in substantial compliance with the permission, at considerable cost, and was ornamental, and not utilitarian, in its character. Both Eighty-Ninth street and Riverside Drive are public streets of the city, in the borough of Manhattan, and the ownership of the fee of the bed of each is in the city. They are of a prescribed width between the house lines, and the wall in

question is substantially upon what is known as the stoop line in either street. The permits obtained from the municipal assembly and from the park commissioner were not formally recalled or otherwise revoked than through the demand of the plaintiff, prior to this action, for the removal of the wall with its piers and pillars; which demand was alleged in the complaint and is found to have been made, as a fact. It was also found that the portions of Eighty-Ninth street and of Riverside Drive affected

Am. St. Rep. 936, 20 Atl. 551, it was held that an ordinance providing that a bulk or jut window should not project over a certain distance into the street implied that one might be built which did not exceed that limit, and that one so built did not constitute an unlawful obstruction to the street.

And it was held in *Dannenberg v. Macon*, 114 Ga. 174, 39 S. E. 880, that the charter of Macon conferred power upon the corporate authorities, in their discretion, to grant encroachments upon its streets. It does not appear in the case what the encroachment involved was.

Where the legislature has authorized cities "to close and vacate any street or alley or any portion thereof," and to regulate depots and depot grounds, a city may vacate part of a street and authorize the erection of a depot thereon, stipulating that the depot company shall purchase a strip of land near by and dedicate it for a street. *Leavenworth v. Douglass*, 59 Kan. 416, 53 Pac. 123.

It has been held, under some charter and statutory provisions, that no power to authorize such encroachments was conferred.

Thus, under a charter provision that the municipal assembly shall have no power to authorize the placing or continuing of any encroachment upon a street, except of a temporary nature, it has been held that a wall of a permanent structure which extends over 3 feet into the street cannot be authorized, nor can it be authorized under the act giving park commissioners power to authorize and regulate projections, since such provision must be taken in connection with the other provisions of the charter relating to the inalienability of streets. *Ackerman v. True*, 175 N. Y. 353, 67 N. E. 629.

And the board of aldermen and park commissioners have no power, under such acts, to authorize the building of a bay window and portico which extend beyond a set-back line agreed to by the abutting owners to widen the sidewalk. *Williams v. Robert M. Silverman Realty & Constr. Co.* 111 App. Div. 679, 97 N. Y. Supp. 945.

So, a city council has no authority to authorize the erection of an outside stairway occupying a position on the sidewalk, although the charter gives full power to lay out, open, widen, alter, close, fill in, grade, vacate, or abolish streets, where it further 28 L.R.A. (N.S.)

provides that the council shall not grant exclusive privileges to use the streets or public grounds of the city. *McCormick v. Weaver*, 144 Mich. 6, 107 N. W. 314.

And power to grant the right to use the streets for bay windows, area ways, steps, etc., does not give the municipality power to grant permission to erect a platform along the sidewalk, and remove the curb, so that wagons may be more easily loaded. *Brauer v. Baltimore Refrigerating & Heating Co.* 99 Md. 367, 66 L.R.A. 403, 105 Am. St. Rep. 304, 58 Atl. 21.

And the power conferred upon the city council of Philadelphia to make and establish general rules for the regulation of bay windows does not authorize them to authorize the building of a bay window extending beyond the street line, in one particular house only. *Reimer's Appeal*, 100 Pa. 182, 45 Am. Rep. 373; to the same effect is *Com. v. Harris*, 10 W. N. C. 10.

And a charter provision giving a city power to regulate the use of streets for any other purpose than public travel does not empower it to confer the right upon a railroad to erect a freight platform and roof occupying exclusively 12 or more feet of a sidewalk. *State, Traphagen, Prosecutor, v. Jersey City*, 52 N. J. L. 65, 18 Atl. 586, 696.

In *Storek v. Baltimore*, 101 Md. 476, 61 Atl. 330, an act empowering the city to regulate the obstructions of streets was held void for uncertainty and because of arbitrary and unreasonable classification, and the city was impliedly held not to have power to allow the erection of steps extending out onto the sidewalk.

In *New York v. Heft*, 13 Daly, 301, the court said that the common council of New York was forbidden to permit any encroachment, except the temporary occupation of the street for construction purposes, and an ordinance providing that no one should be sued for placing an encumbrance in the street, unless he persisted in maintaining it for ten days after notice to remove, was held invalid.

As to the power of municipalities to grant or lease space on street or sidewalk for business purposes, see note to *Chapman v. Lincoln*, 25 L.R.A. (N.S.) 400, and as to the liability of municipalities for permitting obstructions to be placed in the street, see note to *McKim v. Philadelphia*, 19 L.R.A. (N.S.) 506.

were within the jurisdiction of the commissioner of parks. The trial court reached the conclusion that the construction and maintenance of the wall were illegal, and constituted a continuing trespass and a public nuisance; that the resolution of the municipal assembly and the consent of the commissioner of parks were illegal and void; and that the plaintiff should have judgment enjoining the further maintenance of the structure, and directing its removal and the restoration of the sidewalk to the condition in which it would be without the same.

The judgment entered upon the decision of the trial court was unanimously affirmed by the justices of the appellate division, in the first department, and, from the order of affirmance, the defendants have further appealed to this court.

Mr. Norman G. Johnson, with Mr. Alfred F. Seligsberg, for appellants:

The commencement of this suit cannot have the effect of a revocation of either permit.

Buffalo v. Chadeayne, 134 N. Y. 166, 31 N. E. 443.

Structures built or maintained for certain purposes, within certain limitations, and protected by proper permits, are, during the life of such permits, legal.

Wormser v. Brown, 149 N. Y. 163, 43 N. E. 524; Ackerman v. True, 175 N. Y. 353, 67 N. E. 629; New York v. Knickerbocker Trust Co. 121 App. Div. 741, 106 N. Y. Supp. 506; People ex rel. Mark Cross Co. v. Ahearn, 124 App. Div. 844, 109 N. Y. Supp. 249.

The permitted uses and similar uses of the public highway lay within the ordinance powers of the municipal assembly at the time of the issuance of the permit to Rice.

New York v. Knickerbocker Trust Co. and People ex rel. Mark Cross Co. v. Ahearn, *supra*.

Many structures that *per se* when placed on the public highway would be embraced by the term "public nuisance" lose their character as such when sanctioned by permits from the proper city authorities.

Sautter v. Utica City Nat. Bank, 45 Misc. 15, 90 N. Y. Supp. 838, affirmed in 193 N. Y. 661, 87 N. E. 1126; Broadbelt v. Loew, 15 App. Div. 343, 44 N. Y. Supp. 159, affirmed in 102 N. Y. 642, 57 N. E. 1114; Babbage v. Powers, 130 N. Y. 281, 14 L.R.A. 398, 20 N. E. 132; Jorgensen v. Squires, 144 N. Y. 285, 39 N. E. 373.

Messrs. Theodore Connolly and Clarence L. Barber, with Mr. Francis K. Pendleton, for respondent:

A court of equity had jurisdiction and it 28 L.R.A. (N.S.)

was the proper court to determine the controversy.

New York v. Knickerbocker Trust Co. 104 App. Div. 223, 93 N. Y. Supp. 937; New York v. De Peyster, 120 App. Div. 763, 105 N. Y. Supp. 612, affirmed in 190 N. Y. 547, 83 N. E. 1123; Oxford v. Willoughby, 181 N. Y. 160, 73 N. E. 677.

If the wall was not justified by the permits, it was a public nuisance and should be abated.

Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186; Babbage v. Powers, 130 N. Y. 281, 14 L.R.A. 398, 20 N. E. 132; Ackerman v. True, 175 N. Y. 353, 67 N. E. 629; McMillan v. Klaw & E. Constr. Co. 107 App. Div. 411, 95 N. Y. Supp. 365.

Although the title to the streets in the city of New York is in the municipality itself, held in trust for public use, the board of aldermen and the park commissioners of such city have no power to grant licenses to private landowners to encroach upon the street line.

Williams v. Robert M. Silverman Realty & Constr. Co. 111 App. Div. 679, 97 N. Y. Supp. 945.

The title to the streets being in the city as trustee for the public, no grant or permission can be legally given which will interfere with their public use. The right of the public to the use of the streets is absolute and paramount to any other.

Deshong v. New York, 176 N. Y. 475, 68 N. E. 880; New York v. Knickerbocker Trust Co. 104 App. Div. 223, 93 N. Y. Supp. 937; People ex rel. Mark Cross Co. v. Ahearn, 124 App. Div. 840, 109 N. Y. Supp. 249; Hatfield v. Strauss, 117 App. Div. 678, 102 N. Y. Supp. 934, affirmed in 189 N. Y. 208, 82 N. E. 172.

Gray, J., delivered the opinion of the court:

The appellants concede that the permits granted by the municipal assembly and by the commissioner of parks, under which the wall in question was constructed beyond the house, and within the street, lines, were revocable; but they insist that, for want of a revocation by appropriate action, the permits remain in full force. Their contention is, and necessarily must be, that there was authority, under the provisions of the city charter, in the governing body, or in this department of the municipality, to authorize a structure of this purely ornamental or decorative character. I think the appeal must fail. It is not a question of discretion, within the exercise of which that which is actually an occupation or obstruction of the street by an abutting property owner might, nevertheless, because of its decorative

or artistic construction, as enhancing the attractiveness of the streets or park thoroughfares, be permitted. It is a question, simply, of the existence of any power in the municipality to consent to a permanent use of any part of a street for private purposes. That the construction of this wall was for the private purposes of the owner of the property inclosed by it is indisputable, and it cannot be material how far it was a decorative feature of the neighborhood, if neither municipal assembly nor park department was vested with authority to sanction its maintenance. The ownership by the city of the fee of land in the streets is impressed with a trust to keep the same open and for use as such. The trust is *publici juris*,—that is, for the whole people of the state,—and is under the absolute control of the legislature; in which body, as representing the people, is vested power to govern and to regulate the use of the streets. There is no right in the city to use its property therein, as it might corporate property, nor otherwise than as the legislature may authorize for some public use or benefit. *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-second Street & G. Street Ferry R. Co.* 50 N. Y. 206; *Deshong v. New York*, 176 N. Y. 475, 483, 68 N. E. 880. It follows, from the nature of its title, that the city cannot dispose of the streets for, nor divert them to, private uses. Whatever the power of control or of regulation possessed by the legislature, it is restricted in the direction of what may be deemed to be a public use, having in view, of course, the demands of a progressive civilization. See *People v. Kerr*, *supra*, and *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146. The streets were opened for the unrestricted use of the public, and the assessments for the costs were levied upon the properties benefited, and were paid upon the implied promise that they should be maintained, in all their integrity, as public highways. Any erection of permanent and substantial structures thereon, not for a public use, would constitute an encroachment or obstruction, and would therefore be a public nuisance. *Oxford v. Willoughby*, 181 N. Y. 155, 73 N. E. 677. Not only, therefore, does the nature of the title, by which the municipality holds the streets, forbid the inference of any implied power to grant the permission relied upon in this case, but such a power was, in express terms, withdrawn by a provision of the charter in force at the time. It contains the provision that the municipal assembly should have power to regulate the use of the streets and highways; "but they shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the

temporary occupation thereof during the erection or repairing of a building on a lot opposite the same." Charter of 1897 (Laws 1897, chap. 378) § 49, subd. 3. This provision, as construed by this court, denies to the municipal authorities any power to consent to the private use of any part of the street as laid out. The provision, as well as other statutory provisions relating to the jurisdiction and powers of the department of parks, upon which the appellants lay stress, as confirming, through the permit of the commissioner, their right to maintain the wall, have received very definite construction in *Ackerman v. True*, 175 N. Y. 353, 67 N. E. 629. In that case, the defendant had built his house over the line of the street to the extent of 31-2 feet, and the action was brought to compel him to remove so much of the building. The complainant was an adjoining property owner; but, necessarily, the right to the equitable relief, and to the compensatory damages sought, depended upon its being established that there had been such an interference with public and common rights as to create a public nuisance. It was held that the encroachment upon the street was a public nuisance, being an obstruction of the highway. The premises were on Riverside Drive, not far from these defendants' property, and the defendant there attempted to justify his acts under a permit issued by the commissioner of parks, who, as he claimed, was invested with power to permit such encroachments on streets within the jurisdiction of the park board. The statutes relied upon were held to be lacking in authority to the park board, or any member thereof, to grant to abutting property owners "a permit, or right, to extend the main wall of a permanent and substantial structure 3 feet and 6 inches into and beyond the line of the street." If such power was possessed, it was observed, it was unlimited, and the purpose for which streets were laid out might be impaired or defeated. The charter of 1897 was then in force, and it was said that any other construction would "result in practically annulling that portion of the charter of Greater New York which provides that streets and other public places in the city shall be inalienable. . . . Although it is true that the title of the streets in the city of New York is in the municipality, that title is held by it in trust for public use, and not even the municipal assembly has authority to permit permanent encroachments thereon." Citation is then made in the opinion of the inhibitory provision of the charter, already given above. Further provisions of the charter relating to the jurisdiction of the park board, under the Revision of 1901, were not considered to have extended it so as to

confer a right "to permit an abutting owner upon any of the streets of the city, . . . to encroach upon the street by the erection of permanent and substantial structures thereon." It was thought that the constitutionality of the statute, if construed to confer the power to permit such, would be very doubtful. The case of *Wormser v. Brown*, 149 N. Y. 163, 43 N. E. 524, was held to be inapplicable as an authority for the defendant's case. In that case, a bay window was constructed under a permit of the park department, and an adjoining property owner, who complained of it as an illegal interference with the street, from which he suffered injury, was defeated upon two grounds. He was *in pari delicto*, in that there was an erection upon his own property, extending into the street a greater distance, and he had failed to show any material injury. The two cases were held to be distinguishable, and the doctrine of the *Wormser Case* was considered to be insufficient to sustain the plaintiff's contention. It may be further observed that, in the present case, it is the city which is invoking the aid of the courts in undoing that which has been illegally done. Our decision of *Ackerman v. True* has been followed in several well-considered opinions by the appellate division of the supreme court, and its authority should not now be questioned. See *New York v. Knickerbocker Trust Co.* 104 App. Div. 223, 93 N. Y. Supp. 937; *McMillan v. Klaw & E. Constr. Co.* 107 App. Div. 407, 95 N. Y. Supp. 365; *Williams v. Robert M. Silverman Realty & Constr. Co.* 111 App. Div. 679, 97 N. Y. Supp. 945; *Hatfield v. Straus*, 117 App. Div. 671, 102 N. Y. Supp. 934; *People ex rel. Mark Cross Co. v. Ahearn*, 124 App. Div. 840, 109 N. Y. Supp. 249.

Cases which relate to the right to construct and to maintain vaults or cellars under sidewalks of streets are inapplicable, inasmuch as by the charter of Greater New York, and by statute for many years theretofore, authority had been expressly conferred upon municipal authorities to make and to repeal ordinances in relation to the construction and use of vaults. In *Deshong v. New York*, 176 N. Y. 475, 68 N. E. 880, that subject is quite fully discussed. I think it to be fairly clear that there is a distinction between the right to permit the use of the subsoil of a city street by an abutting owner and the right to permit a permanent encroachment upon the street, by which the absolute right of the people to the uninterrupted use thereof may be diminished. So, too, with respect to street awnings, which have been held to be within the power of the city authorities to authorize, the legislature has classified them with

signs, horse troughs, telegraph posts, and such like purposes, as legitimate street uses. See consolidation act of 1882, chap. 410, § 86, and city charters, in § 49 of act of 1897, and § 50 in act of 1901 (Laws 1901, chap. 466); *Hoey v. Gilroy*, 129 N. Y. 132, 29 N. E. 85. They are, within common-law rules, encroachments and obstructions; but the most that could be said is that, if the legislature has stretched its power in delegating to the governing body of the municipality the right to authorize the erection of awnings, such an encroachment is of too unsubstantial a nature to be seriously considered as a public nuisance.

I think that there is no force in the objection that an action in equity is not maintainable. *Oxford v. Willoughby*, 181 N. Y. 155, 73 N. E. 677. If it could be assumed that some revocation of the permission given was necessary, on the part of the city, its demand for the removal of the wall was sufficient notice to the defendant Rice of the revocation. Upon his neglect or refusal to comply with the city's demand, and in view of his claim to be legally entitled to maintain his wall, the appropriate, as indeed the most considerate, way to proceed to try out the question whether he could be compelled to remove the structure as a continuing nuisance was to bring the controversy before a court of equity, where it could be finally and completely determined.

For these reasons, I advise the affirmance of the judgment appealed from.

Cullen, Ch. J., and Haight, Vann, Werner, and Hiscock, JJ., concur.

Edward T. Bartlett, J., dissents.

VIRGINIA SUPREME COURT OF APPEALS.

CITY OF RICHMOND, Impleaded, etc.,
Plff. in Err.,
v.
W. H. LAMBERT.

(— Va. —, 68 S. E. 276.)

Sidewalk — obstruction — step — liability of municipality.

A step 4½ inches high and 10½ wide, placed

Note. — The question of liability of municipal corporations for defects or obstructions in streets is covered in the note to *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 512. See also note on liability of municipal corporation for permitting obstruction to be placed in street, in 19 L.R.A.(N.S.) 507. As to power of municipality to permit abutting owners to extend structures into the street, see note to *New York v. Rice*, ante, 375

on the sidewalk against a building, to facilitate access to it, is not an obstruction to the walk which will render the municipality liable for permitting its presence there in case a pedestrian falls over it, to his injury.

(June 9, 1910.)

ERROR to the Circuit Court for the City of Richmond to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. H. R. Pollard and G. W. Anderson for plaintiff in error.

Messrs. John A. Lamb and S. A. Anderson for defendant in error.

Keith, P., delivered the opinion of the court:

This is an action brought by Lambert against the city of Richmond, to recover damages for an injury which was received by him from a fall, due, as he contends, to the negligence of the city of Richmond in failing to keep its streets in a reasonably safe condition. The particular ground of complaint stated in the declaration is that there was a step on Williamsburg avenue, one of the streets of the city, between Louisiana and Graham streets, in front of the building known as "No. 3822," over which the plaintiff stumbled and fell, and received the injury of which he complains. In obedience to a provision of the charter of the city of Richmond, Segar Waters, Orelia Waters, and A. Anderson, who were the "owners, users, or lessees of the property" in front of which the step was situated, were made parties defendant, and such proceedings were had as resulted in a verdict and judgment for the plaintiff for \$2,000, and the case is before us upon a writ of error.

During the progress of the trial there were many exceptions taken to the rulings of the court; but in the view which we take of the case, we deem it necessary to consider but one of them, a decision of which will be conclusive of the controversy.

The court was asked to instruct the jury as follows: "The court instructs the jury that though they believe from the evidence that the step in the declaration mentioned was an encroachment upon the street, and that the plaintiff received injury by coming in contact therewith, as in the declaration alleged, and that the same was the proximate cause of the accident, yet, inasmuch as the evidence in the case as to the nature, size, character, and use of the said step is clear, and is without conflict, the court instructs the jury that, as a question

of law, the said step was not such an obstruction in the street as to render the city of Richmond liable for the injury resulting therefrom, and they should find a verdict for the defendant the city of Richmond."

The step in question was 4½ inches high and 10½ inches wide, was close up to the building in front of which it was placed, and was used as a means of access to it. We are of opinion that such a step, in such a place, did not constitute an unlawful obstruction in the street, and did not interfere to an appreciable or unreasonable extent with the use of the sidewalk.

In Parrish v. Huntington, 57 W. Va. 286, 50 S. E. 416, it is said: "A municipal corporation is not an insurer against accidents upon streets or sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the street is in a reasonably safe condition for travel in the ordinary modes, with ordinary care, by day or night; and whether so or not is a practical question, to be determined in each case by its particular circumstances. Where the evidence is without conflict, and it is clear and conclusive therefrom that a particular obstruction existed upon the sidewalk of the street of a municipal corporation, it is a question of law as to whether or not the obstruction was such as to render the sidewalk not in a reasonably safe condition, and thereby make the corporation liable in damages to a person injured by reason thereof."

In Robert v. Powell, 168 N. Y. 411, 55 L.R.A. 775, 85 Am. St. Rep. 673, 61 N. E. 699, it was held that a stepping-stone to facilitate access to carriages, placed near the edge of the sidewalk, which does not interfere in the least with the use of the roadway, or to an appreciable extent with the use of the sidewalk, is not a nuisance, so as to give a foot passenger, injured by stumbling over it in attempting to cross the street at a time when it is plainly visible, a right of action against the owner. In the course of the opinion the court said: "The stepping-stone in this case, located upon the sidewalk in front of a private house, was a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desired to visit or enter the house for business or other lawful purpose. It did not interfere in the least with the use of the roadway or bed of the street, nor did it interfere to any appreciable or unreasonable extent with the use of the sidewalk. There was 8 feet of a clear open space upon the sidewalk for the use of travelers; and the fact that the plaintiff, while hurrying in the nighttime to take a cab, stumbled over the stone, when the place was well lighted

and the object plainly visible, does not prove, or tend to prove, that the defendant was guilty of any wrong or breach of duty in maintaining the stepping-stone in front of her house. It is true that the plaintiff was injured; but that was the result of an accident, due, possibly, to his own fault, but, at all events, not to any fault on the part of the defendant, or to any unlawful obstruction by the defendant of the street."

In *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273, a stepping-stone 3 feet, 4 inches in length, and 20 inches wide, was placed on the edge of the sidewalk. The court observed that the stone was not of unusual size, or located in an improper place, and that it would be extending the liability of cities too far to hold them liable for permitting stepping-stones on the edge of sidewalks.

In *Wolff v. District of Columbia*, 196 U. S. 152, 49 L. ed. 426, 25 Sup. Ct. Rep. 198, 1 A. & E. Ann. Cas. 967, the court said: "There are objects which subserve the use of streets, and cannot be considered obstructions to them, although some portion of their space may be occupied."

"It would be adding to the corporate liability beyond reasonable limits," said Mr. Justice Miller in *Dubois v. Kingston*, supra, "to hold that stepping-stones, which are almost a necessity in providing for the interest, comfort, and convenience of the public in the maintenance of walks, avenues, and streets, constitute a nuisance or obstruction, and that corporations are liable for damages by reason of accidents caused thereby."

The cases we have cited have dealt specifically with objects such as hydrants, hitching posts, telegraph poles, awning posts, and stepping-stones in the sidewalk next to the street or curb, and they have been held not to constitute a nuisance, but to be a reasonable and necessary use of the street. In the case before us the stepping-stone was equally useful and equally necessary to the enjoyment of the premises in front of which it was placed; indeed, it subserved the convenience of a greater number of persons than a horse-block would have done. The number of such steps in this city is very great. To compel their removal would be a great hardship, and we think it may safely be left to the city to determine when their removal should be required.

This case is to be differentiated from that of *Richmond v. Gentry* (Va.) 68 S. E. 274, by the fact that the stone in that case was 10 inches from the building in front of which it was placed, and therefore in the midst of the sidewalk.

We are of opinion that the court erred in 28 L.R.A. (N.S.)

refusing to grant instruction G, and that for this error its judgment must be reversed.

Harrison, J., absent.

PENNSYLVANIA SUPREME COURT.

JULIA ANSPACH

v.

PHILADELPHIA & READING RAILWAY COMPANY, Appt.

(225 Pa. 528, 74 Atl. 373.)

Railroad crossing — accident — stranger — duty to listen.

1. A railroad company cannot be held liable for the death of one who drives on the track upon a railroad crossing without looking or listening for approaching trains, because he was unfamiliar with the country, where it omits the performance of no duty which it owes him.

Evidence — negative — weight.

2. Evidence of witnesses that they did not hear signals given by a railroad train for a street crossing will not establish negligence on the part of the railroad company where the train operatives testify positively that they were given.

(October 11, 1909.)

Note. — Liability for killing or injuring at railroad crossing one who went on crossing without knowledge of its existence.

The fact that a traveler approaching a crossing is ignorant of its existence obviously, as a general proposition, imposes no greater duty upon the railroad company in operating its trains over the crossing than if he were aware of its existence. But the company may, by its omission of some duties, subject itself to a liability for injury to one ignorant of a crossing, where it would not be liable if he knew thereof. For example, where an injury at a crossing is caused by a disregard of the statutory requirement to maintain an adequate signboard at a crossing, such omission would constitute negligence which would justify a recovery on the part of one who was a stranger to the locality and wholly ignorant of the existence of the crossing, or the presence of any signboard; and such was the conclusion reached in *Lewis v. Long Island R. Co.* 162 N. Y. 52, 56 N. E. 548; *Henn v. Long Island R. Co.* 51 App. Div. 292, 65 N. Y. Supp. 21; *Stewart v. Long Island R. Co.* 54 App. Div. 623, 66 N. Y. Supp. 436, affirmed without opinion in 156 N. Y. 604, 59 N. E. 1130 (all of the cases arose from the same accident).

So, where the company has been negligent in operating its trains over the crossing, the defense of contributory negligence will not be established by showing that the

APPEAL by defendant from a judgment of the Court of Common Pleas for Schuylkill County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's husband which was alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. John F. Whalen, for appellant:

It was the duty of the deceased to stop, look, and listen for approaching trains before attempting to cross the track, irrespective of his knowledge of the country.

Wade v. Western Maryland R. Co. 220 Pa. 578, 69 Atl. 1112; Dryden v. Pennsylvania R. Co. 211 Pa. 620, 61 Atl. 249; Baker v. Pennsylvania R. Co. 182 Pa. 336, 37 Atl. 933; Hess v. Williamsport & N. B. R. Co. 181 Pa. 492, 37 Atl. 568; Urias v. Pennsylvania R. Co. 152 Pa. 326, 25 Atl. 566; Gleim v. Harris, 181 Pa. 387, 37 Atl. 515; Gangawer v. Philadelphia & R. R. Co. 168 Pa. 265, 32 Atl. 21; Mulvaney v. Pittsburgh R. Co. 213 Pa. 343, 62 Atl. 926; Blotz v. Lehigh Valley R. Co. 212 Pa. 154, 61 Atl. 832; Holden v. Pennsylvania R. Co. 169 Pa. 1, 32 Atl. 103; Pennsylvania R. Co. v. Beale, 73 Pa. 504, 13 Am. Rep. 753; Whitman v. Pennsylvania R. Co. 156 Pa. 175, 27 Atl. 290; Gray v. Pennsylvania R. Co. 172 Pa. 383, 33 Atl. 697; Kinter v. Pennsylvania R. Co. 204 Pa. 497, 93 Am. St. Rep. 795, 54 Atl. 276; Yevsack v. Lackawanna & W. Valley R. Co. 221 Pa. 493, 18 L.R.A.(N.S.) 519, 128 Am. St. Rep. 746, 70 Atl. 837; Moose Brewing Co. v. Pennsylvania R. Co. 36 Pa. Super. Ct. 549; Carroll v. Pennsylvania R. Co. 12 W. N. C. 348; Marland v. Pittsburgh & L. E. R. Co. 123 Pa. 487, 10 Am. St. Rep. 541, 16 Atl. 624; Allyn v. Boston & A. R. Co. 105 Mass. 77.

Messrs. James B. Reilly, W. J. White-

plaintiff had failed upon approaching the crossing to look and listen, where it appeared that he was traveling on a dark night along a road with which he was unfamiliar, and was unaware of the existence of the crossing. Chicago & E. R. Co. v. Fretz (Ind.) 90 N. E. 76; Chicago, R. I. & P. R. Co. v. Hansen, 78 Kan. 278, 96 Pac. 668; Winchell v. Abbot, 77 Wis. 371, 46 N. W. 665.

Nor would such defense be established by showing that the plaintiff in approaching the crossing in daylight and ignorant of the existence of the railroad did not look for or see it, where it was not shown that he could have seen it if he had looked. Cohen v. Eureka & P. R. Co. 14 Nev. 376.

On the other hand, in Allyn v. Boston & A. R. Co. 105 Mass. 77, the defense of contributory negligence was held to be established where it was shown that the plaintiff, who was ignorant of the existence of the crossing at which he was injured, was

house, and O. A. Whitehouse, for appellee:

The testimony of three witnesses that they were listening for some signal by bell or whistle of the approach of the train, and heard none, constituted more than a scintilla of evidence, and was of a higher grade than merely negative testimony, and was sufficient to warrant submission to the jury of the question as to whether or not proper signals were given.

Longenecker v. Pennsylvania R. Co. 105 Pa. 328; Quigley v. Delaware & H. Canal Co. 142 Pa. 388, 24 Am. St. Rep. 504, 21 Atl. 827; Daubert v. Delaware, L. & W. R. Co. 199 Pa. 345, 49 Atl. 72; Kuntz v. New York, C. & St. L. R. Co. 206 Pa. 163, 55 Atl. 915; Pyne v. Delaware L. & W. R. Co. 212 Pa. 147, 61 Atl. 817.

Potter, J., delivered the opinion of the court:

In this action Julia Anspach seeks to recover damages for the death of her husband, alleged to have been caused by the negligence of the defendant. The plaintiff's husband, John Anspach, resided at New Philadelphia, Schuylkill county. He was a miner by occupation, and was also constable of the borough. On the morning of November 19, 1903, at an early hour, he left his home to join two neighbors, for the purpose of going on a hunting trip to the eastern part of the county. They rode in a buggy, Anspach and one of his companions upon the seat, and the other, who was driving, seated on their laps. On the way they were joined by four other men, who rode behind them in another conveyance. In order to reach the hunting grounds, they passed through the borough of New Ringgold, about 10 miles southeast of New Philadelphia. At this point the road upon which they were

driving along a highway which ran for a mile or more nearly parallel with the railroad, and was for the most of the distance in sight of it, and which, as the crossing was approached, bent a little and began to rise, the railroad track and the usual signboard over the highway being visible for several rods before the crossing was reached, but the plaintiff having failed to look up at the foot of the ascent.

In Doyle v. Pennsylvania & N. Y. Canal & R. Co. 139 N. Y. 637, 34 N. E. 1063, recovery was allowed for injuries received at a crossing by an active and intelligent woman who, while walking at night along a street with which she was unfamiliar, and after crossing twenty-four tracks, was struck at an isolated track crossing the same street, by the defendant's train, which was running very fast and upon which no bell was rung nor whistle sounded, she supposing that the train was upon another track.

traveling crossed at grade, and at right angles, the track of the Little Schuylkill Railroad, a branch of the Philadelphia & Reading, which runs from Port Clinton to Tamaqua; the crossing being 70 feet south of a railroad station, and being that of an ordinary country road. According to the testimony of the companions of Anspach, they were not aware of the location of the railroad, and were not on the lookout, but drove straight to the crossing, without stopping or looking or listening for the approach of a train. Just as the horse reached the track, a freight train going south reached the crossing. The horse was turned by the driver, or veered to one side of its own accord, and sustained little injury; but the buggy was struck and demolished, its occupants were thrown out, and Anspach fell under the wheels of the train, and received injuries from which he died in a few hours. The train was made up of an engine and forty-two freight cars, and was running down grade, by gravity, at a speed, according to the engineer, of 10 or 12 miles an hour. It carried a burning headlight, and two other lights on the engine, and approached the crossing on a straight track from a point 2,000 feet distant. There is ample evidence to show that the whistle was blown several times before the train reached the crossing, and that the bell was rung continuously from a point about 1,200 feet above the crossing down to the moment of the collision. The usual station equipment of lamps for a country station was in place and burning, such as a large lamp in front, semaphore lights a short distance from, and opposite, the station, and a light in the operator's office. Yet Anspach and his companions apparently neither heard nor saw anything to indicate danger to them, until they drove almost into the approaching engine. The accident occurred about 6 o'clock in the morning of a November day, while it was yet dark. Not so dark, however, but that the travelers could, as they testified, distinguish teams and vehicles which they met upon the road.

The first question which arises in the consideration of this case is whether there is any evidence of any neglect by the defendant company of any duty which it owed Anspach. Whether or not he was acquainted with the locality was not definitely shown. His companions testified that they did not know the location of the railroad, and for that reason they did not stop, look, or listen as they approached the track. But the defendant company was not to blame for any ignorance in this respect upon the part of Anspach. It was not its duty to hunt him up and inform him of the location of its line. Had the approach of these parties

been made in daylight, no excuse could have been offered for their failure to observe the railroad and take the usual precautions against danger. Nor can anything be fairly predicated in favor of Anspach and his companions because they were traveling in the darkness. If they chose to use the highway at night, they incurred the risk of encountering such obstacles as might lawfully be found along the line of travel. The railroad was where it had the lawful right to be, either by day or by night. It is plainly the duty of parties wishing to travel over an unknown road at night to inform themselves in advance of possible dangers that may beset their way. Certainly in the present case the defendant company cannot justly be held responsible for the results of the ignorance of Anspach and his companions. The increased risk of traveling by night was one which they assumed, and it is not to be cast upon the defendant company.

Undoubtedly, it is the duty of a railroad company in approaching a crossing in a rural community to run at a reasonable rate of speed, and to give proper warning by means of signal or the blowing of a whistle or the ringing of the bell. In this respect the evidence is clear and convincing that every reasonable requirement was met. The evidence of the train crew is that the whistle was blown several times, and at three distinct places, as the train slowly approached the station and the crossing. The bell was also rung continuously for quite a distance, and for some time before the collision. There was no testimony on the part of the plaintiff that the whistle was not blown or the bell rung. The witnesses on that point for plaintiff merely said they did not hear the whistle or bell. Negative testimony of this character by those who did not hear, as against the positive, affirmative testimony of witnesses who did hear, and who were in a position to know, is not enough to make out a charge of negligence. *Hauser v. Central R. Co.* 147 Pa. 440, 23 Atl. 766. We held in *Newhard v. Pennsylvania R. Co.* 153 Pa. 417, 19 L.R.A. 563, 26 Atl. 105, where eleven witnesses testified that they heard the whistle, as against plaintiff's testimony that he did not hear it, that the court must treat the allegation that the whistle was blown as a fact, "because of proof that convinces an unprejudiced mind beyond a reasonable doubt." In *Knox v. Philadelphia & R. R. Co.* 202 Pa. 504, 52 Atl. 90, we held, as set forth in the syllabus, that "the testimony of one witness, a passenger, that a train approached a crossing without ringing a bell or sounding a whistle, contradicted by the engineer, fireman, conductor, and brakeman, is insufficient to carry a case to the jury on the question of the railroad company's neg

ligence." And in *Keiser v. Lehigh Valley R. Co.* 212 Pa. 409, 108 Am. St. Rep. 872, 61 Atl. 903, we again held as summed up in the syllabus that, "in a railroad grade crossing accident case, the negative testimony of nine witnesses that they did not hear the whistle blown nor the bell rung on a stormy and windy night, amounting only to a *scintilla*, cannot prevail against the overwhelming and positive testimony of fourteen witnesses, which conclusively established the fact that these duties were performed. In such a case the trial judge is warranted in giving binding instructions to the jury to return a verdict in favor of the defendant." It further appears definitely that the train was not running at a rate of more than 12 miles per hour, and was under such good control that it was brought to a standstill at the crossing, when not more than half of the train had passed. So that in none of these things does it appear from the evidence that there was any neglect of duty upon the part of the defendant company. The trial judge would have been justified in taking the case from the jury for want of sufficient evidence to justify a verdict against the defendant.

In addition to this, we can find nothing in the evidence to show any reasonable excuse for the neglect of Anspach and his companions to take notice of the approach of the train as they drove to meet it at the crossing. If they did not see the signal lights at the station, the headlight of the approaching locomotive, and one upon an engine standing near by, nor hear the repeated blasts of the whistle, and the ringing of the bell, and the rumbling of a long train of freight cars, then indeed must they have made but little use of their senses.

A careful examination of the evidence in this case leads us to the irresistible conclusion that no negligence upon the part of the defendant company was shown, and that the unfortunate accident which occurred resulted from the heedlessness of the parties who suffered from it. The responsibility for disposing of this case should have been assumed by the court.

The assignments of error are sustained, and the judgment is reversed.

UNITED STATES SUPREME COURT.

UNITED STATES OF AMERICA, Plff. in Err.,

v.

CORA WELCH and Husband et al.

(217 U. S. 333, 54 L. ed. 787, 30 Sup. Ct. Rep. 527.)

Eminent domain — taking — easement.

The owner of a farm, a part of which is

permanently flooded by a government dam, must be compensated, in addition to the value of the land taken, for the lessened value of the farm, caused by the consequent cutting off of a private way across the lands of others, which is the only practicable outlet from the farm to the county road.

(April 25, 1910.)

Note. — Interference with access to highway from the part of parcel not taken by the taking of another part as element of damages in condemnation.

This note is confined to cases involving the question of the interference of access to property as an element of damages, where a part of the property has been taken in eminent domain proceedings. The cases involving the question of cutting off access to the highway as a taking, where no part of the property was actually taken, as where a railroad or other improvement was constructed in a street or where the highway was vacated, etc., are collected in a note in 15 L.R.A.(N.S.) 49.

And see note in 25 L.R.A.(N.S.) 1265, as to right of abutting owner to compensation for interference with ingress and egress by street railway not considered as an additional burden.

For cases involving the question as to cutting off access to navigable waters, see note in 40 L.R.A. 604.

The general rule that the owner is entitled to compensation not only for the part of the land actually taken in condemnation proceedings, but also to damages caused to the remainder of the tract, includes, *inter alia*, interference with access to the highway as an element of the damages to be taken into consideration in arriving at the amount of compensation to be awarded. But while the inconvenience arising from increased difficulty of access owing to the particular location of the improvement is a proper matter for consideration in estimating the damages, it must be considered only as it affects the market value of the land, and not as a distinct item of damages. In other words, the damages awarded must be the difference in the market value as it existed before the taking, and after the appropriation; but, in arriving at the conclusion as to the depreciation in the market value, it is within the province of the jury to inquire whether the interference with the access caused a depreciation, and, if any, its extent, in the market value.

Thus, where land was rendered inaccessible by the construction of a railroad embankment, the difference in the value of the land just before and just after the construction of the road was the measure of damages, and not the cost of constructing a road from the land to existing highways. *Red River, T. & S. R. Co. v. Hughes*, 36 Tex. Civ. App. 472, 81 S. W. 1235.

And so, also, in the following cases, in-

ERROR to the Circuit Court of the United States for the Eastern District of Kentucky to review a judgment awarding damages to the owner of property permanently flooded by a government dam. Affirmed.

The facts are stated in the opinion.

Messrs. John Q. Thompson, A. C. Campbell, and Percy C. Cox, for plaintiff in error:

If private property is merely lessened in value by the erection of a public improvement, and is not invaded or encroached upon, there is no implied contract to make compensation therefor.

Northern Transp. Co. v. Chicago, 99 U.

S. 635, 642, 25 L. ed. 336, 339; United States v. Lynah, 188 U. S. 445, 465, 47 L. ed. 539, 546, 23 Sup. Ct. Rep. 349; Mills v. United States, 12 L.R.A. 673, 46 Fed. 742.

To constitute a taking of private property such as is inhibited by the 5th Amendment to the Constitution, unless just compensation is made, it must be shown that the owner thereof has been wholly deprived of the use of the same. If it has been merely injured or its use impaired, there is no taking such as is contemplated by said Amendment.

Northern Transp. Co. v. Chicago, *supra*; Bedford v. United States, 192 U. S. 217, 223-

terference with access to a highway has been held to be an element of damages to be considered in arriving at the conclusion as to the amount of depreciation in the market value caused by the improvement: Hooper v. Savannah & M. R. Co. 69 Ala. 529; Little Rock, M. R. & T. R. Co. v. Allen, 41 Ark. 431; Rock Island & E. I. R. Co. v. Gordon, 184 Ill. 456, 56 S. E. 810; Union R. Transfer & Stock Yard Co. v. Moore, 80 Ind. 458; Cincinnati, R. & M. R. Co. v. Miller, 36 Ind. App. 36, 72 N. E. 827, 73 N. E. 1001; Elizabethtown, L. & B. S. R. Co. v. Catlettsburg Water Co. 110 Ky. 175, 61 S. W. 47; Kansas City, St. L. & C. R. Co. v. Farrell, 76 Mo. 183; Chicago, S. F. & C. R. Co. v. Miller, 106 Mo. 458, 17 S. W. 499; Hatch v. Cincinnati & I. R. Co. 18 Ohio St. 92; Watson v. Pittsburgh & C. R. Co. 37 Pa. 469.

The destruction of a lot owner's easement of ingress and egress over a private street, by the building of a county bridge, is such a taking of his property as entitles him to recover damages against the county. Frater v. Hamilton County, 90 Tenn. 661, 19 S. W. 233.

Where the taking of a part of the land increases the expense of moving freight to and from the remainder, and thereby affects a business conducted thereon, that fact should be regarded in estimating the damages. Richmond, P. & C. R. Co. v. Chamblin, 100 Va. 401, 41 S. E. 750.

And the right of way to a public highway, across the land of another connected with land sought to be condemned, is such an interest that it should be taken into consideration in determining the value of the land, and estimating the compensation to be paid. Chicago, S. F. & C. R. Co. v. Ward, 128 Ill. 349, 18 N. E. 828, 21 N. E. 562.

But in assessing damages for the location and construction of a railroad through a farm, the owner is not entitled to an allowance for interference with his access, by means of a public highway, to a watering place thereon, but within the bounds of another's land, arising from the manner in which the highway is crossed by the railroad. Gorgas v. Philadelphia, H. & P. R. Co. 144 Pa. 1, 22 Atl. 715. The court said the plaintiff had no right to the water nor of access to it, which was special to him- 28 L.R.A. (N.S.)

self or to his land, or which was not common to the public, and was merely deprived of what did not belong to him.

And the rule is the same where the injury done to the landowner is by destroying all communication between the parts of his land lying on opposite sides of the improvement for which a part of the land has been taken. Mason v. Kennebec & P. R. Co. 31 Me. 215.

So, inconvenience caused by embankments, excavations, ditches, and other obstructions, in going from one part of the land to another, which has been separated by the taking of a part, must be considered as an element of damage arising from the improvement. Omaha Southern R. Co. v. Todd, 39 Neb. 818, 58 N. W. 289; Fremont, E. & M. Valley R. Co. v. Bates, 40 Neb. 381, 58 N. W. 959; Somerville & E. R. Co. v. Doughty, 22 N. J. L. 495.

And so, also, the following cases support the rule as applied to interference with communication between different parts of the land. No attempt, however, has been made to exhaust the authorities upon this point. Peoria A. & D. R. Co. v. Sawyer, 71 Ill. 361; Keithsburg & E. R. Co. v. Henry, 79 Ill. 292; Chicago & I. R. Co. v. Hopkins, 90 Ill. 316; Chicago, P. & St. L. R. Co. v. Greiney, 137 Ill. 628, 25 N. E. 798; Bell v. Chicago, B. & Q. R. Co. 74 Iowa, 343, 37 N. W. 768; Vicksburg, S. & P. R. Co. v. Dillard, 35 La. 1045; New Orleans P. R. Co. v. Murrell, 36 La. 344; Grand Rapids, L. & D. R. Co. v. Chesbro, 74 Mich. 466, 42 N. W. 66; Re Utica, C. & S. Valley R. Co. 56 Barb. 456; Pittsburgh, V. & C. R. Co. v. Vance, 115 Pa. 325, 8 Atl. 764; Texas & P. R. Co. v. Durrett, 57 Tex. 48; Lyons v. United States, 26 Ct. Cl. 31.

So, the measure of damages for overflowing land by the construction of a milldam was held in Harding v. Funk, 8 Kan. 315, to be the difference in the value of the land before and after its erection, but the landowner had the right to show to the jury the additional expense in making a crossing over the stream on his own land, to put the remaining part in condition to be used after the milldam had been erected and the stream raised in consequence thereof. To the same effect is Bates v. Ray, 102 Mass. 458.

225, 48 L. ed. 414, 416, 417, 24 Sup. Ct. Rep. 238; *Manigault v. Springs*, 199 U. S. 473, 483, 485, 50 L. ed. 274, 280, 281, 26 Sup. Ct. Rep. 127; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 583, 584, 50 L. ed. 596, 605, 606, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175.

Where ingress and egress to and from private property is rendered more difficult by reason of the erection of a public improvement, and the value of the property is thereby lessened, there is not a taking such as is contemplated by said Amendment.

Gibson v. United States, 166 U. S. 269, 270, 275, 276, 41 L. ed. 996, 998, 1002, 17 Sup. Ct. Rep. 578.

A claim for damages against the government which arises out of the construction of a lock and dam to improve the navigable capacity of a river, whereby a private road has been destroyed, which afforded to the owners of the farm convenient access to and from a public highway, is not a claim founded upon the Constitution, even though the destruction of the private road has lessened the value of the farm.

Scranton v. Wheeler, 179 U. S. 141, 164, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48.

Private rights are always subservient to the public good.

3 Grotius, *De Jure Belli*, chap. 20, §§ 1, 7; *Surocco v. Geary*, 3 Cal. 70, 58 Am. Dec. 385.

No liability attaches for remote or consequential damages.

Lansing v. Smith, 8 Cow. 149; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 549, 3 Am. Rep. 269; *Cooley*, Const. Lim. 6th ed. p. 473; *Dill. Mun. Corp.* § 987; *Sedgw. Stat. & Const. Law*, 2d ed. pp. 456 et seq; *Harvard College v. Stearns*, 15 Gray, 1; *Louisville & F. R. Co. v. Brown*, 17 B. Mon. 763; *Lewis*, Em. Dom. 3d ed. § 202; *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 71; *Keasy v. Louisville*, 4 Dana, 154, 29 Am. Dec. 395; *Wolfe v. Covington & L. R. Co.* 15 B. Mon. 404; *Hollister v. Union Co.* 9 Conn. 436, 25 Am. Dec. 36; *Sharp v. United States*, 191 U. S. 341, 48 L. ed. 211, 24 Sup. Ct. Rep. 114; *Currie v. Waverly & N. Y. Bay R. Co.* 52 N. J. L. 392, 19 Am. St. Rep. 452, 20 Atl. 56; *High Bridge Lumber Co. v. United States*, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 324; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Lambar v. St. Louis*, 15 Mo. 610; *Benjamin v. Wheeler*, 8 Gray, 409; *Gould v. Hudson River R. Co.* 6 N. Y. 522; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9, 42 Am. Dec. 312; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101; *Boston & W. R. Corp. v. Old Colony R. Corp.* 12 Cush. 605; *Richardson v. Vermont C. R. Co.* 25 Vt. 28 L.R.A. (N.S.)

465, 60 Am. Dec. 283; *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164.

Mere inconvenience or additional expense in operation does not constitute a taking.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; *Manigault v. Springs*, 199 U. S. 473, 484, 485, 50 L. ed. 274, 280, 281, 26 Sup. Ct. Rep. 127; *United States v. Lynah*, 188 U. S. 473, 474, 47 L. ed. 549, 550, 23 Sup. Ct. Rep. 349.

Messrs. Edward S. Jonett and W. M. Beckner, for defendants in error:

Easements are subject to the law of eminent domain.

14 Cyc. Law & Proc. p. 1139; 15 Cyc. Law & Proc. p. 607; *Ross v. Georgia, C. & N. R. Co.* 33 S. C. 477, 12 S. E. 101; *Deavitt v. Washington County*, 75 Vt. 156, 53 Atl. 563; *Western U. Teleg. Co. v. Pennsylvania R. Co.* 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, 1 A. & E. Ann. Cas. 517.

Permanent overflowing is a taking within the meaning of the constitutional provision.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557.

Wherever there is an actual physical invasion, compensation is due, and the law then fixes the measure of that compensation to be the value of the part taken plus the damage to the remainder of the property resulting from such taking.

Louisville & F. R. Co. v. Brown, 17 B. Mon. 763; *Hollister v. Union Co.* 9 Conn. 436, 25 Am. Dec. 36; *Currie v. Waverly & N. Y. Bay R. Co.* 52 N. J. L. 392, 19 Am. St. Rep. 452, 20 Atl. 56; *Sharpe v. United States*, 57 L.R.A. 932, 50 C. C. A. 597, 112 Fed. 893.

The Welch farm and its private roadway should be considered as one property.

Sharp v. United States, 191 U. S. 341, 48 L. ed. 211, 24 Sup. Ct. Rep. 114; *Sharpe v. United States*, 57 L.R.A. 932, note; *Westbrook v. Muscatine, N. & S. R. Co.* 115 Iowa, 106, 88 N. W. 202; *Potts v. Pennsylvania S. Valley R. Co.* 119 Pa. 278, 4 Am. St. Rep. 646, 13 Atl. 291; *Peck v. Superior Short Line R. Co.* 36 Minn. 343, 31 N. W. 217.

The action does not sound in tort.

United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; *United States v. Lynah*, 188 U. S. 446, 47 L. ed. 539, 23 Sup. Ct. Rep. 349.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding under the act of March 3, 1887, chap. 359, § 2, 24 Stat. at L. 505, U. S. Comp. Stat. 1901, p. 753, to recover the value of land taken by the United States. It is admitted that a strip of about 3 acres of land lying along the side

of Four Mile creek, and running east and west, was taken, and is to be paid for. It was permanently flooded by a dam on the Kentucky river, into which Four Mile creek flows. *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; *Manigault v. Springs*, 199 U. S. 473, 484, 50 L. ed. 274, 280, 26 Sup. Ct. Rep. 127. The plaintiffs owned other land south of and adjoining the strip taken, and had a private right of way at right angles to the creek, northerly, across land of other parties, to the Ford county road, which ran parallel to the creek and at some distance from it. This was the only practical outlet from the plaintiff's farm to the county road. The taking of the intervening strip of course cut off the use of the way, and the judge who tried the case found that it lessened the value of the farm \$1,700. He allowed this sum in addition to \$300 for the land taken. The United States took a writ of error on the ground that the former item was merely for collateral damage not amounting to a taking and of a kind that cannot be allowed; that at most it was only a tort. The case is likened to the depreciation in value of a neighboring but distinct tract by reason of the use to which the government intends to put that which it takes. *Sharp v. United States*, 191 U. S. 341, 355, 48 L. ed. 211, 216, 24 Sup. Ct. Rep. 114.

The petition, like the form of the finding, lends some countenance to this contention, by laying emphasis on the damage to the farm, although it is to be noted that, even in this aspect, the damage is to the tract of which a part is taken. 191 U. S. 354. But both petition and finding in substance show clearly that the way has been permanently cut off. A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits that it must pay. But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end. *Miller v. Horton*, 152 Mass. 540, 547, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100. The same reasoning that allows a recovery for the taking of land by permanent occupation allows it for a right of way taken in the same manner; and the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached. The argument is only confused by reference to cases like *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Harvard College v. Stearns*, 15 Gray, 1; *Smith v. Boston*, 7 Cush. 254, where it was held, although there are decisions the other way, 28 L.R.A. (N.S.)

that a landowner cannot recover for the obstruction of a public water course, the discontinuance of a public way, or the like. The ground of such decisions is that the plaintiff's rights are subject to superior public rights, or that he has no private right, and that his damage, though greater in degree than that of the rest of the public, is the same in kind. Here there is no question of the plaintiff's private right. Judgment affirmed.

Mr. Justice Harlan concurs in the judgment only so far as it allows the item of \$300.

WEST VIRGINIA SUPREME COURT OF APPEALS.

V. E. SAYRE, Plff. in Err.,
v.

R. H. WOODYARD, Admr., etc., of E. R. Woodyard, Deceased.

(66 W. Va. 288, 66 S. E. 320.)

Appeal — exclusion of evidence — prejudicial error — necessity of showing.

1. Although a question propounded a witness, objection to which was sustained below, shows on its face the relevancy and materiality of the evidence called for, error in the ruling thereon will not be available here, unless it appears what the answers

Headnotes by MILLER, P.

Note. — Competency of original debtor to testify to payment made to decedent, in action by third person against the estate to recover amount so paid.

It was held in *McBrien v. Martin*, 87 Tenn. 13, 9 S. W. 201, which was an action against an administrator to recover money paid his decedent for the plaintiff's benefit, that the person who made the payment was not rendered incompetent as a witness to prove such fact, by a statute which prohibited either party to an action by or against an executor or administrator, to testify to transactions with the decedent, since such witness, although interested in the result of the litigation, was not a party to the action.

But, on the other hand, it was held in *McClanahan v. McClanahan*, 129 Iowa, 411, 105 N. W. 833, an action against an estate to enforce a trust in money received by decedent, that the one making the payment to the decedent was rendered incompetent to prove such fact, by a statute declaring that the parties interested in the result of an action or proceeding, as well as parties to the action itself, shall not be examined as witnesses in regard to any personal transaction had with a decedent. The court said that "it is manifest that whatever rights the claimant had arose out of the trust re-

would have been, or what was proposed to be proven thereby; the test here being whether the error complained of was prejudicial to the complaining party.

Evidence — suppressed deposition — contents — hearsay.

2. Alleged admission to the opposite party of the same facts testified to by a witness whose deposition has been suppressed at the trial cannot be shown in evidence on the cross-examination of such opposite party, to supply the loss of the deposition suppressed.

Witness — account — leading question — admissibility of evidence.

3. A question propounded plaintiff as to whether two items in an account previously rendered defendant and offered in evidence by him, viz., "September 4, 1898. To notes I gave him to collect, \$470.50." "March 15, 1900. To notes I gave him to collect, \$438.55,"—represented or were intended to represent the notes sued on, was rightfully rejected as being leading, and otherwise improper.

lation and the alleged payment by the witness to the deceased. The witness was then a person through whom the claimant derived an interest. It is not necessary that the interest shall be derived by transfer or assignment. It may be 'otherwise,' and as used that word is one of broad significance. It means that if the right asserted by a claimant depends for its existence and validity upon a transaction between the deceased and a third person, the evidence of such third person shall not be allowed to prove the transaction."

So, a defendant in an execution who has paid money thereon to an attorney is not competent at common law to prove such fact in an action brought by the plaintiff in the execution against the deceased attorney's estate to recover it, as the witness was liable upon the judgment, and was therefore interested in placing the liability on the deceased attorney so as to relieve himself. *Daniel v. Burts*, 72 Ga. 143.

Nor is the competency of such person established by a statute relieving interested parties of disability as witnesses, which prohibits one of the original parties to a contract or cause of action in issue or on trial to testify in his own favor after the death of the other party thereto. *Ibid*.

Attention is called to the following case which, while not within the scope of this note, presents a state of facts closely analogous to the preceding cases:

A statute declaring that where any party to a thing or contract in action is dead, and his right thereto has passed, either by his own act or the act of law, to a party on the record who represents his interest in the subject in controversy, no surviving or remaining party to such thing or contract, or any other person whose interests shall be adverse to the right of such deceased, shall be a competent witness to any matter occurring before the death of said party, does not render a guarantor of a promissory note
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Same — action on note — death of payee — proof of payment — competency of maker.

4. After the assignment of a promissory note and death of the assignor or payee, the maker is a competent witness, in an action by the assignee against the administrator of the assignor, to prove assignment and payment of the note to the latter, as agent of the former, in his lifetime.

Evidence — deposition — suppression — ground.

5. If a deposition contain competent evidence on matters in issue at the time it was taken, the fact that the amended declaration, on which the trial was had, put in issue additional matters, is not good ground of objection to the evidence therein pertaining to the matters in issue when taken; and is not good ground for suppressing the deposition, in whole or in part, after trial begun on such amended declaration.

(November 16, 1909.)

incompetent to testify in an action by the executor of the payee against the maker of the instrument, that it had been paid during the payee's lifetime, as no liability could be imposed upon the guarantor in such action, his liability being separate and distinct from that of the maker of the note, and one which could only be enforced in a separate action. *Pattison v. Cobb*, 212 Pa. 572, 61 Atl. 1108, reversing 26 Pa. Super. Ct. 72. The court said that the contract which was the subject of litigation was one between the payee and the maker of the note, the effect of which was to make the latter pay his obligation, while the contract to which the witness was a party was not involved in the controversy, and though indorsed on the one executed by the maker, it was as separate from and as independent thereto as though it had been written on another piece of paper, and they were not only separate and independent but entirely different in their nature, that of the maker of the note being an unconditional promise to pay, while that of the guarantor was that he would pay if the maker could not,—not that he would pay if the maker would not. But, said the court, "If at the time . . . [the guarantor] was called as a witness there was a liability on his contract of guaranty, his interest was adverse to the right of the deceased in the contract with . . . [the maker of the note], and for that reason he would have been properly excluded" as a witness.

However, if, before being presented as a witness, the guarantor had been discharged in bankruptcy, his contract of guaranty, if his liability thereon had become fixed, would be included thereunder, and therefore he would be a competent witness to prove such payment, as from the date of his discharge he was not a party to "the thing or contract in action," nor had any interests in it adverse to the rights of the deceased. *Ibid*.

ERROR to the Circuit Court for Wirt County to review a judgment in defendant's favor in an action for an accounting for certain promissory notes delivered to defendant's intestate for collection. Reversed.

The facts are stated in the opinion.

Mr. T. A. Brown, for plaintiff in error:

The maker of the note was a competent witness.

Crothers v. Crothers, 40 W. Va. 169, 20 S. E. 927; Kilgore v. Hanley, 27 W. Va. 451; Gilmer v. Baker, 24 W. Va. 72; Page v. Whidden, 59 N. H. 507.

The trial court erred in excluding the Rathbone deposition because it was taken before the filing of the amended declaration.

Goldsmith v. Goldsmith, 46 W. Va. 426, 33 S. E. 266; Edgell v. Smith, 50 W. Va. 349, 40 S. E. 402; Morrow v. Hatfield, 6 Humph. 108; Jones v. Williams, 1 Wash. (Va.) 230; Story, Eq. Pl. § 28, p. 257.

Messrs. D. C. Casto and H. A. Somerville for defendant in error.

Miller, P., delivered the opinion of the court:

The plaintiff's amended declaration in assumpsit contained the common counts, and a special count upon three notes made by S. B. Rathbone, Jr.,—the first, May 9, 1898, payable twenty-one months after date, to the order of Nimrod Wiseman, for \$68.74; the second, November 15, 1899, payable ninety days after date, to E. R. Woodyard, for \$219; the third, May 9, 1898, payable twenty-one months after date, to the order of Nimrod Wiseman, for \$106.51; and

charged that the first and third of said notes, for a valuable consideration, had been indorsed, transferred, and turned over by Wiseman to Woodyard, and by him, for a good and valuable consideration, together with said second note, indorsed in blank, and delivered to plaintiff, and that she, on the ——— day of February, 1900, had redelivered said notes to the said Woodyard for collection and accounting of the proceeds to her; that Woodyard had received and accepted said notes from her in that behalf, and then and there promised plaintiff to collect the same, and, when collected, to pay over the proceeds thereof to her; that Woodyard had in his lifetime in fact collected said notes, but had converted the proceeds to his own use, and had not in his lifetime, nor had his administrator after his death, paid or accounted therefor, or for any part thereof, to plaintiff. The amended declaration is substantially the same as the original, except that the third note counted upon is not called for in the original, and the amount demanded upon said notes in the original declaration is \$369.02, while in the amended declaration the amount demanded

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is \$454.25, principal, with interest to January ———, 1904, aggregating \$563.27. On the trial below the verdict and judgment was for the defendant. The points relied on are errors alleged to have been committed in the trial, and saved by numerous bills of exceptions.

Harry Sayre, a son of and witness for plaintiff, was asked a number of questions relating to a note which plaintiff claimed had been executed by Mrs. Rathbone to Woodyard by way of security for the notes sued on. The court below sustained objections to these questions, and would not permit them to be answered. The record fails to show what the answers would have been, or what was intended to be proven by them. A rule many times declared by this court, lastly perhaps in *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 708, 59 S. E. 634, is that the refusal of the court below to permit a witness to answer such questions will not, on a motion for a new trial, be available as prejudicial error, unless the expected answer be disclosed before the time of the ruling. Counsel, mindful of this rule, nevertheless insists that these questions show upon their face that the answers must have been material to the issues involved, and are therefore brought within some supposed exception to the general rule. No authority establishing such an exception is cited, however, and we know of none. Even if the questions did indicate the materiality of their answers, materiality is not the test. The test is whether the answers would have aided the complaining party, and their rejection was consequently prejudicial to his interests. We cannot, in reviewing a judgment on writ of error, assume that answers favorable to the exceptor would have been given. *Delmar Oil Co. v. Bartlett*, supra, point five of the syllabus.

Another question propounded to the same witness was: "Harry, what effort do you know, if any, has been made to get the original note executed by Mrs. Rathbone to E. R. Woodyard?" He answered: "Well, my mother, she promised my mother, I heard her promise my mother, she would look for it, and send it to her if she could possibly find it." The plaintiff complains that this question and answer were ruled out. It is doubtful whether this note was material. It was not one of the notes sued upon. The plaintiff did not claim this note. There was no controversy about it. The most that plaintiff did claim was that it had been taken by Woodyard as security for the notes assigned to her. The failure of the plaintiff to procure Mrs. Rathbone's testimony, and to produce the original note in evidence, could not have been cured in this way.

Complaint is made that answers were not permitted to a number of questions objected to, propounded to R. H. Woodyard, administrator, on cross-examination. The evident object of these questions was to cover the loss of the deposition of S. B. Rathbone, Jr., suppressed, by showing certain supposed admissions or declarations by Rathbone to the witness of facts testified to by him in his deposition. Answers to these questions would clearly have been hearsay, and the evidence objectionable on this ground, if no other. Rathbone was not a party to the suit. What he may have said or admitted to the witness would not have bound the estate of E. R. Woodyard.

Another point is the refusal of the court to permit the witness Woodyard to testify as to what, if anything, was shown by a record book kept by his father with reference to the note of Mrs. Rathbone referred to. This clearly would have been error. The book was the best evidence, was in existence, and, if it contained material evidence and the plaintiff desired it, the proper process of the court should have been employed to produce it. Its contents could not be proven in the way proposed.

Another point relates to the admission in evidence by defendant of two notes executed by the plaintiff in favor of E. R. Woodyard in October and November, 1901, subsequent to the date of the alleged assignment by Woodyard to her of the notes sued upon and discounted in bank by him, and paid by her. The purpose of defendant in introducing these notes evidently was to discredit the plaintiff's evidence as to the fact of the assignment to her of the notes sued on, and for this purpose we think there was no error in admitting the notes in evidence.

Another point made is that the court below erred in not permitting Mrs. Sayre to answer a question propounded to her respecting items in a statement of account rendered by her to the administrator prior to the institution of the suit, offered and admitted in evidence by defendant, as follows: "September 4, 1898. To notes I gave him to collect, \$470.50." "March 15, 1900. To notes I gave him to collect, \$438.55." She was asked whether there was an item in that statement representing or intending to represent the notes sued upon. Neither of the items represents the aggregate of the notes described in either the original or amended declaration. The first item could not have included the second note described in the amended declaration, for that item antedates the date of the note. But the question was objectionable, if for no other reason, because it was leading. It suggested the answer. It had not even the virtue of words, "whether or not," sometimes employed by counsel in

an endeavor to render leading questions unobjectionable. *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247; 5 Words & Phrases, 4040; 1 Wigmore, Ev. § 768. If the witness had been permitted to answer, how would her answer have enlightened the jury? The question of her intent was not material. It was a question for the court, or for the jury instructed by the court, to determine whether the declaration or any of the items in the account were supported by the evidence. We see no error in this ruling of the court.

The next, and the only meritorious, point of error argued, is that the court struck out the deposition of S. B. Rathbone, Jr., after it had been read to the jury, excepting certain parts objected to and excluded. We must first determine whether the evidence of the deponent was competent; for, if incompetent, the objection may be availed of here whether or not made in, and acted upon by, the court below. *Woodville v. Woodville*, 63 W. Va. 286, 60 S. E. 140. If competent, the objections thereto, at least upon the ground on which it was rejected, must have been first made in the court below.

The plaintiff affirms and the defendant denies the competency of the witness. Section 3945, Code 1906, provides that "no party to any action, suit, or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person, at the time of such examination, deceased, insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such person, or the assignee or committee of such insane person or lunatic." The witness was not a party. Is he cut out then because of interest, or because plaintiff derived any interest or title by assignment or otherwise from him, or because his testimony relates wholly to personal transactions or communications had between him and the decedent? First, is he interested? Plaintiff's evidence shows conclusively that deceased had authority to collect the notes from Rathbone. By the admission of the decedent, proven by Harry, Sayre, Rathbone, through his wife, had fully paid the notes; and the testimony of Rathbone, excluded, was not only that he had paid his notes by the substitution of that of his wife, but that the latter note had been fully paid off and discharged to deceased in his lifetime. This left him without the slightest interest in the suit or in the event thereof. Having fully paid the notes to Woodyard, no action could thereafter be brought against him. Competency as

to intestate is tested, not by the time when a deposition is actually taken, but by the time when it is offered in evidence. *Seabright v. Seabright*, 28 W. Va. 412; *Vanscoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. 927; 1 Wigmore, Ev. § 583. But, suppose he had not paid the notes, Rathbone was nevertheless competent. The test as to interest is not whether the witness may be interested in the question in issue, or may entertain wishes on the subject, or may even have occasion to test the same question in a future suit, but whether the proceeding can be used as evidence for him in some pending or future suit. He must have an interest to be affected by the result of the suit or by force of the adjudication. This was the common-law rule, which prevails in this state. An early law writer on Evidence, Chief Baron Gilbert, as quoted by Chief Justice Tindal, in *Doe ex dem. Teynham v. Tyler*, 6 Bing. 390, says: "The law looks upon a witness as interested when there is a certain benefit or disadvantage to the witness attending the consequence of the cause one way." And in the same case it is also said: "Now, this benefit may arise to the witness in two cases: First, where he has a direct and immediate benefit from the event of the suit itself; and, secondly, where he may avail himself of the benefit of the verdict in support of his claim in a future action." The common-law rule is stated in the same way in 1 Greenl. Ev. 16th ed. Appx. II., § 390, p. 883. See also *Rich v. Topping*, Peake, N. P. Cas. 293; *Brard v. Ackerman*, 5 Esp. 119; and *Burgess v. Merrill*, 4 Taunt. 468. These cases have special application to this case at bar. This rule of test as to interest has thus come down to us from the common law, and from thence through the judicial decisions of the old state, and has been several times declared in our own decisions. *Baring v. Reeder*, 1 Hen. & M. 154; *Stevens v. Bransford*, 6 Leigh, 253; *Black v. Campbell*, 6 W. Va. 63; *Gilmer v. Baker*, 24 W. Va. 84; *Hooper v. Hooper*, 32 W. Va. 526, 528, 529, 9 S. E. 937; *Crothers v. Crothers*, 40 W. Va. 169, 176, 20 S. E. 927. The best statement of the rule in our cases, perhaps, is that of Judge Snyder, in *Gilmer v. Baker*, supra, as follows: "By the common law a person is a competent witness in a cause, if the proceedings therein cannot be used as evidence for him, although he may be interested in the question in issue and entertain wishes on the subject, and even have occasion to contest the same question in his own case in a future suit. This rule has not been affected or changed by our statute (Code 1906, chap. 130, § 23), as to the competency of a person to testify against the

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representatives of a deceased person, in relation to transactions had personally by the witness with such deceased person." Tested by this rule, the maker of a note, after assignment thereof and death of the assignor or payee, is a competent witness in an action by the assignee against the administrator of the assignor, to prove not only the assignment, but payment by him to the assignor. He has no interest to be affected by the result of the suit or by force of the adjudication, and the proceedings cannot be used as evidence for him in any future suit or proceeding.

Was he competent as a person from, through, or under whom the plaintiff derived any interest or title by assignment or otherwise? The notes involved were the notes of the witness, but the plaintiff derived no interest or title thereto by assignment or otherwise from him. Plaintiff claimed the notes by title derived, not from Rathbone, but through Wiseman, and by assignment from deceased. Rathbone's notes represented property, but plaintiff could not be said to have acquired any interest or title by assignment or otherwise from him. *Rank v. Grote*, 110 N. Y. 12, 17 N. E. 665; *Hooper v. Hooper*, supra. We do not think, therefore, that his testimony was rightfully excluded on this ground.

But was the deposition rightfully suppressed because taken after the amended declaration was filed? This was the ground of defendant's motion; and, so far as it related to matters not in issue at the time it was taken, it should have been excluded, if objection had been made at the proper time. But the amended declaration as to two of the notes is the same as the original. Was it proper then to exclude the deposition as a whole? We think not. The court had already admitted the deposition in evidence, except as to that portion of it objected to, and defendant had gone to trial without objection to the deposition, except as noted at the time it was taken, and had permitted it to be read without other exception before interposing his motion to suppress. The motion was then too late. *Electric Supply & Contracting Co. v. Consolidated Light & R. Co.* 42 W. Va. 583, 26 S. E. 188; *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266; *Edgell v. Smith*, 50 W. Va. 349-354, 40 S. E. 402.

We are of opinion that the testimony was competent, so far as it related to the notes in issue, at the time it was taken, was erroneously suppressed, and that the judgment below should be reversed, and plaintiff awarded a new trial.

**WEST VIRGINIA SUPREME COURT
OF APPEALS.**

JAMES J. SINGLETON, Admr., etc., of
Parthenia Singleton, Deceased, Appt.,
v.

DEWANNA CASTLEMAN et al.

(— W. Va. —, 68 S. E. 34.)

Judicial sale — deficiency — abatement.

1. If commissioners authorized by a court decree to make sale of land decreed to be sold undertake, without specific authority given, to sell the land by the acre, and the sale is so reported to and confirmed by the court, such confirmation will cure any irregularities of the commissioners in making such sale, and if, by mistake resulting from the actions of court and commissioners, less land be sold than was bid for and supposed to be sold, the purchaser will be entitled to a proportionate abatement of the purchase money.

Same — purchaser's remedies.

2. Such relief may be obtained by the purchaser upon petition filed in the cause, by way of defense on a rule to show cause why the land should not be resold to pay the balance of purchase money, or by way of defense when sued on the purchase-money notes, or by any other appropriate remedy.

Same — caveat emptor.

3. The rule *caveat emptor* does not apply

Headnotes by MILLER, J.

Note. — Right of purchaser of land at judicial sale to abatement of purchase price for deficiency in quantity.

The purchaser of land at a judicial sale is entitled to an abatement of the purchase price where there is a material deficiency in the number of acres sold, without qualifying expression as to quantity, although the purchase was made for a lump sum. *Cooper v. Hargis*, 20 Ky. L. Rep. 41, 45 S. W. 112; *Marbury v. Stonestreet*, 1 Md. 147; *Watson v. Hoy*, 28 Gratt. 698.

In *Hall v. Nevill*, 3 La. Ann. 326, a judicial sale of land was of a certain tract "containing 400 acres," and it was held that for a deficiency in quantity the purchaser was entitled to a proportional diminution of the price.

One who purchases land at a judicial sale at so much per acre is entitled to recover a *pro rata* amount of the price paid upon ascertaining that there is a deficiency in the number of acres. *Peacock v. Barnes*, 139 N. C. 196, 51 S. E. 926; *Strodes v. Patton*, 1 Brock, 228, Fed. Cas. No. 13,538; *Myers v. Lindsay*, 5 Lea, 331.

The rule that a sale of land by the acre justifies an allowance to the purchaser where there is a deficiency is approved in *Brown v. Wallace*, 4 Gill & J. 479, but it was held that the testimony relied on did not satisfactorily prove a deficiency, and it appeared 28 L.R.A. (N.S.)

to mistakes in the quantity of land sold by the acre at a judicial sale, as it does to defects of title.

Same — laches.

4. Nor, as a general rule, will the rule of laches be applied to a purchaser at such judicial sale, if no equities have intervened and the rights of no one will be injuriously affected by a proportionate abatement of the purchase money, so long, at least, as the purchaser still retains in his hands, unpaid, sufficient of the purchase money out of which such abatement can be made.

Real estate — sale — allowance for errors — rule.

5. The arbitrary rule of allowing 5 per cent to cover inaccuracies reasonably imputable to variations of instruments and small errors in surveys, referred to in *Western Min. & Mfg. Co. v. Peytona Cannel Coal Co.* 8 W. Va. 406, 437, and recognized in *Pratt v. Bowman*, 37 W. Va. 715, 721, 17 S. E. 210, is inapplicable to sale by the acre of valuable farming lands. In such cases only such allowance should be made as, considering the inequality of the ground and other obstacles hindering an accurate survey, may reasonably be imputable to such variations of instruments and small errors in surveys.

(May 3, 1910.)

A PPEAL by plaintiff from a decree of the Circuit Court for Jefferson County in defendants' favor in an action brought to

that there had been a delay of six years in making the claim.

It was held in *Carmody v. Brooks*, 40 Md. 240, that an abatement from the price of a city lot purchased at a judicial sale, described as being 50 feet wide, was properly allowed where the rear of the lot proved to be but 44 feet in width.

But in *Shields v. Thompson*, 4 Baxt. 227, where a city lot was the subject of a judicial sale, it was held that the property having been sold in gross, and not by the foot, there could be no abatement of the purchase price because the frontage advertised and sold as being 62 feet actually measured but 60 feet and 3 inches.

A claim for an abatement of the price paid for a city lot upon a judicial sale, upon the ground of deficiency in quantity, was denied in *Ohio Life Ins. & T. Co. v. Goodin*, 10 Ohio St. 557, although the sale was at so much per foot frontage, and there was a shortage of 3 feet. This decision is based upon the ground that the building standing upon the lot covered the entire frontage, and that, in determining the value, appraisers who were on the ground viewed the property,—ground and improvement as a whole,—and based their estimate on what they saw, merely dividing the entire amount they believed it to be worth by the number of feet which they understood the frontage contained.

It should be noted that the appraisement

abate the purchase price of certain lands for alleged deficiency of acres sold and purchased. Reversed.

The facts are stated in the opinion.

Mr. Forrest W. Brown, for appellant:

The mistake can be rectified and compensation made to the plaintiff by allowing for the ascertained deficiency a proper abatement of the balance of purchase money still owing by him.

Watson v. Hoy, 28 Gratt. 698; Hickson v. Rucker, 77 Va. 135; Berlin v. Melhorn, 75 Va. 639; Redd v. Dyer, 83 Va. 331, 5 Am. St. Rep. 272, 2 S. E. 283.

Mr. R. T. Barton for appellees.

Miller, J., delivered the opinion of the court:

This is an appeal from a decree of the circuit court, pronounced February 18, 1908, denying to a purchaser abatement of purchase money on account of alleged deficiency of acres sold and purchased.

By decree of August 8, 1887, and another supplementing it of October 14, 1892, special commissioners appointed were authorized to make sale, upon the terms prescribed, of "396 acres, 1 rood, and 26 perches, home

tract, and the 419 acres mountain tract of land in the bill and proceedings mentioned." By the latter decree the commissioners thereby appointed in place of those appointed by the former decree were directed to proceed to execute the same with such further powers as were given thereby, to wit: To "make sale as a whole or in parcel of all the real estate in the bill and proceedings mentioned, free from the widow's dower, on terms of one third cash, one third in one year, and one third payable six months after the death of Dewanna Castleman, both of said deferred payments to bear interest from date, and on the latter the interest is to be paid annually to the said Dewanna Castleman during her life, and both of said deferred payments to be evidenced by bonds of the purchaser, and secured by the retention of the title to the property until paid: or, at the option of the purchaser, a deed will be made to said property, and a deed of trust taken to secure the deferred payments."

The report of the commissioners to whom the cause was referred, on August 3, 1887, reported the home farm as "containing 396 acres, 1 rood, and 26 perches, value \$55 per

described the lot as being "30 feet front, more or less," and placed the value at so much per foot "for ground and improvement," and also that the sheriff's return described the frontage as 30 feet, "more or less," and that the sale was made for a certain sum "per front foot."

An abatement from the price of land purchased at a judicial sale was denied in Jones v. Tatum, 19 Gratt. 720, where the sale was in gross, and not by the acre, and the deficiency amounted to but 1 acre in a tract sold as containing 90 acres.

Where land purchased at a judicial sale is correctly described by boundaries, and there is no stipulation as to quantity, although the number of acres supposed to be contained in the boundaries be mentioned, there can be no deduction in the price because of a deficiency in the quantity, unless the sale is fraudulent. Foster v. Bradford, 1 Tenn. Ch. 400; Close v. Brown (N. J.) 20 Atl. 674.

An abatement in the price of certain land bought at a judicial sale for a deficiency in acreage was denied in Lyles v. Haskell, 35 S. C. 391, 14 S. E. 829, where the chief value of the land was in its granite quarries, the sale being of the "Anderson quarry tract," the number of acres being merely mentioned as a part of the description, and there was no evidence of fraud, nor that the deficiency affected the value of the tract in respect of its quarries.

Where a purchaser at a judicial sale buys lands of a certain acreage, "more or less," the quantity does not enter into the essence of the contract, and, in the absence of fraud, no abatement of the price will be allowed him for a deficiency in the number of acres. Slothower v. Gordon, 23 Md. 1. 28 L.R.A. (N.S.)

When a purchaser of land at a sale made under the direction of the court is shown the land in question and its boundaries, he is not entitled to any abatement of the price paid because he came into possession of less land than the boundaries in his deed called for, where he actually acquired all that was pointed out to him at the time of the sale. Crislip v. Cain, 19 W. Va. 438.

A purchaser of land at judicial sale is not entitled as a matter of right to have credit for a deficiency in the quantity of land purchased, and where he refuses to consent to a rescission of the sale, on equitable principles he is not entitled to relief in the way of an abatement from the purchase price. Trig: v. Jones, 102 Ky. 44, 42 S. W. 848.

Where a purchaser at a judicial sale bought a certain quantity of land by the acre, according to a plat showing a river through the land, it was held that he was not entitled to a deduction from the price for the number of acres covered by the river. Shands v. Triplet, 5 Rich. Eq. 76.

See also Blakemore v. Roller (Va.) 67 S. E. 377, holding there was no liability on the part of a purchaser at a judicial sale of certain land, described as a 10-acre tract, for a lump sum, because a subsequent survey showed that it contained 13 acres, there having been no fraud, misrepresentation, or mistake, and the sale having been confirmed. In the course of the opinion, the court said: "It seems to be settled law in this state that an increase or an abatement of the purchase price of land sold at a judicial sale will not be permitted for excess or deficiency in quantity after a confirmation of such sale, except in cases of after-discovered fraud, misrepresentation, or mutual mistake."

acre;" but the report of the commissioner appointed to assign dower to the widow, returned June 7, 1892, with accompanying plat and survey made by T. G. Baylor, surveyor, shows the home tract by metes and bounds to contain 409.65 acres.

The commissioners, in their published notice of sale, set for November 15, 1892, described the home tract as composed of three several tracts as follows: (1) 250 $\frac{2}{10}$ acres of fine farming land, with some woodland, but no improvements, lying south of the river road; (2) 152 $\frac{5}{10}$ acres of No. 1 land, with the improvements, lying north of the river road; (3) 6 acres of land with grist and sawmill and dwelling, lying on both sides of turnpike, aggregating 408 $\frac{7}{10}$ acres. They also gave notice that, in making sale, the first two tracts would be offered together, then all three tracts together, the choice of bids to be accepted, and referred prospective purchasers to plats of the land in their possession at Charles Town.

Parthenia Singleton became the purchaser, and the commissioners, on the day of sale, entered into a contract in writing with her, made a part of and returned along with their report to the court of said sale.

In their report to the court, the commissioners say that they offered the land in the bill and proceedings mentioned in accordance with said decrees, as shown by the attached advertisement, and that said "Parthenia Singleton's bid was the best obtained, which was \$40.25 per acre for the home farm and \$4 per acre for the mountain land, as shown by her agreement," which was in writing, and therewith submitted. The contract says that the "home tract of 409.65 acres was knocked down to said Parthenia Singleton at the bid of \$40 $\frac{25}{100}$ dollars per acre (\$40 $\frac{1}{4}$) and the mountain tract of 419 acres was knocked down to said Singleton at four dollars (\$4) per acre, the amount for both tracts amounting to the sum of \$18,172.66."

The decree confirming said sale, December 2, 1892, recites the sale and purchase by said purchaser "of the land in the proceedings mentioned, to wit: a tract of four hundred and nine acres and eighty-five hundredths, at the price of forty dollars and twenty-five cents per acre, and the mountain tract of four hundred and nineteen acres at four dollars per acre." This decree also directs the commissioner to "at once proceed to complete said sale by making and delivering to the purchaser a deed for said lands, and taking from her her bonds for the deferred payments, secured by a deed of trust upon said lands."

A subsequent decree of December 14, 1892, overruling exceptions to a master commissioner's report, adjudged that Barton and

Boyd should be paid \$1,000, with interest thereon, and Marshall McCormick be paid the like sum of \$1,000, with interest thereon, being in addition to sums previously decreed to be paid them, and then provides how the residue of the purchase money, including the last payment, to be made on the death of the widow, should be distributed, first to creditors, and then to the heirs and distributees of the decedent.

The deed made, executed, and delivered by said special commissioners to Mrs. Singleton, the purchaser, December 23, 1892, recorded in Jefferson county, April 29, 1893, recites the sale of said lands "according to the terms and conditions required by said decrees, at which sale the said Singleton became the purchaser for the sum of eighteen thousand one hundred and seventy-two 66-100 dollars," the confirmation thereof by the subsequent decrees of December 2 and 14, 1892, and describes said home tract by metes and bounds as containing 409 $\frac{65}{100}$ acres, and the mountain tract as containing 419 acres, and also recites that the said first tract is according to the survey of said T. G. Baylor, in 1892, and that the bounds of the mountain land were according to a survey of Jas. M. Brown, in 1847.

The first order relating to the original petition of Mrs. Singleton, praying for an abatement of purchase money, entered in the cause March 2, 1894, is as follows: "This, the 2d day of March, 1894, came Parthenia Singleton, and asked leave, which was granted, to file her petition in the above-entitled cause." No order is found in the record formally filing said petition, but it is copied into the record by the clerk, following this order; on November 26, 1901, the following order was entered: "This cause coming on to be heard this 26th day of November, 1901, upon papers formerly read and the petition of Parthenia Singleton, filed at a former term, it is ordered that the clerk of this court issue process to all parties interested in said petition, returnable to next term of court, and an order of publications may issue against nonresident parties." So far as the record shows, process never issued on this petition. Parthenia Singleton died March 25, 1902, a little more than three months after the entry of the last order. No further proceedings appear to have been taken upon said petition until October 19, 1906, when James J. Singleton, administrator, intervened by filing his petition, in which he refers to the former petition of his decedent, makes the same part of his petition, reaffirms each and every allegation of her petition as if in his petition again set out in full, prays that said proceedings be revived in his name, and makes parties thereto those appearing from said proceed-

ings to be creditors, administrators, and heirs at law of H. W. Castleman, deceased, and the personal representatives of those who had died pending said proceedings. He also makes the prayer of her petition the prayer of his petition, and prays for process and general relief. On the day he presented this petition, an order was entered filing the same, and reviving the cause in his name as administrator, and remanding the same to rules for process. Process was sued out thereon November 12, returnable to December rules, 1906, was duly accepted or served upon all resident defendants, and there was order of publication published and posted against all nonresident defendants, and the case regularly matured and set for hearing.

After setting forth the interests of the defendants, as disclosed by the record, and the several orders, decrees, and proceedings aforesaid, the petition specifically charged that about January 1, 1893, information was first brought to her attention, which led the purchaser to believe that an error had been made in the acreage of the home farm, as sold to her; that she employed S. Howell Brown, county surveyor, to make a survey thereof, who ascertained and reported to her that the same contained only 398½ acres, and which she alleged was a true and accurate survey, showing a shortage or deficiency of 11.60 acres in the number of acres sold to and purchased by her. Petitioner filed with her petition, as a part thereof, the survey and plat of said land, so made by the county surveyor, with his affidavit thereto, that he believed his survey to be correct. Defendants did not plead to or answer the petition.

Thus is presented the question whether the purchaser, upon the petitions filed, is entitled, as prayed for, to credit upon the last purchase-money bond of \$6,057.55, with the sum of \$466.90, the price of 11.60 acres at the rate of \$40.25 per acre, with interest.

Clearly, the sale was a sale by the acre, not in gross. True, as argued, the original decrees of sale did not specifically authorize a sale by the acre, but the special commissioners assumed to make a sale of the land in that way. They so reported the sale to the court, and it was so confirmed as a sale by the acre. This would entitle the purchaser to an abatement of purchase money if there is a deficiency. 24 Cyc. Law & Proc. p. 54 E, note 7. This authority, supported by court decisions cited in the note, says: "When, by mistake resulting from the actions of the court or the misrepresentations of its agents, less land is sold than was bid for and supposed to have been sold, the purchaser will be allowed a proportionate abatement of the purchase price when the property was sold by the

quantity, but not when it was sold in gross as a specific tract." When the court confirmed the action of its commissioners in making sale by the acre, it thereby adopted and approved their act. In all judicial sales the court is the vendor and contracting party, on the one hand, and the purchaser, on the other. The commissioners are merely the creatures of the court, and the sale is never complete until it is reported to and confirmed by the court. *Core v. Strickler*, 24 W. Va. 689, 696, citing *Blair v. Core*, 20 W. Va. 265, and *Kable v. Mitchell* 9 W. Va. 492. Confirmation cures irregularities, and gives the sale the same validity and effect as if made upon the precise terms of the decree. *Rorer Judicial Sales*, §§ 122, 127; *Robertson v. Smith*, 94 Va. 250, 64 Am. St. Rep. 723, 26 S. E. 579; *Langyher v. Patterson*, 77 Va. 470.

It is the universal rule, and many cases in this state and in Virginia so decide, that if a deficiency in quantity is found, where the sale has been by the acre, the purchaser will be entitled to an abatement; and that a court of equity will, even after deed made, abate the deficiency from the unpaid purchase money. See cases collated in 13 Cyclopedic Dig. 525, 9a. And this rule is applicable alike to sales by the court and under court decrees, as to sales by individuals. *Watson v. Hoy*, 28 Gratt. 698, Va. Rep. Anno. 220, and note; *Crislip v. Cain*, 19 W. Va. 438; *Cooper v. Hargis*, 20 Ky. L. Rep. 41, 45 S. W. 112; *Carmody v. Brooks*, 40 Md. 240; *Brown v. Wallace*, 4 Gill & J. 479, 508; *Marbury v. Stonestreet*, 1 Md. 147; *Strodes v. Patton*, 1 Brock. 228, Fed. Cas. No. 13,538; *Myers v. Lindsay*, 5 Lea, 331; *Trigg v. Jones*, 102 Ky. 44, 42 S. W. 848.

But it is said that although the purchaser, in 1894, obtained leave to do so, she never in fact filed her petition; that the order of November 26, 1901, treating it as having been filed at a former term, and directing process thereon, was a misrecital, and that no process having been in fact issued thereon, defendants were not bound thereby, and that not only these proceedings, but the proceedings upon the amended petition filed by the administrator in 1906, the purchaser in her petition admitting knowledge of the alleged deficiency as early as January, 1893, came too late, and that relief was rightfully denied under the rule *caecat emptor*, and because of laches, and because the decrees confirming the sale, and distributing the proceeds thereof to creditors and distributees, being final, were not reviewable, except upon bill of review filed in time and with proper averments.

The authorities do not support the position of counsel. A purchaser at a judicial

sale is not precluded by such decree from obtaining relief from such mistake. Relief may be obtained in such cases by defense to a rule against the purchaser to show cause why the land should not be resold to pay the balance of purchase money (*Jones v. Tatum*, 19 Gratt. 720; *Crislip v. Cain*, supra); also by petition filed in the cause by the purchaser (*Watson v. Hoy*; *Marbury v. Stone-street*, and *Brown v. Wallace*,—supra). While the rule *caveat emptor* is applicable to all judicial sales so far as title is concerned, it has never been applied, either in Virginia or in this state, so far as we can find, to cases of deficiencies in quantity of land where sold by the acre. *Watson v. Hoy*, supra, page 710 of 28 Gratt. In the case just cited, the court below appears to have been of a different opinion, but Judge Burks, referring thereto, says: "I cannot agree to this. It is true that in Virginia the general rule would seem to be that objections by purchasers to judicial sales for defect of title must be made before the sale is confirmed by the court, and that such objections, afterwards made, come too late," citing cases. "But," says he, "I apprehend the rule has no application to the equity of a purchaser arising from after-discovered mistake, fraud, or other like matter. Courts of equity are always ready to relieve innocent injured parties in such cases, unless, by reason of acquiescence, laches, or other special circumstances, relief would be inequitable. There are no such circumstances precluding relief in this case." And, at page 711 of 28 Gratt., he further says: "The mistake can be rectified and compensation made to the appellant by allowing for the ascertained deficiency a proper abatement of the balance of purchase money still owing by him; and thus, while doing justice to him, no harm will be done to others. It would be singular indeed if this could not be done by a court of equity which, by its agents, is a party to a mistake it is called upon to relieve against."

Nor do we think the rule respecting laches applicable. No one can be injuriously affected by the abatement. At least, no equities appear, and none are alleged by way of defense. The last payment of purchase money is still in the hands of the purchaser, or her representative. She is not suing to recover back money paid. Within a year after sale and confirmation thereof, and after discovering the mistake, she presented and obtained leave to file her petition, setting up the mistake and praying for an abatement, thus making a record in the cause of her claim; and though she afterwards delayed suing out process and bringing the matter to an issue, the last payment was not due and did not become due. except 28 L.R.A. (N.S.)

the interest, until the death of the widow. No one has been prejudiced or injured by the delay, so far as appears, and if a mistake was actually made, there is nothing to preclude the court in granting the relief prayed for. In a general creditors' suit, the filing of a petition by a creditor in a pending suit stops the running of the statute of limitations. *Jackson v. Hull*, 21 W. Va. 601. In *Ewing v. Ferguson*, 33 Gratt. 548, it was decided that the first action taken by a party for the assertion of his claim by legal process, whether that be by the issuing of process commencing suit, or the filing of a petition in a suit already commenced, is treated as the institution of a suit, and from that time the statute of limitations ceases to run against him. These cases, it is true, were creditors' suits, and the petitions were creditors' petitions filed therein, and are not strictly applicable to cases like the one we have here. However, when the purchaser asked and was given leave to file her petition in the cause, that was a step which she had the right to take, was the assertion of her right, negating abandonment thereof or acquiescence therein, and gave notice to the court, her vendor, of her claim to abatement of purchase money, and of which the court took notice by giving her leave to file it, and by afterwards treating her petition as filed, and directing process thereon. The petition thus became a part of the record. *Park v. Petroleum Co.* 25 W. Va. 108. But the petitioner was not bound to have filed any petition. She might have waited until sued on her bond, or was proceeded against by rule to resell the property. So long as she had the money in her hands, time did not run against her right to defend the collection of the purchase money. *Smith v. Ward* (W. Va.) 66 S. E. 234.

It is further contended, in support of the decree below, that petitioner did not make out a case for relief, that the petition was not sworn to as it is claimed a bill of review or petition to rehear, based on after-discovered evidence, is required to be. The petition is not a bill of review, nor a petition to rehear the decrees, and the rules applicable thereto are inapplicable. The petition charged a mistake, a shortage in the land sold. No plea or answer of the defendants denied it. It must be treated as taken for confessed.

Another question presented by the record, but not by counsel, has given us some trouble. The shortage of 11.60 acres is less than 3 per cent of the total acreage sold. Should the arbitrary rule of 5 per cent, first announced by this court in *Western Min. & Mfg. Co. v. Peytona Cannel Coal Co.* 8 W. Va. 406, 437, and recognized in *Pratt*

v. Bowman, 37 W. Va. 715, 721, 17 S. E. 210, be applied here? If it should, the shortage being less than 5 per cent, petitioner did not make out a case for relief. One answer to this question, suggested in council, was that the rule was inapplicable to cases of sales by the acre, but only where land is sold as containing a definite number of acres, "more or less," or "estimated to contain" a certain number of acres, or with like descriptive words. But as this allowance of 5 per cent is intended to cover inaccuracies reasonably imputable to variation of instruments and small errors in surveys (Pratt v. Bowman, supra, p. 721), we do not see why, upon principle, it should not be applied in cases of sales by the acre; for in either case parties must necessarily be deemed to contract with reference to all such inaccuracies. Hilliard, Vendors, 2d ed. p. 329. This writer says: "But, in general, on a sale of land by the acre, relief is to be granted for all deficiencies not reasonably imputable to the variation of instruments and small errors in surveys, whether the purchaser has expressly retained an election to have the tract surveyed or not." Citing therefor Nelson v. Carrington, 4 Munf. 332, 6 Am. Dec. 519. But where and how did this arbitrary rule of 5 per cent originate? Judge Hoffman in Western Min. & Mfg. Co. v. Peytona Cannel Coal Co. supra, at page 437 of 8 W. Va., says: "It is settled in Virginia and West Virginia that when a person has sold and conveyed a tract of land, described as containing a definite quantity, at a specified price, it is presumed that the estimated quantity was believed to be substantially correct,—within 5 per cent of exact accuracy; that it constituted a material element in the determination of the price; and that, unless it appear that considerable uncertainty or actual risk as to the quantity was contemplated or intended; if in fact the quantity is afterwards ascertained to be materially less, and the purchaser properly asserts his right in a reasonable time and under reasonable circumstances, a court of equity will grant him relief. Though the sale be not by the acre, but by the tract in gross, this nevertheless is now the rule of decision. But in many—perhaps most—cases of sales by trustees and other fiduciaries or officers, it may be different. This, however, it is not necessary now to determine." No cases, however, are cited by Judge Hoffman declaring this arbitrary rule. He likely deduced it from the decided cases in which relief has generally been denied where the deficiency has been less than 5 per cent. But we do not think that in this day of improved methods and instruments, such an arbitrary rule should be applied, especially when involving valuable

lands like those involved here. A shortage of more than 11 acres of very valuable farm lands, practically level, in a survey of 409 acres, or 398, as the case may be, is entirely too much of a discrepancy to reasonably impute to variations of instruments or small errors in surveys. Certainly, lands of the character of these lands can and should be surveyed with more accuracy than that. The deficiency here we do not think can reasonably be imputed to such inaccuracies, and if not, the relief ought to be granted. Hilliard, Vendors, supra; Young v. Craig, 2 Bibb, 270; Grundy v. Grundy, 12 B. Mon. 269.

In the absence of any showing to the contrary, we think the petitioner was entitled to the relief prayed for. The decree below will therefore be reversed, and such decree as the Circuit Court should have entered will be entered here.

IDAHO SUPREME COURT.

GEORGE STELTZ, Admr., etc., of Gray Sterling, Deceased, Respt.,
v.

HENRY A. MORGAN, Appt.

(16 Idaho, 368, 101 Pac. 1057.)

Trespass — possession.

1. Under an action of trespass *quare clausum fregit*, where the plaintiff does not allege title either in fee or for a term in himself, he must show actual possession of the realty at the time of the trespass.

Property — transfer of title — possession.

2. A legal and valid conveyance of real estate, whether it be by tax deed or deed from the original owner, carries with it a prima facie right of possession; and where the property is vacant and unoccupied, the con-

Headnotes by AILSHIE, J.

Note. — Right of holder of tax deed to take possession.

In addition to the authorities relied upon in the above case for the conclusion that the holder of a tax deed who finds the property occupied must, if the occupant refuses to surrender possession, resort to legal remedies for possession, that rule of law is supported by Handlin v. H. Weston Lumber Co. 47 La. Ann. 401, 16 So. 955, and Muller v. Mazerat, 109 La. 116, 33 So. 104 (in which the same language quoted in STELTZ v. MORGAN, from Martin v. Langenstein, 43 La. Ann. 789, 9 So. 507, was also quoted with approval).

The rights of a purchaser of a tax title before a deed is executed to him, or before the owner's equity of redemption has expired, present different questions.

structive possession of the premises is deemed to be in the holder of the title.

Trespass — possession.

3. In order for one who was the original owner of real estate, and whose title has been divested through taxation and a tax deed, to maintain an action of trespass against the holder of a valid tax deed, for entering into possession of the premises, such original owner must maintain and be in actual possession of the premises at the time of the trespass.

Tax title — holder — right of entry.

4. The holder of a tax title to real estate, who finds the property unoccupied, may enter upon and take actual possession of the premises, and, in doing so, he is not liable to the original owner of the property, whose title has been divested by the tax deed.

Same — effect.

5. A tax deed has no more force or effect as a writ of assistance for procuring the possession of real estate than any other deed, and the holder of such deed, who finds the property occupied, must, if the occupant refuses to surrender possession, resort to the same legal remedy for possession as the holder of any other deed would employ.

(April 21, 1909.)

APPEAL by defendant from a judgment of the District Court for Latah County in plaintiff's favor in an action brought to recover damages for injuries to plaintiff's property through the alleged wrongful removal of a building therefrom. Reversed.

The facts are stated in the opinion.

Mr. William E. Stillinger for appellant.

Mr. Stewart S. Denning for respondent.

Allshie, J., delivered the opinion of the court:

This action was instituted by George Steltz, as administrator of the estate of Gray Sterling, deceased, for the purpose of recovering from defendant the sum of \$2,000 damages for a trespass on real estate. Plaintiff alleges that he is the duly appointed and acting administrator of the estate of Gray Sterling, deceased, and that at the time of the death of Gray Sterling she was in the actual and peaceable possession of lot 2 of block 24 of the town of Genesee, and that ever since her death the plaintiff, as administrator, has been in the actual, peaceable, and quiet possession of that property. It is further alleged that in January, 1908, the defendant forcibly, wrongfully, unlawfully, and maliciously entered and trespassed upon this property, and pulled down and destroyed one building thereon of the value of \$500, and, by reason thereof, the estate has been injured and damaged in the sum of \$1,500. Defendant denied specifically all the material allegations of the complaint, except the taking down and removing of the house

and the official character of the plaintiff as administrator of the estate of Gray Sterling, deceased. Defendant further answered, and alleged that in the year 1902 the lot in question belonged to one Maggie Anderson, and that in September of that year she conveyed and transferred the property to Gray Sterling; that Gray Sterling died about the month of October, 1902, and that thereafter the plaintiff was appointed administrator of her estate; that the property in question, lot 2 of block 24 of the town of Genesee, was duly and regularly assessed for taxation for the year 1902 to Maggie Anderson, and the taxes so assessed were not paid, and thereafter became delinquent; that the property was duly and regularly advertised for sale for nonpayment of the taxes, and at the sale, no buyer appearing, the property was struck off to Latah county; that after the expiration of the time for redemption, the assessor made, executed, and delivered to the county of Latah a tax deed, in conformity with law; that thereafter the county of Latah sold the property at public auction, as provided by law, to one John Thompson; that Thompson thereafter sold and transferred the property to one Joseph Hasfurther; and that the latter thereafter sold the house standing on this lot to the defendant Morgan. Morgan alleges that subsequent to the purchase of the house, he entered upon the premises and tore down the building and removed it, and that the property so removed was his own property.

The plaintiff made no attempt at the trial to show title to the property, but rested upon possession alone. The defendant introduced his evidence showing chain of title through tax deed for taxes assessed for the year 1902. Plaintiff did not question the regularity of the tax sale nor of the tax title. Plaintiff's position is perhaps best illustrated by the objection that was interposed by his counsel to the introduction of tax deed and other records establishing defendant's chain of title, which objection is as follows: "Objected to on the ground that even supposing the parties had purchased a tax title, and were acting under this tax title, and though the tax title may show prima facie evidence of title, still the parties holding such tax title cannot proceed summarily and take possession of the property without due process of law; second, that the defendant has neither pleaded justification or any fact in mitigation of damages which this only could go to." As we understand it, the foregoing objection really embodies the contention of the respondent in this court. The evidence in the case is brief and simple, and there is no substantial conflict in any material fact. The plaintiff had

been renting this property from time to time as occasion offered, but the property had not been occupied for from three to six weeks prior to defendant's entry and removal of the building. This building is described by most of the witnesses as a small board building that had been intermittently occupied during the last six or eight years by sporting women for purposes of prostitution. The house, at the time Morgan entered and tore it down, and, in fact, for some weeks prior thereto, had been in a dilapidated condition, one door being gone entirely, and the other standing open. The windows were all out and gone. The floor was broken through, and the roof was also broken through. The house was untenanted, and no one was in actual possession of the house or of any part of the lot at the time Morgan entered. The two following propositions are fully established by the record: First, that plaintiff, who is respondent here, did not rely upon or attempt to establish title to the property, or question defendant's title; second, that he was not in actual possession of the property at the time of the alleged trespass. In order, therefore, to determine whether or not the respondent was entitled to recover in the court below, it is necessary to determine what the law really is as applied to the foregoing state of facts.

The action of trespass, as we received it from the common law, and, in fact, as it still exists in this country, was that of "trespass *quare clausum fregit*" and "trespass on the case." The former was the remedy resorted to by one in the possession of real estate, as against one who wrongfully and forcibly entered upon the premises. The latter was the remedy given to the owner of the fee for a trespass where the damage was peculiar to the land itself. While these forms of action have been abolished by our Constitution and statutes, the right of action itself, as it existed at the common law, still exists under the Code. The distinction between these two rights of action is very clearly considered in *Casey v. Mason*, 8 Okla. 665, 59 Pac. 252. In the case at bar, respondent relies on his possession. Since he was not in actual possession of the property at the time of the entry by appellant, he is bound to rely on a constructive possession. The question then arises as to whether the original owner of the property, not in the actual possession thereof, can assert a constructive possession for the purpose of maintaining his action in trespass, as against the true owner, who deraigns his title through a tax deed.

It is argued by counsel for respondent that a tax deed does not and cannot operate as a writ of assistance to put the purchaser into possession of the property. That con-

tention must at once be conceded as sound and correct. It is equally true that the holder of a valid deed to real estate, whether it be a tax deed or a deed from the owner himself, impliedly and constructively has the possession of the property described in the deed. Of course, such constructive possession as a justification for an entry is not equal or paramount to an actual possession by another, but it is abundant warrant for the grantee therein named to take possession of the property where it is vacant or not actually occupied by another. In other words, the grantee named in a valid tax deed is entitled to take possession of the property described in the deed if he can do so peaceably and quietly. Mr. Cooley, in his work on Taxation (vol. 2, p. 1056, 3d ed.), speaking of the right of possession under tax deed, says: "The purchaser, if he finds the land occupied, may bring ejectment in the common-law courts to obtain possession; and if, on the other hand, he finds the land unoccupied, and takes possession without suit, the original owner may have the like remedy against him." In the footnote to the foregoing passage, the author makes the following quotation from *Martin v. Langenstein*, 43 La. Ann. 789, 9 So. 507: "The law does not require, to perfect a tax title, that the divested owner shall voluntarily place the purchaser in possession, or that the purchaser shall, in the absence of resistance, institute judicial proceedings and be put in possession by the sheriff, but the purchaser may himself take possession whenever he can do so without difficulty." The supreme court of Iowa in *Moingona Coal Co. v. Blair*, 51 Iowa, 447, 1 N. W. 768, held that "the holder of a tax deed will be deemed to be in possession of unoccupied land, and, if such possession is uninterrupted during five years from the date of execution and recording of the tax deed, the title acquired thereby becomes perfect and complete." That case was followed and approved in *Rice v. Haddock*, 70 Iowa, 318, 30 N. W. 579, the court saying: "The holder of a tax deed to unoccupied lands has constructive possession thereof." In *Casey v. Mason*, supra, the court said: "A plaintiff may maintain trespass for injury to his possession only when he is in the actual possession, and so alleges, or where he is the owner of the fee, and further shows by his petition that the land is unoccupied, and the plaintiff has the constructive possession thereof. He may also maintain an action in the nature of trespass on the case where he alleges that he owns the legal title, and further sets out such a state of facts as will show that the injury is an injury to the real estate. These rules are fundamental, because if one has no possession of a certain tract of land, either actual

or constructive, no right of his can be invaded by going thereon; and one having no legal title to real estate, either in whole or a reversionary interest therein, cannot be damaged by the destruction of buildings or trees, or any of the appurtenances thereon or thereunto belonging, because he has no interest in the land. Where there is no right, there can be no remedy." As we understand the authorities, as well as the reason and justice of the matter, the rule is this: If one who was the original owner of real estate lost his title through taxation and a tax deed, and still would maintain an action of trespass against the holder of the tax deed for entering into possession, he must maintain actual possession of the premises. The constructive possession which ownership of real estate usually confers upon the owner is not a sufficient possession as against the owner and holder of a tax title who takes actual possession of such property. Morgan's grantor was the owner of the title to this property, so far as the record shows in this case. He was therefore entitled to the possession. He consequently had a right to sell the building to Morgan, and the sale of the building carried with it the right to enter and remove the building. That title and right would not have justified either Morgan or his grantor in committing a breach of the peace, or using force or violence in entering upon the premises. On the other hand, it was sufficient warrant and authority for his entry and removal of the property when he found it unoccupied.

Under the law as applicable to this case, it was the duty of the trial court to instruct the jury to return a verdict in favor of the defendant. A new trial must therefore be granted, and it is so ordered, and the cause is remanded. Costs awarded in favor of appellant.

Sullivan, Ch. J., and Stewart, J., concur.

Petition for rehearing denied June 4, 1909.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

FRANK WILMERTON, Appt.,

v.

WILLIAM W. WILMERTON, Exr., etc., of William Wilmerton, Deceased, et al.

(100 C. C. A. 366, 176 Fed. 896.)

Will — ademption of legacy — act of testator's conservator.

The conservator of the estate of one who becomes insane after executing a will which bequeathed money and securities of a certain

amount to specified legatees, subject to a contract by which he had placed that amount with a bank, to be managed, the income to be paid to testator on demand, and the property accounted for to testator's estate after his death, has no authority to demand the income, so as to adeem the legacies, if it is not necessary, either for the conservation of the estate or the support of the ward.

(January 4, 1910.)

Note. — Power of guardian or conservator to adeem legacy.

The few cases bearing upon the question here considered are not entirely in harmony. The reasoning of the court in *WILMERTON v. WILMERTON*, that legacies should be adeemed only when such an intention appears on the part of the testator, seems to be the only one which can be safely followed, since if the power to adeem is conceded to guardians and conservators, the testator's intentions may be entirely defeated after he becomes *non compos mentis*, and the above case is not without some support.

Thus, in *Jenkins v. Jones*, L. R. 2 Eq. 323, where farming stock was bequeathed to testator's son, and the testator then became insane, and the property was converted into money during the life of the testator, by the son, who was named as executor, acting with the consent of his mother, who was designated executrix, it was held that there was no ademption, since it was not the act of the testator, and since he never intended any conversion.

So, where a testator bequeathed his house and shop and his stock in trade to his wife, and disposed of the residue of his estate otherwise, and subsequently, when he became insane, no commission of lunacy being appointed, his wife joined with those named as executors and with the residuary legatees in an agreement for the sale of the house, shop, and stock, and subsequently, after testator's death, this agreement was approved by the court, it was held that none of the parties having had authority from the testator to make the sale, no conversion which worked an ademption occurred. *Taylor v. Taylor*, 10 Hare, 475.

And in *Basan v. Brandon*, 8 Sim. 171, where part of a sum of money in an agent's hands was bequeathed, and the whole sum was subsequently invested by testator's agents, acting of their own accord, in stocks, it was held that there was no ademption of the legacy, notwithstanding the fact that the testator had written a letter, which was not received until after the agent's act, authorizing an investment of a part of the money in stocks.

These cases, however, are distinguishable from others here included, on the ground that the persons bringing about the conversion were not duly authorized to act for the testator. While this fact detracts from their force as authorities for the decision in *WILMERTON v. WILMERTON*, they are nevertheless entitled to considerable weight, since those

APPEAL by complainant from a decree of the Circuit Court of the United States for the Northern Division of the Southern District of Illinois, dismissing a bill filed to recover a one-half share in a certain sum which was alleged to be due under the will of William Wilmerton, deceased. Reversed.

Statement by Grosscup, Circuit Judge:

The bill was by appellant, a citizen of Iowa, against appellees, citizens of Illinois, the appellee William W. Wilmerton being made defendant both in his own right and as executor of the will of William Wilmerton, deceased; and was to recover complainant's one-half share in \$12,442.03, together with interest thereon, said to be due to appellant under the will of William Wilmerton, deceased, and wrongfully withheld by appellee William W. Wilmerton, as executor of such will. A demurrer to the bill having been sustained, the bill was dismissed for want of equity.

The salient facts, stated in the bill, are as follows: On January 12, 1904, William Wilmerton, deceased, executed his will, wherein there was bequeathed to the appellee Louisa Little, and to appellant, Frank Wilmerton, daughter and son, respectively, of the testator, "notes and moneys to the amount of \$75,000, as per contract to be managed by said bank [the Central Trust & Savings Bank of Rock Island] for the benefit of my estate." The remainder of the estate, after three other specific bequests, went to William W. Wilmerton, appellee, amounting, after the deduction of the other bequests, to considerably more than \$75,000 in value. The trust, recited in the contract with the bank, was as follows:

"The said party of the first part [the bank] shall collect and receive the interest and principal of the said notes and securities at maturity, pay the income thereof to said party of the second part, William Wilmerton, on demand, and reinvest the principal thereof as speedily as it is able to, after the receipt of the same, and upon the death of the said party of the second part, to account for all said property to the es-

tate of the said party of the second part. The said party of the first part, in and about the said collecting of interest, principal, and reinvestment, to be held to the exercise of the same degree of care as it would of its own property. . . ."

At the date this contract was entered into, William Wilmerton was about eighty years of age, and at the date the will was executed was a little past eighty-one years of age; but on both dates was of sound and disposing mind and memory. Subsequently Wilmerton became insane, and on the 12th day of June, 1906, one Thomas J. Medill was duly appointed conservator of his estate, and forthwith took possession and control of the estate, except so much thereof as was, at the time, in the care, custody, and control of the trustee above mentioned. Wilmerton, up to the time of his death, November 26th, 1907, did not recover his reason.

The bill shows that during the entire period of the conservation, Wilmerton's estate was worth something like \$200,000; no need is shown for the taking of any portion of the \$75,000, embodied in the trust agreement, either for the conservation of the estate or the support of the ward; nor any occasion for the change of securities. Notwithstanding this, the conservator, considering himself entitled to act upon that provision of the trust agreement under which, "on demand," it was provided that the trustee should pay the income to Wilmerton (and apart from any need arising from the conservation of the estate or the maintenance of the ward), on the 3d day of October, 1906, demanded of the trustee that it should pay over to him the accrued interest or income that had accumulated in its hands; and thereupon there was paid to him such accumulation to the amount of \$12,442.03; which sum, appellee William W. Wilmerton, as executor, has treated as a part, not of the specific trust, but as a part of the residuary estate,—refusing to pay over the same to appellant, Frank Wilmerton, and appellee Louisa W. Little, as a part of the specific trust fund bequeathed to them. The further facts are stated in the opinion.

acting for the testator, in the first two cases, at least, did so in good faith, and had been named by him to administer his estate.

A result opposed to that in *WILMERTON v. WILMERTON* was reached in *Jones v. Green*, L. R. 5 Eq. 555, where the income of certain shares of stock was bequeathed, and subsequently the testator became a lunatic, and, by an order in lunacy, the shares were invested in consols, and it was held that the conversion adeemed the legacy. The court said: "All the authorities show that the conversion must be treated as a lawful con-

version, exactly as if the testator had himself converted the shares into consols. Such an act on his part would clearly have adeemed the gift."

In *Re Larking*, L. R. 37 Ch. Div. 310, where a testator bequeathed a policy in trust to pay two debts, and the balance to his daughter, and he paid one and became a lunatic, and his committee paid the other debt from funds of the estate, without authority from the justices, the sum so paid was recouped from the insurance policy at the testator's death, he still being a lunatic.

Argued before Grosscup, Baker, and Seaman, Circuit Judges.

Mr. S. S. Gregory, with Messrs. George T. Page, C. H. Poppenhusen, and Joseph L. McNab, for appellant:

A specific legacy is a legacy of specific property, which lapses if the subject of such legacy has been sold, lost, or destroyed.

Updike v. Tompkins, 100 Ill. 406; Snyder's Estate, 217 Pa. 71, 11 L.R.A. (N.S.) 49, 118 Am. St. Rep. 900, 66 Atl. 157, 10 A. & E. Ann. Cas. 488; Ives v. Canby, 48 Fed. 718.

A demonstrative legacy is a gift of money or other tangible goods, charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails.

18 Am. & Eng. Enc. Law, 2d ed. p. 721; Kenaday v. Sinnott, 179 U. S. 606, 45 L. ed. 339, 21 Sup. Ct. Rep. 233; Tanton v. Keller, 167 Ill. 129, 47 N. E. 376.

A specific legacy is subject to ademption, while a demonstrative legacy is not; but here, even assuming the legacy to be specific, there has been no ademption.

Hoitt v. Hoitt, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; Clements v. Horn, 44 N. J. Eq. 595, 18 Atl. 71; Nooe v. Vannoy, 59 N. C. (6 Jones, Eq.) 185; Jenkins v. Jones, L. R. 2 Eq. 323; Walton v. Walton, 7 Johns. Ch. 258, 11 Am. Dec. 456; Gardner v. Printup, 2 Barb. 83; Connecticut Trust & S. D. Co. v. Chase, 75 Conn. 683, 55 Atl. 171; Basan v. Brandon, 8 Sim. 171.

The intention of the testator in making such disposition of the subject of a specific legacy as is claimed to be ademption is material.

Coleman v. Coleman, 2 Ves. Jr. 640; Beall v. Blake, 16 Ga. 119; 1 Am. & Eng. Enc. Law, p. 625; Walton v. Walton and Gardner v. Printup, supra; Re Slater [1907] 1 Ch. 665, 8 A. & E. Ann. Cas. 141.

An inquiry as to the intent of the testator is admissible and necessary.

Wilson v. Smith, 117 Fed. 707; Richardson v. Eveland, 126 Ill. 43, 1 L.R.A. 203, 18 N. E. 308; Langdon v. Astor, 16 N. Y. 9.

Mr. H. A. Weld for appellees.

Grosscup, Circuit Judge, delivered the opinion of the court:

The argument of appellee William W. Wilmerton is that under the law of Illinois, the conservator succeeded to the right of the beneficiary in the trust agreement "to demand" the income accumulating and that had accumulated upon the securities embodied in the trust; that such demand having been complied with, the income thus paid over became at once segregated from the trust fund,—was no longer

a part of the trust fund in fact, but became a part of the general property of the conservator's ward; from which it follows, that the will, acting as of the testator's death, a date subsequent to this act of segregation, acted only, so far as the bequest to appellant and Louisa W. Little went, upon the securities remaining; the test of the testator's intention being, not what, aside from the will, he may be shown to have said or done in relation to the specific bequest involved, but what property was, in fact, included in and acted upon by the specific bequest at the date of his death.

We accept this as the true test of the testator's intention. It does not follow, however, that intention is thereby shown in the will that the power of the testator to take down "on demand" the income of the securities mentioned in the specific bequest should go over to his conservator in case of his subsequent mental incapacity. No such intention is affirmatively shown in the will. Nor does it follow that such power of the testator to take down the income goes by operation of law to the conservator, to the end that the special fund acted upon in the specific bequest, shall be by that amount diminished. That, indeed, is the real question in this case.

Counsel for appellee have brought to our attention two cases, one an English, the other a Pennsylvania case, the former, at least, supporting his contention, viz.: In *Re Freer*, L. R. 22 Ch. Div. 622, and *Hoke v. Herman*, 21 Pa. 301. The *Freer* Case was that of a testator who bequeathed "all his first preference bonds" in a certain railroad to one of his sons, the residuary estate to a son and daughter. Subsequently, but before the testator's death, and while he was of unsound mind, a conservator, under an order of the lord justices, transferred these bonds, on the ground that they were an unsafe investment, into consols, and this was held by Chitty, Justice, to have been an "ademption" or "extinguishment" of the legacy,—the learned justice finding that he need make no distinction between those two terms in their application to the question before him.

In the Pennsylvania case, *Herman* held a note against *Hoke*, which was the subject of a bequest to *Hoke* by *Herman*, in his will, made subsequently, as follows: "I give and bequeath unto my said nephew, *Herman Hoke*, and his heirs, a promissory note of \$600, with interest, which I hold against him at this time."

Subsequently *Herman* became insane, a committee of his person and estate was appointed, and this committee, settling with *Hoke* for certain services rendered by him to *Herman* after the date of the will (the bequest above mentioned being known neither

to Hoke nor to the committee), credited \$178.63 on the interest on the note, and a receipt was given by Hoke to the committee in full of his claim. Upon the death of Herman, the note, thus in part paid and indorsed, was delivered to Hoke; but Hoke demanded the return of the \$178.63, with interest, debited against him in his settlement with the committee, there being assets of the estate sufficient to pay the demand if he were entitled to recover. The court, Black, Ch. J., delivering the opinion, held: "That if a thing bequeathed in a will by such a description as to distinguish it from all other things be disposed of, so that it does not remain at the death of the testator, or if it be so changed that it cannot be called the same thing, the bequest is gone. If such a legacy be of a debt, payment necessarily makes an end of it. The legatee is entitled to the very thing bequeathed, if it be possible for the executor to give it to him; but if not, he cannot have money in place of it. This results from an inflexible rule of law applied to the mere fact that the thing bequeathed does not exist, and it is not founded on any presumed intention of the testator."

In the English case, the ruling is made to turn upon the proposition that if the testator himself, not being a lunatic, had sold the stock and placed the proceeds to a separate account on his books, there would have been an ademption or extinguishment of the specific legacy, notwithstanding a memorandum placed there by the testator to the effect that, for all purposes, the proceeds were to stand in place of the stock,—a proposition that is as true here as in England, for the stock having been voluntarily taken down by the testator from the specific bequest, and the memorandum not having been attested according to the wills act, there stood at the date of the testator's death (the date when the will took effect), no disposition by special bequest of the stock thus involved. But is that proposition a true criterion of the question before the court in the Freer Case, or the question before us now? Had the testator in the Freer Case sold the specific preference bonds, so that they no longer, in *specie*, were a part of his property, or had the testator in this case taken down the interest, or any portion of the principal (provided he had power, under the trust agreement, to take down the principal), the act would have been one performed by him in view of his then-existing will, and, therefore a voluntary and conscious extinguishment or diminution of the corpus of the specific thing upon which the specific bequest was intended to act. In other words, the will and the subsequent act, considered together,

would give us the testator's final testamentary intention.

But how can that be said to be the case where the diminution or extinguishment of the thing upon which the specific bequest acts is not the subsequent voluntary or conscious act of the testator himself? The conservation of an estate under the lunacy laws, both here and in England, is purely an administrative function. Is it contemplated that an administrator may, at his will, change the testator's will? The testator, lunacy committed on, is, so far, at least, as a disposing mind is concerned, civilly dead. Does the disposing mind, along with the ward's effects, go over to the conservator? Is the conservator anything more than a mere custodian and administrator of the ward's estate, with no power, either directly or by indirection, to change the ward's duly expressed purposes respecting the disposition of that estate until the ward recovers his reason, or the administration after death begins?

The Pennsylvania case is expressly founded on *Blackstone v. Blackstone*, 3 Watts, 338, 27 Am. Dec. 359, an early Pennsylvania decision, holding that where a specific bequest of bank stock, after the date of the will, was exchanged for a bond, the bequest was adeemed, notwithstanding the declared intention of the testator to keep the bond for the legatee in lieu of the stock,—a ruling that again is founded upon the fact that the so-called "declared intention" was not attested according to the laws of Pennsylvania relating to wills; and the change, having been made voluntarily and consciously by the testator, in view of his will, must, in the absence of any duly attested further intention, be held to have been an intentional and conscious change in his testamentary disposition. Nor is *Hoke v. Herman* exactly in point; for the voluntary payment of interest on a note by the intended legatee, even though the testator was not in a mental condition to determine whether he would accept or reject it, is not the case of a stranger to the bequest changing, at his own will, the carrying out of the bequest.

In the *Am. & Eng. Encyclopædia of Law*, 2d ed. vol. 1, p. 625, it is said: "There is some early English authority for the view that the question whether or not a legacy has been adeemed does not depend upon the supposed intention of the testator, but is to be determined solely according to the strict rule requiring the property bequeathed to remain in *specie* and a part of the testator's estate. There are, however, English cases to the contrary." Citing *Jenkins v. Jones*, L. R. 2 Eq. 323.

"In the United States, the doctrine of the latter line of cases has been generally followed; and in deciding questions of ademp-

tion, the courts here have been disposed to observe the same rule which prevails elsewhere in the construction of wills and testaments, and to hold legacies adeemed only where the testator apparently so intended."

Though none of the cases cited precisely support this statement of the rule, there are no cases, other than the ones above mentioned, that are contrary thereto. Upon sound reason, we think that the English and Pennsylvania cases cited ought not to be followed, and upon what appears to us to be sound reason, we think that the rule that legacies are adeemed only where such an intention appears on the part of the testator himself ought to be followed. The question, in our judgment, is not whether, as a mere matter of accident, or of purpose outside of the testator's purpose, the thing set apart as the corpus of a special bequest has been changed in *specie*. The real question is whether, all things considered, the testator's testamentary disposition did, or did not, remain, with reference to the particular thing embodied in the specific bequest or its proceeds, the same as it was the last moment he was able to exercise a testamentary disposition. In that way, and in that way only, we think, can the right of the man to dispose of his property according to his own wishes, exempt from the interference, caprice, or interest of others, be fully carried out. In that way only can his intention, as embodied in his will, be truly administered.

The decree of the Circuit Court is reversed, with instructions to overrule the demurrer to the bill, and to proceed further in accordance with this opinion.

Petition for writ of certiorari denied by the Supreme Court of the United States May 31, 1910 (217 U. S. 606, 54 L. ed. 900, 31 Sup. Ct. Rep. 696).

KANSAS SUPREME COURT.

MARY J. BAKER, Appt.,
v.

MARY KELLEY LANE et al.
(82 Kan. 715, 109 Pac. 182.)

Quietting title — tax deed to deceased person — right of heir to maintain action.

1. A party whose only title to land is under a tax deed made to a grantee who was dead when it was executed, which was delivered to such party as the heir of the deceased person, who caused the deed to be recorded, and paid the taxes on the land, but who never took actual possession, cannot maintain an action to quiet title, or for an

injunction against one who holds under the government title, and who is in actual possession of the land.

Deed — to deceased person and his heirs — validity.

2. The words "his heirs and assigns," following the name of the deceased person so designated as grantee in the deed, did not operate to vest title in such heir, and the deed is void as a conveyance.

Reformation of instrument — tax deed to deceased person — substitution of grantees.

3. A person who, as heir of the deceased

Note. — Effect of deed to a deceased person.

A deed to a dead man is a nullity, and though made to one deceased "and his heirs," it is inoperative, the word "heir" not being a word of purchase, carrying title, but merely qualifying the title of the grantee. *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Neal v. Nelson*, 117 N. C. 393, 53 Am. St. Rep. 590, 23 S. E. 428; *Morgan v. Hazlehurst Lodge*, 53 Miss. 665.

Nor is a deed to a grantee after his death of any validity for the purpose of correcting a former deed to the same grantee, in the absence of the consent of all the parties to the original deed, or their heirs. *Bartlett v. Brown*, 121 Mo. 353, 25 S. W. 1108.

A deed to "Abner Dunn, deceased, estate," was held void in *McInerney v. Beck*, 10 Wash. 515, 39 Pac. 130.

But a deed to a named grantee "or his heirs" has been upheld as a valid conveyance to the heirs, if the grantee was dead at the time it was made. *Ready v. Kearsley*, 14 Mich. 215.

A deed to a deceased grantee was upheld in *City Bank v. Plank*, 141 Wis. 653, 124 N. W. 1000, where it appeared that all the parties knew the grantee to be dead, and that it was the desire and intention to convey to the executor of the deceased grantee, in his official capacity, so that the land in question might be subject to a charge in favor of the widow and other claimants.

In *Northern Lake Ice Co. v. Orr*, 102 Ky. 586, 44 S. W. 216, under a statutory provision, a deed to a deceased person was held to vest her children with whatever title would have passed to the mother had she been living when the deed was made.

Naming as grantee in a deed of real estate a partnership the members of which have died, but the name of which has been perpetuated and the property kept together by consent of all parties interested, after a sale of the business to strangers, for the purpose of collecting the accounts and settling up the partnership affairs, does not render the conveyance void. *Walker v. Miller*, 139 N. C. 448, 1 L.R.A. (N.S.) 157, 111 Am. St. Rep. 805, 52 S. E. 125, 4 A. & E. Ann. Cas. 601.

Cases upon the validity of a grant or patent by a state where the patentee was dead at the date of the grant have not been included in this note.

owner of a tax sale certificate, took out a tax deed thereon, wherein the name of the deceased person was inserted as grantee, cannot maintain an equitable action to have the deed reformed by a decree substituting her own name as grantee therein; she might, upon due application to the county clerk, have obtained a deed made to herself as grantee, notwithstanding the issuance of the former instrument.

(June 11, 1910.)

A PPEAL by plaintiff from a judgment of the District Court for Seward County sustaining a demurrer to the petition in an action brought to reform a certain tax deed, to quiet title thereunder, to restrain defendants from entering upon or injuring the land embraced therein. Affirmed.

The facts are stated in the opinion.

Mr. A. L. Billings for appellant.

Mr. Thomas A. Scates and Albert Watkins for appellees.

Benson, J., delivered the opinion of the court:

This is an action to reform a tax deed, to quiet title under it, and for an injunction to restrain the defendants from entering or trespassing upon the land or injuring it. A demurrer to the petition was sustained, and the plaintiff appeals.

The petition shows that the defendant Mary Kelley Lane is the owner in fee simple of the land in question, unless her title has been divested by a tax deed under which the plaintiff, Mary J. Baker, claims to own it. The title to this land became vested in Mary Kelley Lane in the year 1888. It was then vacant and unoccupied, and so remained until April 10, 1908, when possession was taken by the defendants, who still hold it. The taxes of 1889, due upon this land, were delinquent, and it was sold at the tax sale of 1890, and a certificate was issued thereon which was afterward assigned to J. W. Baker, the plaintiff's husband at that time, but who died on April 3, 1892. On March 7, 1894, the plaintiff, now the sole surviving heir of the decedent, presented the tax certificate to the county clerk, and requested that a tax deed be made to J. W. Baker, which was accordingly done, and the deed was delivered to her. This tax deed purports to convey the land to "J. H. Baker, his heirs and assigns;" but the initial "H." was inserted by clerical error, instead of the initial "W.," as directed. It is dated March 7, 1894, and was recorded that day. On the same date the plaintiff redeemed the land from a tax sale made in 1891, and paid all taxes to and including the taxes of 1893. In April, 1908, finding that the defendants, Mary Kelley Lane and H. W. Lane, her hus-

band, had entered upon the land, and had erected a small house, and had broken out about 5 acres, the plaintiff caused a notice to be given to them that they were considered as trespassers; that an action to quiet title and for an injunction would be commenced against them. Before this notice was given, the defendants had offered to pay the tax lien, which was refused. The petition is very voluminous. Exhibits are attached containing correspondence of the defendants with the county clerk and county treasurer and between the parties. It contains an allegation that the plaintiff took possession under the tax deed upon its delivery; but as it is also alleged that the land was vacant and unoccupied until the defendants' entry, and as this fact is also stated in the exhibits, it is understood that the possession referred to in the petition is constructive only; and this is the claim as stated in the plaintiff's brief. The entry of the defendants is characterized as wrongful and a trespass, and made to harass, annoy, and extort money; but these and other like charges add nothing to the legal effect of the facts pleaded, the substance of which is given above. The case presented, then, is that of one party in possession of land, claiming title thereto in fee simple, and another party, out of possession, asserting a superior title and right of possession under a tax deed.

The plaintiff contends as matter of law that the tax deed to Baker and his heirs and assigns vested the title in Baker's heirs, and cites *Rynearson v. Conn*, 77 Kan. 160, 94 Pac. 205. The cases are easily distinguishable. There the deed was to "the heirs of D. C. Rynearson, deceased,"—a designation sufficiently definite to pass the title to whoever were in fact such heirs. Here the deed was to "J. H. Baker, his heirs and assigns." The words "heirs and assigns" are found in the statutory form of a tax deed, and the word "heirs" is usual in other conveyances, although not necessary under our statute, and implies a title in fee simple in the grantee named, which may descend to his heirs. A deed to a person not living and his heirs is void, there being no person to take under it. 1 Jones, Real Prop. in Conveyancing, § 223; 3 Washb. Real Prop. 6th ed. § 2121; Devlin Deeds, 2d ed. § 123; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Miller v. Chittenden*, 2 Iowa, 315; *Neal v. Nelson*, 117 N. C. 393, 53 Am. St. Rep. 590, 23 S. E. 428.

The argument is made that the words, "J. H. Baker, his heirs and assigns," are equivalent to "J. H. Baker's heirs" but this construction is unwarranted, as it omits the grantee expressly named. The plaintiff, having failed to prove title in herself, cannot maintain her action to quiet title, or for

an injunction against the defendants, who were in actual possession when the suit was begun. Other objections urged against granting that relief need not be discussed.

The cause of action to reform the tax deed cannot be maintained. A party desiring to obtain affirmative relief in court, based upon tax proceedings, should pursue such proceedings before the proper officers to a conclusion which will give at least prima facie right to the relief sought. The holder of the tax certificate had a right to a tax deed made to the proper grantee, and a proper deed could have been obtained by application to the county clerk, notwithstanding the previous execution of a void or imperfect one. *Clippinger v. Tuller*, 10 Kan. 377; *Young v. Gibson*, 80 Kan. 264, 105 Pac. 3; *Douglass v. Nuzum*, 16 Kan. 515; see also *Atchison, T. & S. F. R. Co. v. Jefferson County*, 12 Kan. 127.

No good reason is shown why the court should exercise its chancery powers to accomplish for the plaintiff what might have been obtained long ago by an application to the county clerk. Whether the period in which the right to obtain such a deed, or to enforce rights under it, has elapsed, is not decided, as the record does not present that question, and it has not been discussed.

The plaintiff, by this equitable action, seeks to accomplish the substantial purpose of an action in ejectment. The petition and exhibits show that defendants are in possession of the land, and if they should be restrained, as the plaintiff prays, they would, to that extent at least, be ousted from the possession, which they have taken peaceably, under a title which is perfect unless overthrown by the tax deed. In this situation, even if the deed were reformed, or had been made in the first instance to the proper grantee, an action to recover possession would have been the appropriate proceeding. *Atkinson v. J. R. Crowe Coal & Min. Co.* 80 Kan. 161, —L.R.A.(N.S.)—, 102 Pac. 50, 106 Pac. 1052.

In the assignment of the tax certificate to J. W. Baker, the initial "H." was by mistake inserted instead of "W.," and following this mistake, the county clerk used the same initial in writing the name of the grantee in the tax deed; but this is unimportant, and is so treated in the briefs, as it appears that it was intended to make both the assignment and the deed to J. W. Baker, and both should be considered as so written.

The judgment is affirmed.

All the Justices concur.
29 L.R.A.(N.S.)

NORTH CAROLINA SUPREME COURT.

A. N. DALE et al.

v.

GAITHER LUMBER COMPANY et al.
Appts.

(152 N. C. 651, 68 S. E. 134.)

Statute of frauds—another's debt — promise to subcontractor.

A promise by an owner of timber lands who has contracted to have the timber removed and manufactured into lumber, to hold back the amount which the contractor has promised to pay another to do the logging, and pay it to him, is not a promise to pay the debt of another within the statute of frauds.

(May 25, 1910.)

APPEAL by defendants from a judgment of the Superior Court for Burke County in plaintiffs' favor in an action brought to recover the amount alleged to be due under a contract to pay for certain work performed on defendants' lands by plaintiffs as subcontractors. Affirmed.

Statement by Hoke, J.:

There was evidence tending to show that one L. L. Wood had contracted in writing with defendant company to "cut, saw, log, and stack in a workmanlike manner" for defendant company the timber growing on a tract of land of 888 acres, and was engaged in the performance of said contract; that the plaintiff had agreed with L. L. Wood to do the logging for this job at \$3 per 1,000 feet; that plaintiff went to work under this agreement, and after a short time, not receiving any money, and not being satisfied

Note.—The holding of the court in the above case, that a promise by a third person to pay the debt of another is not within the statute of frauds where the agreement is to pay out of moneys of the debtor in the hands of, or thereafter to be paid to, the promisor, and the promise is primarily for his benefit, is supported by the weight of authority, not only where both of these elements exist, but also where either is present, the existence of either element generally being held sufficient to take the promise out of the statute.

For cases considering the question whether an oral promise to pay another's pre-existing debt is within the statute of frauds where made to secure a benefit to the promisor, see *Howell v. Harvey*, 22 L.R.A.(N.S.) 1077.

And for a discussion of the question whether a contemporary promise to pay out of moneys in the hands of the promisor belonging to the debtor is within the statute of frauds, see note to *Mankin v. Jones*, 15 L.R.A.(N.S.) 224.

with the arrangements for his pay, he saw the manager of defendant company and told him that plaintiff was to have \$3 per 1,000 for doing the logging, and that he wanted the company to hold back that amount for plaintiff out of money to be earned by Wood under his contract; that the manager agreed to do this, and, under and by reason of this agreement, plaintiff went back to work and did logging to the amount of \$400 and over, for which he had not been paid; that this arrangement and agreement as to holding back the \$3 per 1,000 was made with the knowledge and assent of Wood; that after this agreement on the part of the manager a large amount of the lumber was cut and turned over to the company by Wood, the amount thereafter earned by Wood under the contract being near \$2,000; and that plaintiff had applied to the company for his money, and it had failed and refused to pay the amount or any part of it, claiming that they had paid Wood in full, and that he was indebted to them several hundred dollars on an old debt, etc. Defendant's evidence tended to show that they had the written contract with Wood to do the work, and they did not know plaintiff in the transaction; that the first they knew of plaintiff making any claim against the company was when he presented an order from Wood for the company for \$416; that they had paid Wood something over \$2,000, all they owed him for work done under the contract, and he was indebted to the company for more than \$200 on an old debt. There was also evidence of some payments by Wood to Dale on the amount due him for logging. It appeared that R. A. Gaither was secretary and treasurer, having power as general manager to bind the company.

On the issue as to the liability of the defendant company, the court charged the jury as follows: "The court charges you: (a) That if you find from the evidence that R. A. Gaither, who is admitted to be the secretary and treasurer of the Gaither Lumber Company, agreed with plaintiff A. N. Dale that he would hold back \$3 per 1,000 feet out of the money due or to become due L. L. Wood for sawing for said company, and that he would pay the same to said plaintiff for cutting and logging done by him for said Wood, and if you find from the evidence that plaintiff was induced thereby to go on with the logging, then the defendant the Gaither Lumber Company would be liable to pay plaintiff at that rate for all timber cut and logged by plaintiff for said Wood after the time such agreement was made, and you will therefore allow plaintiff \$3 per 1,000 feet for whatever amount of timber you find was so cut and logged, in your answer to the second issue (b)."

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There was verdict against the company for \$393.90. Judgment on the verdict, and defendant excepted and appealed, assigning for error chiefly that the demand of plaintiff against defendant company was avoided under the statute of frauds (Revisal 1905, § 974), requiring agreements to answer for the debt, default, or miscarriage of another to be in writing, and that all oral evidence tending to support the claim should have been excluded.

Messrs. Avery & Ervin for appellants.

Mr. John T. Perkins, for appellees:

Where the party promising has a personal interest, benefit, or advantage to be subserved, without regard to the interest of the original debtor, such promise is not within the statute, though the performance have the effect of discharging the original debtor.

Whitehurst v. Hyman, 90 N. C. 489; Draughan v. Bunting, 31 N. C. (9 Ired. L.) 10; Stanly v. Hendricks, 35 N. C. (13 Ired. L.) 86; Treadgill v. McLendon, 76 N. C. 24; Mason v. Wilson, 84 N. C. 51, 37 Am. Rep. 612; Parsons, Contr. 24 & 25 note; Alger v. Scoville, 1 Gray, 391; Fears v. Story, 131 Mass. 47; Little v. McCarter, 89 N. C. 233; Jenkins v. Holley, 140 N. C. 380, 111 Am. St. Rep. 846, 53 S. E. 237; Emerson v. Slater, 22 How. 28, 16 L. ed. 360; Davis v. Patrick, 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. Rep. 58; Gale v. Harp, 64 Ark. 462, 43 S. W. 144; Iverson v. Caldwell, 3 Wyo. 465, 27 Pac. 563; Sheppard v. Newton, 139 N. C. 533, 52 S. E. 143; White v. Tripp, 125 N. C. 523, 34 S. E. 686; Neal v. Bellamy, 73 N. C. 384.

Mr. John M. Mull also for appellees.

Hoke, J., delivered the opinion of the court:

We are of opinion that the case has been correctly tried, and the charge of his Honor is in accord with the better considered precedents.

In Emerson v. Slater, 22 How. 28-43, 16 L. ed. 360-365, a decision on this section of the statute of frauds, the court said: "But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." This position has been sustained and applied in other cases of the same court, notably in Davis v. Patrick, 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. Rep. 58, in which

it was held: "In determining whether an alleged promise is or is not a promise to answer for the debt of another, the following rules may be applied: (1) If the promisor is a stranger to the transaction, without interest in it, the obligations of the statute are to be strictly upheld; (2) but if he has a personal, immediate, and pecuniary interest in a transaction in which a third party is the original obligor, the courts will give effect to the promise. The real character of a promise does not depend altogether upon form of expression, but largely upon the situation of the parties, and upon whether they understood it to be a collateral or direct promise."

This rule has prevailed in many well-considered cases in other courts construing this section of the statute, as in *Crawford v. Edison*, 45 Ohio St. 239, 13 N. E. 80; *Prout v. Webb*, 87 Ala. 593, 6 So. 190; *Gibson County v. Cincinnati Steam Heating Co.* 128 Ind. 247, 12 L.R.A. 502, 27 N. E. 612,—and the same general principle has been recognized and approved with us, as in *Deaver v. Deaver*, 137 N. C. 241, 49 S. E. 113; *Voorhees v. Porter*, 134 N. C. 591-605, 65 L.R.A. 736, 47 S. E. 31; *Whitehurst v. Hyman*, 90 N. C. 487; *Mason v. Wilson*, 84 N. C. 51, 37 Am. Rep. 612; *Threadgill v. McLendon*, 76 N. C. 24. A doctrine resting upon the same basic principle appears in several of these cases from our own court, to the effect that where a debtor places a fund, money, or property in the hands of a third person, who agrees to pay the debt out of the fund, the said agreement is not within the statute. The position is stated in *Mason v. Wilson*, supra, as follows: "A parol promise to pay the debt of another out of property placed by the debtor in the hands of the promisor, who converts the same into money, is not within the statute of frauds. It is an original and independent promise founded upon a new consideration." And in either class of cases the promise on the part of the third person is held to be a binding obligation, whether the original debtor continues liable or not; this by reason of the new consideration moving between the parties.

Referring to this question in *Whitehurst v. Hyman*, supra, *Merrimon, J.*, said: "It is settled by many judicial decisions in construing this statute, and others substantially like it, that where there is some new and original consideration of benefit or harm moving between the party to whom the debt to be paid is due and the party making the promise to pay the same, such case is not within the statute; as where a promise to pay an existing debt is made in consideration of property placed by the debtor in the hands of the party promising, or where the

party to whom the promise is made relinquishes a levy on the goods of the debtor for the benefit of the promisor, or where the party promising has a personal interest, benefit, or advantage of his own to be subserved, without regard to the interests or advantage of the original debtor; as for example, if a creditor has a lien on certain property of his debtor to the amount of his debt, and a third person who has an interest in the same property promises the creditor to pay the debt in consideration of the creditor's relinquishing his lien. Such promises are not within the statute, because they are not made 'to answer the debt, default, or miscarriage of another person.' It may be the performance of the promise will have the effect of discharging the original debtor, but such discharge was not the inducement to, or the consideration to support the promise. The moving, controlling purpose of the promisor in such cases is his own advantage, not that of the debtor. It not unfrequently happens that in a great variety of business circumstances it becomes important in a valuable sense to third parties to discharge the debt of a debtor, or relieve his property from liability to the creditor for the benefit of such third parties, without regard to the benefit, ease, or advantage of the debtor. The advantage to the third party, the promisor, is a sufficient valuable consideration to support a contract separate from, and independent of, the debt to be discharged."

And to like effect, delivering the opinion in *Voorhees v. Porter*, supra, Associate Justice Walker said: "But we think the case of *Mason v. Wilson*, supra, is directly in point. The doctrine there stated is that if a third person promises the debtor to pay his antecedent debts in consideration of property placed in the hands of the promisor by the debtor for the purpose, which is afterwards converted into money, the creditors may recover on the promise or for money had and received, 'for although,' says the court, 'the promise is in words to pay the debt of another, and the performance of it discharges that debt, still the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an original and distinct cause of action,' and it is immaterial, as is further said by the court, whether the liability of the original debtor is continued or not; the promise being an independent and original one founded upon a new consideration and binding upon the promisor. In our case, though the property was not received for the purpose of being converted into money in order to pay the debt out of the proceeds, the promise to purchase it at a fixed price and to pay the amount of that price to the creditors of the

vendor amounts to the same thing, and brings our case within the principle of the third class mentioned in *Mason v. Wilson* (which authorizes the creditor to sue directly), namely, 'when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the original contracting parties.' In such a case the creditors may sue the promisor, whether his debtor remains liable to him or not."

In the case before us, the defendant company had a direct pecuniary interest in the work to be performed by plaintiff, and received the benefit of it, and its obligation comes clearly within the first principle as it appears in *Emerson v. Slater*, *supra*, and we see no reason why the promise of defendant does not come also within the second principle referred to. The company's agreement was, in effect, to see the claim paid out of the amount to be earned under the contract by L. L. Wood, the original debtor. This was entered into with the sanction and approval of Wood, and, as this amount was earned by Wood, it would seem to become a fund applicable by the agreement to plaintiff's debt, and affording the consideration to support the company's promise as a new and original obligation.

There is no error in the rule laid down by the court which gives defendant any just ground of complaint, and the judgment in plaintiff's favor is affirmed.

WASHINGTON SUPREME COURT.

SARAH J. MOORE et al., Respts.,
v.
GREAT NORTHERN RAILWAY COMPANY, Appt.

(— Wash. —, 107 Pac. 852.)

Railroad — unsafe crossing — deviation — injury — liability.

A railroad company is not liable for injury to one who voluntarily turns aside from a crossing over the track, left unsafe by the company, and attempts to make the crossing over the unprotected rails, and is thrown from his wagon by the unevenness of the crossing place.

(March 25, 1910.)

Note. — A search has failed to disclose any other case involving the question of a railroad company's liability for an injury to a traveler while trying to cross its tracks at a place other than the regular crossing, because the latter is out of repair, though in *Cowans v. Ft. Worth & D. C. R. Co.* 40 Tex. Civ. App. 539, 89 S. W. 1116, where the question was whether the railroad company had invited the plaintiff to use as a crossing

APPEAL by defendant from an order of the Superior Court for Lincoln County, granting a new trial after judgment in defendant's favor in an action brought to recover damages for the alleged negligent killing of Michael Schabb. Reversed.

The facts are stated in the opinion.

Messrs. F. V. Brown and J. J. Lavin, for appellant:

The defendant, having furnished a place for deceased to cross the tracks, is not liable for injuries resulting by his having selected and attempted to use another place, not intended for such purpose.

Thomp. Neg. 6296; *Carey v. Hubbardston*, 172 Mass. 106, 51 N. E. 521; *Kelley v. Fond du Lac*, 31 Wis. 179; *Sykes v. Pawlet*, 43 Vt. 446, 5 Am. Rep. 295; *Matthews v. Baraboo*, 39 Wis. 674; *Harwood v. Oakham*, 152 Mass. 421, 25 N. E. 625; *Palmer v. Andover*, 2 Cush. 600; *Tisdale v. Norton*, 8 Met. 388; *Tasker v. Farmingdale*, 85 Me. 523, 27 Atl. 464; *Shepardson v. Colerain*, 13 Met. 55; *Little v. Brockton*, 123 Mass. 511; *Smith v. Wakefield*, 105 Mass. 473.

Messrs. W. E. Southard and Southard & Southard, for respondents:

The deceased was not confined to the limits of the crossing, unless the crossing was of reasonable width under the circumstances and conditions of the particular case.

8 Am. & Eng. Enc. Law, 2d ed. p. 366; *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831.

Mount, J., delivered the opinion of the court:

Respondents brought this action to recover damages on account of alleged negligence of the appellant, which negligence, it is alleged, caused the death of Michael Schabb, the father of Jennie Schabb, and at that time, the husband of respondent Sarah J. Moore. The cause was tried to the court with a jury, and resulted in the discharge of the jury and a directed judgment for the defendant. Thereafter the respondents filed a motion for new trial upon several grounds. The motion was based upon the record of the case and affidavits of newly discovered evidence. This motion was not heard by the judge who tried the case, but was heard by his successor upon the record which is now before us. The court made an

the place where he was injured, the court, in holding that, if such was the case, the plaintiff was under no obligation to exercise ordinary care in selecting the crossing, added: "He would only be required to exercise this care in the event the company had in no way invited him to use the crossing, and he chose the same himself in his effort to avoid the use of a defective and unsafe crossing provided by the company."

order granting a new trial, without specifying the ground therefor. This appeal is from the order granting the new trial.

The case is presented here solely as one of law, to the effect that, under all the facts which were received and offered in evidence at the trial, and those discovered after the trial, no case is made out sufficient to go to the jury. No other question is presented. The facts are as follows: The appellant, in the year 1905, maintained a station or depot in the town of Wilson Creek. A railway track, called a "house track," extended east and west on the north side of this depot. The town is north of this house track. On the east side of the depot, and to the south of the house track, there was an L-shaped platform; the short end of the L or platform being at right angles to the house track, and near to it. The long side of the platform extended east and west, parallel with the house track, and about 33 to 36 feet distant therefrom. This platform was about 3 feet high. The space between the house track and the platform was covered with soft cinders. At the northeast corner of the depot, where the west end of the platform was nearest the house track, a crossing had been constructed and maintained by the railroad company for the use of teams in going to and from the platform. This crossing was made by laying boards lengthwise of the rails, on the railroad ties, on both sides and between the rails. These boards were about 16 feet long. They were not thick enough by 2 or 3 inches to come to the level of the tops of the rails. Some steps extended from the platform to the ground at the northeast corner of the depot, near this crossing, so that the length of the crossing was reduced about 2 feet, leaving about 14 feet space for the crossing. On the evening of December 26, 1905, the deceased, Michael Schabb, who was a drayman, hauled some trunks from the residence part of town to the depot. He drove over the crossing, made a turn of his wagon in the angle of the platform, and backed his wagon up against the long part of the platform. He unloaded the trunks and attempted to drive away. It was quite dark, but he was seen to drive away. After he had gone but a few feet, the wheels of the dray were heard to strike the rails of the house track, and were seen to "slew to one side," and Mr. Schabb "was hurled suddenly out of the dray, apparently over the front end thereof." The team of horses moved up a few feet and stopped. The witness who saw this paused for a moment, and, concluding that Mr. Schabb was not hurt, passed into the depot. A few minutes later Mr. Schabb was found dead under the left front wheel of his wagon. His neck was broken.

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He had attempted to cross over the railroad tracks a few feet east of the crossing prepared by the railway company.

It is alleged that the appellant was negligent for the reason that the crossing was defective, in that the rails extended above the planking, so that it made the crossing dangerous; that the crossing was located too close to the depot, and did not extend a sufficient distance to the east. It is argued by the respondents that the space between the platform and the house track was too narrow, and the soft cinders thereon made it difficult for teams to turn around therein. The appellant argues that the facts are insufficient to go to the jury, because (1) it is not shown that the decedent came to his death by reason of being jolted from his wagon, and the cause of death is mere conjecture; (2) because it is not shown that the condition of the crossing caused the decedent to attempt to cross at the place where he did; and (3) because the deceased attempted to cross the rails at a place other than the one prepared for such purpose.

These last two positions must be sustained. The fact that the space between the house track and the platform was narrow and soft, so that it was difficult for teams to turn around therein, is of no importance in this case, because it was shown by the respondents' evidence that the deceased did turn his team around and back his wagon so that the rear thereof was against the platform, where he unloaded his trunks. It is plain, therefore, that the deceased could readily have driven out over the crossing the same way he drove in. It is true there is some evidence to the effect that wagons frequently "slewed" when an attempt was made to cross the rails at an angle, and this is no doubt a fact. But there is no evidence in the record to show that a wagon once turned around could not be driven out over the regular crossing without crossing the rails at an angle, and there is no evidence that it was necessary for the deceased to attempt to cross the rails at the place where he did, viz., 3 or 4 feet to the east of the crossing which the company maintained. The crossing was at the corner of the platform nearest the depot building. It was 16 feet in length, but some steps leading from the platform occupied 2 feet of this length, leaving the driveway 14 feet in width. This was clearly sufficient for the purpose for which it was used or intended. If the deceased had used this crossing, and, by reason of its defective or dangerous condition, had been injured, complaint then might be made that the company was negligent; but when it is shown and conceded that he attempted to cross in another place, not used or intended as a crossing, the company may not be

held for an injury occurring there, because the negligence of the company was not the cause of the injury. The reason why the deceased attempted to drive his wagon across the rails of the track rather than over the crossing is not shown. It was clearly more dangerous to attempt to cross the rails where no crossing was prepared than it was to attempt to cross where a crossing was constructed for that purpose. No excuse is attempted, excepting the fact that it was difficult to turn a wagon such as deceased used in the narrow space and soft cinders between the house track and the platform. But this excuse failed when it was shown that he did turn his wagon, which was backed up against the platform before he started away. Where a railroad company has prepared a crossing over its rails, this is an invitation to the public to make use of such crossing, and the company would be liable to a person injured in using such crossing while exercising ordinary care, if the crossing proved to be unsafe for any cause of which the company was bound to take notice. If a person voluntarily or negligently turns aside from such crossing, and uses another way which is not held out as a crossing, and which is obviously more dangerous, there is no liability on the part of the company. 33 Cyc. Law & Proc. p. 929; 5 Thomp. Neg. § 6269; Carey v. Hubbardston, 172 Mass. 106, 51 N. E. 521; Kelley v. Fond du Lac, 31 Wis. 179; Tasker v. Farmingdale, 85 Me. 523, 27 Atl. 464. This is a reasonable rule, and the facts in this case are controlled by it. It is not claimed that the deceased could not see the crossing, or that the company was negligent in any other respects than those above mentioned.

Under all the facts in the case, there is no liability against the appellant, and the order granting the new trial is therefore reversed and the cause ordered dismissed

Rudkin, Ch. J., and Crow, Parker, and Dunbar, JJ., concur.

Petition for rehearing denied.

IDAHO SUPREME COURT.

REILLY ATKINSON

v.

BOARD OF COMMISSIONERS OF ADA COUNTY.

(— Idaho, —, 108 Pac. 1046.)

Statute — authorizing county to build railroad — constitutionality.

1. The act of the legislature approved

Headnotes by AILSHIE, J.
28 L.R.A. (N.S.)

March 16, 1909 (Sess. Laws 1909, p. 238), providing for the formation of railroad districts and the voting of bonds and purchase or construction of railroads by such districts, and providing for operating or leasing the same, is in violation of the provisions of § 4 of article 8 of the state Constitution, and contrary to the spirit of §§ 2 and 3 of article 8 and § 4 of article 12 of the Constitution.

Constitutional law — prohibited acts — authorizing by indirect method — validity.

2. That which the Constitution directly prohibits may not be done by indirection or by a general legislative act which is meant and intended to include and accomplish the purposes and objects specifically or impliedly prohibited.

County — right to build railroad.

3. It was never anticipated or intended by the framers of the Constitution that counties or other political subdivisions would or could enter into the business of railroad building, but, on the contrary, the specific prohibitions found in the Constitution manifest a clear purpose and intent to prohibit the state or county, or any subdivision thereof, from entering into any such enterprise.

Same — governmental power.

4. The building of a railroad is not, within itself, an exercise of governmental power, but is purely a business enterprise; and if it is to be engaged in by the state or any of its political subdivisions, it must be done by virtue of the proprietary powers of the state or political subdivisions thereof, and not under the police or general welfare powers of the state.

(May 25, 1910.)

Note. — Power of legislature to authorize counties or other political divisions to build, purchase, or operate railroad or street railway, as affected by limitations or restrictions on power to aid private enterprises.

The few cases involving this question have considered it with reference to legislative power under constitutional restrictions or limitations, as did the court in ATKINSON v. ADA COUNTY. Hence, the question necessarily discussed was the legislative power to authorize counties or other political divisions to acquire a railroad or street railway, indirectly to aid a private enterprise, where power to render aid was limited or restricted by constitutional provisions. Each decision was necessarily based on the language of the restriction or limitation, and hence it is seldom that an individual case will be found an entirely satisfactory precedent for other cases, where the restrictions or limitations imposed by the Constitution, or the circumstances or conditions under which the power is sought to be exercised, are, to any substantial extent, different. Nevertheless, certain principles are recognized by such cases, which are of value in testing the constitutionality of an attempted

APPPLICATION for a writ of mandamus to compel the commissioners of Ada County to call an election for the purpose of voting on the formation of a railroad district, as provided by law. Denied.

The facts are stated in the opinion.

Messrs. Karl Paine and B. S. Crow, for plaintiff:

The act is constitutional.

Nampa & M. Irrig. Dist. v. Brose, 11 Idaho, 474, 83 Pac. 499; *Cincinnati v. Dexter*, 55 Ohio St. 93, 44 N. E. 520.

The limitations and restrictions of the act apply to political subdivisions of the state, and not to districts created to promote internal improvements.

Re Madera Irrig. Dist. Bonds, 92 Cal. 296, 14 L.R.A. 755, 27 Am. St. Rep. 106, 28 Pac. 272, 675.

Messrs. D. C. McDougall, Attorney General, C. P. McCarthy, J. H. Peterson, and O. M. Van Duyn for defendant.

Ailshie, J., delivered the opinion of the court:

This is an original action commenced in this court, praying for the issuance of a writ of mandate against the commissioners of Ada county, requiring and compelling them to make an order calling an election for the purpose of voting on the formation of a railroad district in the manner authorized and provided for by the act of March 16, 1909 (Sess. Laws 1909, p. 238). The real question involved in this proceeding is the constitutionality of this statute. The act is intended to authorize the formation of railroad districts by a vote of the resi-

exercise of such power under varying conditions and constitutional restrictions or limitations.

Thus, the cases are in harmony upon the proposition that constitutional restrictions or limitations upon the legislative power to authorize governmental corporations to lend their credit or give money to aid in the construction of a railroad cannot be avoided by an indirect exercise of the power, under the guise of authorizing the construction of a railroad by governmental corporations, where the primary purpose or object is to aid a private enterprise, in violation of a constitutional provision against giving such aid, rather than to build a railroad the title to which shall be retained by the corporation building it, and which the common good and general welfare of the people of the political division require. *Pleasant Twp. v. Aetna L. Ins. Co.* 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215; *Aetna L. Ins. Co. v. Pleasant Twp.* 10 C. C. A. 11, 22 U. S. App. 510, 62 Fed. 719 (same case after return to lower court); *Underground R. Co. v. New York*, 116 Fed. 960; *People ex rel. Murphy v. Kelly*, 76 N. Y. 475; *Sun Printing & Pub. Asso. v. New York*, 152 N. Y. 257, 37 L.R.A. 788, 46 N. E. 499; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Taylor v. Ross County*, 23 Ohio St. 22; *Wyscaver v. Atkinson*, 37 Ohio St. 80; *Counterman v. Dublin Twp.* 38 Ohio St. 515.

Thus, in *Pleasant Twp. v. Aetna L. Ins. Co.* 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215, it was said that, in determining the constitutionality of any statute, its scope and effect are as proper for consideration as its language,—“The eyes of the court are never limited to the mere letter.” Thus, examining into the scope and effect of a statute which authorized in general terms certain townships to build railroads, and to lease or operate the same, it was said that this act contemplated the construction of a limited distance of track whose value could only be secured by mingling the funds of the township with other capital; the circumstances clearly disclosing that there was no thought or possibility of the township to

which the act related equipping and owning an independent railroad, and that the only practical value and the only real resulting benefit would be the incorporation of this roadbed into a railroad then projected, and to be practically operated and made effective only through private capital. Such circumstances, the court said, established an intent to further the projected line through public aid, and meant not the building and ownership of a railroad by the township, but aid to a projected and lengthy line of railroad. Similar acts relating to other townships were held to be unconstitutional in *Wyscaver v. Atkinson* and *Counterman v. Dublin Twp. supra*.

A distinction was made both in the decision in the Supreme Court of the United States in *Pleasant Twp. v. Aetna L. Ins. Co.* and in the last-mentioned cases between the constitutionality of a legislative act authorizing political divisions to construct a railroad where such construction was necessary to the business interests of such political division, and where the railroad would be a mere convenience. In *Pleasant Twp. v. Aetna L. Ins. Co.* it was said that it was one thing for a large city, with its concentration of business interests, to build, equip, and own a great railroad highway running from such center outward into other districts, rapid and easy communication with which advances its business interests, and a very different thing for a quasi public corporation, as a township, with its sparse population, its lack of concentration of business interests, to construct a few miles of railroad through its territory, and added: “Business may demand the one, convenience alone supports the other. The justification of the one is in the private and business element which enters into a municipal corporation proper, the absence of which element in a quasi corporation, like a township, forbids its investment in railroad enterprises.”

In using this language, the court was considering and distinguishing the case of *Walker v. Cincinnati*, *supra*, which held that there was no constitutional limitation on the general legislative power vested in the gen-

dent landowners of the districts. It provides for the manner of organizing the district, the election of directors, the voting of bonds, the selection and acquiring rights of way, and the building and constructing of lines of railroad, and operating or leasing the same. The act appears to have been very carefully drawn, and conforms very closely to the provisions of the irrigation-district laws of this state, providing substantially the same method of formation of the district, of levying and collecting assessments, determining benefits, and other incidents and details of the irrigation act.

Sections 2, 3, and 4 of article 8 of the state Constitution read as follows:

"Sec. 2. The credit of the state shall not, in any manner, be given or loaned to or in aid of any individual, association, municipality, or corporation; nor shall the state, directly or indirectly, become a stockholder in any association or corporation.

"Sec. 3. No county, city, town, township, board of education, or school district, or other subdivision of the state, shall incur any indebtedness or liability, in any manner or for any purpose, exceeding in that year the income and revenue provided for it for

such year, without the assent of two thirds of the qualified electors thereof, voting at an election to be held for that purpose; nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state.

"Sec. 4. No county, city, town, township, board of education, or school district, or other subdivision, shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner, to or in aid of any individual, association, or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract, or liability of any individual, association, or corporation in or out of this state."

Section 2 prohibits the state in any manner ever becoming interested with any indi-

eral assembly, which prohibited it from authorizing a city to raise by taxation of its citizens the means for constructing a railroad leading into such city, when such an improvement was deemed by a majority of the citizens to be essential to its interests.

This case was also distinguished in *Taylor v. Ross County*, supra, which held unconstitutional a statute authorizing any county, township, or municipality to levy certain taxes for the purpose of building so much of a railroad as could be built for that amount, the railroad being of no practical utility to such political division, except to be used for the unlawful purpose of aiding a private enterprise, and the sale of the railroad by the county commissioners, either at or after its construction, being authorized by the act. The court said that this act attempted to accomplish by an indirection what would be a plain violation of the expressed provision of the Constitution to do directly, and added: "Where public credit or money is furnished to be used in part construction of a work which, under the statute authorizing its construction, must be completed, if completed at all, by other parties, out of their own means, who are to own or have the beneficial control and management of the work when completed, the public money or credit thus used can only be regarded within the meaning of the constitutional provision in question as furnished for or in aid of such parties."

In this connection, it is of interest to note that in reaching this conclusion in *Taylor v. Ross County*, the court referred to and distinguished *Walker v. Cincinnati*, principally upon the ground that the statute under consideration in the latter case author-

ized the construction of a railroad which was of special interest to the people of the political division constructing same, and which was to remain the property of such municipality; while in the case then under consideration, the railroad would not be of special interest to the political division constructing it, and a sale thereof was authorized by the statute delegating the power to construct.

The latter distinction would seem to be of no great practical value as a test of the constitutionality of such an act, in view of the later decision of that court in *Cincinnati v. Dexter*, 55 Ohio St. 93, 44 N. E. 520, which held that the city of Cincinnati, having constructed such railroad under the act the constitutionality of which was sustained in *Walker v. Cincinnati*, might thereafter sell it to private parties.

It has been denied that it is a city purpose within the meaning of the constitutional provision against the levying of taxes by cities for other than city purposes, for a city to construct a railroad not wholly within its borders, and of which it is only a terminal point. See remarks to that effect by Earl, J., in *People ex rel. Murphy v. Kelly*, supra.

It has been held, however, that a city may be lawfully authorized to construct a street railway or subway wholly within the borders of the city, where it is clearly to the business interests of the city that such railway be constructed, and where the circumstances are such that private capital cannot be induced to engage in such construction; and the fact that the purpose of the construction is to lease the railway so constructed to private parties does not ren-

vidual, association, or corporation in any business enterprise, and it likewise prohibits the state in any manner loaning its credit to the aid of such an enterprise, or becoming a stockholder therein; while § 4 makes substantially the same prohibition against any county, city, town, township, board of education, school district, or other subdivision of the county or state, ever lending its credit, either directly or indirectly, to any business enterprise in aid of any individual, association, or corporation. Section 4 of article 12 reiterates substantially the same thing with reference to counties and municipal corporations as is provided against in § 4 of article 8. Section 4 of article 12, however, specifically authorizes cities and towns to contract indebtedness for "school, water, sanitary, and illuminating purposes," thereby excluding all other purposes not governmental in their character.

It is argued by the plaintiff in this case that under the authority of *Nampa & M. Irrig. Dist. v. Brose*, 11 Idaho, 474, 83 Pac. 499, holding the district irrigation law of this state valid and constitutional, that it must necessarily and logically follow that the present act authorizing railroad districts

is also constitutional. The foregoing case is clearly not decisive of the question now before the court. There is a wide difference between the subject of and necessity for irrigation in this state and railroad building. Water, when secured, becomes appurtenant to land, and in vast sections of this state it is absolutely essential to life and habitation that it be secured by means of canals and ditches. When water is conveyed to a tract of land, it is unnecessary that it be carried further in order to be useful or marketable. It needs nothing further than application to the soil. It has, in fact, already become attached to and the chief value of the land, and will be fully as useful if not another acre be watered as if thousands adjoining be watered. But a railroad is an entirely different utility. A railroad from one man's farm to another would be of no use, nor would it, in many cases, be of any use from one side of a county or district to the other. It is a medium of transportation and commerce; and, in order to be of any use or value whatever, must tap centers of population, production, and manufacture. A railroad, in order to be of use or value, must extend from some place to somewhere. The

der the construction unlawful. While the case, as to the facts, goes no further than above indicated, yet, in considering the scope of constitutional limitations upon the power of political divisions to give money or their credit to or in aid of any individual, association, or corporation, or to become owners of stock of any such individual, association, or corporation, the court said that such provision was not intended to and did not prohibit municipalities from constructing their own roads and paying therefor when necessary and authorized by the legislature.

To the same effect is *Underground R. Co. v. New York*, supra.

Compare with *Atty. Gen. ex rel. Barbour v. Pingree* (Oren ex rel. Barbour v. Pingree), 120 Mich. 563, 46 L.R.A. 414, 79 N.W. 814, which holds it to be a violation of the constitutional provision against the state engaging in the work of internal improvement for a city to purchase and operate a street railway system then in existence and operation, wholly or partially within the city; and a legislative act delegating such power to a city is therefore unconstitutional, as violative of such provision.

See, however, *Platt v. San Francisco* (Cal.) 110 Pac. 304, which holds that a street railway system is a public utility which the state may invest a municipality with the power to acquire and operate. On this point it was said: "The existence and proper conduct of such utilities in cities clearly constitute public affairs, one relating very closely to the well-being, safety, health, advantage, and convenience of all the inhabitants thereof, and are well with-

in the legitimate functions of government. If the state deems it conducive to the welfare of the inhabitants of a city that the municipality shall have the power to itself acquire and operate for their benefit any such utility, in order that they may not be dependent solely on the establishment or operation thereof by some private corporation or person, there can be no doubt of its right to confer such power on the municipality."

It is to be noted that *ATKINSON v. ADA COUNTY* was decided upon the theory that the statute under consideration did not contemplate bona fide acquisition or construction of railroads as public utilities, to be operated by the political division constructing same for the benefit of the inhabitants thereof. It was based upon the theory that the purpose of acquiring or constructing railroads thereby authorized was to avoid the constitutional limitations upon the power of a political division to aid or lend its credit to railroads or other private purposes. It is the latter question that has been considered herein, and no attempt has been made to consider the power of a state to authorize political divisions to acquire bona fide a railroad or street railway, to be used by it as a public utility for the benefit of its inhabitants, where not considered with reference to a constitutional provision against aiding a private enterprise, and the cases bearing thereon are not included herein,—*Atty. Gen. ex rel. Barbour v. Pingree* and *Platt v. San Francisco* being the only exceptions, and they are included simply for the purpose of distinguishing the two questions, and to direct attention thereto.

act in question authorizes the building of "railroads," but the result under the act must necessarily be that a district can only build a part of a road,—a branch line or feeder to a main or trunk line. As a court, we cannot be ignorant of that which is common knowledge. With the wisdom of legislation we have nothing to do, but it is our duty to look to the results an act will and is intended to accomplish, and determine whether those results will be violative of the Constitution. If each community is to be authorized to form a district and bond itself to build a stub or branch line to connect with the main transcontinental trunk lines, will they not be absolutely at the mercy of the trunk line? And will it not result in the district building the branch line for the use of or donation in whole or in part to the main line, and thereby doing indirectly the very thing § 4 of article 8 of the Constitution forbids and prohibits. No one anticipates or expects that a district, as authorized by this act, either can or will operate a line of railroad extending through or across such district only. It is to all purposes and intents an inducement or subsidy to a main or through line. If it is constitutional to build such a line of road by a district, it would be constitutional to authorize its sale, and thereby "indirectly . . . aid . . . a corporation," in violation of the Constitution.

In *Wyscaver v. Atkinson*, 37 Ohio St. 80, the supreme court of Ohio had under consideration an act passed by the legislature in 1880, "to authorize certain townships to build railroads, and to lease or operate the same." That act provided that townships falling within a certain class might vote bonds and construct a line of railroad, and do the things necessary and incident thereto. The court held the act to be in violation of § 6 of article 8 of the Constitution of Ohio, which reads as follows: "The general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation, or association whatever, or to raise money for, or loan its credit to or in aid of, any such company, corporation, or association." In considering this question, the supreme court said: "Was it contemplated that a complete and independent railroad should be constructed by the township? We think not, and therefore, without speculating as to the matter in which it was intended that the result should be accomplished, it is quite evident, to our minds, that the legislative intent, as well as that of the trustees of the township, was that the proposed road should, in some manner and by some means, become consolidated or con-

nected with other roads, as part of a more extended line of railway, in order to make it at all subservient to the public welfare; and that in no other way could it be made of public utility. The purpose and effect of the statute is to unite the means and credit of the township with those of other parties, in order to promote a common enterprise; to wit, the construction of a continuous line of railway, which could not be accomplished without such combination of interests."

The court quoted with approval from the opinion in *Walker v. Cincinnati*, 21 Ohio St. 54, 8 Am. Rep. 24, as follows: "The mischief which this section interdicts is a business partnership between a municipality, or subdivision of the state, and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders, nor furnish money or credit for the benefit of the parties interested therein. Though joint-stock companies, corporations, and associations only are named, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same, whether the public suffered from the cupidity of a single person or from that of several persons associated together." The learned justice who wrote the opinion in *Wyscaver v. Atkinson*, after quoting the above extract from *Walker v. Cincinnati*, added the further comment: "And I will add that it makes no difference whether the scheme for the union of public and private money or credit originates with the party or parties representing the public or the private interests. In short, the thing prohibited is the combination in any form whatever of the public funds or credit of any county, city, town, or township with the capital of any other person, whether incorporated or unincorporated, for the purpose of promoting any enterprise whatever." In *McDonald v. Doust*, 11 Idaho, 24, 69 L.R.A. 220, 81 Pac. 63, this court said: "Acts inconsistent with the spirit of the Constitution are as much prohibited by its terms as are acts specifically enumerated and forbidden therein." This position is reinforced by the further fact that railroad building is not, within itself, an exercise of governmental power, but is purely a business enterprise, and must be justified, if at all, under the proprietary powers of the state or political subdivision. Previous action of the legislature and the people with reference to

this provision of our Constitution is a pertinent and proper subject of inquiry. In March, 1905, the legislature, by joint resolution, submitted to the people a proposition to so amend § 4, art. 8, Const., as to authorize a "county, city, village, municipality, or other subdivision of the state," by vote of the people, to "make donations to any railroad or other works of internal improvement" to an amount not exceeding 10 per cent of the assessed valuation of such county. That amendment was defeated by an overwhelming vote of the people. In this respect we have a positive declaration from the people against any participation by the counties or any of their subdivisions in railroad building in aid of "any individual, association, or corporation."

It is said that this provision does not prohibit the county or other subdivision building and owning a road in its entirety. It is true that the prohibition against absolute ownership is not, in so many words, to be found in the Constitution, but it is clear from the context and the language employed in §§ 2, 3, 4, article 8, and § 4, article 12, that it was never contemplated that the counties or other political subdivisions would or could go into railroad building, and so the framers of the Constitution forbade donations or ownership in part. They evidently appreciated the fact that a railroad, to be of any value to the people of Idaho, must extend further than across a county or even across the state,—that it must reach the markets, not merely at one end of the line, but at both ends. If the people want to authorize the formation of railroad districts, they can readily do so by adopting an amendment to the Constitution; but until they do so, we are constrained to hold such acts in conflict with the Constitution. The act in question is, in our opinion, violative of the spirit and intent of the Constitution (§§ 2, 3, 4, article 8, and § 4, article 12), and cannot be upheld.

The demurrer to the complaint is sustained, and the action will be dismissed. No costs awarded.

Sullivan, Ch. J., and Stewart, J., concur.

MICHIGAN SUPREME COURT.

RE WILL OF THOMAS KENNEDY, Deceased.

(159 Mich. 548, 124 N. W. 516.)

Will—intention—parol evidence.

Parol evidence is not admissible to show that testator did not intend an instrument
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executed in pursuance of the formal requirements of the statute of wills to be a will.

(February 3, 1910.)

ERROR to the Circuit Court for St. Clair County to review a judgment affirming a judgment of the Probate Court admitting to probate the will of Thomas Kennedy, Deceased. Affirmed.

The facts are stated in the opinion.

Messrs. David Fitzgibbon and John B. McIlwain, for appellants:

Parol evidence of the statements of the testator made at the time of the execution of the paper writing is admissible to show with what intention the execution of the instrument was accompanied, and to establish the fact that the testator did not intend it as a will to operate and be in force at his death as a disposition of his property, and such being the fact the paper writing never became a valid will.

1 Underhill, Wills, § 39, 30 Am. & Eng. Enc. Law, 2d ed. pp. 572, 581; Sunday's Estate, 167 Pa. 30, 31 Atl. 353; Lister v. Smith, 3 Swabey & T. 288, 29 Am. & Eng. Enc. Law, p. 159; Southern Street Railway

Note.—Admissibility of extrinsic evidence to show that instrument, on its face a will, was not intended as such.

This note is confined strictly to cases passing on the question whether an instrument unambiguous, and on its face a will, may be shown by extrinsic evidence not to have been intended as such. The question, therefore, whether parol evidence is admissible to show that an ambiguous instrument was intended as a will is not within the scope of this note.

A case supporting the doctrine laid down in RE KENNEDY, is Heaston v. Krieg, 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805, where it was said that where a writing contains every element of a valid will, and is incapable of operating in any other way, the *animus testandi* must be implied, and the instrument, supposing it to be regularly executed, is not subject to control by parol evidence tending to show any different intent.

This doctrine was evidently also recognized in Shaw v. Shaw, 1 Dem. 21.

And see Barnewall v. Murrell, 108 Ala. 366, 18 So. 831, sufficiently set out in the KENNEDY CASE.

A case not strictly in point, but of possible interest in this note, is Sewell v. Slingluff, 57 Md. 537, where it was held that parol evidence is not admissible to prove that a paper in form a valid will was in fact intended to be used and probated only in the event of the testatrix dying without issue, and that in the contingency of her dying leaving issue, it should be wholly inoperative, and her estate should pass as if it had never been executed. This

Advertising Co. v. Metropole Shoe Mfg. Co. 91 Md. 61, 46 Atl. 513; Swett v. Boardman, 1 Mass. 262, 2 Am. Dec. 16; Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155; Waite v. Frisbie, 45 Minn. 361, 47 N. W. 1069; Whyte v. Pollok, L. R. 7 App. Cas. 400; Nosworthy's Goods, 11 Jur. N. S. 570; Nichols v. Nichols, 2 Phillim. Eccl. Rep. 180; Spence v. Huckins, 208 Ill. 304, 70 N. E. 289; 9 Enc. Ev. pp. 334, 335; Waid v. Hodson, 17 Colo. App. 54, 67 Pac. 176; Robinson v. Nessel, 86 Ill. App. 212; Earle v. Rice, 111 Mass. 17; Grierson v. Mason, 60 N. Y. 394; Sigafus v. Porter, 28 C. C. A. 443, 51 U. S. App. 693, 84 Fed. 430; Burke v. Dulaney, 153 U. S. 234, 38 L. ed. 700, 14 Sup. Ct. Rep. 816; Ware v. Allen, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174; Adams v. Morgan, 150 Mass. 143, 22 N. E. 108; Nutting v. Minnesota F. Ins. Co. 98 Wis. 32, 73 N. W. 432; Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127; 1 Greenl. Ev. § 284, p. 439; Fulton v. Priddy, 123 Mich. 298, 81 Am. St. Rep. 201, 82 N. W. 65; Farwell v. Ensign, 66 Mich. 600, 33 N. W. 734; Gibson v. Miller, 29 Mich. 355, 18 Am. Rep. 98; Robinson v. Blood, 10 Kan. App. 576, 62 Pac. 677; Brick v. Brick, 98 U. S. 514-516, 25 L. ed. 256, 257; Bush v. Merriman, 87 Mich. 268, 49 N. W. 567; Cleveland Ref. Co. v. Dunning, 115 Mich. 238, 73 N. W. 239; Church

v. Case, 110 Mich. 621, 68 N. W. 424; Atwood v. Gillett, 2 Dougl. (Mich.) 218; Cutler v. Steele, 93 Mich. 208, 53 N. W. 521; Holland v. Hoyt, 14 Mich. 242.

Declarations of the testator made at the time of the signing of the instrument, showing his purpose and intention in signing the same, are a part of the *res gestæ*, and admissible in determining whether the testator intended to give the instrument the force and effect of a will.

Dan v. Brown, 4 Cow. 483, 15 Am. Dec. 395; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Eighmy v. People, 79 N. Y. 558; Comstock v. Hadlyme Ecclesiastical Soc. 8 Conn. 254, 20 Am. Dec. 100; Re Calkins, 112 Cal. 296, 44 Pac. 577; Re Donovan, 140 Cal. 390, 73 Pac. 1081; Linebarger v. Linebarger, 143 N. C. 229, 55 S. E. 709, 5 A. & E. Ann. Cas. 596; Shailer v. Bumstead, 99 Mass. 112; Greenl. Ev. 16th ed. 760.

Messrs. Walsh & Walsh, for appellees:

The will cannot be vitiated after testator's death, by allowing the person who drew it to state that the allegations contained in the will are false, and that the instrument was not a will.

Abbott v. Abbott, 41 Mich. 542, 2 N. W. 810; Zibble v. Zibble, 131 Mich. 655, 92 N. W. 348; Barnewall v. Murrell, 108 Ala. 366, 18 So. 831; Taylor v. Cox, 153 Ill. 224, 38

court in distinguishing *Lister v. Smith*, 3 Swabey & T. 282, and *Nichols v. Nichols*, 2 Phillim. Eccl. Rep. 180, said: "These cases go, perhaps, as far as any cited in allowing parol evidence. But in these and in all other cases referred to, the courts have restricted the evidence to the ascertainment of the *animus testandi*, and have never gone beyond that. Even if we were to admit that these cases were well decided (which we do not determine), we consider the parol evidence offered in this case inadmissible. If it were in any such case admissible, we would be unwilling to reject it in this, as the straightforward testimony and disinterested conduct of the husband of the testatrix presents a strong case, and one with many equitable features, strongly appealing to our sense of justice. But we must take the law as we find it; and as in all the long period that has elapsed since the passage of the act of 29 Charles II., no court has permitted such testimony to be received, we cannot do so now."

There are other cases closely related to the cases presenting the question here annotated, which also might be cited in support of the *KENNEDY CASE*.

Such a case is *Jackson ex dem. Coe v. Kniffen*, 2 Johns. 32, 3 Am. Dec. 390, where it was held that parol evidence of declarations of a testator are not admissible to show that a will was made under duress.

It will be noticed, however, that such cases cannot be said to be strictly in point. 28 L.R.A. (N.S.)

and no effort has been made to include all of them here.

So, in *Moran v. Moran*, 104 Iowa, 216, 39 L.R.A. 204, 65 Am. St. Rep. 443, 73 N. W. 617, it was held that a devise absolute in form cannot be shown by oral evidence to be in trust for other persons.

But to the contrary see *Vance v. Park*, 15 Ohio C. C. 713, where it was said, however, that such proof must be "clear, convincing, and conclusive."

A case holding directly contrary to the *KENNEDY CASE* is *Lister v. Smith*, 3 Swabey & T. 282. This case is sufficiently set out in the *KENNEDY CASE*.

That a will might be shown by extrinsic evidence not to have been written with a testamentary intention was also held in *Nichols v. Nichols*, 2 Phillim. Eccl. Rep. 180.

So, in *Fleming v. Morrison*, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499, the court was of opinion that it is competent to contradict by parol the solemn statements contained in an instrument that it is a will, that it has been signed as such by the person named as the testator, and attested and subscribed by persons signing as witnesses.

On the question whether an instrument not on its face of a testamentary character may be shown by extrinsic evidence to be such so as to take effect as a will, see note to *Noble v. Fickes*, 13 L.R.A. (N.S.) 1203.

N. E. 656; Clay v. Layton, 134 Mich. 341, 96 N. W. 458.

Blair, J., delivered the opinion of the court:

Thomas Kennedy died in the fall of 1908. In 1897 he signed a paper in the form of a will. The paper was drawn by John L. Black, and he and his nephew, Clare R. Black, are the witnesses. This paper was allowed in the probate court as the last will and testament of Thomas Kennedy. An appeal was taken to the circuit court by the brothers of deceased. The case rested on the testimony of the two subscribing witnesses, whereupon the circuit judge directed a verdict sustaining the document as the last will and testament of Thomas Kennedy, deceased. The contestants, his brothers, appeal and contest on the ground that the paper was not executed to operate as a will, and not executed as required by the statute.

John L. Black testified that he was an attorney at law and, up to January 1, 1897, had been judge of probate; that he drew the will in question, February 11, 1897; that, at Mr. Kennedy's request, he locked the door so that they should not be interrupted. "I remember that will being signed by Thomas Kennedy. I saw him sign it."

Q. In the presence of yourself and Clare R. Black?

A. I cannot remember about Clare, but I remember myself; I did not know Clare was a witness to it until I saw it here in probate court. As a matter of memory I could not recall who it was that signed it besides myself. He writes a little different, but have no doubt but that is his signature. I recall that Thomas Kennedy signed the will in my presence and that I signed it in his presence, at his request. I was well acquainted with Mr. Kennedy. He was in good bodily and mental condition at the time he signed it; no question about it in my mind. . . .

Q. Just state to the jury what he said he wanted.

A. Why, he wanted some paper; he was having trouble out there with the boys, as he put it, and they were making him a good deal of trouble, and insisting upon knowing what he was going to do with his personal property, and I think at the same time he told me that he had already disposed of his real estate; that is the way I understood him, and he said they kept at him and kept hounding him all the time, and that he wanted me to draw some kind of a paper that would be a peacemaker, that he could take out home. I told him at that time, "Mr. Kennedy, you don't have to make any kind of a paper, you are too old a man to make any kind of a paper," and he said to

me, as I remember it, "You don't know the conditions out there as well as I do," and we talked it over one way and another. First we talked about a bill of sale, and I told him, if I remember right, some kind of a paper he had in mind that it was going to be a dangerous paper, and then he talked about putting it in the form of a will. I said that would be better because "You can destroy it any time." So I drew him up a paper, the paper that is here, and he signed it. . . . He said it was not a will; that at some future time he would draw a will.

Q. Did you have any talk at that time with him about keeping it in your safe?

A. Yes, I insisted, I said, "Mr. Kennedy, leave that with me, don't take it out there; and if you don't want it, why, if anything should happen you, I could destroy it for you," but he said, "No;" he would have to take it out there as a peacemaker. . . . He went over pretty near the history of his life with me, because I was at him for being so foolish as to sign a paper that he didn't want to sign. . . .

Q. He told you he had made some disposition of his real estate at that time? . . .

A. Well, he told me in a general way that he had made a disposition, and that he wanted that put in the will that he had made a disposition of his real estate, in that paper there that he had made a disposition of his real estate during his lifetime.

Q. And you put that clause in here?

A. I put that clause in.

That the ink of Clare R. Black's signature was of a lighter hue than that used by Mr. Kennedy and himself; that he did not sign the paper as an instrument intended to become operative as a will, and, so far as he knew, neither did Clare R. Black; that from the time he drew the paper until the time Mr. Kennedy left the building with it he was constantly with him; that Clare R. Black might have signed the will as a witness in the presence of Mr. Kennedy and himself, and he might have taken the will into Clare R. Black's office and he have signed here.

Q. But you told me a minute ago that the will and yourself,—that you were with the will all the time until the old man took it away that day?

A. Yes, sir.

Q. For you do not remember taking it away from the old man in next door?

A. No, I do not; and I don't remember of Clare coming in there either.

Clare R. Black, a practising attorney, testified to the genuineness of his signature:

Q. Now, Mr. Black, you state now that you have no memory of ever being called upon to witness any other will, except that one

of Mr. Atkinson's, prior to your becoming a member of the bar?

A. No, sir.

Q. If you had been called into the office of John L. Black, and it had been made known to you either by Mr. Black or by Mr. Kennedy that Mr. Kennedy was making his will, and he had signed it or was going to sign it, and wanted you and Mr. Black to witness it, or wanted you to join with Mr. Black to witness it, and you did so join with him in witnessing it; what do you say whether you would have remembered it?

A. I believe I would have.

Q. What do you say now as to whether any such transaction as that occurred in February, 1897, in connection with the execution of the document presented here as a will?

A. As to whether I went in there and Mr. Kennedy asked me to sign this as his witness and told me what it was?

Q. That he was making a will and wanted you to sign as a witness, or Mr. Black in his presence and you did sign as a witness to his making his will; what do you say as to whether any such transaction as that occurred?

A. Well, from memory I would say, "No."

The court directed a verdict for the proponents, instructing them that the will had been executed in pursuance of the formal requirements of the statute, and that parol testimony that the testator did not intend that the instrument should operate as a will was not receivable. "The presumption is that this paper was executed, subscribed, and attested or witnessed as it purports to be on its face, and the mere fact that Mr. Black, one of the witnesses, fails to remember the circumstances under which he subscribed and attested this will cannot, under the law of this state, be allowed to defeat it. The court instructs you that these statutory formalities of execution have been complied with in this case as shown by the evidence. That is, the paper claimed to be a will is in writing, it is signed by Mr. Thomas Kennedy, it was attested and subscribed in the presence of the testator by two or more competent witnesses, hence, you must assume that the paper here claimed to be a will was executed in the form and manner as prescribed by law. The contestant also claims, as heretofore stated, that Mr. Kennedy at the time he executed this paper did not intend to make a will, but signed the paper merely to satisfy his relatives, the family of John Cavanaugh, Mr. Cavanaugh being the beneficiary under the will, and this being the family with whom Mr. Kennedy was living. Mr. John L. Black testifies that Mr. Kennedy said to him just before

the paper was prepared, signed, and witnessed, that he, Mr. Kennedy, did not intend the paper for a will, but merely to satisfy the sons of John Cavanaugh, who were hounding him about his property. The court says to you that this testimony cannot be received and considered to invalidate the paper and render it of no effect as a will. Parol testimony of this kind when it arises, separate and apart from any question of fraud, undue influence, mental competency, or of ambiguity in the paper proposed as a will, cannot be permitted to overcome the presumption that the testator, in executing a solemn instrument like a will, intended the paper, not for a will, but to serve some collateral and extraneous purpose. To admit such testimony to defeat a will in a case like this would to some extent tend to defeat the right which every sane and competent person has under our laws to make a final disposition of his property by will, and to have his or her wishes in regard to property carried out after death. The momentous consequence of permitting parol evidence to thus outweigh the sanction of a solemn act is obvious. It would have a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said and what he put in solemn written form. Hence, gentlemen of the jury, it is the duty of the court in this case to direct a verdict in favor of the proponent of the will."

The will gave all of his personal property to his sister's husband, John Cavanaugh. The important question presented by this record is whether the court erred in holding, as a matter of law, that evidence was not admissible to show that the alleged will was executed for a collateral purpose, and that the testator did not intend it to operate as a will disposing of his property. Stated in another way, the question is: Is an instrument purporting to be a will, and executed with all the statutory formalities, conclusively presumed to have been executed *animo testandi*? This question is one of first impression in this court. As stated by the circuit judge, the question is wholly separate and apart from any question of fraud, undue influence, or mental competency in the procurement of the will, or of ambiguity in the meaning of its provisions. The evidence conclusively shows that the testator was of sound mind, was laboring under no mistake of fact, knew precisely what he was doing, and intended to do precisely what he did do,—viz., to execute, according to the forms prescribed, a paper on its face disposing of his estate with knowledge that he could revoke it at any time.

Accepting the testimony of the scrivener,

it must be presumed that he exhibited the will to his brother-in-law as his genuine will, for the purpose of securing peace in the family and securing those attentions which he required.

Q. You understood from him that he was making his home at the Cavanaughs?

A. I did; yes. Mrs. John Cavanaugh was his sister.

Q. What reason did he give for making his home there?

A. If I remember right, that his father and brothers were keeping bachelor's hall or something of that kind, and it was handy for him over there; that he could get his clothes cared for and one thing and another with his sister, and he made his home there and lived with them. I don't know how long he had been living there, but if I remember right, he told me that he taught school out in Emmett, too, and had made his home there while he was teaching school. Then he came in here and remained a great many years when he was here as deputy county treasurer. He made his home then at Mr. Walsh's hotel. He had either left the county treasurer's office or was about going to leave, I don't remember just which, and he was going back to make his home with the Cavanaughs, or had made it when this trouble arose out there, whatever it was, he wouldn't tell me the details of it.

Q. So that just before this will had been made he was here to town for eight years?

A. For eight to twelve, somewhere along there.

The testimony of the scrivener also discloses that Mr. Kennedy intended at a future time to make a will, but never spoke to him again about the paper in question or the making of another will. For over eleven years Mr. Kennedy retained this will in his possession, so far as this record discloses, and died leaving it unrevoked. There can be no doubt that a presumption of testamentary intention arises from the deliberate execution, by a competent person, of a paper in the express form of a will, in strict pursuance of the provisions of our statute regulating the execution of wills. Whether this presumption is a disputable one is the serious question in this case.

Respectable authorities are cited by counsel for contestants, some of which are directly in point, holding that parol evidence is receivable in such cases. The case of *Lister v. Smith*, 3 Sawbey & T. 282, is such a case. In that case, the question was whether a certain codicil was entitled to probate. It was regularly executed by the testator, but evidence was given at the trial that the testator never intended it seriously to operate as a testamentary document. It was proved

before the jury that the testator wished one of his family to give up a house which she then occupied, and that, to force her to do so, he made pretense of revoking by codicil a bequest which he had made by will in favor of this woman's daughter, and that the paper in question was made with that sole object; that the testator gave his attorney instructions to prepare it with that intention, and informed him before it was drawn that he never wished it to operate at all; further, that the attorney pointed out the folly of executing such an instrument, and would have nothing to do with its execution. It was, however, executed in the presence of the testator's brother, to whom it was then given by the testator, with express directions that he was not to part with it, and that it was in no event to operate or to revoke the bequest made in his will, but to be used only in the manner above described. Similar declarations were made by the testator at the moment of its execution. The court said: "The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said. On the other hand, if the fact is plainly and conclusively made out, that the paper which appears to be the record of a testamentary act was in reality the offspring of a jest, or the result of a contrivance to effect some collateral object, and never seriously intended as a disposition of property, it is not reasonable that the court should turn it into an effective instrument. And such no doubt is the law. There must be the *animus testandi*," citing *Nichols v. Nichols*, 2 Phillim. Eccl. Rep. 180; *Trevelyan v. Trevelyan*, 1 Phillim. Eccl. Rep. 149; *Swinburne, Wills*, pt. 1, § 3; *Shep. Touch.* 404; *Pym v. Campbell*, 6 El. & Bl. 370.

The court, however, recognizing the serious consequences which might flow from this holding, remarked: "But here I must remark that the court ought not, I think, to permit the fact to be taken as established, unless the evidence is very cogent and conclusive. It is a misfortune attending the determination of fact by a jury, that their verdict recognizes and expresses no degree of clearness in proof. They are sworn to find one way or the other, and they do so sometimes on proof amounting almost to demonstration, at others on a mere balance of testimony; sometimes upon written admissions and independent facts proved by disinterested parties, sometimes on conflicting oaths or a nice preponderance of credibility. And it is difficult to impress them with the enormous weight which attaches to the document itself as evidence of the animus with which it was made. This

weight it becomes the court to appreciate, and to guard with jealousy the sanction of a solemn act. In the present case, however, the court finds the evidence so cogent, that it is prepared to act on the finding of the jury that the codicil was executed as a sham and a pretense, never seriously intended as a paper of testamentary operation. But I am far from saying that the court will in all cases repudiate a testamentary paper, simply because a jury can be induced to find that it was not intended to operate as such. The character and nature of the evidence must be considered, as well as the result at which a jury have arrived, and the court must be satisfied that it is sufficiently cogent to its end."

The case of *Swett v. Boardman*, 1 Mass. 262, 2 Am. Dec. 16, cited by counsel for contestant, is to the effect that some form of publication of a will is necessary, and that it was competent to prove by parol that, at the time of executing the instrument proposed as his last will and testament, the testator did not know or suppose that he was executing a will. The case of *Waite v. Frisbie*, 45 Minn. 361, 47 N. W. 1069, also cited by counsel for contestant, merely holds that where a will is not read by nor to the testator, and it has been prepared by another person from instructions given by the testator, and is then signed upon an assurance that it expresses what he desires, if the language inserted is not the language of the instructions, and if it does not make in legal effect the provisions which the testator apparently desires, it is not his will.

See also 30 Am. & Eng. Enc. Law, 2d ed. p. 581, and cases cited; 1 Underhill, Wills, § 39.

"The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act," referred to by the court in the case of *Lister v. Smith*, supra, are still more momentous under the laws of this state, since, under the rule of evidence prevailing with us, no more cogent evidence is required to establish the fact of lack of testamentary intention in the making of an instrument, than to establish any other fact which may be submitted to a jury for its determination, and the court has no greater authority to control the verdict or influence it in such a case than in any other. Recognizing fully the high character of the authorities sustaining the contestants' position, we are inclined, as this is an open question in this state, in view of the serious consequences of the contrary view, to hold, as was held by the supreme court of Alabama in the case of *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831, that "it was, doubtless, one of the purposes of the statute, in requiring that testamentary dispositions of personal

property should be executed with the same formalities required in devises of land, to remove them from the doubt and uncertainty in this respect, which attended them while the rule of the common law prevailed. There is no other mode of giving a valid expression to the *animus testandi*, than that which the statute prescribes. Whatever form the expression may assume, whatever solemnity may accompany it, the statute declares it ineffectual, unless the formalities it prescribes are observed. When these formalities are observed, if the writing be testamentary,—if it imports a posthumous destination of property,—the statute in itself and of itself attaches, and conclusively attaches, the *animus testandi*. The requisition of extrinsic or additional evidence of its existence is to add to the requirements of the statute; and to receive such evidence to repel the existence of the intent would be to receive evidence against the statute." And, again: "When a sane testator, not subject to coercion or restraint, intentionally executes, with the formalities required by the statute, a writing which in form and substance is testamentary, the writing of itself imports, and conclusively imports, the *animus testandi*, i. e., the mind to dispose. the firm and advised determination to make a testament,—closing all inquiry as to the existence and manifestation of the intent."

Section 9262, Comp. Laws, provides for the disposition of real property by will. Section 9265, Comp. Laws, provides that every person of full age and sound mind may, by his last will and testament in writing, bequeath and dispose of all his personal estate. Section 9266, Comp. Laws, provides that no will "shall be effectual to pass any estate, whether real or personal, nor to charge or in anyway affect the same, unless it be in writing, and signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses," etc. Section 9270 provides: "No will nor any part thereof shall be revoked, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil in writing, executed as prescribed in this chapter; or by some other writing, signed, attested, and subscribed in the manner provided in this chapter for the execution of a will; excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."

No publication of the instrument is required in this state to give it effect, but the

execution of an instrument in testamentary form, with the statutory formalities, completes the testamentary act. *Danley v. Jefferson*, 150 Mich. 590, 121 Am. St. Rep. 640, 114 N. W. 470, 13 A. & E. Ann. Cas. 242.

The execution of a paper in the form of a will, under the provisions of our statute, does not place the instrument beyond the control of the testator, whether he retains possession of it himself or delivers it over to the persons for whose benefit it has been made, or to another person for them. It remains at all times subject to his control. If he retains possession of it, he may revoke it in one of the ways specified in the statute. If he has parted with the possession of the instrument, he may revoke it by making a will. The certificate of attestation is as follows:

On this 11th day of February in the year one thousand eight hundred and ninety-seven, Thomas Kennedy, of the township of Emmett, St. Clair County, Michigan, signed the foregoing instrument, and declared the same to be his last will and testament, in the presence of us as witnesses, and we, not being interested therein, at the request of said Thomas Kennedy, in his presence and the presence of each other, and where he could see us sign our names, did thereupon on said above-mentioned day subscribe our names thereto as witnesses thereto.

Clare R. Black,
Residing at Port Huron, Mich.,
John L. Black,
Residing at Port Huron, Mich.

On the back of it, in the handwriting of Mr. Black, was: "Will of Thomas Kennedy, of Emmett, St. Clair county, Michigan." It is undisputed that John L. Black witnessed the instrument in the presence of the testator.

Clare R. Black testified:

Q. Do you recall the circumstance of signing that?

A. No, sir.

Q. You haven't any present memory of going into that office? You haven't any present memory of signing that paper at all?

A. No, sir.

Q. But you have no memory one way or the other on this paper now at this time?

A. No, sir.

It is apparent, from his testimony, that he had no recollection whatever of the facts connected with his signing the will as a witness. His opinion, based wholly upon conjecture, is not sufficient to raise a question of fact for the jury, and the trial court did not err in so holding. *Abbott v. Abbott*, 41 Mich. 542, 2 N. W. 810. The declarations 28 L.R.A. (N.S.)

of the testator that he was being hounded to make a will are the sole evidence in the record of undue influence in the procuring of the will, of which fact they are not competent evidence. *Zibble v. Zibble*, 131 Mich. 655, 92 N. W. 348.

The judgment is affirmed.

MICHIGAN SUPREME COURT.

ISAAC G. JENKINS, Plff. in Err.,
v.

FRANK E. PILCHER.

(160 Mich. 349, 125 N. W. 355.)

Bankruptcy — fraud — inducing surrender of note.

Inducing the abandonment of a suit on a note and surrender of the instrument by a promise to pay the same, when falsely made to secure time to conceal assets and take advantage of bankruptcy proceedings, is not such fraud as will prevent the discharge of the debt in such proceedings.

(March 19, 1910.)

Note. — Fraud in preventing collection of claim as excepting it from discharge in bankruptcy.

Fraud as used in that part of the bankrupt law which provides that no debt created by fraud, etc., shall be discharged in bankruptcy, means positive fraud or fraud in fact involving moral turpitude or intentional wrong. *Wolf v. Stix*, 99 U. S. 1, 25 L. ed. 309.

To come within the exception the debt must be tainted with fraud in its inception. The vice must come into existence with the debt. If the contract was fair and honest when made, although the debtor may subsequently have been guilty of fraudulent conduct in respect of it, yet such conduct does not cut off the benefit of the discharge. *Brown v. Broach*, 52 Miss. 536; *Bank of North America v. Crandall*, 87 Mo. 208.

Therefore the liability of a firm which succeeded a partnership, upon its agreement to save the partnership harmless from debts contracted before the firm succeeded to the business, will not be excepted from a discharge in bankruptcy, because the successor firm forged the partnership's signature to notes and indorsed them in payment of such debts, at the same time falsely representing to the members of the former partnership that the debts had been paid. *Brown v. Broach*, supra.

Fraud which will except a debt from discharge in bankruptcy does not include such fraud as the law implies from the purchase of property from a debtor, with the intent thereby to hinder and delay his creditors in the collection of their debts. *Wolf v. Stix*, supra.

Therefore, liability upon a replevin bond

ERROR to the Circuit Court for Wayne County to review a judgment sustaining a demurrer to the declaration in an action brought to recover damages for alleged fraud and deceit in inducing plaintiff to abandon a suit on a certain promissory note and to surrender the instrument. Affirmed.

The facts are stated in the opinion.

Mr. William H. Wetherbee, for plaintiff in error:

The right in action upon the note was property.

Dunlap v. Toledo, A. A. & G. T. R. Co. 50 Mich. 474, 15 N. W. 555; Power v. Harlow, 57 Mich. 111, 23 N. W. 606.

The action for fraud or obtaining property by false pretenses, mentioned in the bankruptcy act of 1898, is the common-law form of action for fraud and deceit.

Goodman v. Herman, 172 Mo. 344, 60 L.R.A. 885, 72 S. W. 546.

Upon the theory that defendant received nothing of value, plaintiff is entitled to recover damages, which are not a provable debt, nor barred by a discharge in bankruptcy.

Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377; Joyce, Damages, § 2214.

Messrs. Jackson, Mills, Culver, & Griffin for defendant in error.

Blair, J., delivered the opinion of the court:

Plaintiff prosecutes his writ of error in this case to reverse the judgment sustaining the defendant's demurrer to his declaration.

The declaration alleges, in substance, that, for the purpose of aiding defendant to obtain a medical education, secure his admission to the practice of his profession, and support him while acquiring a practice, plaintiff loaned to defendant the sum of \$3,487.50, for which he took his note payable after date, with the understanding that defendant should repay the loan as soon as he should become established in the practice of medicine and surgery; that defendant failed to pay the note as agreed, and plaintiff brought suit against him "in the circuit court for said county of Wayne in an action

of assumpsit . . . for the recovery thereof;" that, for the purpose of getting possession of the said note and terminating the said suit, and in order that he might get time to fraudulently dispose of, conceal, and cover up his property, and later obtain his discharge in bankruptcy and defeat the collection of plaintiff's debt, defendant on the 16th of November and on previous days fraudulently represented 'that he, defendant, during a considerable time then immediately preceding, had done and transacted considerable business in his said practice and profession, but that all the money he had been able to collect and realize from his said business was the sum of \$15 during the last preceding month, which constituted his income for that month, and that he, defendant, was wholly unable from his then said income to make any payment upon said indebtedness so owing to plaintiff as aforesaid; that, if said plaintiff would surrender up said promissory note and return the same to him, defendant, and take no judgment in said cause, record and file number 43,611, and consider the same ended, he, the said defendant, would be greatly aided and assisted thereby, and would then and there be enabled to make, and would make, regular considerable payments upon said indebtedness so owing to plaintiff for the recovery of which said action was brought, . . . would make considerable and substantial payments upon said indebtedness, and would soon pay the entire amount thereof, if he were not annoyed, hindered, and prevented by actions or proceedings brought for collection and enforcement of the same;" that plaintiff, relying upon the fraudulent representations, turned back the note, took no judgment, and "considered said action at an end," "and, relying upon the same, was led and induced to, and did, delay, prolong, and put off bringing any other or further action against defendant for the recovery of said several sums until the 18th day of April, 1906, when he began a similar action in said circuit court, and, before judgment could be recovered therein, said defendant had matured, carried out, and fulfilled his fraudulent plans and intentions,

given by one against whom replevin was brought upon the alleged ground that he was a fraudulent grantee of the grantor is dischargeable in bankruptcy. Ibid. To the same effect is Re Blumberg, 94 Fed. 476, 1 Am. Bankr. Rep. 633.

It was held in United States v. The Rob Roy, 1 Woods, 42, Fed. Cas. No. 16,179, that the obligation evidenced by a forthcoming bond was not created by fraud so as to be excepted from discharge in bankruptcy, merely because the obligor used false witnesses and swore falsely himself in an

effort to establish his right to the property in the suit in which such right was adjudicated.

It was held in Gleason v. O'Mara (C. C. A.) 180 Fed. 417, that a liability for obtaining property by false pretenses or representations, within the bankruptcy act, was not established by proof that a bankrupt's false representations as to his property, alleged to have induced an attorney to accept his defense on a criminal prosecution, were not made until after the attorney had undertaken to defend the bankrupt.

as aforesaid stated, to collect, receive, and obtain from his, defendant's, said business, practice, and profession of medicine and surgery divers other large sums of money, to wit, the sum of \$10,000 and upwards, and to unlawfully, wrongfully, and fraudulently assign, conceal, secrete, and dispose of the same, and place the said sums beyond plaintiff's knowledge and ability to trace the same, and thereafter to go through bankruptcy and secure discharge from the payment of his just debts, and particularly from his said indebtedness to plaintiff. And plaintiff further avers that said statements, representations, pretenses, and promises so made by defendant, as aforesaid, were then and there false and untrue, that defendant's said promises to make regular considerable payments upon said indebtedness so owing by him to plaintiff were then and there a mere subterfuge, designedly made in connection with said statements, representations, and pretenses, as part and parcel thereof, and of the general scheme therein embraced to cheat and defraud him, said plaintiff, and with the preconceived and well-matured intention on the part of defendant not to carry out and fulfil the same or any part thereof, and not to make any payments whatsoever upon said indebtedness; that the said defendant then and there, at the time of making said false, unlawful, deceitful, and fraudulent statements, representations, and pretenses concerning his said income, was receiving in money from his said business, practice, and profession of medicine and surgery an income of nearly \$500 per month; that the said defendant in the month of October, 1903, collected, received, and obtained from his said business the sum of \$493.75 or thereabouts, and that, during the year then immediately preceding, the said defendant collected and received from his said business \$300 and upward in money per month; that since the said 16th day of November, 1903, and up to the time of filing his petition in bankruptcy, the said defendant had received, collected, and obtained from his said business as income therefrom more than \$12,500 in money, and that said defendant, during said time, assigned, concealed, secreted, and disposed of the greater part thereof, to wit, of the sum of \$8,000 and upwards, with the intention of going through bankruptcy at such opportune time as presented itself, for the purpose of obtaining a discharge from the payment of his just debts, which he is entirely able to pay, and particularly from his said indebtedness to plaintiff, and that said defendant did on, to wit, the 22d day of October, 1907, or about that date, and before judgment could be recovered in said second action, begin proceedings in the bankruptcy court of this jurisdiction,

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scheduling but a few debts of small amounts in addition to his said indebtedness to plaintiff; that said bankruptcy proceedings are still pending undetermined, and that in due time the said defendant will procure his coveted discharge. . . . And plaintiff further avers that he but lately learned that the said statements, representations, pretenses, tokens, and promises so by the said defendant made as aforesaid were wholly designedly false and untrue." The declaration further avers that defendant, by means of his fraudulent practices and representations, "did then and there designedly, unlawfully, falsely, and fraudulently deprive him, plaintiff, of said promissory note and the said action at law thereon based, and did further designedly, unlawfully, falsely, and fraudulently deprive him, plaintiff, of all further effort, action, and proceeding to enforce, compel, and collect payment of said indebtedness during the time aforesaid when he, defendant, received and collected the said sum of \$12,500 and upwards of his, defendant's, money, and then and there and thereafter by means of said bankruptcy proceeding the said defendant did designedly and intentionally, fraudulently deprive him, said plaintiff, of all action and proceeding to enforce, compel, and collect payment of said indebtedness; wherefore, by reason of the promises, the said plaintiff was cheated and defrauded of said divers large sums of money, and has been damaged in a large sum, to wit, at the county of Wayne aforesaid, to his, the said plaintiff's, damage, \$10,000."

Among the causes of demurrer assigned are the following:

"(21) Because the adjudication in bankruptcy of said defendant on October 22d, 1907, and the consequent discharge of defendant's liability to said plaintiff, is pleaded in said declaration.

"(22) Because in so pleading plaintiff admits that his claim, if any, was a provable debt, from which bankruptcy of defendant is a discharge.

"(23) Because it nowhere appears in said declaration that defendant failed to turn over and account to his trustee in bankruptcy all of his assets.

"(24) Because plaintiff himself admits in said declaration that his failure to collect all that was due him from defendant prior to defendant's adjudication and discharge in bankruptcy was due to his own laches.

"(25) Because plaintiff admits in said declaration that the bankruptcy of defendant is a discharge of his alleged claim."

Although the record does not disclose the ground upon which the circuit court sustained the demurrer, plaintiff states such ground in his brief, as follows: "The deci-

sion in the lower court was based upon the effect of defendant's discharge in bankruptcy. Had it turned upon any point which would have left defendant in court after amendment, the case would not now be in this court." It is apparent, from the declaration, that plaintiff has never parted with his original cause of action. Whether at the time of surrendering the note he took a new note in its place, as claimed by defendant, does not appear, but, at least, it does appear that he retained his cause of action, and commenced a similar suit to the original suit thereon, and was entitled to and would have proceeded to judgment except for the bankruptcy proceedings. As the defendant admitted the cause of action by scheduling the debt, it is clear that plaintiff suffered no damage by merely surrendering the note. The plaintiff did not lose his cause of action, and have remaining an action of fraud and deceit alone, because of the bankruptcy proceedings. The enforcement of his cause of action was merely transferred to another forum, and the trustee in bankruptcy "is subrogated to the rights of creditors, and may sue to avoid any conveyance which a creditor could have avoided, although more than four months prior to the adjudication of bankruptcy." Collier, Bankruptcy, 6th ed. 612, ¶ 6; Re Mullen (D. C.) 101 Fed. 413; Bush v. Export Storage Co. (C. C.) 136 Fed. 918; Lewis v. Bishop, 47 App. Div. 554, 62 N. Y. Supp. 618; Beasley v. Coggins, 48 Fla. 215, 37 So. 213, 5 A. & E. Ann. Cas. 801. In view of the allegations of the declaration that the defendant is really the owner of much more than sufficient property to satisfy his claim and all other claims which can be collected by the trustee as well as by himself, it is not apparent how the plaintiff has been injuriously affected by the bankruptcy proceedings, or why he could not have collected his claim in full if he had seen fit to file it against the bankrupt's estate. But, however this may be, we are satisfied that the declaration shows an indebtedness or liability provable against the bankrupt's estate, and that therefore the bankrupt's discharge would terminate his liability. *United States v. The Rob Roy*, 1 Woods, 42, Fed. Cas. No. 16,179; *Re Blumberg* (D. C.) 94 Fed. 476; *Wolf v. Stix*, 99 U. S. 1, 25 L. ed. 309; *Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576; *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9; *Tindle v. Birkett*, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. Rep. 493; *Collier Bankruptcy*, 6th ed. 224; *Brown v. Broach*, 52 Miss. 536; *Bank of North America v. Crandall*, 87 Mo. 208; *Hatten v. Speyer*, 1 Johns. 41. The declaration alleging the pendency of the

bankruptcy proceedings "and that in due time the said defendant will procure his coveted discharge," we think the case may be considered as though the declaration alleged a discharge.

Since such discharge, in our opinion, would be a bar to the maintenance of the action, the judgment sustaining the demurrer is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

SAMUEL T. HAUSER, JR., et al., Appts,
v.
CITY OF ST. LOUIS.

(96 C. C. A. 82, 170 Fed. 906.)

Deed — heirs — construction.

1. A mere restraint on alienation is not sufficient to cause the word "heirs" in a grant to one and his heirs to be construed as meaning "children," so as to limit the interest of the first taker to a life estate.

Same — fee — limitation of alienation.

2. A limitation upon the power of alienation may be imposed upon a grant of a fee in trust for a married woman.

Same — equitable fee.

3. Under a deed in trust for the sole and separate use of a married woman and her heirs, but not her assigns, she acquires an equitable fee, which, upon the death of her husband, becomes an absolute estate, which she may assign at will.

(May 21, 1909.)

Note. — Validity of limitation upon power of alienation imposed upon grant or devise of equitable estate to married woman.

Whatever differences of opinion there may be as to whether a restraint upon the power of alienation, imposed by the creator of an absolute equitable estate, generally is void for repugnancy, it is well settled that an exception to the general rule exists in the case of the equitable separate estates of married women.

That a restraint on alienation, or its equivalent, a restraint on anticipation (see *Re Currey*, L. R. 32 Ch. Div. 361), is in such case valid, has been expressly or impliedly recognized in a considerable number of decisions in the United States, as well as in England. See *Lindsay v. Harrison*, 8 Ark. 302; *Phillips v. Grayson*, 23 Ark. 769; *Robinson v. Randolph*, 21 Fla. 629, 58 Am. Rep. 692; *Weeks v. Sego*, 9 Ga. 199; *Fears v. Brooks*, 12 Ga. 195; *Freeman v. Flood*, 16 Ga. 528; *Moore v. Thompson*, 4 Ky. L. Rep. 303; *Mebane v. Mebane*, 39 N. C. (4 Ired. Eq.) 131, 44 Am. Dec. 102; *Steinmetz's Estate*, 3 Pa. Dist. R. 440; *Calhoun v. Calhoun*, Rich Eq. Cas. 36; *Monday v. Vance*, 92 Tex. 428, 49 S. W. 516; *Simonton*

APPEAL by complainants from a decree of the Circuit Court of the United States for the Eastern District of Missouri, dismissing a bill filed to recover an interest in certain lands to which they allege title as heirs of Ellen Farrar, deceased. Affirmed.

The facts are stated in the opinion.

Argued before Hook, Circuit Judge, and Riner and Amidon, District Judges.

Messrs. Christy M. Farrar and Holmes, Blair, & Koerner, for appellants:

Whenever it plainly appears from a deed that the word "heirs" is used in the sense of "children," it is construed to mean children.

Washb. Real Prop. 3d ed. p. 240; Kinney v. Mathews, 69 Mo. 520; Waddell v. Waddell,

99 Mo. 338, 17 Am. St. Rep. 575, 12 S. W. 349; Chew v. Keller, 100 Mo. 362, 13 S. W. 395; Maguire v. Moore, 108 Mo. 267, 18 S. W. 897; Ringquist v. Young, 112 Mo. 25, 20 S. W. 159; Clarkson v. Clarkson, 125 Mo. 381, 28 S. W. 446; Rines v. Mansfield, 96 Mo. 394, 9 S. W. 798; Fanning v. Doan, 128 Mo. 323, 30 S. W. 1032; Fountain County Coal & Min. Co. v. Beckleheimer, 102 Ind. 76, 52 Am. Rep. 645, 1 N. E. 202; Blake v. Stone, 27 Vt. 475; Cleveland v. Spilman, 25 Ind. 95.

The life tenant, Mrs. Farrar, took an equitable estate; the remaindermen, the trust created being a dry one, and depending for its existence upon the coverture of the life tenant, took a legal estate.

Handy v. McKim, 64 Md. 576, 4 Atl. 125.

v. White, 93 Tex. 50, 77 Am. St. Rep. 824, 53 S. W. 339; Nixon v. Rose, 12 Gratt. 425; Camp v. Cleary, 76 Va. 144; Bain v. Buff, 76 Va. 374; Price v. Planters' Nat. Bank, 92 Va. 468, 32 L.R.A. 219, 23 S. E. 887; Radford v. Carwile, 13 W. Va. 572; Foot v. Foot, 15 Can. S. C. 699; Brandon v. Robinson, 18 Ves. Jr. 429; Peillon v. Brooking, 25 Beav. 218; Goulder v. Camm, 1 De G. F. & J. 146; Jollands v. Burdett, 2 De G. J. & S. 79; Rennie v. Ritchie, 12 Clark & F. 204; Re Ellis, L. R. 17 Eq. 409; Buckton v. Hay, L. R. 11 Ch. Div. 645; Hood Barrs v. Heriot [1896] A. C. 174; also other cases cited elsewhere throughout this note.

The establishment of the principle seems to have been due rather to a general recognition than to any express adjudication. This was doubtless largely due to the circumstance that its sponsor, Lord Thurlow, at whose instance a sweeping provision against anticipation is said to have been first introduced into marriage settlements, was at the time Lord Chancellor. His lead was followed by his successor, Lord Alvanley, with the result that Lord Eldon, speaking in 1817, said that it was too late to contend against the validity of a clause in restraint of anticipation. See Jackson v. Hobhouse, 2 Meriv. 483.

The argument in its support is stated by Lord Brougham in Woodmeston v. Walker, 2 Russ. & M. 197, as follows: "As the separate estate of the wife was thus the invention of equity, it followed that the same court which invented might mold and modify its own creation in whatever manner it thought fit. It is by force of the donor's intention, to which, in the case of a *feme covert*, equity gives effect, that, contrary to the rule of law, a married woman is permitted to hold property in this peculiar manner. And it is strictly in accordance with the same principle that equity allows such restrictions to be imposed on the separate interest thus given, as, by qualifying the extent of her dominion over it, may, in the judgment of the settlor or testator, best secure to the object of his bounty the full and uncontrolled enjoyment of the property for her own benefit."

28 L.R.A. (N.S.)

Although some courts seem to entertain the idea that this exception was arbitrarily created for the purpose of effectually protecting the separate estates of married women, the better view is that such exception, so far from being an infringement of the principle that a restraint upon alienation attached to an absolute estate is void for repugnancy, is perfectly consistent with it. And this view has the support of a very discriminating writer, who says: "That doctrine [of the repugnancy of restraints upon alienation] is that it is against public policy to permit restraints to be put upon transfers which the law allows. But the common law does not allow married women to transfer their property. The separate estate which allows a transfer is the creature of equity, and it cannot be deemed against public policy for equity to permit its creation to be molded by a clause against anticipation, for the tendency of such clause is only to put the married woman where the common law has always put her." Gray, Restraints on Alienation, § 269.

The attempt has been made to distinguish the case of real from that of personal estate, on the ground that both the property of a married woman in the latter and her power of disposition over it, being creatures of equity, might, by the same jurisdiction, be modified and restricted to any extent; but that in the case of real estate, which a married woman had power to dispose of by the common law, that power could not be controlled by the terms of the gift, any more than in the case of a male. But the courts have held that although the power of a married woman, independent of the trust for separate use, may be different in relation to real estate from what it is in relation to personal, yet that equity, having created in both a new species of estate, may in both cases modify the incidents of that estate. Baggett v. Meux, 1 Colly. Ch. Cas. 138, affirmed in 1 Phill. Ch. 627; Woodmeston v. Walker, *supra*.

The doctrine under discussion, which was first recognized in cases involving life estates, was held in Baggett v. Meux, 1 Phill.

A restriction upon the right to alienate an estate conveyed is one not favored by law, and one which cannot be raised by implication, but must be clearly and explicitly set forth.

Pybus v. Smith, 3 Bro. Ch. 340; *Whitesides v. Cannon*, 23 Mo. 457; 1 Washb. Real Prop. § 524.

The heirs or children of a life tenant, without words of inheritance appended, take a remainder in fee.

Burchett v. Durdant, 2 Ventr. 311; *Darbi-son v. Beaumont*, 1 P. Wms. 229; *White v. Williamson*, 2 Grant, Cas. 249; *Brown v. Mattocks*, 103 Pa. 16; *Prior v. Quackenbush*, 29 Ind. 475; *Fountain County Coal & Min. Co. v. Beckleheimer*, supra; *Nicholson v. Caress*, 45 Ind. 479; *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. 167; *Smith v. Hastings*, 29 Vt. 243; *Blake v. Stone*, 27 Vt. 475.

Messrs. Charles W. Bates and Charles P. Williams for appellee.

Amldon, District Judge, delivered the opinion of the court:

This is a suit in equity, brought to ob-

tain a decree defining and declaring the rights of complainants to a one-fifth interest in valuable real property situated in the heart of the city of St. Louis. In 1823 this property was owned by William Christy. On the 13th day of October of that year, he and his wife executed the following deed, conveying the same to trustees for the benefit of their daughter:

This deed, made and concluded this 13th day of October in the year of our Lord one thousand eight hundred and twenty-three, between Wm. Christy and Martha Christy, his wife, of North St. Louis, county of St. Louis and state of Missouri, of the first part, and John O'Fallon, of St. Louis aforesaid, and Charles W. Thruston, of Louisville, state of Kentucky, in trust for Ann C. T. Farrar, the wife of Bernard G. Farrar, of the other part.

Witnesseth that the said William Christy and Martha, his wife, for and in consideration of the sum of \$800 lawful money of the United States, the receipt of which is hereby acknowledged, the said sum of \$800 paid

Ch. 627, to apply equally to an estate in fee, the Lord Chancellor saying: "The object of the doctrine was to give a married woman the enjoyment of property independent of her husband; but to secure that object it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate; to real property as much as to personal."

As applicable to subsequent coverture.

It is no objection to the validity of such a restriction that the woman is unmarried at the time the grant or devise takes effect. *Robinson v. Randolph*, 21 Fla. 629, 58 Am. Rep. 692; *Fears v. Brooks*, 12 Ga. 195; *Tullett v. Armstrong*, 4 Myl. & C. 377, 405, 3 Eng. Rul. Cas. 215.

But in Pennsylvania no such restriction can be sustained unless there is a marriage in immediate view when the trust is created. *Wells v. McCall*, 64 Pa. 207; *Pickering v. Coates*, 10 Phila. 65. This is a result of the peculiar doctrine entertained in that state, that a trust intended for a protection against a coverture is not valid except where in immediate contemplation of marriage; as the restraint on anticipation, being an incident of the equitable separate estate, necessarily stands or falls with it.

Since the operation of the clause against alienation or anticipation, where there is no limitation over, rests entirely on its connection with the coverture, and on its being applied to a species of interest which is itself a creature of equity, its validity is necessarily coterminous with such interest. It therefore follows that it will not be permitted to operate so as to prevent alienation either before coverture or after dis-

coverture. *Brown v. Pocock*, 2 Russ. & M. 210, reversing 2 Myl. & K. 189; *Baggett v. Meux*, 1 Colly. Ch. Cas. 138, affirmed in 1 Phill. Ch. 627; *Jones v. Salter*, 2 Russ. & M. 208; *Woodmeston v. Walker and Robinson v. Randolph*, supra; *Brown v. Foote*, 2 Tenn. Ch. 255.

In view of the doctrine that a woman, upon becoming discover, might dispose of her separate estate notwithstanding any restriction against anticipation or alienation which may have been imposed upon it, it was at one time contended that her contracting a second marriage was equivalent to a disposal thereof to the second husband, and consequently that such restriction was not operative during the second coverture; but the decisions favoring such view, of which *Massey v. Parker*, 2 Myl. & K. 174, may be cited as an instance, were subsequently overruled in *Tullett v. Armstrong*, supra.

That such a provision revives upon subsequent coverture, see also *Clark v. Jaques*, 1 Beav. 36; *Re Gaffee*, 1 Macn. & G. 541; *Brown v. Foote*, supra; *Phillips v. Grayson*, 23 Ark. 769, overruling *dictum* to contrary in *Lindsay v. Harrison*, 8 Ark. 309.

Under the Pennsylvania doctrine relating to the creation of trusts for the separate use of a woman, to which reference has heretofore been made, neither the separate estate nor its incident, the restraint upon alienation, revives upon a second marriage. See *Pickering v. Coates*, supra.

Effect of enabling acts.

As above pointed out, the provision under discussion owes its validity to the fact that at common law a married woman is not *sui juris*. It therefore becomes an in-

to them, by the said John O'Fallon and Charles W. Thruston, in trust, as aforesaid, the said William Christy and Martha, his wife, have granted, bargained, and sold, and hereby do grant, bargain, and sell, unto the said John O'Fallon and Charles W. Thruston, in trust for the said Ann C. T. Farrar, now the wife of said Bernard G. Farrar, for her sole, separate, and only use, the following property to wit:

A square of ground on the hill in the addition to the old town of St. Louis laid off by said William Christy of 210 feet French measure in front by 270 American feet back, bounded on the east by a street laid off by said Christy through said addition in its present direction, which passes on the north side of Clamorzan's, now Thomas Brady's, square on the main street, on the west by Sixth street, and on the south by a street parallel to the one passing up by said Brady's square, the lots in said square above sold known on the plan of said addition by Nos. (25, 26, 27, and 28) twenty-five, twenty-six, twenty-seven, and twenty-eight.

To have and to hold unto them, the said John O'Fallon and Charles W. Thruston, in

trust to and for her, the said Ann C. T. Farrar, the wife of said Bernard G. Farrar, to her sole, separate, and only use, as aforesaid, the aforegranted and bargained premises, together with all and singular the privileges and appurtenances to the same belonging or in any wise appertaining, and to her heirs forever.

It is understood by the said grantors that the above-granted premises are conveyed as aforesaid for the sole and separate use and benefit of the said Ann C. T. Farrar and her heirs, and not to her assigns, and to the use and benefit of no other person whatever, to have, hold, enjoy, or possess any part thereof.

In testimony whereof the parties to these presents have hereunto set their hands and seals at St. Louis of the day, month, and year above written.

W. Christy. [Seal.]

Martha Christy. [Seal.]

At the date of this conveyance, Ann C. T. Farrar was the wife of Bernard G. Farrar. In 1847 the trustees, by quitclaim deed, transferred the legal title vested in them to

teresting question, but one of which there seems to have been but little discussion, as to the effect upon such validity of the married women's enabling acts of modern times.

In *Pacific Nat. Bank v. Windram*, 133 Mass. 175, where a woman, after her marriage, being possessed in her own right of personal property, conveyed it to trustees to pay the net income to her during her life, with a provision against anticipation, the court, considering this question, pointed out that the legislation of the state had essentially changed the common-law status of the married woman, especially in respect to her holding separate property, making her a person *sui juris*, except as to dealings with her husband, and said: "Courts of equity upheld the restraint of alienation in favor of a married woman because of her disability during coverture, and as an incident of the trust estate necessary for her protection. The statutes having removed her disability, and having made unnecessary the creation of a trust estate, the incidents of the trust estate and the equitable rights growing out of it no longer remain in her favor. She is put upon the same footing as if she were a *feme sole*. She no longer needs any protection against the marital rights of her husband. It is argued that she still needs protection against his persuasion and undue influence. The statutes have made such provisions as were deemed necessary to meet this danger by providing that, upon her application to the supreme judicial court, a trustee may be appointed, and she may thereupon convey her separate estate to the trustee upon such trusts and to such uses as she may declare. Pub. Stat. chap. 147, § 13. For these reasons, we are of opinion that the provision in the indenture of 28 L.R.A. (N.S.)

March, 1879, intended to restrain Mrs. Windram's power of alienating the income of the trust fund, is invalid."

In *Brown v. Macgill*, 87 Md. 161, 30 L.R.A. 806, 67 Am. St. Rep. 334, 39 Atl. 613, it was held that the doctrine under discussion could not be invoked to enable a married woman, or a woman contemplating marriage, to settle her separate property, which would otherwise be liable to her creditors, upon herself in such a way that she could escape the payment of her just debts, notwithstanding the settlement is made a matter of record before the debts are contracted; since this may not be done by one *sui juris*, and the policy of the state is so radically different in its dealings with married women from what it formerly was, that the reasons for making an exception in their favor are no longer applicable.

In *Deering v. Tucker*, 55 Me. 284, where a testatrix had devised to her granddaughters certain property, not to be subject to the control of creditors of any husbands they might have, "and this direction not to be altered by any request or consent of either of such granddaughters, thereto," the court, although not explicitly discussing the question whether the enabling acts affected the validity of a limitation upon the power of alienation of the separate estate of a married woman, stated that since the enactment of such legislation, a husband acquires no right by marriage to any property of his wife, and that his joinder and consent is not necessary to her dealing therewith as she sees fit, and said: "If the design of the testatrix was to restrict the rights of the granddaughters in the control and disposition of these estates devised to them in fee, such design would be against law."

Mrs. Farrar, "for her sole, separate, and only use." Mr. Farrar died in the year 1849. On June 4, 1866, Ann C. T. Farrar, then being a widow, conveyed the property in question to the city of St. Louis, by warranty deed, in consideration of the sum of \$245,000. The city rests its right to the property upon that grant. The complainants claim as heirs at law of Ellen Farrar, a daughter of Ann C. T. Farrar, being one of five children, the issue of the marriage between Ann C. T. Farrar and Bernard G. Farrar. It is not necessary for the purposes of this case to set forth fully the facts upon which they base their right, nor the peculiar reasons why that right is not barred by the statute of limitations. The bill was dismissed on general demurrer.

The whole controversy turns upon the proper interpretation of the deed above set out in full. The primary object of the grantors was to secure the property to their daughter, free from the marital rights and influence of her husband. That object is conspicuous, not only in the peculiar form of the conveyance, but in all its provisions. The grantors show no solicitude as to the respective rights of their daughter and her children. Their concern was to protect the property against the rights and solicitations of Bernard G. Farrar. Every term of the deed should be interpreted in the light of this primary purpose.

By the first paragraph of the habendum clause an equitable estate in fee is granted to Ann C. T. Farrar and her heirs, forever. The next paragraph, however, says: "It is understood by the said grantors that the above-granted premises are conveyed as aforesaid for the sole and separate use and benefit of the said Ann C. T. Farrar, and her heirs, and not to her assigns, and to the use and benefit of no other person whatsoever, to have, hold, enjoy, or possess any part thereof."

Seizing upon the phrase that the grant is not to the assigns of the grantee, counsel for the complainants make the following argument: They say, first, that, because the grant does not extend to the assigns of the grantee, it is impossible that she should take a fee in the property; hence they say that Ann C. T. Farrar took only a life estate. To support such a contention it is necessary to get rid of the words "heirs forever" in the paragraph preceding. This is accomplished by the familiar doctrine that the word "heirs" will be construed in a popular sense as meaning "children," when the entire grant shows clearly that such a meaning was in the mind of the grantor; and it is insisted that such a meaning in the present grant follows as a necessary conclusion from the restriction as to "assigns." The effect of

the deed as thus interpreted is to convey to Ann C. T. Farrar a life estate in the property, with a remainder to her children then in being, opening, however, to let in after-born children, under the rule applied and explained by the supreme court of Missouri in *Kinney v. Mathews*, 69 Mo. 520.

This argument is based upon two fundamental fallacies: First, it is urged that the equitable fee granted to Mrs. Farrar is, by a proper interpretation of the deed, cut down to a life estate by the restraint upon her alienation of the property, and that the word "heirs" for this reason should be interpreted to mean "children." So far as we are aware, a restraint upon alienation alone has never been held to show clearly that a grantor used the term "heirs" as meaning "children." All the authorities agree that in order to justify such an interpretation the intent of the grantor must be clear. *McDowell v. Brown*, 21 Mo. 60; *Allen v. Craft*, 109 Ind. 476, 58 Am. Rep. 425, 9 N. E. 919; *Roth v. Rauschenbusch*, 173 Mo. 584, 61 L.R.A. 455, 73 S. W. 664. No case has been brought to our notice, nor have we been able to discover any case, in which a restraint upon alienation alone has been held to show that the grantor used the terms "heirs" other than according to its recognized legal meaning. In all the decisions brought to our notice by counsel for complainants, the restraint upon alienation was coupled with other language in the deed, evidencing the intent. It was a cardinal rule of the common law that the grant of a fee, coupled with a restraint against all alienation of the property, did not limit the fee; but the restraint was held to be repugnant to the grant, and for that reason was rejected as of no force. 4 Kent, Com. 131; *Potter v. Couch*, 141 U. S. 296, 315, 35 L. ed. 721, 11 Sup. Ct. Rep. 1005. If such an interpretation were necessary in the present case, we should not feel the slightest hesitancy in applying the rule, and treating the restraint upon alienation as void.

Second. But no such interpretation is necessary. The limitation of the power of alienation, even when a fee is granted, has no application to estates in trust for the benefit of married women. This exception was found necessary in order to protect the rights of married women during coverture. It was at first held that restraints upon alienation, when married women were given the equitable ownership of property, were void, the same as in the case of legal estates. This, however, resulted in defeating the whole object underlying such separate estates. The subject is clearly explained by Lord Cottenham in *Tullett v. Armstrong*, 4 Myl. & C. 377, 405, 3 Eng. Rul. Cas. 215, as follows: "When this court first established

the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation."

See also 1 White & T. Lead. Cas. in Eq. pt. 2, p. 713, note.

The whole doctrine of the separate estate of married women is equitable, and the ancient common-law rules of property are applied to it only in so far as they are compatible with the object which courts of equity sought to attain in the creation of such separate estates. Mr. Pomeroy, after fully explaining the subject in his work on Equity Jurisprudence (§§ 1107 et seq.), says: "The subject-matter on which the restraining clause is to operate may be any kind of property, real or personal, and any estate therein, absolute, for life, or for years." § 1108.

Prof. Gray, in his work on Restraints on Alienation, says, at § 125: "There is one exception to the invalidity of restraints on the alienation of fees, or absolute interests. When, in the case of married women, the doctrines of separate use and restraint upon anticipation came into existence, the interests alienation of which it was sought to restrain were life interests. It was only in *Baggett v. Meux* (1844) 1 Colly. Ch. Cas. 138, that the question as to the validity of a clause against anticipation upon a gift of an absolute interest came up. In this case the legal estate in land was devised to a married woman, in fee, for her separate use, with a direction that she should not sell or encumber it. She did encumber it. Vice Chancellor Knight Bruce held that a restraint on anticipation was equally valid upon a fee simple as upon a life estate, and that the encumbrance was void. The decision was confirmed by Lord Lyndhurst, C., s. c. 1 Phill. Ch. 627."

See also *Tiffany*, Real Prop. p. 1138; *Perry*, Tr. 5th ed. § 671; *Brown v. Foote*, 2 Tenn. Ch. 255, 259.

In speaking of a devise of a fee, coupled with an absolute restriction upon alienation during coverture, the court says in *Robinson v. Randolph*, 21 Fla. 629, 58 Am. Rep. 692: "The court of equity having created such estate, it was held that it could modify its creature by annexing to it the restraining feature."

Such being the law, the entire foundation 28 L.R.A. (N.S.)

of complainants' argument is swept away. The deed being a grant for the benefit of a married woman, an absolute restraint upon her alienation of the property during coverture was entirely consistent with her taking an equitable fee to the property, which, upon the death of her husband, became an absolute estate, free from the restriction; for it is well settled that the trust continues only during the marriage relation. *Pom. Eq. Jur.* 3d ed. § 1109. Upon its termination, the wife became vested with all the powers over the property possessed by a *feme sole*. The deed of Mrs. Farrar, therefore, after the death of her husband, passed the entire estate to the defendant.

It is urged, however, that the exclusion of "assigns" should be interpreted as a limitation upon the quantum of the estate, instead of a restriction upon the grantee's power of alienation. But why should such an interpretation be adopted? There is nothing in the deed supporting it, and it is out of harmony with the primary purpose which caused the conveyance of the property to trustees. It may be conceded that the deed is not drawn with legal accuracy; but it seems to us that the general purpose of the grantors is not open to doubt. They were apprehensive that the provision which they were making for their daughter would, in some way, be lost through the improvidence or solicitation of her husband. The whole last paragraph of the deed seems to us to be simply the language of a layman seeking to emphasize that purpose. It may be that there was also in the minds of the grantors a desire that the property should continue for all time to be the family seat. If that was in fact an end desired, its accomplishment would cause such a restriction upon the power of alienation as the law could not sustain. Again, if we should interpret the word "heirs" in the deed as meaning "children," then it would contain no general words of inheritance. The result would be, as counsel for complainants says, that Mrs. Farrar would take an equitable estate for life, with a legal remainder to her children. Their estate, however, would also be for life, as the change of "heirs" to "children" would leave no words of general succession. As a result, upon the death of Mrs. Farrar's children, the estate would then revert to the grantors, or their heirs. Such a result, it is conceded by both parties, was never in the contemplation of the grantors. A fair interpretation of the last paragraph of the deed seems to us simply to limit Mrs. Farrar's power of alienation during her coverture.

The decree must therefore be affirmed.

Petition for rehearing overruled.

MISSOURI SUPREME COURT.
(Division No. 1.)

MICHAEL OHLMAN, Appt.,
v.
CLARKSON SAWMILL COMPANY et al.,
Respts.

(222 Mo. 62, 120 S. W. 1155.)

Nickname — tax proceeding — validity.

No valid judgment can be entered in a proceeding to enforce unpaid taxes against one whose Christian name is Michael, upon a constructive service of process against him by the name of Mike, where there is nothing to show that he ever answered to or tolerated such name.

(July 1, 1909.)

APPEAL by plaintiff from a judgment of the Circuit Court for Reynolds County in defendant's, Clarkson Sawmill Company's, favor in a suit to quiet title to certain lands. Reversed.

The facts are stated in the opinion.

Messrs. R. I. January, Arthur T. Brewster, and Samuel M. Brewster, for appellant:

The court did not have jurisdiction to render judgment for taxes against the land of Michael Ohlman on an order of publication giving constructive notice to "Mike Ohlman."

Becker v. German Mut. F. Ins. Co. 68 Ill. 412; Moynahan v. People, 3 Colo. 367; McGill v. Weill, 19 N. Y. Civ. Proc. Rep. 43, 10 N. Y. Supp. 246; Skelton v. Sackett, 91 Mo. 379, 3 S. W. 874; Robson v. Thomas, 55 Mo. 583.

Messrs. Dinning & Dinning, for respondents:

The suit for taxes brought against Mike Ohlman gave the court jurisdiction against Michael Ohlman, to render a judgment for taxes against land the title to which stood in Michael Ohlman.

Fenton v. Perkins, 3 Mo. 145; Weaver v. McElhenon, 13 Mo. 90; Birch v. Rogers, 3 Mo. 227; Gordon v. Holliday, 1 Wash. C. C. 285, Fed. Cas. No. 5,610; 21 Am. & Eng. Enc. Law, 2d ed. ¶ 7, p. 309; 17 Am. & Eng. Enc. Law, 2d ed. p. 897; Moseley v. Martin, 37 Ala. 216; Goodell v. Hall, 112 Ga.

436, 37 S. E. 725; Jones's Estate, 27 Pa. 338; Rupert v. Penner, 35 Neb. 587, 17 L.R.A. 824, 53 N. W. 598; McGregor v. Balch, 17 Vt. 562; Sparks v. Sparks, 51 Kan. 195, 32 Pac. 892; People ex rel. Yates v. Ferguson, 8 Cow. 106; People ex rel. Atty. Gen. v. Tisdale, 1 Dougl. (Mich.) 59; Com. v. O'Baldwin, 103 Mass. 210; Walter v. State, 105 Ind. 589, 5 N. E. 735; Sowle v. Sowle, 10 Pick. 376; Com. v. Terry, 114 Mass. 263; Shelburne v. Rochester, 1 Pick. 470; People v. Armstrong, 114 Cal. 570, 46 Pac. 611; Ogden v. Gibbons, 5 N. J. L. 518; Trimble v. State, 4 Blackf. 435; State v. Johnson, 67 N. C. 57.

Lamm, P. J., delivered the opinion of the court:

Suit under § 650, Rev. Stat. 1899 (page 667, Anno. Stat. 1906). Plaintiff, a resident of Illinois, sues the Clarkson Sawmill Company (joining divers other parties as codefendants) in the Reynolds circuit court to quiet title to S. $\frac{1}{4}$ Sec. 35, Twp. 32, range 2,—the sawmill company alone making defense. Judgment went in favor of that defendant on the S. W. $\frac{1}{4}$ of said section, and, as to the S. E. $\frac{1}{4}$, dismissing the cause. Plaintiff comes here.

The petition alleges, *inter alia*, that the sawmill company claims under a quitclaim deed from certain Cartys and others. The answer of that company was a general denial, barring an admission that it held an adverse claim to the S. W. $\frac{1}{4}$ and an allegation that it owned the S. W. $\frac{1}{4}$ by a fee-simple title. It pleads a misjoinder of causes of action, admits the quitclaim deed by the Cartys, but denies it makes any claim to the S. E. $\frac{1}{4}$ under that deed.

Plaintiff introduced a patent from the United States to the S. $\frac{1}{4}$ of said section 35 of date September 1, 1859, recorded December 7, 1866. This patent runs to "Michael Ohlman."

Defendant, over objection and exceptions saved, introduced a tax deed from Harrison, sheriff of Reynolds county, dated May 29, 1879, purporting to convey the S. $\frac{1}{4}$ of section 35 to G. J. Carty.

Sundry objections were made below to this tax deed, and are now pressed. But unless it is necessary to develop and determine

Note.—It appears that the above case presents for the first time the question of the validity of a judgment based upon the publication of process in which the defendant was designated not by his Christian name, but by a nickname. The decision is clearly right, for no one should be held responsible for the fact that others, no matter how numerous, may have so designated him, unless it further appears that in his business transactions he has adopted and made use of such name.

28 L.R.A. (N.S.)

Upon the question of the use of initials instead of Christian name in publication of process, see note to Butler v. Smith, post, 436.

As to whether publication of process under wrong name may be held good on the doctrine of *idem sonans*, see note to Schoenfeld v. Bourne, post, —.

As to the admission of the Christian name in the publication of process, see note to Whitney v. Masemore, 11 L.R.A. (N.S.) 676.

other phases of the case, we need heed but one, viz., that the deed does not purport to convey the title of Michael Ohlman, patentee, but runs against the title of "Mike Ohlman." Carty's bid was \$16 for the half section, and the land was knocked down to him for that sum. Whether this sheriff's deed was put of record does not appear.

Supplementing that deed with evidence that certain Cartys and others were the sole heirs of G. J. Carty, the sawmill company introduced a quitclaim deed of date September 5, 1903, conveying to it the title of said heirs in the locus.

Thereupon plaintiff read into the record the petition, authenticated tax bill made a part thereof, order of publication, and judgment in the tax suit,—from all which it appears that the suit was instituted in 1878 in the name of the state, to the use of Carter, collector of revenue in Reynolds county, against "Mike Ohlman" as owner of a certain 960 acres of land, including said S. $\frac{1}{2}$, for delinquent taxes; that the back tax bill certified the owner's name to be "Mike Ohlman," and that the order of publication ran against "Mike Ohlman" as a nonresident. The judgment followed the petition, back tax bill, and order of publication in that particular.

No possession is alleged or proved by either side.

Waiving, for the present, all other questions raised on the record (some of them of no little gravity), we confront the first, viz.: Did Michael Ohlman's title as patentee pass by a sheriff's deed purporting to convey the title of "Mike Ohlman," when the deed is based on a judgment for taxes on constructive service, with no appearance by defendant; the petition, order of publication, and judgment describing the owner as "Mike Ohlman?"

(a) The question goes to jurisdiction and due process of law. No man may judicially lose his property without his day in court. A day in court proceeds on notice. So, due process of law and jurisdiction depend on notice. By Rev. Stat. 1899, § 9303 (Anno. Stat. 1906, p. 4274), it is ordained that tax suits shall be brought "against the owner of the property." By this is meant the record owner, unless the fact is known, or the purchaser have notice, that the record owner is not the true owner. When summons is actually served on the right individual by the wrong name, the error becomes immaterial, because he has notice of the suit, and may appear if he choose and plead a misnomer. But, absent actual notice, when the law, for convenience, substitutes a constructive notice, the name of the individual defendant obviously becomes one of the essentials and of the very life of the notice.

"Names are like definitions in mathematics, though less exact," says Woodward, J., in *Jones's Estate*, 27 Pa., loc. cit. 338. "The use of names [he continues] is to describe the individual of whom we speak, so as to distinguish him from all other persons."

(b) There will be found a variety of cases decided by us, giving voice to the gravity and significance of accuracy in the use of the Christian name of a defendant where his land is sought to be taken from him through jurisdiction acquired in a suit by constructive notice. Thus, the settled doctrine has come to be that the use of the initials of the Christian name is not sufficiently accurate for such purpose. *Gillingham v. Brown*, 187 Mo. 181, 85 S. W. 1113; *Evarts v. Missouri Lumber & Min. Co.* 193 Mo. loc. cit. 449 et seq. 92 S. W. 372; *Burkham v. Manewal*, 195 Mo. 506, 94 S. W. 520 et seq., and cases cited. The rule is relaxed where estoppel has play; for instance, where the record title was taken by the owner in the initials of his Christian name, and he was served by such initials. *Elting v. Gould*, 96 Mo. 541, 9 S. W. 922. There is a case (*Mosely v. Reily*, 126 Mo. 124, 26 L.R.A. 721, 28 S. W. 895) seemingly holding against the general rule, but that case itself was finally sustained only on the theory of estoppel (*Turner v. Gregory*, 151 Mo. loc. cit. 106, 52 S. W. 234). Use of initials in procuring a license to marry, and in being married in accordance with the license, was held to create an estoppel, so that a judgment of divorce granted against defendant on publication, identifying him by his initials, was held valid. *McDermott v. Gray*, 198 Mo. 266, 95 S. W. 431.

There is a line of cases holding that the law recognizes only one Christian name, and that some freedom may be taken with the initial of a middle name. *Howard v. Brown*, 197 Mo. 46, 95 S. W. 101 et seq.; *Morrison v. Turnbaugh*, 192 Mo. loc. cit. 445, 91 S. W. 152 et seq. But in the last case the true name of the defendant appeared in the petition, the affidavit for an order of publication, and the order itself. The trouble arose by clerical slip in the judgment. In the *Howard Case*, where the defendant's name was Henry "P. P." Brown, and he was sued as Henry "T." Brown, significance was given to the fact that his name was grouped with his mother, his sisters, and his nephews, comprising the immediate Brown family to which he belonged, thus identifying him in that way. These cases in no wise militate against the rule that in notice by publication the defendant should be accurately designated by his true name.

If the law tolerated slovenliness or

pranks in this regard, then slovenliness and pranks might ripen into a custom, and open the door to great mischief. Constructive service at best is harsh. It is service, not in substance and fact, but of a sort to which the name of service is attached from necessity. That method of service, being highly technical, must be strictly pursued. Thus it was said in the *Turner Case*, *supra*: "Where resort is had to this method, a substantial, even rigid, observance of the law is required, otherwise the judgment will be void [citing cases]." And in the *Morrison Case*, *supra*, it was held that "constructive service must be viewed critically in order to prevent, so far as can be, irreparable injury." And this rule of strictness was applied in each case directly to the use of the true name of the defendant.

The *Turner Case* has met the approval of this court many times. It is a landmark in the law, and establishes the proposition that in constructive service the real record name of the landowner, the name in which he took title (as distinguished from the colloquial name he was known by in the neighborhood of the land, and to which he answered among those who knew him), should be used in designating him in an order of publication in a tax suit. *Turner's* record name was *Singleton V. Turner*. By that name he was designated in the deed by which he took title, his name appearing there no less than four times. Though grantee, he signed that deed by that name. The "V." in his name stood for "Vaughn." While a resident of Missouri he lived in Holden, say 15 miles from the land. In Holden he was usually called "Vaughn Turner." He went by that name in the neighborhood of the land. He was known as Vaughn from his youth up. When he went to California and took up a residence there, he continued to be called Vaughn. He was sued for taxes as "Vaughn Turner." That name runs through the whole record-petition, order of publication, judgment, and deed. In business transactions he usually signed his name "S. V. Turner." It was held that the deed was void, and that ruling and the reason underlying it apply vehemently to the case at bar.

(c) We are cited to many cases by counsel for defendant in which the right party has been sued and served with process, but in which profert has been made of some document signed with an abbreviated name, or in which it has been urged there was a variance between the proof and allegation, arising from misnomer, etc. But none of those cases touch the vital point of jurisdiction and due process of law. For instance:

In *Fenton v. Perkins*, 3 Mo. 144, a question arose whether a certain oral contract called for a note signed by John Mickle. 28 L.R.A. (N.S.)

The contention was the contract called for one signed by John McMickle. It was ruled that McMickle might be bound under a note signed as Mickle, but that defendant had no right to impose on plaintiff the risk of proving that "Mickle" was intended for "McMickle." In discussing the case, it was held that abbreviations of men's given names are so common that, without any violation of the laws of the land, the courts may take judicial notice of them. It will be seen that the question in that case arose on the sufficiency of the evidence to identify the subject-matter of the contract.

In *Weaver v. McElhenon*, 13 Mo. 89, the suit was on a note, and defendant was sued by his true Christian name, "Christopher." But the note was set forth in the petition, and it was signed "Christy" or "Christ" McElhenon. The defendant demurred. It was ruled that the defect, if any, could not be reached by demurrer, but by a motion to exclude the note as evidence on account of variance. The court also ruled that the signature to the note was a well-known abbreviation of Christopher, and the logic of the ruling was simply that Christopher, if he liked, could dub himself "Christy" or "Christ," and by signing his name that way bind himself on a note when impleaded under the name of "Christopher."

In *Moseley v. Mastin*, 37 Ala. 216, an abbreviation, "adm'r" was used in the complaint. Exception was taken to that, and the court held "adm'r" meant "administrator."

In *Goodell v. Hall*, 112 Ga. 436, 37 S. E. 725, it was ruled that "judicial notice will be taken of the ordinary and commonly used abbreviations and equivalents of Christian names." That language must be read with the case, *viz.*, *Eliza M. Hall* held title to certain land. She made application under the Georgia statute to have it set apart as a homestead, signing the application "Elizabeth M. Hall." Subsequently she mortgaged the land as "Eliza M. Hall." The mortgage being foreclosed, she made claim that her homestead was not subject to mortgage. This, because her application to have it set apart as a homestead had been sustained. In offering the application in evidence, it was objected to because made by "Elizabeth M. Hall." The court ruled that "Eliza" was an abbreviation of "Elizabeth," and, if not so, that at least parol evidence was admissible (and was admitted) to show the identity of "Elizabeth M." with "Eliza M."

In *Jones's Estate*, 27 Pa. 336, *supra*, a judgment was recovered against Abel Jones. It was entered on the lien docket against "A. Jones." Other judgments were obtained against Jones, and entered on the lien docket. The real estate of Abel Jones was sold

at sheriff's sale, and, on making distribution between judgment creditors, the auditor disallowed the judgment entered on the lien docket in the name of "A. Jones." Proof was made that Abel Jones signed his name in no other way but "A. Jones," and that there was no other Abel or A. Jones in the county. It was ruled on appeal that the object of the docket entry was to give the public notice who was bound, and that the entry was sufficient.

In *Rupert v. Penner*, 35 Neb. 587, 17 L.R.A. 824, 53 N. W. 598, the proposition was announced that a deed correctly describing the grantor as "Archibald T. Finn," with an acknowledgment designating the grantor as "Archibald T. Finn," and identifying him as known to the officer to be the person whose name is affixed to the instrument and who executed the same, and which deed was signed "Arch T. Finn," was sufficient to convey the title of Archibald T. The question arose over the admission of the deed in evidence. See, in this connection, *Houx v. Batteén*, 68 Mo. 84.

McGregor v. Balch, 17 Vt. 567, was a scire facias upon a recognizance. The defendant pleaded *nul tiel record*. At the trial plaintiff gave in evidence a record of the recognizance, in which Balch's Christian name is set forth as "Barney D." Objection was made to this evidence. The court ruled that there was no controversy but that "Barney" and "Barnabas" are used for the same name, and that, as defendant was known by the name of "Barney" as well as "Barnabas," the objection was properly overruled.

In *Sparks v. Sparks*, 51 Kan. 195, 32 Pac. 892, a question arose on a motion to quash a deposition. The notice to take specified the place as the office of "Dan Ray." The deposition was actually taken at the office of Daniel E. Wray. Wray was identified in the notice as an "attorney at law of Versailles, Mo." There was no claim made there was any other person of that name or sounding like his in that place, or that the parties were misled. In view of that fact, and of the further fact that "Dan" is an abbreviation of "Daniel," and that "Ray" and "Wray" are *idem sonans*, a motion to quash was held properly overruled.

Other cases cited are of a similar character, and none go to the point of due process of law or jurisdiction, or in any wise impugn the reasoning of *Turner v. Gregory*.

(d) We cannot find it ever ruled by any respectable court that "Mike" is a universally known abbreviation of "Michael." We are asked to take judicial cognizance that it is a universally recognized equivalent of that name. We decline to do so. It is sometimes used flippantly to designate anyone, as in the colloquialism, "Sure, Mike," or in

the other, "Are you Mike?" or "You think you're Mike." But this figurative and slangy use is too broad, and proves too much.

We are of the notion there is something Celtic about "Mike,"—a tang or flavor of the old sod,—and that its usage among Teutons is either malapropos, mythical, or scant. The name "Michael Ohlman" is self-evidently German, and we have no call to judicially determine "Mike" as applicable to a nationality not shown to have adopted its use at the fireside as part of the mother tongue.

In this connection it is not without some appreciable weight that there is no evidence tending to show that Ohlman was known as "Mike" where he lived in Illinois, or in Missouri, where his land lay, or that he answered to that name or tolerated such easy familiarity. So far as we can see, it is left to the tax officers and circuit court of Reynolds county to be the first to joke or trifle with his name; this, too, when engaged in enforcing tax laws, serving him with summons, and solemnly enforcing the state's lien, and separating him from the ownership of his estate (no joking matter, withal), and when the records of Reynolds county showed his title was got and held in the name of "Michael."

(e) Michael is a baptismal name, sacred in meaning and hallowed by sacred legends; witness Saint Michael, Michaelmas, or the great archangel whose prowess is vouched for in accredited annals of those dim wars seen by the mind's eye of the blind Milton, in which the Great Enemy of Mankind, thrust forth by his sword, pitched headlong flaming, so that (as the record runs):

"From morn
To noon he fell, from noon to dewy eve,
A summer's day; and with the setting sun
Dropp'd from the zenith, like a falling star."

Messrs. J. F. Green and W. A. Meserve, "It ill becomes the law, moving with dignity and venerating sacredness, to deal in flippant vein with such a name as Michael, literally, in Hebrew, "Who is like God."

If we were to hold that an order of publication might deal with those abbreviations in names commonly known to all men, yet "Mike" is not an abbreviation of Michael, any more than of Micah, Micaiah, Micha, Michah, Michaiah, Michal, or others mentionable. But "Mike" is not an abbreviation at all, accurately speaking. It is to all intents and purposes a mere diminutive, a nickname,—a corruption. Now, nicknames are in a sense nicked names,—names that are snipped, whittled off. They are names given in contempt, derision, or sportive familiarity,—a familiar or opprobrious appellation. Webster's International Dict. title "Nickname." As such appellations they have

no place in those judicial publications of notice by which courts acquire jurisdiction. Otherwise we would have Amelia Jones notified by an order of publication directed to "Sis" Jones; or William Brown under the title of "Bub" or "Bill" or "Buck" Brown; or, if the hypothesis be indulged that the master sculptor and painter were alive and so fortunate as to own real estate in Missouri, he would be brought in under the name of "Mike" Angelo; or Winfield Scott (in like hypothesis) under the name of "Fuss-and-Feathers" or "Hasty-Plate-of Soup Scott; or Thomas H. Benton as "Old Bullion" Benton.

But we have pursued the matter far. We think the deed was void, because the Reynolds circuit court never acquired jurisdiction over Michael Ohlman. This view of the matter precludes the necessity of considering other questions made.

The judgment is reversed, and the cause remanded, with directions to enter a judgment in favor of plaintiff, adjudging title in him to all the land in his patent.

All concur.

NEBRASKA SUPREME COURT.

MARY BUTLER, Appt.,

v.

SUSIE M. SMITH, Exrx., etc., of Banks
M. Smith, Deceased, et al.

(84 Neb. 78, 120 N. W. 1106.)

Writ — substituted service — legal name.

1. For the purpose of giving constructive notice to a defendant in a suit to foreclose a mortgage, where he is not sued on a written instrument signed by himself, his legal name includes his first Christian name and surname.

Same — initials — sufficiency.

2. Foreclosure of a mortgage does not divest the title of a nonresident defendant who was sued by the initial letters of his name, there being no personal service of summons upon him or appearance in his behalf, and the record showing that he did not sign the mortgage or the note secured thereby.

Adverse possession — suspension — ejectment action — amendment — effect.

3. Service of summons in ejectment arrests the running of the statute of limitations in favor of a defendant who claims title by adverse possession, though the form of action is subsequently changed,

by amendment of plaintiff's petition, to a suit to redeem.

Same — unimproved and unoccupied land — presumption as to possession.

4. Unimproved and unoccupied land is deemed to be in possession of the holder of the legal title.

Same — establishment of title — elements.

5. Title by adverse possession is not established, unless the proof shows actual, exclusive, and continuous possession under claim of ownership for the full statutory period of ten years

(April 13, 1909.)

Note. — Use of initials instead of Christian name in publication of process.

It is clear that when a defendant is not correctly named in the process, or his Christian name is represented by initials only, and service of the writ is actually made on the person intended, he is thereby informed that he is the person meant, and, unless he appears and takes advantage of the misnomer or defect by plea in abatement, the judgment by default, rendered thereupon, will not be void. 20 Enc. Pl. & Pr. p. 1131.

But a distinction exists between such a case and a case where the only notice is by publication, and no appearance is made. While the service of the writ in the former case is a demonstration that the person upon whom it is served is the person intended to be sued, in the latter case, notice by publication is a proceeding against the name, and to give such notice as the service of the writ imparts, the name should be fully and correctly set forth, and if it is not so set forth, it is ineffectual as a notice. It would seem that a publication of process against J. Adam would impart the same notice to Jacob, James, John, Jane, or Julia Adam: but it would not impart to any one of them notice of the fact that he or she was the J. Adam intended, while the actual service of such process upon any one of them would inform him that he was the J. Adam against whom it was directed.

In *Herbage v. McKee*, 82 Neb. 354, 117 N. W. 706, it was conceded by counsel that a foreclosure decree was void as to defendants served by publication, and described by the initial letters of their names.

In *Steinmann v. Strimple*, 29 Mo. App. 478, it was held that an order of publication in an action to foreclose a mechanics' lien, naming defendant as "J. Strimple," was void as to Joab Strimple.

In *Hirsh v. Weisberger*, 44 Mo. App. 506, where it appeared that, in an action in attachment by a nonresident, the case proceeded in the ordinary course to a judgment by default and final judgment, after publication of notice against "A. Weisberger," it was held that the court properly granted his petition to set aside the judgment, and reinstate the cause for further proceedings, upon the ground that the order of publica-

A PPEAL by plaintiff from a decree of the District Court for Knox County dismissing a suit to redeem certain lands from a mortgage. Reversed.

The facts are stated in the opinion.

Messrs. M. F. Harrington and W. R. Butler for appellant.

Messrs. J. F. Green and W. A. Meserve, for appellees:

The foreclosure was valid, and Boon was properly named and sued as C. L. Boon.

21 Am. & Eng. Enc. Law, 2d ed. pp. 305, 309, 311; Binfield v. State, 15 Neb. 484, 19 N. W. 607; Schofield v. Jennings, 68 Ind. 233; Gillespie v. Rogers, 146 Mass. 612, 16 N. E. 711; Blinn v. Chessman, 49 Minn. 140, 32 Am. St. Rep. 536, 51 N. W. 666; Jones's Estate, 27 Pa. 336; Charleston v. King, 4 M'Cord, L. 487; 29 Cyc. Law & Proc. p. 269; Hinkle v. Collins, 113 Mich. 105, 71 N. W. 481; Perkins v. McDowell, 3 Wyo. 328, 23 Pac. 71; Cox v. Durham, 63 C. C. A. 338, 128 Fed. 870; Ferguson v. Smith, 10 Kan. 398.

Defendants have title by adverse possession.

Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792; Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; Oldig v. Fisk, 53 Neb. 157, 73 N. W. 661; Webb v. Thiele, 56 Neb. 752, 77 N. W. 56; Wiese v. Union P. R. Co. 77 Neb. 40, 108 N. W. 175; Harter v. Twohig, 158 U. S. 448, 39 L. ed. 1049, 15 Sup. Ct. Rep. 883; Patton v. Dixon, 105 Tenn. 97, 58 S. W. 209; Olsson v. Howard, 38 Wash. 15, 80 Pac. 170;

tion used the initial instead of using his real Christian name, which was Aaron.

In Skelton v. Sackett, 91 Mo. 377, 3 S. W. 874, it was held that an order of publication which named the defendant as Q. R. Noland did not give the court jurisdiction in a tax suit against Quinces R. Noland for delinquent taxes on land granted by letters patent to Quinces R. Noland, where there was no appearance under such publication.

In McDermott v. Gray, 198 Mo. 266, 95 S. W. 431, it was said that while the rule of the foregoing cases is the general rule, there are well-understood exceptions to the same; and it was held that one exception was where a man secured a marriage license which described him by his initials, and he was married by the same initials, in which case a publication directed to him by such initials, in a suit for divorce by his wife, was sufficient.

And in Elting v. Gould, 96 Mo. 535, 9 S. W. 922, it was held that, in an action to enforce a lien for taxes on land, an order for service by publication was sufficient which designated the owner by the initials of his Christian names, where his name was so written in the recorded deeds to the land.

But in Kahn v. Thorpe, 43 Wash. 463, 86 Pac. 855, a tax foreclosure action, it was 28 L.R.A. (N.S.)

Jones v. Perry, 10 Yerg. 59, 30 Am. Dec. 430; Westersfield v. South Omaha Loan & Bldg. Asso. 75 Neb. 53, 105 N. W. 1087, 107 N. W. 1010.

The statute of limitations continued to run until the filing of the amended petition.

Currier v. Teske, 82 Neb. 315, 117 N. W. 712; Stull v. Masilonka, 74 Neb. 309, 104 N. W. 188, 108 N. W. 166.

Rose, J., delivered the opinion of the court:

The subject-matter of litigation in this suit is 640 acres of land in Knox county. Both parties claim title. When Clement L. Boon was the undisputed owner, he conveyed the land and 100 acres more to Ellis W. Wall, January 1, 1890. Eight days later, the grantee and his wife mortgaged the entire tract of 800 acres to Pierce, Wright, & Company for \$2,850, and by deed dated January 11, 1890, reconveyed it to Boon, subject to the encumbrance thus created. Boon did not pay the taxes, interest, or the mortgage, but left the state a year or two later, and never returned. September 28, 1903, Boon executed and delivered to Paul Butler a quitclaim deed to the premises, and the latter's interest was transferred to plaintiff, March 7, 1904. In the meantime, Henry H. Drake became the owner of the mortgage, brought suit March 1, 1894, to foreclose his lien, procured a decree of foreclosure, bought the land August 18, 1894, at judicial sale thereunder, which was confirmed September 25, 1894, and received, April 27, 1895, a

held that although the property was assessed on the tax rolls to Joseph G. Thorpe, a published summons running to J. G. Thorpe was sufficient. This was based upon the ground that the proceedings were *in rem* against the land, not against the person of the owner, and that the evidence showed that he was commonly known by the latter name.

In the first two cases cited in the note to Illinois C. R. Co. v. Hasenwinkle, 15 L.R.A. (N.S.) 129 (upon the question of summons or notice to a person by wrong initial), it appeared that service was had by publication in which merely the initial letters of the Christian names were used, but that these initials appeared in an inverse or improper order, for which reason the notices were held ineffectual. In each case the court expressly said it was not called upon to determine the sufficiency of a notice which contains only the initial letter of the Christian name.

As to the omission of the Christian name in the publication of process, see note to Whitney v. Masemore, 11 L.R.A. (N.S.) 676.

As to the use of a nickname in the publication of process, see Ohlman v. Clarkson Sawmill Co. ante, 432.

sheriff's deed to the entire tract of 800 acres. Through mesne conveyances from Drake, defendants claim title to the 640 acres in controversy, and are now in possession thereof. Plaintiff instituted a suit in ejectment against them March 11, 1905, for the realty in dispute. In their answer defendants pleaded the mortgage described, an assignment to Drake, nonpayment, foreclosure, a judicial sale, the sheriff's deed, title in themselves through mesne conveyances from Drake, and adverse possession for ten years. After the court acquired jurisdiction in the ejectment suit, plaintiff was permitted to amend her petition by changing the form of action to a suit to redeem the land, and to require defendants to account for rents and profits. If plaintiff has any right to redeem, it rests on the quitclaim deed from Boon and the conveyance from Boon's grantee to plaintiff. Defendants have no title, unless it is derived from the sheriff's deed to Drake, or acquired by adverse possession. The trial resulted in a decree for defendants. The suit was dismissed, and plaintiff appeals.

The trial court held that Boon's title was divested and the right to redeem terminated by the foreclosure of the mortgage. Plaintiff insists that this holding was erroneous, and that the foreclosure proceedings were void for the following reasons: Boon did not sign the mortgage or the notes secured. He was sued by the initial letters of his name. There was no notice except by publication. The verification in Drake's petition did not state that he could not discover Boon's true name, and neither the summons nor notice contained the words "real name unknown," as required by § 148 of the Code. The title to the land described in Drake's petition stood on the public records in the name of Clement L. Boon. On these facts, plaintiff argues that the district court had no jurisdiction to bar her equity of redemption, and that the sheriff's deed was void. In an effort to meet this attack on the foreclosure proceedings, defendants adduced proof in the present case to show that in the name of "C. L. Boon" he transacted business, accepted deeds, transferred realty, and acted in the capacity of deputy county clerk and of notary public. It is insisted by defendants that these facts show that he was sued by his true name. They have argued this point at some length, and have referred to a number of cases in support of their contention. Their view of the law, however, cannot be accepted as applicable to the present controversy. Statutes creating a method for bringing a defendant into court without personal service are strictly construed, where actual notice may never reach him. *Stull v. Masionka*, 74 Neb. 322, 104 N. W. 188, 108 N. W. 166. For the purpose of con-

structive notice under the statutes of this state, in a case where defendant is not sued on a written instrument signed by himself, the legal name of a defendant includes his first Christian name and surname or patronymic. *Enewold v. Olsen*, 39 Neb. 59, 22 L.R.A. 573, 42 Am. St. Rep. 557, 57 N. W. 765. Not having been so described as a defendant, Boon's title was not divested by the foreclosure proceedings, since he was not personally served with notice, did not appear in the case, and did not sign the mortgage or notes secured by the name of C. L. Boon or by any other name. *Herbage v. McKee*, 82 Neb. 354, 117 N. W. 706; *Enewold v. Olsen*, *supra*. The law required personal service when Boon was not sued by his true name. He was protected by that law. The fatal defect deprived the court of jurisdiction to bar his right of redemption. In the present suit, the law was not abrogated nor jurisdiction restored in the foreclosure proceeding by proof that Drake sued him by the initial letters used by himself, and by which he was known in the community. It follows that the title of defendants fails in so far as it rests on the sheriff's deed to Drake.

Plaintiff also complains of the trial court's ruling that defendants have title to the land by adverse possession. The objection to this finding is that there is no evidence to support it. Plaintiff commenced her action in ejectment March 11, 1905. Summons was issued the same day and afterward returned with the appearance of each of the defendants indorsed thereon. She takes the position that the running of the statute of limitations against her cause of action was arrested March 11, 1905, when the summons was issued. Defendants insist that the ejectment suit was abandoned, and, by reason thereof, the statute of limitations continued to run until her action to redeem was barred at a later date. The question thus presented is not an open one in this state. Under both petitions, plaintiff asked the court to protect her title, and the changing of the form of action did not delay the assertion of her rights until she filed in the ejectment suit her amended petition to redeem the land. Defendants having waived service of summons in ejectment, the running of the statute of limitations was arrested when it was issued, March 11, 1905. In *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614, plaintiff, by amendment of his petition, changed the form of his action from ejectment to a suit to redeem; and this court, in an opinion delivered by Chief Justice Maxwell, held that the statute of limitations ceased to run from the date of the summons in ejectment, saying: "The plaintiff sought in the original petition to recover the land, because he was the owner thereof; and in the amended petition, filed by

him by leave of court, he seeks to recover the land in question upon the ground that he is the owner of the same, but, while asking equity, he offers to do equity by paying the defendant all valid claims held by him against the land. The cause of action is the same, although the relief is sought in a different manner from that in the first petition. This, however, does not change the cause of action, and the statute of limitation ceased to run when the summons which was served on him was issued."

To establish title by adverse possession, it was therefore necessary for defendants to show that Drake took actual and exclusive possession of the premises as early as March 11, 1895. *Clark v. Hannafeldt*, 79 Neb. 586, 113 N. W. 135. Drake's action in attempting to enforce his mortgage against the real estate was inconsistent with his claim of title by adverse possession. *McKeighan v. Hopkins*, supra. He received the sheriff's deed through which defendants claim title as late as April 27, 1895, and ten years had not elapsed March 11, 1905, when plaintiff's ejectment suit arrested the running of the statute of limitations. There is evidence that Drake and his grantees did not have exclusive occupancy for the statutory period; that the land was never cultivated after 1890; and that it was open territory or commons where cattle ran at large as late as May 24, 1895. Unimproved and unoccupied land is presumed to be in possession of the person holding the legal title. *Herbage v. McKee*, supra; *Yorgensen v. Yorgensen*, 6 Neb. 384; *Troxell v. Johnson*, 52 Neb. 46, 71 N. W. 968. There is no pretense that Drake ever made a personal effort to take possession of the premises. Defendants rely chiefly on the testimony of E. D. Wigton to establish title by adverse possession. Wigton lived in Sioux City, Iowa, and was Drake's attorney. For a time John Green was lessee and Robert Peyton was local agent under Wigton's directions. Wigton testified that he came over from Iowa, and went out to the land in the summer or fall of 1893. When asked what he did upon that occasion with reference to taking possession, he answered: "I viewed the land, and it was particularly pointed out to me by a Mr. Green, who had been using it for grazing purposes; and I informed Mr. Green that I represented the man who held the mortgage against the land, and that the interest on the mortgage and taxes were delinquent, and that I had charge of the land for my client, and instructed him that the rents hereafter would be payable to my client; Mr. Boon and Mr. Wall both being out of the country, and unable to reach them by any usual process."

Wigton further stated that on behalf of
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Drake he declared himself to be in possession of all the land described in the mortgage, and claimed the same against all the world; that he actually took possession openly and notoriously under claim of ownership; that Green was pasturing the land at the time, and was instructed to make settlement with Peyton; and that Green agreed to recognize Drake as landlord. Wigton also testified that he afterward saw the land on two different occasions. Green stated that he never rented the land from Wigton, and never paid any rent except to Peyton. Peyton said he never leased the land to anyone before May 24, 1895, and that the first rent received was for the period between May 24, 1895, and January 1, 1896. The lease is in the record. It is dated May 24, 1895, expired January 1, 1896, and is signed by Green and Peyton. In a letter dated May 17, 1895, Wigton wrote Peyton as follows: "We have arranged to take legal steps, if necessary, to disabuse Mr. Green of his idea in regard to control of the land. . . . It might be Green would rent land, but he must first get the idea of his right to the land out of his head." In a letter dated May 22, 1895, Wigton wrote Peyton further: "You may rent the land to Green for pasturage for \$40 cash, lease to run to January 1, 1896. Sign lease 'Henry H. Drake' by you as agent, and have it distinctly understood therein that Green acknowledges Drake's ownership, and that he will give possession without further trouble January 1. Green's claim to the land is entirely without foundation, even if he had rented it from some other party, as the sheriff's deed entitled Drake to possession." Wigton's testimony that he viewed the land, and his conclusion that he took possession for Drake, when considered with his letters and the entire record, fail to show actual and exclusive possession under claim of ownership prior to May 24, 1895. From that date ten years did not elapse before plaintiff brought her ejectment suit, March 11, 1905. Defendants' testimony has been carefully considered, and is found to be wholly insufficient to establish title by adverse possession for the full statutory period.

Delay on the part of plaintiff in bringing her suit is also urged to defeat her recovery, but the rule in this state is that an action to redeem may be brought at any time before the statutory bar of ten years is complete. *Dickson v. Stewart*, 71 Neb. 424, 115 Am. St. Rep. 596, 98 N. W. 1085. For the reasons given, the decree of the District Court is reversed, and the cause remanded for further proceedings.

Petition for rehearing denied.

NEW YORK COURT OF APPEALS.

MARY M. COOKE WOODRUFF, Admr.,
etc., of Jason G. Cooke, Deceased, Respt.,
v.

H. B. CLAFLIN COMPANY, Appt.

(198 N. Y. 470, 91 N. E. 1103.)

Executor — overpayment — right to recover.

1. An executor who, under the mistaken belief that the estate is solvent, pays a claim in full, may, upon ascertaining the fact of its insolvency, recover the excess over the portion equitably due the claimant.

Surrogate's decree — person not party — binding effect.

2. One holding a claim against a decedent's estate is not bound by a decree of the surrogate's court in a proceeding to which he is not a party, settling the executor's accounts, and declaring the estate to be insolvent, nor by a decree entered on petition of the executor's surety, amending the original decree by restating the dividend to which creditors were entitled, after a citation to such claimant to attend the hearing.

Note. — Right of executor or administrator to recover back from creditor excessive payments made under the mistaken belief that estate was solvent.

It may be laid down as a rule supported by the weight of judicial authority that an executor or administrator who, under the mistaken belief that the estate is solvent, pays the claim of a creditor in full, may, upon ascertaining the fact of its insolvency, recover the excess over the *pro rata* share due the claimant.

This rule, in addition to WOODRUFF v. H. B. CLAFLIN Co. and those cases therein sufficiently cited and reviewed, is also supported by Tarplee v. Capp, 25 Ind. App. 50, 50 N. E. 270; Walker v. Bradley, 3 Pick. 261; Bliss v. Lee, 17 Pick. 83; Heard v. Drake, 4 Gray, 514.

In East v. Ferguson, 59 Ind. 169, it was held that an administrator may recover the amount due the estate from a debtor, and compel him, being also a creditor, to file his debt against the estate, and share *pro rata* therein as other creditors, where it appeared that upon settlement with such creditor, through mutual mistake that the estate was solvent, his claim was allowed in full.

A case closely related to the above, although possibly not directly in point, is Moore v. Moore, 88 Ky. 683, 11 S. W. 780, where it was held that the wife of a testator, who, in accordance with the latter's wishes, paid creditors out of the proceeds of an insurance policy in her favor, under the mistaken belief that the estate was solvent, and that she would be indemnified, 28 L.R.A. (N.S.)

Executor — overpayment — carrying on business — effect.

3. That the executor, after paying a claim against the estate in full, carries on decedent's business for a time at a loss, does not prevent his recovering the overpayment in case the estate proves to be insolvent, if it is not made to appear that such conduct in any manner affected the respective rights or relations of the executor and claimant.

(May 17, 1910.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Monroe County, entered upon a directed verdict for plaintiff in an action brought to recover back money alleged to have been overpaid to defendant as a creditor of the estate of Jason G. Cooke, deceased. Reversed.

The facts are stated in the opinion.

Mr. Percival DeWitt Oviatt, for appellant:

A creditor cannot be compelled, in the absence of statute, to refund a portion of the moneys he has obtained from an insolvent

might, upon finding that the estate was insolvent, compel the creditors to refund the insurance money, and to take of the estate their *pro rata* share of the assets.

However, as will be noted from the cases cited in the WOODRUFF CASE, there are a few which have denied the right of an executor or administrator to maintain an action of this character.

In Lawson v. Hansborough, 10 B. Mon. 147, it was held that when an administrator pays a debt in full to a creditor, under the mistaken belief that the estate is solvent, such mistake being the result of his own negligence, he cannot recover of such creditor in equity the surplus paid over what would have been the creditor's *pro rata* share of the estate. The court, in distinguishing Walker v. Hill, 17 Mass. 386, cited in the WOODRUFF CASE, said: "Although it may be inferred from the opinion of the court in that case, that their statute for the administration and settlement of estates is, in many of its leading provisions, similar to ours, yet there may, and probably do, exist, some distinctive features in the two statutes which demand a different rule to prevail in relation to the question in this case. Our statute certainly contemplates a class of cases where the executor or administrator will pay the debts at his own risk, although he may deem the estate sufficient to pay all the debts of the decedent. There would be no propriety in the language used by the statute, nor would it be allowing to it any meaning, if an exposition be given to it by which a mere mistaken belief entertained by the executor or administrator as to the sufficiency of the assets, no matter how it originated, or what cause produced it, will

estate in payment of his claim, where the personal representative pays the claim upon the assumption that the estate is solvent, but previous to the time when the law would compel him to make such payment.

18 Cyc. Law & Proc. p. 851; *Beardsley v. Marsteller*, 120 Ind. 319, 22 N. E. 315; *Egbert v. Rush*, 7 Ind. 706; *Adams v. Smith*, 19 Nev. 259, 9 Pac. 337, 10 Pac. 353; *Whitted v. Nash*, 66 N. C. 590; *Gulke v. Uhlig*, 55 How. Pr. 434; *Johnson v. Molsbee*, 5 Lea, 444; *Carson v. McFarland*, 2 Rawle, 118, 19 Am. Dec. 627; *Findlay v. Trigg*, 83 Va. 539, 3 S. E. 142; *Staples v. Staples*, 85 Va. 76, 7 S. E. 199; *Story*, Eq. Jur. 11th ed. § 90.

As the payment was voluntary, was made within six months of the death, and was a compromise, the administratrix cannot recover.

Re Gilman, 92 App. Div. 462, 87 N. Y. Supp. 128; *Chouteau v. Suydam*, 21 N. Y. 179; *Commercial Bank v. Rochester*, 42 Barb. 488; *New York & H. R. Co. v. Marsh*, 12 N. Y. 308; *Lawyers' Surety Co. v. Reinach*, 25 Misc. 150, 54 N. Y. Supp. 205, 23 Misc. 242, 51 N. Y. Supp. 162; *Windbiel v. Carroll*, 16 Hun, 101; *Hess v. Cohen*, 20

Misc. 333, 45 N. Y. Supp. 934; *Mutual L. Ins. Co. v. Wager*, 27 Barb. 354.

The debts the administratrix contracted in the business were inferior to a debt of the intestate, and she wrongfully paid these business debts, contracted subsequent to the death, from the assets which were applicable to the payment of defendant's debt.

18 Cyc. Law & Proc. pp. 241, 244, 555; *Ferrin v. Myrick*, 41 N. Y. 315; *Farrelly v. Schaettler*, 121 App. Div. 678, 106 N. Y. Supp. 445; *Willis v. Sharp*, 113 N. Y. 586, 4 L.R.A. 493, 21 N. E. 705; *Austin v. Munro*, 47 N. Y. 360; *Morrow v. Morrow*, 2 Tenn. Ch. 549.

The decree resettling the accounts of the administratrix, which is the plaintiff's only basis for recovery, was made without jurisdiction. As to this defendant, at least, it is void, and its admission in evidence constitutes error.

Rockwell v. Carpenter, 25 Hun, 529; *Parker v. Linden*, 59 Hun, 359, 13 N. Y. Supp. 95; *Heath v. New York Bldg. Loan Bkg. Co.* 146 N. Y. 260, 40 N. E. 770; *Foley v. Foley*, 15 App. Div. 276, 44 N. Y. Supp. 588; *Fannon v. McNally*, 33 App. Div. 609, 53 N. Y.

authorize the reclamation of the money, so far as it exceeds the ratable share of the debts paid."

So, in *Brooking v. Farmers' Bank*, 83 Ky. 431, it was held that notwithstanding a statute to the effect that when a personal representative shall pay to a creditor an undue proportion of his demands, under a mistake as to the solvency of the estate, he may recover from the creditor the amount of the overpayment, such personal representative cannot recover from the holder of a note, who, under the mistaken belief that the estate was solvent, had been paid in full, where it appeared that the sureties liable for the payment of the note had been released through the negligence and bad faith of the administrator.

Where the creditor expressly agrees to refund upon it being found that the estate is insolvent, it would seem as a matter of course that the executor or administrator may recover the overpayment. *Wright v. Jordan*, 71 Ind. 1; *Beardsley v. Marsteller*, 120 Ind. 319, 22 N. E. 315; *Hatcher v. Royster*, 14 Lea, 222.

The administrator cannot recover the overpayment where the commissioners of insolvency returned a list of claims allowed by them after the time limited in their commission, although the judge of probate thereafter ordered a payment of the dividends to the creditors. *Bascom v. Butterfield*, 1 Met. 536.

So, an executor cannot recover the overpayment, made more than a year after his appointment, where a statute provides in effect that if an executor or administrator shall not, within one year after notice given

of his appointment, have notice of demands against the estate which will authorize him to represent the estate insolvent, he may proceed to pay the debts due from the estate, and the creditors, if subsequent demands arise from other creditors, shall not be liable to refund any part of the amount received by them. *Colegrove v. Robinson*, 11 Met. 238.

It would follow that a payment made within the year would not come within the above statute, and the overpayment might be recovered by the personal representative. *Heard v. Drake*, *supra*.

In *Austin v. Henshaw*, 7 Pick. 46, where the executor of an estate promised a debtor that if the latter would secure a note due from the estate to a certain creditor, he would allow the note towards the payment of his debt, it was held, upon the estate afterwards proving insolvent, that the executor could not recover of the debtor the difference between the amount of the note and the dividends decreed upon it; since, as the court said, the negotiations for the procuring of the note were made at the request of the executor, and he could not be permitted to throw the loss upon the defendant.

An administrator cannot recover back the whole amount so paid, but only the amount of the overpayment. *Morris v. Porter*, 87 Me. 510, 33 Atl. 15.

The right of an executor or administrator to recover overpayments to creditors does not accrue when the estate is represented insolvent, nor when commissioners are appointed, but when the decree of distribution is made. *Flint v. Valpey*, 130 Mass. 385.

Supp. 1032; *Ray v. New York Bay Extension R. Co.* 34 App. Div. 5, 53 N. Y. Supp. 1052; *Smith v. Smith*, 40 App. Div. 251, 57 N. Y. Supp. 1122; *Muller v. Naumann*, 85 App. Div. 337, 83 N. Y. Supp. 488; *Duncomb v. Poole*, 41 Misc. 335, 84 N. Y. Supp. 749.

A surrogate's court, having only statutory powers, and being of an inferior and limited jurisdiction, would have no such power to amend as is possessed by a court of general jurisdiction, unless such a power were given expressly by statute. There is no such statute giving New York surrogate courts such powers.

Singer's Estate, 6 N. Y. Civ. Proc. Rep. 393; *Re Tilden*, 98 N. Y. 442; *Re Soule*, 72 Hun, 594, 25 N. Y. Supp. 270; *Re Monteith*, 27 Misc. 163, 58 N. Y. Supp. 379; *Re Hawley*, 100 N. Y. 206, 3 N. E. 68; *Re Mount*, 27 Misc. 411, 58 N. Y. Supp. 176; *Re Hayward*, 44 App. Div. 265, 60 N. Y. Supp. 636; *Re Wallace*, 28 Misc. 603, 59 N. Y. Supp. 1084; *Re Douglas*, 52 App. Div. 303, 65 N. Y. Supp. 103; *Re Walrath*, 37 Misc. 696, 76 N. Y. Supp. 448; *Yale v. Baker*, 2 Hun, 468; *Melcher v. Stevens*, 1 Dem. 123.

A surety, although not a party to the first proceeding, and although not named in the first decree, was bound by that decree, had the right to intervene in the proceeding, and likewise the right to appeal.

Poillon v. Volkenning, 11 Hun, 385; *McMahon v. Smith*, 24 App. Div. 25, 49 N. Y. Supp. 93; *Casoni v. Jerome*, 58 N. Y. 315; *Deobold v. Oppermann*, 111 N. Y. 531, 2 L.R.A. 644, 7 Am. St. Rep. 760, 19 N. E. 94; *Scofield v. Churchill*, 72 N. Y. 565; *Gerould v. Wilson*, 81 N. Y. 583; *Re Sill*, 41 Misc. 270, 84 N. Y. Supp. 213; *Brownell v. Snyder*, 122 App. Div. 246, 106 N. Y. Supp. 771; 2 Cyc. Law & Proc. p. 638; *Hotchkiss v. Platt*, 7 Hun, 56, affirmed in 66 N. Y. 620; *Re St. John*, 104 App. Div. 460, 93 N. Y. Supp. 836.

Messrs. O'Brien & O'Brien, for respondent:

The decree resettling the accounts of the administratrix, in a proceeding to which the defendant was a party, is binding upon the defendant as to all matters therein adjudicated, and cannot now be attacked collaterally.

Re Douglas, 60 App. Div. 64, 69 N. Y. Supp. 687; *Re Hood*, 90 N. Y. 512; *Re Tilden*, 98 N. Y. 434; *Sipperly v. Baucus*, 24 N. Y. 49; *Hotchkiss v. Platt*, 7 Hun, 56, affirmed in 66 N. Y. 620; *Re St. John*, 104 App. Div. 460, 93 N. Y. Supp. 836.

A petition to vacate or modify a decree, by a person not a party thereto, but prejudiced thereby, is an original special proceeding, not a motion in the old proceeding.

Re Regan, 167 N. Y. 338, 60 N. E. 658; 28 L.R.A. (N.S.)

Re Killan, 172 N. Y. 547, 63 L.R.A. 95, 65 N. E. 561; *Re Tilden*, 98 N. Y. 442; *Re Miles*, 33 Misc. 147, 68 N. Y. Supp. 368, affirmed in 170 N. Y. 75, 62 N. E. 1084; *Redfield*, Law & Pr. of Surrogate Ct. 5th ed. p. 865; *Deobold v. Oppermann*, 111 N. Y. 531, 2 L.R.A. 644, 7 Am. St. Rep. 760, 19 N. E. 94.

The accounting of a personal representative, and the settlement of her account, are separate proceedings.

Remington v. Walker, 21 Hun, 322.

The defendant and other paid creditors were proper parties to the original settlement of the account.

Re De Forest, 86 Hun, 300, 33 N. Y. Supp. 216.

The petition of the surety invested the surrogate's court with jurisdiction to vacate, modify, or amend the original decree.

Sipperly v. Baucus, 24 N. Y. 46; *Re St. John*; *Re Regan*; and *Re Killan*,—*supra*; *Re Traver*, 9 Misc. 621, 30 N. Y. Supp. 851; *Re Harlow*, 73 Hun, 433, 26 N. Y. Supp. 469; *Re Dey Ermand*, 24 Hun, 1; *Re Donlon*, 66 Hun, 190, 21 N. Y. Supp. 114; *Pew v. Hastings*, 1 Barb. Ch. 452; *Wells v. Wallace*, 2 Redf. 58.

The personal representative of an insolvent estate may recover an overpayment made to a creditor.

Wetmore v. Porter, 92 N. Y. 76; *Deobold v. Oppermann*, *supra*; *Kingston Bank v. Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516; *Roberts v. Ely*, 113 N. Y. 128, 20 N. E. 606; *Chapman v. Forbes*, 123 N. Y. 532, 26 N. E. 3; *Commercial Nat. Bank v. Sloman*, 121 App. Div. 874, 106 N. Y. Supp. 508; *Bliss v. Lee*, 17 Pick. 83; *Walker v. Bradley*, 3 Pick. 261; *Heard v. Drake*, 4 Gray, 514; *Walker v. Hill*, 17 Mass. 380; *Flint v. Valpey*, 130 Mass. 385; *Mansfield v. Lynch*, 59 Conn. 320, 12 L.R.A. 285, 22 Atl. 313; *Morris v. Porter*, 87 Me. 510, 33 Atl. 15; *Rogers v. Weaver*, 5 Ohio, 536; *Wolf v. Beaird*, 123 Ill. 585, 5 Am. St. Rep. 565, 15 N. E. 161; *Tarplee v. Capp*, 25 Ind. App. 56, 56 N. E. 270; *East v. Ferguson*, 59 Ind. 169; *Stokes v. Goodykoontz*, 126 Ind. 535, 26 N. E. 391; *Boles v. Jessup*, 57 Ark. 469, 21 S. W. 880.

The defendant is in no position to say that plaintiff is estopped from maintaining this suit by reason of the very misconduct it compelled her to commit.

Wetmore v. Porter and Chapman v. Forbes, *supra*.

Willard Bartlett, J., delivered the opinion of the court:

Jason G. Cooke, who died at Potsdam, New York, on December 23, 1899, was indebted to the defendant in the sum of \$725.95. His widow, the plaintiff, became his ad-

ministratrix on January 2, 1900. The defendant pressed for payment of its claim, threatening to sue if it were not speedily paid, whereupon the administratrix, believing the estate to be solvent, compromised it by paying \$700 in the month of May, 1900. Upon her subsequent accounting in the surrogate's court, it turned out that the estate has been from the outset insolvent, and was really capable of paying only a dividend of 71.04 per cent upon its indebtedness. Such a dividend would have given the H. B. Claflin Company \$178.48 less than it received from the administratrix in discharge of its claim, and she brought the present suit to recover that amount, with interest. As evidence of the insolvency of the estate and its extent, she was allowed to introduce, over the defendant's objection and exception, a decree of the surrogate's court of Monroe county upon her accounting, to which it is conceded the defendant was not a party, and a second decree of the same court, purporting to amend the first, made in a proceeding which the defendant was cited to attend. The competency of this proof will be considered presently. The trial court directed a verdict for the plaintiff, and the judgment thereon has been affirmed by the appellate division.

We have no statute in New York, giving the personal representative of an insolvent decedent a right of action in such a case as this; and the first question presented for our determination is whether an action of this character can be maintained in the absence of statutory authority therefor. The only New York case referring to the question, to which our attention has been called by counsel, is *Gulke v. Uhlig*, 55 How. Pr. 434, which was decided by a general term of the New York court of common pleas, consisting of Chief Justice Charles P. Daly and Judges Van Hoesen and Joseph F. Daly. Two opinions were written, one by Judge Van Hoesen and the other by Judge Joseph F. Daly. It does not appear with which of these the Chief Justice concurred. Judge Van Hoesen distinctly assumed that an administrator could recover money which he had overpaid to creditors in confidence in the ultimate solvency of the estate, but insisted that the suit must be brought in equity, and not at law; while Judge Joseph F. Daly avowed his inability to perceive any good reason for denying the administratrix relief in an action at law, if she made out a case which would entitle her to recover formerly in equity. The case involved other issues, however, and it is impossible to ascertain from the report which of these conflicting views received the sanction of a majority of the court.

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The decisions in other states are conflicting. The doctrine which is supported by the weight of judicial authority, and which, it seems to me, we ought to sanction, may be briefly stated. In the case of the death of an insolvent debtor, the law contemplates equality in the distribution of the proceeds of his estate among his creditors. A creditor who seeks more than his *pro rata* share of the debtor's property under such circumstances seeks that which does not belong to him, and makes the other creditors poor in proportion. To insist upon full payment from an insolvent estate is dishonest, if the party thus insisting is aware of the insolvency. Hence, whether the overpaid creditor shares the erroneous belief of the administrator, that the estate is solvent, or is acquainted with its true condition, he is equally obligated to return the surplus he has received over the dividend to which he was entitled when it has become judicially ascertained that the estate is not large enough to pay all the debts in full; for in the first case both parties act under a mutual mistake of fact, and in the second case there is a wrongful intent on one side and a mistake on the other. The creditor who has received the excess has no right to retain it, in equity and good conscience; and the personal representative who has innocently paid such excess may maintain an action to recover it, if he moves seasonably after the ascertainment of the insolvency, and has done nothing which ought to constitute an estoppel in favor of the overpaid creditor.

It is settled by a uniform series of decisions in Massachusetts, beginning with the case of *Walker v. Hill*, 17 Mass. 380, that an administrator who pays a debt due from his intestate within a year after giving notice of his appointment, and under the honest belief that the estate is solvent, may subsequently, when the estate is shown to be insolvent, recover back the difference between the amount of the debt so paid and the amount awarded to the creditor by the probate court on a judicial settlement of the estate. See *Heard v. Drake*, 4 Gray, 514, and *Flint v. Valpey*, 130 Mass. 385. It is not entirely clear, however, that the assertion of this doctrine in Massachusetts has not been dependent to some extent upon the statutes of that commonwealth. The case of *Walker v. Hill*, *supra*, was cited by Finch, J., writing for this court in *Re Hodgman*, 140 N. Y. 421, 431, 35 N. E. 660, 662, when he said it must probably be granted "that an executor may, at least in equity, recover an overpayment to a legatee under peculiar circumstances which excuse his mistake."

The case of *Mansfield v. Lynch*, 59 Conn. 320, 12 L.R.A. 285, 22 Atl. 313, was an action by an administrator *de bonis non*. The

first administrator, within the time limited for the presentation of claims, paid in full to the defendants a claim of \$400, under the belief that the estate was solvent, and having disallowed certain claims against the estate on the ground that they were invalid, as he had been advised by the probate judge. These disallowed claims were subsequently held to be valid in a judicial proceeding, and the estate was thereby rendered insolvent. The dividend which the defendants would have received was \$290 less than the amount actually paid them. The first administrator having died, and the plaintiff having succeeded him as administrator *de bonis non*, he sued the defendants to recover \$290, on the ground that it was money paid to them under a mistake by the original administrator. The supreme court of errors of Connecticut held that the action was maintainable, saying: "We know of no case, and have been referred to none, wherein it is decided that the administrator may not recover in a case like the present." The court points out that in such a case the mistake in overpayment works no harm whatever to the creditor, but that it would be against equity and good conscience to allow the creditor to retain money which rightfully belongs to the estate, and which has been obtained solely in consequence of an honest error. A considerable portion of the opinion is devoted to a discussion of the question whether it is necessary that the mistake should be one of fact, and the conclusion is reached that the same principle should apply even where the mistake is only one of law. That question, however, does not arise in the present case, where it is clear that the administratrix made a mistake of fact as to the condition of the estate.

In *Morris v. Porter*, 87 Me. 510, 33 Atl. 15, it is expressly held "that an administrator who, within the year allowed by statute, pays a creditor's claim in full, acting upon the honest belief that the estate is solvent, may, upon the estate proving actually insolvent, recover back the difference between the amount so paid and the *pro rata* share which the creditor would have been entitled to in common with all other general creditors." Such right of action is declared to arise out of the equitable doctrine that the creditor has received money which, in equity and good conscience, belongs to the estate, for the purpose of making an equal distribution among all the general creditors. This purpose is characterized in the opinion as "the cardinal principle of the laws relating to the administration and settlement of decedent's estates."

In *Wolf v. Beaird*, 123 Ill. 585, 5 Am. St. Rep. 565, 15 N. E. 161, both the executor

and the creditor who received the overpayment believed that the assets of the estate were sufficient to pay all claims of the same class in full, and acted upon such belief; but both were mistaken in regard to the fact. The supreme court of Illinois held that the executor might recover back the overpayment in an action for money had and received for the use of the estate. So also in Ohio it has been held that, where an administrator, supposing an estate to be solvent, pays a creditor more than the distributive share to which he was entitled upon a final settlement of the estate, the administrator may recover back the difference in an action for money had and received. *Rogers v. Weaver*, 5 Ohio, 536.

The cases cited by the appellant which distinctly deny the right to maintain an action of this character are few in number. The earliest of these is *Carson v. McFarland*, 2 Rawle, 118, 19 Am. Dec. 627, decided by the supreme court of Pennsylvania in 1828. There it was held that an administrator who had paid money within a year from the issue of letters, to a creditor of the intestate, on account of a just debt, could not recover it back on the ground that it proved to be an overpayment by reason of a subsequently discovered deficiency of assets. In *Findlay v. Trigg*, 83 Va. 539, 3 S. E. 142, it was held that where an administrator voluntarily pays debts of inferior class in preference to debts of higher class, and there is a deficiency of assets, he is not entitled to have the money refunded by creditors so overpaid. The only authority cited in the opinion is *Carson v. McFarland*, supra. In Indiana, in the case of *Beardsley v. Marsteller*, 120 Ind. 319, 22 N. E. 315, it is declared to be settled "that, in the absence of an agreement to refund, an administrator who has paid money on account of a just debt cannot recover it back on the ground that, by reason of insufficient assets, not arising from their accidental destruction, loss, or failure, it afterwards appears that he has made an overpayment by mistake, unless the mistake was induced by the fraudulent conduct of the creditor."

Other cases in behalf of the appellant on this branch of the appeal are distinguishable in their facts. Thus, in *Adams v. Smith*, 19 Nev. 259, 9 Pac. 337, 10 Pac. 353, it did not appear that when the administratrix caused the claim to be paid she supposed that the estate was solvent. On the contrary, it was clearly shown that she paid the claim voluntarily and in her own wrong. The case of *Johnson v. Molsbee*, 5 Lea, 444, was not an action by an executor or administrator to recover an overpayment made to a creditor under the mistaken supposition that the estate was solvent, but was a suit

in equity, brought by other creditors, to compel those who had been overpaid to refund the excess which they had received over and above their proper *pro rata* shares. The case does not decide the question involved in the case at bar; it merely asserts that such a suit cannot be maintained by creditors.

Without continuing the discussion of the authorities any further, I am of the opinion, as already intimated, that the plaintiff has a right of action upon the facts set out in her complaint. It does not follow, however, that she has established her alleged cause of action by competent proof. It was essential for her to show that the estate was insolvent and the extent of its insolvency. The adjudication to the effect that it could pay creditors only 74.01 per cent by the surrogate's court of St. Lawrence county, in the first decree which she put in evidence, was not binding upon the defendant corporation, since it was not made a party to the proceeding in which that decree was entered. Two years later an attempt was made to render it binding upon the defendant by means of an application by the surety upon the bond of the administratrix, to open the original decree and amend the same. The petition of the surety alleged that the original decree was erroneous in having credited the administratrix with 74.01 per cent of the amount paid to unsecured creditors; whereas, the amount paid to unsecured creditors should have been stated at 74.043 per cent, at which the dividend should have been fixed. It further alleged that the original decree erroneously directed a dividend upon a claim of \$1,000 to be paid to the administratrix individually. It prayed that a citation issue, directed to all the persons interested in the estate, including the defendant in the present action, ordering them to show cause before the surrogate's court why the said first decree, settling the accounts of the administratrix, should not be reopened and amended, as set forth in the petition. The defendant was duly cited to appear in accordance with the prayer of the petition, and upon the return of the citations a second decree was made which in terms granted the prayer of the petitioner, and amended the original decree in the respects therein prayed for. The contention of the plaintiff is that these amendment proceedings put the defendant in precisely the same position as though it had been a party to the judicial settlement of the accounts of the administratrix which terminated in the first decree; and, there-

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fore, that it was bound by the adjudication of insolvency therein contained, and by the determination of the surrogate's court as to the dividend to which creditors were entitled. No such effect can properly be given to the proceedings upon the petition of the surety, which led to the rendition of the second amendatory decree. The original decree was not vacated and set aside. The petitioning surety did not ask that this should be done. The original decree was left to stand precisely as it was first made, except in the particulars which have been pointed out. It seems to me that it would be a perversion of the truth to assume that the defendant had ever been afforded an opportunity to litigate any of the issues as to the solvency of the estate or the extent of its insolvency, or the correctness of the account of the administratrix, that arose upon her original accounting, which terminated in the first decree. Assuming that the surrogate's court might have set aside the first decree upon a proper application for that purpose, and proceeded with the judicial settlement *de novo*, with the defendant as a party, it is sufficient to say that nothing of the kind was attempted, and what was done in no wise operated to make the first decree evidence against the defendant of the facts which the plaintiff sought to prove by its introduction. There was no other sufficient proof of those facts, and the error in receiving this decree, therefore, requires a reversal of the judgment.

The administratrix carried on the intestate's business for some time at a loss, and the circumstances under which she did this are relied upon by the appellant as insuperable obstacles to a recovery in her behalf, as well as the point that a voluntary payment is not recoverable. The defense of voluntary payment is not available where the payment was the result of mistake; and it does not appear that the conduct of the business by the administratrix, after her settlement with the defendant, in any manner affected their respective rights or relations.

The conclusion which I have reached is that, while an action of this character is maintainable, some of the most material evidence offered and received in behalf of the plaintiff was inadmissible.

The defendant is therefore entitled to a reversal of the judgment and a new trial, costs to abide event.

Cullen, Ch. J., and Gray, Vann, and Chase, JJ., concur. Haight, J., absent.

WASHINGTON SUPREME COURT.

CITY OF SEATTLE, Respt.,

v.

JOHN P. DENCKER, Appt.

(— Wash. —, 108 Pac. 1086.)

License — vending machine — discrimination — validity.

A municipal corporation cannot impose a license tax on automatic vending machines when no tax is placed upon merchants selling the same articles as are sold by the machine, without its aid, where no police supervision or regulation of the machine is necessary.

(May 28, 1910.)

APPEAL by defendant from a judgment of the Superior Court for King County, convicting him of violation of an ordinance requiring the licensing of automatic vending machines. Reversed.

The facts are stated in the opinion.

Messrs. Lyter & Folsom and I. L. Blair, for appellant:

When a business may be carried on without restraint by paying the license fee, the imposition of such fee cannot be upheld as an exercise of the police power.

21 Am. & Eng. Enc. Law, p. 798; Re Nichols, 48 Fed. 164; Re Tyerman, 48 Fed. 167.

The ordinance is a revenue measure.

Ayars's Appeal, 122 Pa. 277, 2 L.R.A. 577, 16 Atl. 363; McKnight v. Hodge, 55 Wash. 289, 104 Pac. 504.

The legislature regulates the business of hawker or peddler only for the purpose of preventing it from becoming a nuisance.

Re Camp, 38 Wash. 396, 80 Pac. 547; State ex rel. Luria v. Wagener, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; Ex parte Crowder, 171 Fed. 252.

There must be back of the fact that a law operates upon all within a class a substantial reason why it is made to operate only upon a class, and not generally upon all.

Ex parte Jentzsh, 112 Cal. 468, 44 Pac. 803; State ex rel. Richards v. Hammer, 42 N. J. L. 439; State v. Whitcom, 122 Wis. 110, 99 N. W. 468.

A merchant cannot be discriminated

Note. — No other case has been found involving the validity of a license tax on automatic vending machines.

In Cain v. Daly, 74 S. C. 480, 55 S. E. 110, however, it was held that a statute prohibiting the buying and selling or exposing to sale of merchandise on Sunday was broad enough to include automatic vending machines, and that a license from the city, authorizing their operation, was of no avail, as such license was subject to the Sunday laws of the state.
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against because of the instrumentality used by him in prosecuting his business.

Re Yot Sang, 75 Fed. 983; Covington v. Dalheim, 126 Ky. 26, 102 S. W. 829; Read v. Graham, 31 Ky. L. Rep. 569, 102 S. W. 860; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Ex parte Westerfield, 55 Cal. 550, 36 Am. Rep. 47; 1 Dill. Mun. Corp. § 322.

A law is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities, or burdensome conditions, on the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.

Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Johnson v. St. Paul & D. R. Co. 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 157.

Messrs. Scott Calhoun and Ralph S. Pierce for respondent.

Dunbar, J., delivered the opinion of the court:

This is an appeal from a judgment of the superior court for King county after trial, upon conviction of the violation of an ordinance of the city of Seattle relating to the sale of goods by automatic vending machine, which ordinance reads as follows:

An Ordinance Licensing Certain Automatic Devices, and Providing a Penalty for Violation.

Be it ordained by the city of Seattle as follows:

Section 1. That it shall be unlawful for any person to maintain, keep, conduct, manage, have in his possession or control for use, any automatic device for the sale of goods of any kind or character, where money or any representative of value is used to operate the same, or where gain or trade is the object, without being licensed so to do by the city of Seattle.

Sec. 2. The license required by this ordinance shall be secured by paying the required amount to the city treasurer, receiving a receipt therefor, and presenting such receipt to the city comptroller, who shall issue such license as the receipt calls for.

Sec. 3. The schedule of amounts to be paid for licenses, is as follows: Where a deposit of one (1) cent or slug representing the same in trade is required to operate the same, one (1) dollar per year for each device; where a deposit of five (5) cents or slug representing the same in trade is required to operate the same, five (5) dollars per year for each device; where a deposit of ten (10) cents or slug representing the same in trade, is required to operate the same, ten (10) dollars per year for

each device; where a deposit of twenty-five (25) cents or slug representing the same in trade is required to operate the same, fifteen (15) dollars per year for each device.

Sec. 4. The provisions of this ordinance shall not be held to include or apply to the sale of gas or other commodities, through prepayment meters, or the installation and use of telephones with slot machine devices, by public-service corporations operating under franchises granted by the city of Seattle, or to the sale of candies or similar confections by automatic devices in theaters or other such places of public assembly where a fee is charged for admission.

Defendant is the manager of the Northwestern Automatic Vending Machine Company, a Washington corporation, which is engaged in the business of selling cigars at retail by means of vending machines, owns and operates a great many of these machines in the city of Seattle, and has invested a large sum of money in said machines. The machines are placed in hotels where cigars are required by the patrons, are under the general supervision of the clerks of the hotels, and, as a rule, a certain percentage is given to the hotel men for operating the machines. Under the ordinance in question the license fee required for the operation of the machines varies from \$30 to \$95, according to the number of devices; the fee being based on the denomination of the coin required for operation and the number of devices, and not on the amount of business done. Each machine has a device for 5, 10, and 25 cent pieces. The cigars are at all times exposed to view under their proper labels and prices, so that the purchaser can at all times see what he is getting for his money, and he gets just what he pays for. If he drops in a 5-cent coin in the device calling for a coin of that denomination, and presses the plunger, he gets a 5-cent cigar; if a 10-cent coin, a 10-cent cigar; and if a 25-cent coin, either a two-for-a-quarter or a three-for-a-quarter cigar, according to his selection. There is no more opportunity for the customer being cheated or defrauded in dealing with this device than by any other one.

The question for determination here is the validity of the ordinance. It is conceded that this ordinance is a revenue measure; that the only ground of difference between licensed and unlicensed sales in this ordinance is in the mode of sales, whether by device or hand. It is conceded that none of the other retail merchants of that occupation is taxed by licenses for the sale of cigars; that if the sale is by this device, the license is imposed; and that if it is by hand,

in the ordinary way, no license is required. In the discussion of this question there are certain fundamental principles which may be conceded; viz., that it is a well-known attribute of sovereignty to tax occupations for the purpose of raising revenue, and that such tax may be imposed in the form of a license fee; that the state may tax all or any occupations or business carried on within its boundaries, imposing the burden upon some and passing by others; that only considerations of general policy determine such selections; and that there is no restriction unless it be imposed by the Constitution. This determination, however, must not be exercised arbitrarily or fraudulently, and, while the policy of the enactment may not be questioned by the courts, the discretion exercised by the lawmaking power must be natural and reasonable, and consistent with the general principles of law and the fundamental principles upon which our government is founded. When these principles are violated to the extent of depriving the citizen of natural or constitutional rights, it is the duty of the court to intervene in his behalf. A wilderness of authority might be cited on this interesting and fruitful subject of litigation, for from the beginning of not only our government, but of all government, the contest has been waged between legislative powers and individual rights. But, from the best-considered cases, the general principles above announced can be deduced.

Tested by these principles, can this ordinance be sustained? We think not. It is plain that there is no police power or regulation involved,—a power which is the sustaining principle in 99 out of 100 of the cases cited; for there is no claim that the business discriminated against here affects in any way the public morals or the business interests of the community, except as it affects the interest of others engaged in the same business, but purely in the way of competition. The article that is sold does not in any way involve the police power. Hence it is a matter of no public concern whether it be sold by device or by some other method. And here it is well to note a vital distinction, founded on sound and just principles of law, between the power to tax occupations under the form of a license, which, by reason of the character of the occupation, is subject to police regulation, and the power to tax what are termed useful trades and employments under the guise of a license. It is well settled that the license required of employments of the latter character can carry with it only such fee as is necessary to make compensation for the regulation services, and cannot be perverted into a tax. Especially is this true when the attempt is made to discriminate

between occupations alike in principle, but differing only in mode of operation in some trifling particular.

The respondent relies largely upon the case of *St. John v. New York*, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 A. & E. Ann. Cas. 909, where the Supreme Court of the United States sustained an act prohibiting the sale of adulterated milk, wherein certain respects it provided different prohibitions and penalties as to producing and nonproducing venders of milk; the enactment making it a penal offense for a person to vend milk that contained more than a certain amount of water and less than a certain amount of milk solids. The objection urged to the law was that it was a discrimination between the vender and the producers of the milk, and that such discrimination had no basis in right or public policy. In discussing the case, the court said: "It has been decided many times that a state may classify persons and objects for the purpose of legislation. We will assume the cases are known, and proceed immediately to consider whether the classification of the law is based on proper and justifiable distinctions, considering the purpose of the law and the means to be observed to effect that purpose. By referring to § 20, it will be observed that adulterated milk, as there defined, includes not only that to which something has been added, but milk from which the cream has been removed, or which is deficient naturally in certain substances, or taken from cows fed on certain things, or cows in certain conditions when milked. In other words, the purpose of the law is to secure to the population, adult and infant, milk attaining a certain standard of purity and strength. All other milk is declared to be 'unclean, impure, unhealthy, adulterated, or unwholesome.' It is not contended that such purpose is not within the power of the state, but it is contended that the power is not exercised on all alike who stand in the same relation to the purpose.

. . . Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. The ultimate purpose is that wholesome milk shall reach the consumer; and it is the conception of the law that milk below a certain strength is not wholesome, but a difference is made between milk naturally deficient and milk made so by dilution. It is not for us to say that this is not a proper difference, and, regarding it, the law fixes its standard by milk in the condition that it comes from the herd. It is certain that, if milk starts pure from the producer, it will reach the consumer pure, if not tampered with on the way. To prevent such tampering, the law is framed and its penalties adjusted. As the stand-

ard established can be proved in the hands of a producing vender, he is exempt from the penalty. As it cannot certainly be proved in the hands of other venders so as to prevent evasions of the law, such venders are not exempt." It would be difficult to discover in principle any similarity between that case and the one at bar. The court in that case, as in nearly all the cases, starts out with the discussion as to what is the purpose of the law. The purpose of the law in the case just cited was to prevent the adulteration of milk, which the state undoubtedly had a right to do under its plain police powers, for the protection of the health of the citizen. But, as we have before said, this case is stripped of any police feature, and if we were to start an investigation to determine the purpose of this act, it could only end in a report that there was no such beneficent purpose as was stated by the court in that case, but that the purpose, if it had any, was to benefit the regular retail cigar merchants by suppressing a business of the same kind, but differing simply in the mode of the delivery of the cigars; or, in other words, to prevent honest competition in the cigar trade. The further reason upon which the court decided that case, *viz.*, that it was more difficult to detect fraud when the milk was in the hands of the vender than when it was in the hands of the original producer, is also absent in this case. As the testimony shows and as the model of the machine indicates, there is no more opportunity for fraud or deceit in selling cigars under this system than in selling them in any other way.

The case of *Chicago v. Bowman Dairy Co.* 234 Ill. 294, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 813, 14 A. & E. Ann. Cas. 700, also largely relied upon by the respondent, is practically the same kind of a case. Probably the circumstances of that case bring it a little nearer to the case at bar. There an act was sustained which required dealers selling cream and milk in bottles or glass jars to have the capacity of the bottles or jars permanently indicated upon them, and prescribed a penalty for having in their possession bottles or glass jars of capacity less than that indicated on the outside; while the act did not apply to venders of milk through other agencies. But that case, as the other, was sustained on the doctrine of the police power of the state. Even so, we are doubtful if that case could be indorsed by this court under the decision in *Spokane v. Macho*, 51 Wash. 322, 21 L.R.A.(N.S.) 263, 130 Am. St. Rep. 1100, 98 Pac. 755, where it was held that in an ordinance to regulate and license employment agencies, a section making it a misdemeanor for the keeper of an employment

agency to make wilful misrepresentations, or to wilfully deceive any person seeking employment, and take a fee of such employment, is unconstitutional, since it is not general and impartial in its operation, but operates upon one class to the exclusion of others, in respect to a penal act common to all classes of business, and exceeds the reasonable limit of police regulations. In that case it was stated that it is a fundamental proposition that an ordinance must be fair in its terms, impartial in its provisions, and general in its application; citing Dill. Mun. Corp. § 322, and McQuillin, Mun. Ord. 193. It was also said: "When exercising its power to regulate a business, the municipality may classify subjects of legislation; but the law must treat alike all of a class to which it applies, and must bring within its classification all who are similarly situated or under the same condition,"—citing *State ex rel. McCue v. Ramsey County*, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112, where the court said: "The classification must be based on some reason suggested by a difference in the situation and circumstances of the subjects treated, and no arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar." A much worse discrimination would be a discrimination between citizens of the same class, engaged in the same business, where there is no reason suggested by a difference in the situation and circumstances of the subjects treated; for not only is the business in this case similar and identical, but it is purely and simply a difference in the mode of transacting the business,—a mode which cannot possibly affect any principle or affect deleteriously the consumer or purchaser of the article sold. The general principle announced by Mr. Dillon, in his work on *Municipal Corporations* (volume 1, § 322), seems to be specially applicable here: "As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and, if done by another, not so, ordinances which have this effect cannot be sustained. Special and unwarranted discrimination or unjust or oppressive interference in particular cases is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation." The Montana legislature passed a law imposing a license tax of \$25 per quarter on every laundry business other than that of a steam laundry, wherein more than one person was employed or engaged, and but \$15 per quarter upon steam laundries. This law was sustained by

the state court of Montana, but was afterwards declared unconstitutional by that eminent jurist, Judge Knowles, of the United States circuit court, in *Re Yot Sang*, 75 Fed. 983. In the course of the opinion it was said: "Unless there is something so different in the conducting of a laundry by steam to that of the carrying on of that business by any other means, the law providing a different and more excessive license for the conducting of such business other than by steam is unequal and unjust. . . . It may be said that the state may have wished to encourage steam laundries. If so, it had no right to do it at the expense of any person carrying on such a business other than by means of steam. Such an argument would imply that it was in the power of a state to force a man who conducted a business in one mode to abandon the same in order that he who conducted such business in another mode should be encouraged and built up." The court concluded that where the same business is conducted by different modes, it was unjust and in violation of the rule that each man should have the protection of equal laws to place upon one a greater burden than upon the other. It is stated by counsel for appellant as a matter of history that, since the determination of this case in the United States court, it has been accepted as the law of the state, and that there have been no prosecutions under the statute. However this may be, we are satisfied that the decision of the United States court expresses the true principles governing such cases. In the case of *Covington v. Dalheim*, 126 Ky. 26, 102 S. W. 829, the court, in passing upon the constitutionality of an act which imposes a tax on a certain class of grocers, without the imposition of the same tax on others, held that the tax must apply to all grocers in the city, and that the act was unconstitutional, saying: "It is competent for the city to select any of the enumerated classes as subjects for license taxes. But . . . it is not competent for it to tax some members of a class set apart by the legislature, and not tax others of the same class." And the principle announced in that case was reaffirmed by the court of appeals of Kentucky in the case of *Read v. Graham*, 31 Ky. L. Rep. 569, 102 S. W. 860. These last three cases which we have mentioned seem to be exactly in point on the question under discussion.

It is very well suggested by counsel for appellant that it would be just as reasonable to discriminate against a merchant who used a patent carrier for the transmission of money and change, instead of a cash boy. The same rule might apply to a thousand different improvements that have a tendency

to cheapen products by reason of the fact that they are labor-saving machines, and do away with the necessity for so many clerks and employees. It is a legitimate business, and it makes no difference to the public whether the cigar is delivered by means of this automatic device or in the ordinary way. A strict or puritanical conception of the business of selling cigars might be that it was harmful to the health of the consumers, but the mode of selling them would not enter into that thought. Nor can the objection that it is particularly attractive be urged, for handsome girls are ordinarily employed around hotels for the purpose of selling cigars, and no doubt many susceptible men are induced to buy more cigars than they otherwise would by reason of the employment of this delivery agency. Fairly considered, this seems to be a tax or invention, for invention in most cases, as in this, lessens the expense of the business, and thereby necessarily cheapens the product. This was one of the arguments advanced in favor of sustaining the validity of this ordinance; viz., that the machine could be manufactured and operated for less money than a retail cigar store could be equipped and operated. It would seem that the reduction in price of an article of commerce would savor of the quality of a blessing rather than of a curse, when the welfare of the consumer is taken into consideration; and to hold otherwise would reverse the general rule that legal restraints may be imposed upon the few for the benefit of the many. The tendency of this kind of an ordinance is to foster monopolies, for a monopoly exists when the manufacture and sale of any commodity is restrained to one or a certain number. It is said that it has three inseparable consequences,—the increase of the price, the badness of the wares, the impoverishment of others. Hence it naturally follows that monopolies are odious to the law, and the law will concern itself to restrain rather than to nourish them. If this ordinance can be sustained, there is no limit to the arbitrary, capricious, or tyrannical imposition of taxes, and the constitutional guaranty that "no law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations," becomes a dead letter. Discrimination to the extent exhibited in this ordinance discourages enterprise, paralyzes progress, is a deprivation of liberty, and is entirely inconsistent with the true principles and the genius of our government. None of the cases cited, from either this or any other court, numerous as they are, go to the extent of discriminating

against a simple mode of doing business, which is conceded to be lawful and fair, and which in no way involves the principles of police power or regulation.

The judgment will be reversed, with instructions to dismiss the action.

Rudkin, Ch. J., and Crow, Mount, and Parker, JJ., concur.

ALABAMA SUPREME COURT.

WILLIAM A. SHRINER, Appt.,

v.

JOHN CRAFT.

(— Ala. —, 51 So. 884.)

Contract — signing — liability.

1. The mere signing of one's name to a contract does not make him a party thereto, if the contract states that it is between other parties, and the person so signing is not mentioned therein.

Action — discontinuance — striking — party.

2. The striking out of an improper party does not work a discontinuance of the case.

Contract — promise of additional compensation — validity.

3. The promise by one party to a building contract to pay more for the work than the amount called for in the contract, upon the refusal or threatened refusal of the

Note. — Promise of additional compensation for completing an executory contract other than for the payment of money.

The conflict of authority on this subject shown in the notes in 34 L.R.A. 38 and 11 L.R.A. (N.S.) 780, is reflected in the contradictory conclusions reached in *SHRINER v. CRAFT* and *Evans v. Oregon & W. R. Co.* post, 455. The statement, in the latter case, of the elementary principle that parties competent to contract may abrogate or rescind the contract and enter into a new one touching the same matter, to be performed in the same or a different way, upon a different consideration, hardly serves to distinguish that case from the *SHRINER CASE* and other cases cited in the notes referred to, holding that the promise of additional compensation is without consideration; since that statement was evidently not intended to imply that the parties in this case had in fact formally abandoned the original contract and then formally entered into a new one, but was merely intended to express the court's view of the legal aspect or implication of a promise to pay additional compensation for performing the contract. The statement would therefore seem to be applicable to any case of a promise to pay additional compensation for completing a contract. Possibly a basis for a distinction might be found,

contractor to go on with the work, the original contract still remaining in force, is without consideration and unenforceable.

Same—failure to secure ordinance—effect.

4. Failure to have an ordinance passed authorizing a frame building within the fire limits, so as to allow the work to be begun at a certain time, is no defense to an action for breach of a building contract, if the ordinance was in fact passed, and there is nothing to show that the building contract fixed any time when work should be commenced, or that there was any consideration for the agreement as to the ordinance.

Evidence — architect's certificate — contract provision.

5. An architect's certificate provided for by a building contract is admissible in evidence in an action for breach of the contract.

Contract — architect's certificate — binding effect.

6. An architect's certificate which a building contract provides shall be final and conclusive is so in legal effect unless impeached for fraud or such gross mistakes as would imply bad faith or a failure to exercise an honest judgment.

(December 16, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Mobile County in plaintiff's favor in an action brought to recover damages for breach of a building contract. Affirmed.

if the parties did in fact formally abandon the original contract and enter upon a new one in all respects the same except for the promise of additional compensation. That, however, might be fairly characterized as a distinction without a difference.

Some considerations were suggested in the note to 11 L.R.A. (N.S.) 789, in favor of the doctrine that the actual performance of the work, even though the party was already under obligation to perform, is a sufficient consideration to support a promise to pay additional compensation. But even if the reverse is the true doctrine, it is apparent that very slight circumstances will be sufficient to take a case out of its operation. A modification of the contract favorable to the party agreeing to pay the additional compensation, though comparatively slight, would undoubtedly be sufficient for this purpose. So, of course, many cases may be taken out of the operation of that doctrine, on the ground that there was a compromise of an honestly disputed question concerning the original contract. And so, in exceptional cases, the new promise may be sustained consistently with that doctrine, upon the ground that the circumstances under which the original contract was entered into were such as would have entitled 28 L.R.A. (N.S.)

The ninth plea, to which reference is made in the opinion, is as follows:

"(9) The defendant, as a defense to the action of the plaintiff, saith that at the time the said action was commenced the plaintiff was indebted to him in the sum of \$250 damages, arising in connection with the contract described in the complaint, in this: That the buildings provided for to be erected under the contract described in the complaint were to be built upon lots of land lying within what are known as the 'fire limits' of the city of Mobile, within which limits it was unlawful to erect frame buildings, such as was provided in the contract described in the complaint should be erected on said lot, and the plaintiff agreed with the defendant that, because he was a member of the general council of the city of Mobile, he would have an ordinance passed by the general council of the city of Mobile excepting these lots from the provisions of said ordinance, and permitting defendant to erect plain buildings on said lot, and that he would do this sufficiently in advance of the commencement of the contract to enable the defendant to begin the erection of buildings upon the day prescribed by the terms of the contract; but defendant says that plaintiff negligently failed to secure the passage of such ordinance as would exempt the buildings to be erected under the contract, from the provisions of law establishing the fire limits of the city of Mobile, until two weeks had elapsed after the time defendant was required to commence con-

the party to whom the promise of additional compensation was made to relief at the hands of the courts. Cases of this kind are not within the scope of these notes, but, for the purpose of illustrating the point, the recent case of *John King Co. v. Louisville & N. R. Co.* 131 Ky. 46, 114 S. W. 308 (rehearing denied in 116 S. W. 1201), may be referred to. In that case a promise of additional compensation to a contractor for excavating and removing a rocky stratum was upheld, it appearing that, at the time the contract was made, test pits had been sunk, which developed no rock, and that the contract was made on the supposition by both parties that there was none. The court said that, after the discovery of the true condition, which was materially different from that represented and relied on, a court of equity might have relieved the contractor from the execution of a contract under the circumstances, and that it was competent for the parties to do voluntarily what the court might have done for them.

The analogous question as to the payment of part of a liquidated and undisputed debt as a consideration for the discharge of the whole is treated in notes in 11 L.R.A. (N.S.) 1018, and 21 L.R.A. (N.S.) 1005.

structing said building under the terms of the contract, and the defendant says that, by the said delay of the plaintiff, he was damaged in the sum of \$250, which he hereby offers to set off against the demand of the plaintiff, and he claims judgment for the excess."

Further facts sufficiently appear in the opinion.

Mr. Frederick G. Bromberg, for appellant:

Delay by the owner excuses default on the part of the building contractor.

Morse Dry Dock & Repair Co. v. Seaboard Transp. Co. 88 C. C. A. 263, 161 Fed. 99; Dannat v. Fuller, 120 N. Y. 554, 24 N. E. 815.

A contract in writing entered into may be subsequently modified by parol, in any way the parties thereto may choose, without any additional consideration passing between them, at any time before there has been a forfeiture under its terms, incurred by any party thereto.

Badders v. Davis, 88 Ala. 367, 6 So. 834; Prestwood v. Eldridge, 119 Ala. 72, 24 So. 729; Guthrie v. Carpenter, 162 Ind. 417, 70 N. E. 486; Barnum v. Williams, 115 App. Div. 694, 102 N. Y. Supp. '874; Peet v. East Grand Forks, 101 Minn. 518, 112 N. W. 1903; Bader v. New York, 51 Misc. 358, 101 N. Y. Supp. 351; Brown v. Mader, 120 App. Div. 515, 105 N. Y. Supp. 70; Michigan Yacht & Power Co. v. Busch, 75 C. C. A. 109, 143 Fed. 929.

Messrs. Gregory L. Smith and H. T. Smith for appellee.

Simpson, J., delivered the opinion of the court:

This is an action by the appellee against the appellant, for damages for the breach of a contract, by which the defendant undertook and agreed to furnish material and build two houses in accordance with the contract set out in the record.

The first assignments of error insisted on (numbered 1 and 2) are to the sustaining of the demurrer of Mary R. Shriner, on the ground that the complaint shows on its face that Mary R. Shriner was not a party to the contract sued on, and the third, fourth, and fifth assignments relate to the same subject, to wit, to the refusal of the court to grant the motion for a discontinuance of the case, because of the amendment of the complaint, by striking out the name of said Mary R. Shriner.

There was no error in either action of the court. The contract sued on is set out in the complaint, and it states distinctly that it is between W. A. Shriner and John Craft. The fact that Mary R. Shriner's name appears at the end of the contract with

W. A. Shriner does not make it her contract. The statute is clear on the right of amendment by striking out parties, and our decisions are uniform to the effect that the striking out of an improper party does not work a discontinuance of the case. It cannot be material how the fact comes to the knowledge of the court that such person is an improper party; whether it appears upon the face of the pleading, and is brought to the attention of the court by demurrer, or is subsequently made to appear in the evidence. Section 5367, Code of 1907, and cases cited.

A number of the assignments of error are grouped by the appellant in his brief, being questions raised on sustaining motions to strike and demurrers to pleas, which set up a modification of the contract. The first proposition is correct, to wit, that the parties to a written contract may, by mutual parol agreement, modify the contract; but the second proposition, to wit, that said modification is binding without any new consideration, is not so clear. While there are some expressions in the case which seem to dispense with the necessity of a consideration to a modification of a contract, yet a modification can be nothing but a new contract, and must be supported by a consideration like every other contract. An analysis of the cases shows that it would be more accurate to say that the mutual obligations assumed by the parties, at the time of the modification, constitute a sufficient consideration, and if one of the parties does not assume any obligation or release any right, then a promise by the other is a *nudum pactum* and void.

Where a teacher who had been employed at an annual salary agreed to give up his definite contract and to serve during the pleasure of the board, it was held that the change in the terms of the teacher's service furnished a sufficient consideration for the promise of increased compensation. *Hildreth v. Pinkerton Academy*, 29 N. H. 227, 235.

Where an agreement to do blasting on certain terms was made upon the representations of the defendant as to the quality of the rock to be blasted, and it was found that the rock was much harder, and useless to the party blasting, in place of being useful, as represented, a new agreement to pay more for the work was supported by the additional work which the other party agreed to perform. *Osborne v. O'Reilly*, 42 N. J. Eq. 468, 475, 9 Atl. 209.

There is a class of cases in which the original contract had been abandoned, and the parties afterwards entered into a new parol contract for the performance of the same work on different terms, and the con-

tract was held to be valid. The theory of these cases seems to be that either party may abandon the contract and subject himself to the penalty or liability therefor, and then the parties are at liberty to make another contract, in which the original work, stipulated for in the first contract, may be a sufficient consideration for the second, leaving the parties to their remedies on account of the abandonment of the first contract, unless special provision be made to release the same. *Munroe v. Perkins*, 9 Pick. 298, 20 Am. Dec. 475, 478; *Coyner v. Lynde*, 10 Ind. 282, 284; *Morrison v. Heath*, 11 Vt. 610; *Koerper v. Royal Invest. Co.* 102 Mo. App. 543, 551, 77 S. W. 307.

Other cases have gone a step further, and have held that, if one party finds himself in such a position that he cannot carry out the contract on the terms provided, and notifies the other party that he will abandon the contract unless different terms are granted, said second party has the option either to let the contract be abandoned, and depend on his action for damages, or to make the new agreement, and consideration being that he considers it worth more to him to have the benefits of the new agreement, than to recover his damages for the breach of the original contract. *Bishop v. Busse*, 69 Ill. 403, 407.

It seems to this court that this latter class of cases has reached a dangerous limit in permitting one party to be bound by his promise to another, who has promised nothing but what he was already under contract obligation to perform, which is no consideration at all. *Koerper v. Royal Invest. Co.* 102 Mo. App. 543, 550, 77 S. W. 307; *Widiman v. Brown*, 83 Mich. 241, 244, 47 N. W. 231; *C. H. Davis & Co. v. Morgan*, 117 Ga. 504, 506, 61 L.R.A. 148, 97 Am. St. Rep. 171, 43 S. E. 732; *Willingham Sash & Door Co. v. Drew*, 117 Ga. 850, 45 S. E. 237.

Where, upon the mere statement of the defendant that the drilling of the well would be very expensive, plaintiffs agreed to reduce the price of drilling, it was held no modification of the contract (*Wendling v. Snyder*, 30 Ind. App. 330, 333, 65 N. E. 1041, 1042), the court saying: "The evidence did not tend to prove an abandonment or modification of the original contract" and that the work was done under the new contract.

In our early case of *Young v. Fuller*, 20 Ala. 464, no question was raised about consideration, the only question being that the parties might, by a subsequent written contract, guarantee the genuineness of a note which had been indorsed by one to the other, by providing that if the note turned out to be void, the transaction was, in effect, to be canceled.

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In the case of *Thomason v. Dill*, 30 Ala. 444, 459, T. had purchased a slave from D., taken a bill of sale, and given his promissory note, but left the slave with D. until he (T.) went to procure sureties, and the court held that if the promise of T. to procure the surety was after the consummation of the contract, in pursuance merely of a prior unaccepted offer, it was *nudum pactum*, but if the parties mutually agreed to modify the contract, T.'s right to the slave not to attach until he executed the proposed note, the promise of each is supported by a sufficient consideration. See same case, 34 Ala. 175.

In the case of *Johnson v. Sellers*, 33 Ala. 265, the defendant had entered into a contract to take charge of a school, and there being a dispute as to whether he was bound, under the original contract, to bring his wife to the school as a teacher, it was agreed to pay him an additional amount to bring her. The court held that the defendant could not refuse to perform his contract and make that a sufficient consideration for a promise of payment of a sum to induce him to perform his contract, though one party might waive the performance of the contract and the two agree to rescind or modify the contract and ingraft new provisions on it, but that, while the original contract was subsisting, a promise to prevent its breach was without consideration.

In the case of *Burkham v. Mastin*, 54 Ala. 122, 125, 127, emphasis is placed on the fact that the part payment made at the time of the additional contract was before anything was due, thus furnishing a consideration for the modification, and the court held that, in that phase of the case, the modification was supported by a consideration, but "if such agreement is made only to induce a performance, or to prevent a breach of the original contract, it would be without consideration, and could not be supported."

In the case of *Hall v. Jones*, 56 Ala. 493, 497, where the question was whether the assumption of the debt of the old firm by the new one discharged the old one, this court, speaking through Stone, J., said: "It requires the same mutuality to vary or modify a contract, as it does to create it in the first instance; for modification is only a species of contract. The mutual agreement of the parties, a promise for a promise, is sufficient to uphold such modified contract, without other new consideration."

In the case of *Cooper v. McIlwain*, 58 Ala. 296, 300, the original contract was expressly rescinded and a new written contract made, and on these facts the court says that the parties "may rescind or modify it, at pleasure; and their mutual assent is all

49 Me. 558; Bartlett v. Wyman, 14 Johns. 260; Gordon v. Gordon, 56 N. H. 170; Peelman v. Peelman, 4 Ind. 612; Davenport v. First Cong. Soc. 33 Wis. 390; Ritenour v. Mathews, 42 Ind. 7; Havana Press Drill Co. v. Ashurst, 148 Ill. 115, 35 N. E. 873; Ford v. Garner, 15 Ind. 298; Reynolds v. Nugent, 25 Ind. 328; Vanderbilt v. Schreyer, 91 N. Y. 392; Sherwin v. Brigham, 39 Ohio St. 137.

Gose, J., delivered the opinion of the court:

Prior to August 12, 1907, the appellants entered into a contract with the respondent Oregon & Washington Railroad Company for grading a part of its roadbed in Lewis county. On that date the appellants entered into a written contract with the respondent Evans, by which they sublet to him a portion of the work. The respondent Evans commenced work under his contract, but, finding that the compensation agreed upon was inadequate, abandoned the work. The following day, at the instance of the division engineer of the railroad company, a Mr. Abbott, Evans and Abbott went to see the appellant Dibble, and informed him that Evans was dissatisfied, and had quit work. Evans then complained of the refusal of the appellants to pay a certain bill, and further said to them that he did not want to resume work because he had struck gumbo, and could not make anything. Abbott insisted that he should go on with the work, and stated in the presence of the appellant Dibble that, if he would continue and complete the work, "we will see that the bills are paid and you get a reasonable wage." Dibble was present, but said nothing further than to discuss the bill. The respondent Evans then resumed and completed the work, and, upon the refusal of the parties to pay a portion of the bills and his wages, brought this suit against his correspondent and the appellants to enforce the oral contract. At the close of his testimony, a motion for a nonsuit was granted as to the railroad company and denied as to the appellants. There was a verdict and judgment in favor of the respondent Evans against the appellants, and they have appealed.

The first point suggested by the appellants is that the oral contract, if made, was without consideration, and not enforceable. It is insisted that neither the promise to do, nor the doing of that which the promisor is by law or subsisting contract bound to do, is a sufficient consideration to support a contract in his favor. We cannot assent to this view of the law. We think the better rule is that, where a party has breached his contract and refused to perform it, it is

optional with the adverse party to sue him for damages, or waive the breach, treat the contract as abrogated, and enter into a new contract with the delinquent party. It would seem to be elementary that parties competent to contract can abrogate or rescind the contract and enter into a new contract touching the same subject-matter to be performed, in the same or a different way, upon a different consideration. In the case at bar the appellants had contracted to do certain work, and it was important to them that the work that Evans had agreed to perform should go forward. When he abandoned the work, they had the election to hold him answerable in damages, or to make a new contract with him. They chose the latter course, and cannot now be heard to say that the contract was *nudum pactum*. This position has abundant support in the authorities. "Where the contractor refuses to perform his contract, and the builder promises to pay him additional compensation in consideration of the continued performance of the contract, the authorities are not in accord on the question whether the promise for additional compensation is supported by a sufficient consideration. The prevailing rule seems to be, however, that such a promise is valid as an abandonment of the original contract and the creation of a new contract." 30 Am. & Eng. Enc. Law, 2d ed. p. 1197. "The release of one from the stipulations of the original agreement is the consideration for the release of the other; and the mutual releases are the consideration for the new contract, and are sufficient to give it full legal effect." Rollins v. Marsh, 128 Mass. 116. In Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122, it was held that where one party has agreed to sell and the other has agreed to buy certain goods at a stipulated price, and the seller delivers a part of the goods, but refuses to deliver the remainder except at an advanced price, the agreement of the purchaser to pay the increased price is binding upon him upon the delivery of the goods. In Goebel v. Linn, 47 Mich. 489, 41 Am. Rep. 723, 11 N. W. 284, in an opinion by Judge Cooley, it was held that, where an ice company had contracted to deliver ice to a brewing company at a given rate, and, owing to a shortage in ice, refused to complete the contract unless a higher rate was paid, a note given by the brewing company for the ice at the increased price was based upon a sufficient consideration. In Foley v. Storrie, 4 Tex. Civ. App. 377, 23 S. W. 442, the plaintiff had agreed to deliver to defendant 1,000 cords of wood at \$4 per cord. Owing to the advance in wages, the plaintiff found that he could not make a profit on the contract, and so advised the defendant. Thereupon it was

agreed that the defendant would pay \$5 per cord. The plaintiff then delivered 100 cords, and brought suit to recover the price on the new contract. It was held that the new contract was enforceable, and that "the parties had the right to rescind their contract or to modify it by mutual agreement." In *Coyner v. Lynde*, 10 Ind. 282, the defendant agreed with the plaintiff, the original contractor, to complete a portion of his contract for the construction of a part of a line of railroad at the price plaintiff was to receive, and to pay plaintiff a premium for the privilege of the contract. Later the defendant ascertained that the contract price was inadequate, and determined to abandon the work. The plaintiff, to induce the defendant to continue the contract to completion, agreed to release him from the payment of the premium, and the defendant completed the contract. It was held that when a party abandons his contract, the adverse party has his election to sue or make a new agreement, and, if in the new agreement he makes new or additional promises dependent upon the fulfilment of the contract, and the party abandoning the contract, in consideration of the new promises, completes the work, the promise is binding. In *Munroe v. Perkins*, 9 Pick. 298, 20 Am. Dec. 475, the plaintiff undertook to construct a cartway for the sum of \$900. After beginning the work, he ascertained that the price was inadequate, and determined to abandon the contract. Whereupon the defendant orally agreed to release him from the contract and pay him by the day, if he would complete the work, which he did; and, in an action to recover upon the second contract, it was held binding. The same principle is announced in *Cooke v. Murphy*, 70 Ill. 96; *Abbott v. Doane*, 163 Mass. 433, 31 L.R.A. 33, 47 Am. St. Rep. 465, 40 N. E. 197; and *Wilhelm v. Voss*, 118 Mich. 106, 76 N. W. 308. The rule contended for by the appellants was criticized by this court in *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798, the court saying that it was not in accord with ethics, and ought not to be in accord with the law, to allow a creditor to compromise a debt for a less sum than the amount due, receive a sum of money on the compromise, and then permit him to repudiate the compromise and retain the benefits. We think the view we have expressed is supported by the reasoning of this court in *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117. It must be conceded, however, that the courts are not agreed upon this question, and judges of the highest ability have announced the view urged by the appellants. The view we have taken will permit greater freedom in contracting, and is, we think, more in har-

mony with the fundamental conception of contracts.

The court instructed the jury that they must find "that there was some consideration for the contract," and that "one promise is a good consideration for another promise." The respondent Evans did not except to this view of the law. The following interrogatory was propounded to the jury: "If you find from the evidence that there was an oral agreement entered into between the railroad company and Dibble-Hawthorne Company and the plaintiff, wherein the said defendants agreed to pay the plaintiff all past bills incurred, all future bills to be incurred in the prosecution of the work, and a reasonable wage to himself, state what the consideration for such promise was to the defendants Dibble and Hawthorne." The jury answered: "The fact that Dibble and Hawthorne were under bond to complete the work within a stated time." The appellants insist that the answer is in conflict with the instructions of the court, and that their motion for a judgment notwithstanding the verdict should have been granted. The contention is untenable, for three reasons: (1) If the parties made an oral contract, the sufficiency of the consideration was a legal question for the determination of the court, and not a fact for the consideration of the jury; (2) the answer to the interrogatory necessarily implied that the minds of the parties met and that the oral contract was made, thus falling within the instruction that "one promise is a good consideration for another;" and (3) the consideration found was a sufficient consideration and within the evidence.

It is insisted that the court erred in submitting the case to the jury as to the appellants, and withdrawing it as to the railroad company, and that there is not sufficient evidence of the oral contract to support the verdict. The respondent is not complaining of the action of the court in granting the nonsuit in favor of the railroad company. Obviously he is the only party injured thereby. In addition to the facts stated, there was evidence tending to show that, after making the alleged oral contract, the appellants kept the time of the men employed by Evans; that they did not do so before that time; and that they thereafter paid five bills for supplies, such as milk, hay, meat, and powder, which Evans had contracted in the prosecution of the work, aggregating over \$500. They were not required to pay these bills under the written contract. The appellants stoutly denied making the oral contract, but admitted paying the bills mentioned, explaining that they did so, not as a duty, but at

the request of Evans, when there was money due him. There is sufficient evidence, direct and circumstantial, to support the verdict. On the other hand, the jury might properly have found for the appellants. The issue was sharply drawn, and was determined adversely to the appellants upon sufficient evidence, and they must abide the result.

The authorities cited in the reply brief, holding that it requires clear, positive, and convincing evidence to establish the rescission of a written contract, have no application here; the court, at the instance of the appellants, having instructed that a preponderance of evidence was sufficient to establish that fact.

The judgment is affirmed.

Rudkin, Ch. J., and Fullerton, Chadwick, and Morris, JJ., concur.

MICHIGAN SUPREME COURT.

FINNEY'S ORCHESTRA

v.

FINNEY'S FAMOUS ORCHESTRA et al.,
Appts.

(— Mich. —, 126 N. W. 198.)

Unfair tradename of organization — protection.

A name like "Finney's Orchestra" may be protected against unfair competition by those whose efforts have made it valuable, although the one who originated the organization and gave it his name is dead.

(May 7, 1910.)

APPEAL by defendant from a decree of the Circuit Court for Wayne County in complainant's favor in a suit to enjoin the alleged unlawful use of complainant's tradename. Affirmed.

The facts are stated in the opinion.

Messrs. Duncan C. Beath and H. F. Chipman, with William Look, for appellants:

Theodore Finney could legally devise his music and instruments to Mosby, but not the name of "Finney Orchestra" or "Finney."

Atkinson v. John E. Doherty & Co. 121 Mich. 372, 46 L.R.A. 219, 80 Am. St. Rep. 507, 80 N. W. 285.

Neither corporation, as such, was entitled to the name or property or business of the association as its successor, to the exclusion of the other.

Mason v. Finch, 28 Mich. 282; Schiller Commandery No. 1 v. Jaennichen, 116 Mich. 129, 74 N. W. 458.
28 L.R.A. (N.S.)

Messrs. Stellwagen & MacKay, for appellee:

Tradenames are protected, not as trademarks necessarily, though they may also be trademarks, but on the ground of unfair competition.

Christy v. Murphy, 12 How. Pr. 77; Hopkins, Unfair Trade, §§ 52, 53; Weinstock, L. & Co. v. Marks, 109 Cal. 537, 30 L.R.A. 182, 50 Am. St. Rep. 57, 42 Pac. 142.

Defendants incorporated under the name for the sole purpose of appropriating the

Note. — Right of members of organization to protection in use of name which their efforts have made valuable.

Although it is sometimes loosely said that a person whose efforts have made a tradename valuable acquires a property right therein, the more discriminating decisions hold that the principle upon which the courts proceed in restraining the simulation of trade or business names, where the name assumed is of a fanciful or arbitrary character, is not that there is property acquired in the word or name employed, but that it is to prevent fraud and deception in the dealing of the party charged with the simulation or infringement of the name used by another in a similar business.

Although the question has received little judicial discussion, the right of the members of an organization, or, more properly speaking, of the public, to protection against the use by others of a name to which the united efforts of such members have given a peculiar significance, seems to have been recognized wherever the question has arisen in such a form as definitely to require the predication of such right.

Thus, in Aiello v. Montecarlo, 21 R. I. 496, 44 Atl. 931, it was held, against an objection that no cause for equitable action was disclosed, because equity will not interfere except in cases of substantial monetary damage to a continuing business, that a bill setting forth that the complainants, a voluntary association organized under a certain name for the purpose, in part, of giving dramatic entertainments, had advertised themselves and were well known as a club or society, and had from time to time given dramatic entertainments, and that the action of the defendants in wrongfully appropriating the name of the society had caused and would cause great loss and damage to the complainants, set forth cause for equitable relief.

In Original La Tosca Social Club v. La Tosca Social Club, 23 App. D. C. 96, and Black Rabbit Asso. v. Munday, 21 Abb. N. C. 99, it was held that members of a social organization could not, by withdrawing therefrom and organizing a corporation of the same name, acquire any right to interfere with the use of such name by the remaining members of the organization.

In Messer v. The Fadettes, 168 Mass. 140, 37 L.R.A. 721, 60 Am. St. Rep. 371, 46 N.

benefit of the previous work of this organization, and should be permanently enjoined.

Hopkins, Unfair Trade, §.53, pp. 105 et seq.; Christy v. Murphy, supra; Weinstock, L. & Co. v. Marks, 109 Cal. 529, 30 L.R.A. 182, 50 Am. St. Rep. 57, 42 Pac. 142.

Any similarity of name which will be likely to deceive or mislead an ordinary unsuspecting customer may be restrained.

Messer v. The Fadettes, 168 Mass. 140, 37 L.R.A. 721, 60 Am. St. Rep. 371, 46 N. E. 407.

McAlvay, J., delivered the opinion of the court:

The parties to this controversy are Michi-

E. 407, the court refused to enjoin the use of the name of an orchestra by a corporation, some of the members of which were members of the original organization, at the instance of one who claimed to have acquired the right to an exclusive use of the name by purchase from the organizer of the orchestra, upon the ground that, so far as the organizer had any right or ownership in the tradename which designated the organization under her management, it was personal to herself, depending upon her personal reputation and skill, and therefore was not assignable, and upon the further ground that the use of the name by such assignee would be only to mislead and defraud the public by implying that she and such musicians as she employed were the same persons who had formerly gained a good reputation under this name.

But in Christy v. Murphy, 12 How. Pr. 77, it was held that the originator of the form of entertainment known as negro minstrelsy was entitled to enjoin the use of the name which he had given a band of performers organized by him, by persons who had formerly been employed by him as members thereof. This case, however, is not necessarily inconsistent with the right of members of an organization to the use of a name which owes its value to their efforts; since, so far as appears therein, whatever value attached to the name was due to the efforts and expenditures of the plaintiff.

An analogous question is presented in the cases involving the rights of members of a labor organization to protection in the exclusive use of a label which owes its value to them. That the members of a union have an interest in the proper use of the labels of the union, which may, upon sufficient grounds, be protected by injunction against the inequitable use of such labels, is expressly held in Schmalz v. Wooley, 57 N. J. Eq. 303, 43 L.R.A. 80, 73 Am. St. Rep. 637, 41 Atl. 939, and Strasser v. Moonelis, 23 Jones & S. 197.

In Allen v. McCarthy, 37 Minn. 349, 34 N. W. 416, the court was equally divided in opinion upon the question whether a complaint brought by plaintiffs as officers and members of a local union, a branch and member of a general organization, to restrain defendant from putting up, selling,

gan corporations. The incorporators of complainant for many years before incorporation acted together in a voluntary association under the same name as incorporated, and claim that defendant, without any right, and intending to injure their corporation in its business, etc., wrongfully adopted the name of "Finney's Famous Orchestra," and have, by falsely claiming to be the original Finney's Orchestra, greatly injured complainant in its business. Complainant claims the sole right to use the name "Finney's Orchestra," and filed its bill of complaint against defendant, asking that it be perpetually enjoined from using the name "Finney's Orchestra" or the name

stamping, or offering for sale any boxes containing any cigars whatever having posted, placed, or put thereon a label or trademark in imitation of plaintiff's label, and having thereon the words "Union-Made Cigars," showed the plaintiffs to be entitled to assert a proprietary claim or interest in the device or trademark.

That the right to relief against the infringement of a tradename is not dependent upon its use in connection with the manufactured article is demonstrated by a note upon that question in 15 L.R.A. (N.S.) 625.

That a person—using the term in its broadest sense, as including individuals, firms, corporations—will be protected in the use of a name which he has attached to his business, and to which he has no claim other than may be based on the circumstance that his efforts have made it valuable, may be demonstrated by reference to the following cases: Woodward v. Lazar, 21 Cal. 448, 82 Am. Dec. 751; Busch v. Gross, 71 N. J. Eq. 503, 64 Atl. 754; Howard v. Henriques, 3 Sandf. 725; Martell v. St. Francis Hotel Co. 51 Wash. 375, 98 Pac. 1116, 16 A. & E. Ann. Cas. 503 (names of hotels); Gamble v. Stephenson, 10 Mo. App. 581 (name of restaurant); Dewitt v. Mathey, 18 Ky. L. Rep. 257, 35 S. W. 1113 (name of saloon); Weinstock, L. & Co. v. Marks, 109 Cal. 529, 30 L.R.A. 182, 50 Am. St. Rep. 57, 42 Pac. 142; Wormser v. Shayne, 111 Ill. App. 556; Ball v. Best, 135 Fed. 435 (names of stores); Hainque v. Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014 (name of factory); People ex rel. Power v. Rose, 219 Ill. 46, 76 N. E. 42; Atlas Assur. Co. v. Atlas Ins. Co. 138 Iowa, 228, 15 L.R.A. (N.S.) 625, 128 Am. St. Rep. 189, 112 N. W. 232, 114 N. W. 609; Sanders v. Utt, 16 Mo. App. 322; Sanders v. Jacob, 20 Mo. App. 96; Glen & H. Mfg. Co. v. Hall, 61 N. Y. 226, 19 Am. Rep. 278; DeYoungs v. Jung, 7 Misc. 56, 27 N. Y. Supp. 370; Cohn v. Reynolds, 26 Misc. 473, 57 N. Y. Supp. 467, affirmed without opinion in 40 App. Div. 619, 58 N. Y. Supp. 1138; International Soc. v. International Soc. 59 N. Y. Supp. 785; Cady v. Schultz, 19 R. I. 193, 29 L.R.A. 524, 61 Am. St. Rep. 763, 32 Atl. 915; Lee v. Haley, L. R. 5 Ch. 155 (names attached to various other sorts of business).

"Finney" in any way, or representing itself to be the original "Finney's Orchestra." Defendant answered this bill of complaint by answer in the nature of a cross bill, praying affirmative relief, and the benefit of a demurrer. Answers were filed to the cross bill by complainant and by the twenty-three members of complainant organization. The record shows a motion on the part of cross-complainant to strike the answer of the members of the complainant corporation from the files. No disposition appears to have been made of this motion by any formal order. It does appear that it was "held pending the hearing of case." Replications were later filed by complainant and defendant. The issues joined were heard before the Wayne circuit court, in chancery, and a decree granted to complainant. Defendant appeals. The main contention in the case is upon the facts presented.

We agree with the findings and conclusion of the trial judge. The evidence preponderates greatly in favor of complainant, the membership of which includes all but three of the entire number of a voluntary association, known since the year 1899 by the name under which they have now become a legal organization under the laws of this state. Theodore Finney during his lifetime organized and conducted an orchestra known as "Finney's Orchestra" in the year 1864. This he continued to manage and conduct until his death, April 7, 1899. By his will he gave his music and musical instruments to his friend, Frank Mosby, with the request "to keep up the organization of the Finney Orchestra during his natural life." Mosby proceeded at once to do this with the assistance of his fellow associates. The old members, and such as were considered competent by them to be added from time to time, continued to act together with this common purpose under the name of Finney's Orchestra. Each year elections were held, and officers and a manager were elected. Mr. Mosby was elected for seven years as president. Fred S. Stone was elected manager, until the election held in January, 1908, when Mr. Shook was elected to that office by a large majority. Mr. Stone's resignation was accepted January 18, 1908. Two of his brothers also withdrew. During these years the record shows without dispute that this voluntary association existed and continued to do a successful business under the name and style of "Finney's Orchestra." Twenty-three remaining members, desiring to become a body corporate known as "Finney's Orchestra," under the law of this state, on January 25, 1908, made, executed, and filed articles of association in the office of the secretary of state, which, after being amended 28 L.R.A. (N.S.)

to conform with the statute, were finally recorded February 7, 1908. In the meantime, ex-manager Stone and three brothers incorporated as "Finney's Famous Orchestra," on January 27, 1908, and this organization, holding itself out as the "Original Finney's Orchestra," has caused the injuries complained of. It will be of no benefit to the profession to review this evidence. Suffice it to say, we find no single contention of defendant sustained. It may be fairly inferred from the record that the only reason for the organization of defendant association was to accomplish exactly what is charged in the bill of complaint. The name of this organization was the property of those who made it valuable, and its use by others "different from those who earned a reputation thereunder would be a fraud upon the public." *Messer v. The Fadettes*, 168 Mass. 140, 37 L.R.A. 721, 60 Am. St. Rep. 371, 46 N. E. 407. Such tradenames are protected on the ground of unfair competition. *Hopkins, Unfair Trade*, §§ 52, 53; *Weinstock, L. & Co. v. Marks*, 109 Cal. 529-537, 30 L.R.A. 182, 50 Am. St. Rep. 57, 42 Pac. 142. In the last case cited the court said: "Although there can be no property right in a tradename which is not the subject of trademark, yet it is a fraud on a person who has established a trade and carried it on under a given name that some other person should assume the same name or the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the one who has given a reputation to the name; and an injunction will issue to prevent such fraudulent infringement of the tradename."

The decree of the Circuit Court is affirmed, with costs.

OKLAHOMA SUPREME COURT.

T. E. POTTS, Plff. in Err.,

v.

ROBERT FOLSOM.

(— Okla. —, 104 Pac. 353.)

Election — ballot — marking.

Section 4, art. 1, chap. 17, p. 233, Sess. Laws 1905, under the title of "Elections," provided that on receiving his ballot, "if the voter shall desire to vote for all the candidates of one political party or group of petitioners, he may stamp a cross in the circle which is under the device and in the column above the candidates of the party or group for whom he desires to vote, and such ballot when so marked shall be counted

Headnote by DUNN, J.

as a straight ticket for all the candidates in the column under said circle." A voter stamped a cross in the circle under a party device, and then stamped a cross in the square immediately to the left of all the names in the same column except the name of plaintiff. Held, that by stamping in the circle under the party device the voter, under the law, voted for all the candidates in the column under said circle, and that the extra markings were without effect.

(Kane, Ch. J., and Williams, J., dissent.)

(September 14, 1909.)

ERROR to the District Court for Haskell County to review a judgment in defendant's favor in an action in the nature of quo warranto to try the title to a certain office. Reversed.

The facts are stated in the opinion.

Messrs. Frederick & Mitchell for plaintiff in error.

Messrs. Holley & Brown and Clark & Crittenden for defendant in error.

Dunn, J., delivered the opinion of the court:

This is an action in the nature of quo warranto, brought by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, to try the title to the office of constable of Taloka township, Haskell county, Oklahoma. At the general election held on the 17th day of September, 1907, both plaintiff and defendant were candidates for the office of constable on the Democratic ticket. The judges of election at Garland precinct in said township de-

clared a tie vote between them, and certified their finding to the county commissioners. The commissioners decided the matter by lot, and declared the defendant elected.

It is admitted by counsel that this ruling would be correct, and that the defendant would be legally entitled to the office, if it were not for the fact that the election commissioners counted two ballots for the defendant which the plaintiff insists should have been counted for him. The ballots are made a part of the case made, and are in the usual form, but the plaintiff insists that they were not properly voted. They are stamped with a cross in a circle under the party device and also each candidate on the ticket for Congress, district judge, state senator, representatives, etc., is marked with a cross in the square to the left of their names, with the exception of the office of constable, where the square to the left of defendant's name is marked with a cross and the square to the left of the plaintiff's name left blank. The plaintiff insists that because the voter marked the ticket with a cross in the circle under the device that is a vote for every candidate on the ticket, notwithstanding he also marked all the other candidates in the manner above described, except himself. The court below held that these ballots should be counted for the defendant, and not counted for the plaintiff. Section 41 of chapter 33 (§ 2946) of Wilson's Revised & Annotated Statutes of Oklahoma of 1903, under the title "Elections," provided that, after receiving his ballot, the voter shall enter a booth and in-

Note. — Does marking some but not all of the candidates on a party ticket defeat the effect of marking under the party emblem as a vote for the omitted candidates, where no votes were cast for their opponents.

The conclusion reached in the above case finds support in *Dickerman v. Gelsthorpe*, 19 Mont. 259, 47 Pac. 999, in which it was held that ballots marked with a cross in a party circle, and also marked with crosses opposite the names of the part of the candidates under such party circle, were properly counted for a candidate thereunder whose name was not so specifically marked, in view of the provision of the Montana Political Code, that if any part of a ballot was sufficiently plain to gather therefrom the voter's intention, it should be counted, as the marking in the party circle was, so far as the legal intent was concerned, equivalent to voting for all candidates under it.

Potts v. Folsom is in accord also with *McClelland v. Erwin*, 16 Okla. 612, 86 Pac. 283, which is fully set forth in that opinion.

In *Whittam v. Zahorik*, 91 Iowa, 23, 51 Am. St. Rep. 317, 59 N. W. 57, the court 28 L.R.A.(N.S.)

said that when a voter has marked his ticket by placing a cross in the circle opposite the party appellation, no addition is made to the legal effect of that marking by placing crosses opposite the names of candidates on the same party tickets; and this language was approved in *Spurrier v. McLennan*, 115 Iowa, 461, 88 N. W. 1062, the court adding that crosses in the squares under such circumstances not only do not add to the effect of the mark in the circle, but do not detract from it; in short, they have no consequences whatever. These cases, however, did not involve the point under annotation.

On the other hand it was held in *Young v. Simpson*, 21 Colo. 460, 52 Am. St. Rep. 254, 42 Pac. 666, that a general designation by the marking of a ballot with a cross opposite the emblem of a party, indicating an intention to vote for all its candidates, was controlled by a particular designation by the marking of crosses opposite the names of part of the candidates under such emblem, and ballots so marked could not be counted for a candidate of that party opposite whose name no cross appeared.

dicating the candidates for whom he desires to vote by stamping in the square immediately preceding their names, and, if he desires to vote for all the candidates of one political party, he may stamp in the square surrounding the device at the head of the list, and that the vote shall then be counted for all the candidates under that device, unless the square in front of the name of one or more candidates under another device shall also be stamped, in which case the names of the candidates so stamped shall be counted, and the names of other candidates for the same office under the other device on the ballot shall not be counted. This section of the statute was amended by § 4, art. 1, chap. 17, p. 233, Sess. Laws 1905, in which it was provided: "The voter shall then and without leaving the room go into any booth which may be unoccupied, and indicate the candidates for whom he desires to vote by stamping a cross in the square immediately to the left of their names, and indicate his preference on any question or constitutional amendment or other special matter by stamping in the square immediately to the left of and preceding the words 'yes' or 'no' under such question; provided, however, that if the voter shall desire to vote for all the candidates of one political party or group of petitioners, he may stamp a cross in the circle which is under the device and in the column above the candidates of the party or group for whom he desires to vote, and such ballot when so marked shall be counted as a straight ticket for all the candidates in the column under said circle." And § 9, art. 1, chap. 17, p. 240, of the same laws, provides, under instructions of how to vote, that "to vote a straight ticket, stamp in the circle beneath the device. To vote a mixed ticket, stamp in the square to the left of the name of each candidate you desire to vote for."

By the change made in the law as indicated above, it appears to us that it was the intention of the legislature to make the controlling stamp, in the law as it existed at the time of the election held in this case, to be the stamp placed at the head of the list of candidates, and to provide that, where a mixed ticket was to be voted, it was necessary, in order to accomplish this result, and to manifest this intention, each individual candidate to be voted for should be stamped. This rule does not appear to us to have been manifested in the law under which cases such as *Young v. Simpson*, 21 Colo. 460, 52 Am. St. Rep. 254, 42 Pac. 666, and *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018, and perhaps some other cases which appear to follow that rule, were de-

cided. It will be noted that the language of the act is mandatory, and that, when the stamp is placed in the circle under the device, such ballot shall be counted as a straight ticket for all the candidates under the column in such circle, and this intention it appears to our minds is emphasized by the language of the instructions noticed. The question of the effect of the stamp and cross opposite the names of the persons voted for, in the same column, over which a stamp had been placed in the device, was dealt with by the supreme court of the territory of Oklahoma in the case of *McClelland v. Erwin*, 16 Okla. 612, 86 Pac. 283. In the discussion of this question in that case, Justice Irwin, who wrote the opinion for the court, said: "It is next contended by counsel for plaintiff in error that ballots stamped in the device, and then stamped in the square opposite the names of the persons voted for on the same ticket should not be counted. In other words, it is claimed that where the voter puts another stamp upon the ballot which is unnecessary, or makes more stamps than is necessary on the ballot, that this constitutes a distinguishing mark, and that for this reason the ballots should have been rejected. We do not think this is the correct rule." To our minds it seems clear that under this statute a stamp in the circle at the head of the list of candidates is the statutory method provided whereby a voter may manifest his intention to vote for every candidate under that stamp. If this is true, and, after having placed the stamp there, the voter has succeeded in voting for all of these candidates, then the placing of additional stamps in front of the different names on that same list would either constitute distinguishing marks or be without any effect whatsoever. These are held not to be distinguishing marks in the *McClelland v. Erwin* Case, *supra*. Hence we conclude they are without effect. Our conclusion herein seems to be supported by the cases of *Dickerman v. Gels-thorpe*, 19 Mont. 249, 47 Pac. 999; *Spurrier v. McLennan*, 115 Iowa, 461, 88 N. W. 1062; *Whittam v. Zahorik*, 91 Iowa, 23, 51 Am. St. Rep. 317, 59 N. W. 57; *McKittrick v. Pardee*, 8 S. D. 39, 65 N. W. 23. This holding necessarily results in the reversal of the judgment of the lower court.

The cause is accordingly remanded, and action is directed to be taken in accordance with the views herein expressed.

Turner and Hayes, JJ., concur.

Kane, Ch. J., and Williams, J., dissent.

UTAH SUPREME COURT.

THOMAS F. DALY, Respt.,

v.

WILLIAM W. OLD et al., Respts.,

and

W. MONT FERRY, Appt.

(35 Utah, 74, 99 Pac. 460.)

Surety — change of contract — liability.

The change of the state in which a solicitor of life insurance is to work, after the execution of a bond conditioned for the faithful performance of his duties, will not, although it enlarges his responsibilities, release the surety, where the bond provides that it shall not be annulled or revoked without the consent of the obligee, but shall remain in force, whether under the agent's existing appointment or any future one, and the agency contract provides that the agent shall have authority in the original state, and shall give a satisfactory bond which shall hold good "under this or any future agreement."

(January 11, 1909.)

Note. — Effect upon bond conditioned for fidelity of employee or agent, of a change in the latter's field of operation or the nature of his duties.

It is generally held that permitting or requiring an employee or agent to perform other duties in addition to those in respect of which the security is given will not discharge the surety if the additional duties are not such as to prevent or hinder the faithful performance by the principal of those for which the bond was given. *Shackamaxon Bank v. Yard*, 150 Pa. 351, 30 Am. St. Rep. 807, 24 Atl. 635; *Hibernia Sav. Bank v. McGinnis*, 9 Mo. App. 578; *Saint v. Wheeler & W. Mfg. Co.* 95 Ala. 362, 36 Am. St. Rep. 210, 10 So. 539; *Third Nat. Bank v. Owen*, 101 Mo. 558, 14 S. W. 632; *Home Sav. Bank v. Traube*, 75 Mo. 199, 42 Am. Rep. 402, reversing 6 Mo. App. 221; *New York v. Kelly*, 98 N. Y. 467, 50 Am. Rep. 699; *Harrisburg Sav. & L. Asso. v. United States Fidelity & G. Co.* 197 Pa. 177, 46 Atl. 910.

In *Kellogg v. Scott*, 58 N. J. Eq. 344, 44 Atl. 190, affirmed without opinion in 62 N. J. Eq. 811, 48 Atl. 1117, however, it was held that the sureties of a bookkeeper and collector were released by the increase of his duties which required him to act as cashier, so that he had charge of all the cash, though the default was accomplished by false entries as bookkeeper.

In *Lane's Appeal*, 112 Pa. 499, 5 Atl. 776, where the duty of an employee was to perform all work assigned to him, it was held that the surety was not discharged, though the employment in which the default occurred was in a different branch from that in which he was employed at the time the bond was given.

28 L.R.A. (N.S.)

APPEAL by defendant W. Mont Ferry from a judgment of the District Court for Salt Lake County in plaintiff's favor in an action brought to recover upon a bond of an insurance solicitor. Affirmed.

The facts are stated in the opinion.

Messrs. Richards, Richards, & Ferry for appellant.

Messrs. Snyder & Snyder, for respondents:

Surety contracts will be so construed as to give force and effect to the manifest intention of the parties, and to give force and meaning to the words employed.

Rochester City Bank v. Elwood, 21 N. Y. 88; *Gamble v. Cuneo*, 21 App. Div. 413, 47 N. Y. Supp. 548, 162 N. Y. 634, 57 N. E. 1110; *Smith v. Bowman*, 32 Utah, 33, 9 L.R.A. (N.S.) 889, 88 Pac. 687; *Western New York L. Ins. Co. v. Clinton*, 66 N. Y. 327; *Howe Mach. Co. v. Farrington*, 82 N. Y. 121; *Griswold v. Hazels*, 62 Neb. 888, 87 N. W. 1047; *Union Dime Sav. Inst. v. Neppert*, 21 N. Y. S. R. 723, 3 N. Y. Supp. 797; *New York L. Ins. Co. v. Hamlin*, 100 Wis. 17, 75 N. W. 421; *Singer Mfg. Co. v.*

In American Teleg. Co. v. Lennig, 139 Pa. 594, 21 Atl. 162, it was held that the surety of the bookkeeper was not relieved, as a matter of law, because the principal was appointed cashier temporarily, in which position he committed the default, which he concealed by a false entry as bookkeeper, but that, if the jury determined that the temporary duties as cashier were not incidental to the employment as bookkeeper, the surety would not be liable.

In *National Mechanics' Bkg. Asso. v. Conkling*, 90 N. Y. 116, 43 Am. Rep. 146, affirming 24 Hun, 496, 61 How. Pr. 76, where the bond of a bookkeeper was conditioned on the faithful performance of his duties as bookkeeper, and to "discharge the duties of any other office, trust, or employment relating to the business of the said association, which may be assigned to him, or which he shall undertake to perform," it was held that the sureties were not liable for his default as teller, to which position he was subsequently appointed, as the clause quoted referred to such other duties as pertained to the office of bookkeeper.

But *Fourth Nat. Bank v. Spinney*, 120 N. Y. 560, 24 N. E. 816, affirming 47 Hun, 293, which was similar to the *Conkling* Case, was distinguished therefrom by the wording of the bond, in which the clause providing for faithful performance of the duties of bookkeeper continues: "Or if" he "shall be appointed to any other office;" and it was held that the appointment of the bookkeeper to other duties did not release his sureties.

A change in the duties of an employee or agent, as distinguished from a mere increase of responsibility under the same duties, or an addition of other duties, will, as a rule, discharge his sureties, and it has

Reynolds, 168 Mass. 588, 60 Am. St. Rep. 417, 47 N. E. 438; 27 Am. & Eng. Enc. Law, pp. 450, 451, 495; Casoni v. Jerome, 58 N. Y. 321; McWilliams v. Mason, 31 N. Y. 294; Brandt, Suretyship & Guaranty, §§ 92, 193; Thompson v. Roberts, 17 Ir. C. L. Rep. 490; Home Sav. Bank v. Traube, 75 Mo. 199, 42 Am. Rep. 402; Fourth Nat. Bank v. Spinney, 120 N. Y. 560, 24 N. E. 816; Stearns, Suretyship, 253; Saint v. Wheeler & W. Mfg. Co. 95 Ala. 362, 36 Am. St. Rep. 210, 10 So. 539; State Solicitors' Co. v. Savage, 39 Fla. 703, 23 So. 413; Travelers' Ins. Co. v. Stiles, 82 App. Div. 441, 81 N. Y. Supp. 664; Snyder v. State, 5 Wyo. 318, 63 Am. St. Rep.

60, 40 Pac. 441; Drumheller v. American Surety Co. 30 Wash. 530, 71 Pac. 25; People's Lumber Co. v. Gillard, 136 Cal. 55, 68 Pac. 576; United States v. Freel, 92 Fed. 299.

Frick, J., delivered the opinion of the court:

This is an appeal from a judgment against appellant, entered by the district court of Salt Lake county.

The judgment is based upon substantially the following facts, as found by the district court: That on the 28th day of October, 1901, the respondent Daly appointed in

been so held under the following circumstances:

—where an agent was removed from the place where he was employed when the bond was given, and transferred to another state, under a new contract. Singer Mfg. Co. v. Armstrong, 7 Kan. App. 314, 54 Pac. 571;

—where the duties of the principal and the place of his employment were changed without the knowledge or consent of the surety. Singer Mfg. Co. v. Hibbs, 21 Mo. App. 574;

—where an agent was appointed to an entirely different position, with greater responsibilities, though the bond contained a clause as follows: "During his employment by said company, in whatever capacity in which he may be engaged, the duties and emoluments of which may be changed from time to time by the company, without notice to the sureties." Iliff v. Western-Southern L. Ins. Co. 11 Ohio C. C. 426;

—where an agreement with a sales agent was changed so that he became a conditional purchaser instead of a mere agent for sales to third parties. Gass v. Stinson, 2 Sumn. 453, Fed. Cas. No. 5,260;

—where a bookkeeper was changed to note teller and discount clerk, where large amounts of money were received by him daily. First Nat. Bank v. Gerke, 68 Md. 449, 6 Am. St. Rep. 453, 13 Atl. 358.

But in the similar case of Rollstone Nat. Bank v. Carleton, 136 Mass. 226, where it was found that the duties as clerk, contemplated in the bond, embraced receiving and paying out money, and not merely those of bookkeeper, it was held that the imposition of such duties was not, as a matter of law, such a change as would discharge the sureties.

That merely increasing the duties of an employee or agent, without changing their nature, will not release the sureties, was held in the following cases:

—Strawbridge v. Baltimore & O. R. Co. 14 Md. 360, 74 Am. Dec. 541, where a railway station was changed from second to first class, which increased the responsibility of the agent, because of the increased amount of freight paid there, but did not change the nature of his duties;

—Wallace v. Exchange Bank, 126 Ind. 265, 28 L.R.A. (N.S.)

26 N. E. 175, where the duties of the cashier were enlarged without changing their nature;

—Collier v. Southern Exp. Co. 32 Gratt. 718, where the sureties for a freight clerk gave a bond conditioned for the faithful performance of all duties required of him in forwarding packages of all kinds, and he was subsequently made the principal agent at that point;

—Kellogg v. Farquhar, 55 Hun, 604, 8 N. Y. Supp. 208, where an agency to sell goods in New York and Brooklyn was construed not to limit the agent to business in those cities, but merely to give him the exclusive sale there, and he made sales elsewhere.

But the contrary was held in the following cases:

—Pybus v. Gibb, 6 El. & Bl. 902, where a statutory increase of the jurisdiction of the court enlarged the responsibility of the bailiff, though his default was in a matter within the former jurisdiction;

—Mumford v. Memphis & C. R. Co. 2 Lea. 393, 31 Am. Rep. 616, where a ticket agent of one of two stations in a city was placed in charge of both stations, which were consolidated;

—And Monroe County v. Clark, 92 N. Y. 391, affirming 25 Hun, 282, where the duties of the treasurer were increased by the legislature and supervisors, and it was held that the sureties were not liable for defaults concerning the new duties, but were for those concerning the old.

An increase of responsibility of an officer or member of a firm merely upon an increase of the capital of the firm will not release his surety from liability for his subsequent defalcations. Bank of Wilmington v. Wolleston, 3 Harr. (Del.) 90; Lionberger v. Krieger, 88 Mo. 160; McAuley v. Cooley, 47 Neb. 165, 66 N. W. 304.

And to the same effect is Coombs v. Harford, 99 Me. 426, 59 Atl. 529, where an increase of responsibility of a lodge trustee, because of an increase of the membership, was held not to discharge his sureties.

But in Grocers' Bank v. Kingman, 16 Gray, 473, it was held that the increase of responsibility of a cashier by an increase of the capital stock of the bank was sufficient to release his sureties.

writing one William W. Old as Daly's agent to solicit and procure applications for life insurance, and to perform such other duties in connection therewith as should be intrusted to said agent; that, under the original appointment, said Old was permitted to solicit and procure said applications within the territory of the states of Oregon and Washington; that thereafter, on the 10th day of November, 1901, the territory in which such applications were to be solicited and procured was changed from the states of Oregon and Washington to the states of Utah, Colorado, and Wyoming; that said Old acted under said appointment, and solicited and procured applications within the territory last above named, and did not solicit or procure applications within the states of Oregon and Washington; that on the date first above named, the said Old, as principal, and the appellant, Ferry, and one R. H. Officer, as sureties, executed and delivered to the respondent their obligation in writing, which, among other things, contained the following conditions: "The condition of this obligation is such that whereas the above-named bounden William W. Old has been, under an instrument in writing of even date herewith and hereby referred to, appointed by said Thomas F. Daly, manager, as his agent, for the purpose of procuring applications for life insurance, and performing such other duties in connection therewith as may be intrusted to him: Now, if the said William W. Old shall pay or hand over all moneys payable in any event to Thomas F. Daly, manager, aforesaid, which shall at any time be received by him, or for which he shall be accountable or liable, whether the same shall be or shall have been received by him personally and solely, or by, through, or together with a copartner, coagent, or other persons, including all money so received prior to the date of this instrument (if any such shall be), as well as those received thereafter, as also all moneys which he now owes, or hereafter may owe, said Thomas F. Daly, manager, aforesaid, on account of advances made to him or otherwise, . . . and shall also on the 10th day of each month hereafter account for, remit, and pay over to said Thomas F. Daly, manager, or his successors, or whenever otherwise required so to do by said Thomas F. Daly, manager, or his successors to his office, all moneys due by him (not previously remitted and duly accounted for), as such agent, less his commission and allowances as expressly authorized by his written appointment, or such other written instructions as he may receive, and shall also, on the 25th day of each month make and render to said Thomas F. Daly, manager, or his successors, or

whenever otherwise requested so to do, a full, just, and true account of said moneys and the sources from whence they shall have been received, then this obligation shall be void, otherwise to remain in full force and effect. It being agreed and understood that this obligation shall not be annulled or revoked without the consent of the above-named Thomas F. Daly, manager, aforesaid, but shall be and remain in force so long as said William W. Old shall continue to be the agent of said Thomas F. Daly, manager, aforesaid, whether under his existing appointment or any future one, and whether such present or future agency be sole, or whether said William W. Old be joined with any other person or persons, and until all transactions under such agency shall have been finally adjusted and settled, and all liabilities of said William W. Old by reason thereof shall have been discharged; it is, however, expressly agreed that neither forbearance nor the extension of time for the payment of moneys due or to become due, or failure to notify said sureties hereunder, shall operate as a waiver of their liability, but that their liability shall continue as long as said Thomas F. Daly, manager, shall have a valid demand against said William W. Old." The court also found "that said undertaking was executed in consideration that plaintiff (respondent) would appoint defendant Old as agent within the states of Oregon and Washington, or for any other territory; . . . that the sureties intended when they executed the bond to become bound as sureties for the defendant Old under such new or additional appointment." The court also found that Old had defaulted; that the other surety on the bond had been released by reason of his death, and for a failure to file a claim against his estate, and that the bond was in force against Ferry; and that the sum of \$1,413.33 was due thereon, for which he was liable, and the sum of \$2,827.46, for which Old was liable, and entered judgment accordingly, from which Ferry alone appeals.

Counsel in their brief state the errors to be reviewed by us as follows: "Objections were made to the sufficiency of the evidence, and to the sufficiency of the findings, all of which raise the sole question whether this provision in the bond was sufficiently broad in its terms to hold the sureties for a default of the principal, Old, in writing insurance in a territory not covered by the contract referred to. All other assignments of error, not being fatal to the plaintiff's recovery on retrial, numerous though they were, are abandoned." It is asserted by counsel for appellant that, under the original contract, the defendant Old was appointed agent to solicit and procure applications for life in-

surance within certain specified territory; that this territory was abandoned and the states of Utah, Colorado, and Wyoming substituted without the knowledge or consent of appellant; and that this constituted such a change or departure from the agreement upon which appellant obligated himself for the default of Old that it avoids the bond. In order to arrive at a correct conclusion, the provisions of the contract of appointment and the bond must be considered and construed together. As we view it, paragraphs 6 and 14 of the contract are the only ones that contain provisions which are material to a determination of the scope of the obligations assumed by appellant. Paragraph 6 is as follows: "It is agreed that the district within which said party of the second part shall have permission to operate is within the states of Oregon and Washington; but said district is not assigned exclusively to him." The 14th paragraph reads as follows: "It is agreed that said party of the second part shall keep deposited with said party of the first part a satisfactory bond for the faithful performance of all duties pertaining to his agency, and that said bond shall hold good under this or any future agreement." By referring to the 6th paragraph it will be observed that the territory in which Old is given permission to solicit applications for life insurance is specified to be within the states of Oregon and Washington. For the purpose of this decision, we will assume that within the purview of the clause in the original contract, now under consideration, the appointment of Old was a limited one so far as the territory in which he was to operate was concerned, although the clause does not in terms limit the appointment to those states, but simply gives Old permission to solicit insurance therein. If we now consider the language used in the two paragraphs quoted above in connection with what is expressed in the bond, what was the intention of the parties with regard to the scope of the obligations assumed by appellant? Is it not as clearly stated as it well could be that a new or future agreement and appointment is permitted and contemplated? Is it not just as clearly expressed that the bond in question should apply to such future agreement and appointment? Up to this point, therefore, there cannot be any room for either construction or doubt.

But it is asserted that the agreement and appointment referred to were intended to be limited to some agreement or appointment operative within the states of Oregon and Washington only. By referring to the terms of the contract and bond, it will be seen that no such a limitation is therein expressed. If it exists at all, therefore, it

must be implied. What is there in either the contract or bond from which such a limitation may be implied? It seems to us the parties have in terms provided against such an implication, in view of the language contained in the 14th paragraph of the contract, and in further view of what is said in the bond itself. In the contract the particular agency for which the bond is to be in force is expressly stated. The agency there referred to is, and can be, no other than the agency under which applications for life insurance were to be solicited, and such transactions as are naturally and necessarily connected therewith. This, to our minds, is clearly and unambiguously expressed. This being so, there is no room for the application of the doctrine that where general terms are used in any instrument, which, if standing alone, would extend the obligation thereby assumed beyond the subject-matter of the contract, such general expressions must be strictly limited to the subject-matter of the contract. This is good law and good sense, for the reason that the parties contracted and became obligated with regard to the business mentioned in the contract, and not with regard to matters pertaining to any and every kind of business or calling. To so construe general language in any obligation would be to extend the obligation beyond the intention of the parties, and would bind when neither party, at the time of entering into the obligation, intended such a result. In this case, however, the parties have expressly provided that a future agreement and appointment with regard to soliciting applications for life insurance might be entered into, and when entered into, the bond should cover such future agreement and appointment as well as the existing ones. This right is given in the most general terms without restriction or limitation of any kind.

In view of the right thus conferred upon Daly and Old, can it be said that they did not have authority to enlarge the duties and responsibilities of Old in the future agreement and appointment? The right to do this inevitably follows from the mere fact of being authorized to enter into a new or future agreement and to make a new appointment. While the future agreement and appointment in the contract was limited to a life insurance agency, as we have pointed out, it was not limited otherwise. If it be conceded, as we think it must be, that Daly and Old could change or modify the existing provisions and conditions of the old contract and appointment, or add new provisions, and thereby enlarge the duties and responsibilities of Old in the future agreement and appointment, as compared with the old one, how can it be reasonably contended that such en-

larged duties and responsibilities should be limited to one thing rather than another, so long as such conditions and responsibilities pertained to the agency expressly referred to in the contract? In what way did the fact of extending the territory in which Old might solicit affect appellant's obligation, except, perhaps, to enlarge Old's duties and responsibilities? A mere enlargement of the duties and responsibilities of Old could not affect appellant's right, because to do this was expressly authorized by him. We say this because the right to enter into a new or future agreement and to make a future appointment was expressly given. The agreement which was authorized therefore must have meant just what the term "future agreement" signifies, *viz.*, the right to formulate and agree upon terms and conditions when limited to the business of soliciting applications for life insurance, and the matters incident thereto; in other words, to the agency referred to in the 14th paragraph of the contract. In any contract or obligation the terms and conditions control, and any change in any one of them, without the consent of all the parties thereto, if material, voids the agreement, because it no longer constitutes the actual agreement entered into. But if a party to any agreement expressly agrees that he will be bound by any future agreement with regard to the subject-matter covered by the existing one, it is not easy to perceive why he should be bound by some, and not by all, of the provisions contained in the new agreement. If he wanted to limit his liability, it was an easy matter to have expressed it in the agreement; but, not having done so, how can a court place a limitation upon one provision rather than upon another of the new agreement which was entered into with his consent? If in such a case he is bound by all of the provisions agreed to by him in the old agreement, why is he relieved from any that are contained in the new one, so long as the provisions of the new agreement relate to the business covered by the old one? To hold that appellant expressly authorized the future agreement and appointment, but that he is relieved from the new responsibilities imposed by the new agreement, is tantamount to holding that the same rule applies to the obligation in question as would apply to an ordinary contract or obligation where new duties are imposed without the consent of the party to be bound. Such a holding would, in our judgment, be contrary to the express provisions of the contract and bond in question, and also to the law applicable thereto. The law undoubtedly relieves a party from any obligation not assumed by him, but it just as certainly enforces those that he has assumed. If, in the first in-

stance, the law refuses to bind, it is because the party did not bind himself; and in the second instance the law simply enforces that which the obligor promises or undertakes to do. If the courts should enforce the obligation in the first instance, it would be an act of injustice and wrong to the obligor. If it refused to enforce it in the second, it would amount to the same thing as against the obligee. The only thing, therefore, that the courts are concerned with, is to ascertain the intention of the parties to any contract; and when this is ascertained, the duty to enforce such intention admits of no escape. A primary canon of construction is to construe the language of the parties when applied to the subject-matter of the contract. The language used, when applied to the subject-matter, must be given its usual and ordinary meaning, unless it is clear that certain words or terms are employed in a technical sense. If the intention of the parties cannot readily be ascertained from the language alone, then the court must have recourse to the situation, conditions, and circumstances which affected the parties, and from the language, when considered in the light that those matters afford, determine the real intention of the parties.

From hasty and careless expressions in the books it is sometimes assumed that a different and stricter rule of construction is applied to surety or indemnity contracts than to others. Neither principle nor authority support such an assumption. Mr. Justice Straup in the case of *Smith v. Bowman*, 32 Utah, 38, 9 L.R.A. (N.S.) 889, 88 Pac. 688, has very clearly and tersely stated the general rule with regard to the application of such contracts in the following language: "In determining the question, it is well to bear in mind that sureties are favorites of the law, and that their liability is not to be extended by implication beyond the terms of their contract. They are bound by their agreement, and nothing else; and they have a right to stand upon the strict terms of their obligations." It must be remembered, however, that the rule there stated applies to the application of the contract when the intention of the parties is ascertained, and not to the rule applicable in ascertaining such intention. The rules of construction in ascertaining the intention of the parties are the same whether applied to one kind of a contract or another. 22 Cyc. Law & Proc. p. 84. This is well expressed by Mr. Justice Rumsey in the case of *Gamble v. Cuneo*, 21 App. Div. 414, 47 N. Y. Supp. 549, where it is said: "It is quite true that in one sense the contract of a surety is *strictissimi juris*, and it is not to be extended beyond the express terms in which it is expressed. This rule, however, is not a

rule of construction of a contract, but a rule of application of the contract after the construction of it has been ascertained. Where the question is as to the meaning of the language of the contract, there is no difference between the contract of the surety and that of anybody else. . . . In the case of a surety, as in the case of anybody else, when it becomes necessary to construe the contract, the usual rules are to be used, and it is to be interpreted like any other paper." This case was affirmed in 162 N. Y. 634, 57 N. E. 1110. The authorities in support of this doctrine are stated in the opinion there, and need not be referred to here.

If we apply the foregoing rules to the contract and bond in question, it seems to us that there is no room for doubt that the parties, including appellant, intended to cover the acts set forth in the complaint in this case, and to which the trial court applied the bond. If the bond in question had simply in general terms referred to the contract of appointment, and had then stated that the obligor bound himself to indemnify Daly as against the wrongful acts of Old, as stated in the contract, we would have to look to the contract for the purpose of determining what Old was required to do, and the obligation would be limited to such acts. But the bond in question speaks for itself, and in apt terms states just for what acts appellant bound himself. Appellant had the right to enlarge upon the matters enumerated in the contract. The appointment of Old was sufficient consideration for such an enlarged undertaking. But, apart from this, when appellant executed a bond to indemnify against the acts of the agent named in the contract, and in which the duties of the agent were specified, and in which it was further provided that the bond should cover any future agreement, then appellant bound himself by the terms of the future agreement, so long as the future agreement covered the business or agency referred to in the original contract. This is just what the parties expressed in the 14th paragraph of the contract. We therefore are not confronted with a case where nothing is said about what the future agreement shall cover. In this case the contemplated future agreement was limited to the business or agency of soliciting applications for life insurance only. The parties, therefore, fixed their own limitation; and since no other was expressed, what right have we to imply one? If nothing had been said in the contract with regard to what the future appointment should relate to, then, under the general rule that general expressions, however broad they may be, must nevertheless be limited to the things which constitute the subject-matter of the contract, would apply.

28 L.R.A. (N.S.)

But how can such a rule be applicable when the contract expressly provides against it? All of the acts complained of are expressly covered by the bond. True, they arose under a future agreement and appointment, but they all come within the agency expressly referred to in both the contract and the bond. As we have seen, to extend the agency of Old to the states of Utah, Colorado, and Wyoming, in addition to those of Oregon and Washington, was no more than to enlarge upon the duties and responsibilities of Old, and the authority to do this was as clearly given as was the right to enter into a future contract and to make a future appointment, either or both of which the bond was intended to cover. To say that the future agreement and appointment was intended to be operative within the states of Oregon and Washington only not only robs the language used of its full force and effect, but a limitation placed thereon would be unreasonable in view of the circumstances. By the original contract Old was permitted to operate in the states of Oregon and Washington. What reason, therefore, was there to enter into a future agreement or make a future appointment limited to those states only? So far as the record discloses, there was no reason for this whatever. The right to enter into any future agreement, and to make a future appointment, in the absence of any limitation in the original agreement or in the bond, must therefore be held to mean just what it implies; namely, to make an agreement and appointment to solicit applications for life insurance in a place or places not already covered by the original agreement. No new appointment was necessary to authorize Old to solicit in Oregon and Washington. He had this right; but a new appointment and additional permission were necessary if his agency was to be extended to some other territory. Are we to say that the bond was to be limited to an appointment which was not necessary, but not to be extended to one which was necessary if any new agreement or appointment was made? It is quite true that either Mr. Old or Mr. Daly might become dissatisfied with some of the other provisions of the original contract, and might have desired the right to modify or change them. But this is mere conjecture. It is just as likely that the place wherein permission was given to carry on the business of the agency would prove undesirable as that any other provision of the contract might do so. The right to change, extend, or modify any provision of the original contract was given, if any right was given at all. We therefore have no right to place a limit upon one of the obligations rather than upon another, all of which are contained in the contract, when

the parties have not indicated by apt language, either in express terms or by necessary implication, that a limitation was intended.

But it may be suggested that if it be held that the future agreement and appointment given extended the agency of Old to the states of Utah, Colorado, and Wyoming, then it could for the same reasons be extended to France, Germany, China, Japan, or Africa, and the appellant would still be bound. The appellant had a right to so bind himself if he wanted to, and, if he did, the courts could not relieve him simply because it may seem unreasonable for him to do such a thing in advance. It is easy at times to be led away from the real question by having recourse to extreme cases as illustrations for the purpose of applying well-known legal principles. But the suggestion is not such that cannot be answered. One answer is that we have no such a case before us at this time. Another answer is that the thing suggested would not necessarily follow, even though we gave full scope and effect to the language employed in the contract and bond before us. As we have seen, in arriving at the intention of the parties to any contract, the surrounding circumstances and conditions by which the parties are affected are always to be considered. These matters may be made to appear by proper evidence, and from the language used, when considered in the light of the matters referred to, the real intention of the parties must be ascertained; and it would not be assumed that they intended a future agreement and appointment to apply to conditions and circumstances entirely foreign to and different from those surrounding them and which affected the contemplated business concerning which they were contracting. It frequently occurs in arriving at the true meaning of language used in a statute, and of the real intention of the legislature in using it, that courts must give words, phrases, and even clauses either an enlarged or restricted meaning, so as to make the law conform to the real intention of its authors, as the same is gleaned from the whole law or statute. This is, if possible, more often the case with regard to written contracts. The ordinary meaning of certain language must, in some instances, be enlarged, and in others restricted, so as to make the contract, when considered as a whole, conform to the real and manifest intention of the parties, notwithstanding that the literal meaning of a word, phrase, or clause, when considered by itself, would be given a different meaning. 2 Lewis's Sutherland, Stat. Constr. § 376; *Hilton v. Thatcher*, 31 Utah, 370, 88 Pac. 20. In view of this rule, any court might thus be justified in holding that foreign countries

were not, and could not have been, within the contemplation of the parties, and that it was not their intention to cover them, or any one of them, by the terms used in the agreement. If, therefore, it were manifest that such was not the intention of the parties, then the court would hold it not their contract, and hence would not enforce it as literally written. But would it not be somewhat unreasonable to contend that, because certain language used was not intended to apply to the whole world, therefore it was not intended to apply to any part of it outside of the particular place where the contract was made? We take judicial notice of the general scope and extent of the territory named in the contract, and to which the appointment applied, and of the general history and the number of inhabitants, and of their general condition, so far as this is a matter of common or general knowledge. Are the conditions prevailing in Utah, Colorado, and Wyoming so different from those existing in Oregon and Washington that it may be assumed that the parties, because of such difference, did not intend to extend the agency of Old to those states? We think not. There is nothing in the conditions, therefore, from which a limitation could be implied.

The only ground, therefore, upon which a limitation can rest, is that the scope of Old's duties and responsibilities was enlarged, and that therefore the appellant's obligation should not be extended to such new duties and responsibilities. If appellant had so limited his obligation either in express terms or by language from which such a limitation could reasonably be implied, then he could not have been held upon this bond. He did not do so; but, upon the other hand, there are numerous expressions in the bond which clearly forbid us to make such a limitation without disregarding the ordinary rules of construction, and doing violence to the ordinary sense to be imputed to the language used. In dealing with this question we have considered the term "future agreement," as used in the contract, as referring to a future appointment, which is referred to in the bond. We think that to do this is not only permissible, but is necessary, in view of the circumstances. The contract was executed first, and the bond expressly refers to the contract. In the bond it is said that the bond shall remain in force "whether under his [Old's] existing appointment, or any future one." This was a construction by the parties themselves of what was meant by the term "future agreement," used in the contract. Appellant is bound by this construction, and therefore must be held to have consented to a future agreement and appointment. The future appointment,

therefore, must have been intended to be other than the existing one, but with reference to the business of soliciting applications for life insurance. That it was limited to an agency for that purpose only is made clear in the 14th paragraph, wherein it is said that the bond should be given for the "faithful performance of all duties pertaining to his [Old's] agency, and that it should hold good," etc. This, thus, was a limitation only with regard to the business intrusted to the agent, and not upon the duties and responsibilities that might be imposed under a future agreement and appointment.

We are not unmindful of the rule invoked by counsel for appellant, and as illustrated in the case of *Singer Mfg. Co. v. Hibbs*, 21 Mo. App. 574. In that case the territory for which the agent was appointed was clearly defined, and no right was there given to extend the scope of the agency. Under such circumstances, the court in that case properly held that the bondsmen were not liable for the defalcations of the agent, occurring in some other place than the one for which he was appointed. Under such circumstances, the bond is limited to the place or territory for which the agent is appointed as well as to the acts contemplated by the appointment. Not so in this case. A future agreement and appointment are expressly provided for. It would therefore be just as unreasonable to say that the bond in question does not extend to the acts occurring under the future appointment, as it would have been to have held in the *Hibbs* Case that the bond in question in that case did so extend. While counsel for respondents have not cited any case, and we have found none, which is exactly parallel in its facts with those of the case at bar, we nevertheless think that the following cases cover and are decisive of the principles involved and which we have discussed: *New York L. Ins. Co. v. Hamlin*, 100 Wis. 17, 75 N. W. 421; *Singer Mfg. Co. v. Reynolds*, 168 Mass. 588, 60 Am. St. Rep. 417, 47 N. E. 438; *Travelers' Ins. Co. v. Stiles*, 82 App. Div. 441, 81 N. Y. Supp. 664; *Western New York L. Ins. Co. v. Clinton*, 66 N. Y. 326. All of the foregoing cases except the last one relate to indemnity bonds where the right was given to make changes in the original contract of appointment, or to make a new agreement or appointment. In view of such a right being given, it is held that the obligations of the bond extended to the acts under the new agreement or appointment. It is clearly held that where the right is given to enter into a future agreement or to make a new appointment, it makes no difference that the responsibilities and duties of the agent are enlarged under the new appointment. The bond, it is held, applies to the acts under 28 L.R.A. (N.S.)

the new agreement or appointment to the same extent as it did to those of the original agreement or appointment. Every question was involved in those cases that is involved here except the change of territory; but, as this change of territory can involve nothing except an enlargement of the duties and responsibilities of the agent Old, there is no escape from the conclusion that the cases referred to above are decisive of the principle which is involved in this case.

In considering all of the terms of the contract and bond in question, we are clearly of the opinion that the parties intended to extend the bond to the acts of Old which are involved in this case, and that the trial court committed no error in its findings, conclusion, and judgment.

The judgment is affirmed, with costs to appellant.

McCarty, J., concurs, and Straup, Ch. J., in result.

WISCONSIN SUPREME COURT.

RE ESTATE OF JAMES KAVANAUGH,
Deceased.

J. P. WATT, Exr., etc., of James Kavanagh, Deceased, Appt.,
v.

MATT KAVANAUGH et al., Respts.

(— Wis. —, 126 N. W. 672.)

Charity — bequest for masses — validity.

1. A bequest for masses for testator and certain specified relatives being, under the doctrine of the Catholic Church, for the benefit of all mankind, is a valid public charity, and not subject to statutory provisions governing the creation of private charities.

Same — uncertainty.

2. A bequest for masses for certain specified purposes, to be used under direction of specified persons, is not void for uncertainty.

Will — real estate — title not vested.

3. A devise of real estate for the celebration of masses, being for a public charity, is not invalid, although title is not vested in anyone.

Same — statutory direction — applicability.

4. A statute requiring a devise of land to be made directly to the beneficiary, and not to a trustee, is not applicable to public

Note. — As to validity of bequest for masses, see notes in 25 L.R.A. 360, and 40 L.R.A. 717. And see also note in 14 L.R.A. (N.S.) 96, as to enforcement of general bequest for masses.

charities or in cases where the will works conversion of the property into personalty.

(Timlin, J., dissents.)

(May 24, 1910.)

APPEAL by J. P. Watt, Executor, from a judgment of the Circuit Court for Manitowoc County adjudging invalid the will of James Kavanaugh, deceased. Reversed.

Statement by Kerwin, J.:

This proceeding was brought in the county court to construe the will of James Kavanaugh, deceased, which is as follows:

I, James Kavanaugh, of Maple Grove, Wisconsin, being of sound mind and memory and undersanding, but considering the uncertainties of human life, do make and declare this to be my last will and testament.

First. After the payment of my just debts and funeral expenses, I give, devise, and bequeath all the rest of my property, both real estate and personal property, for masses for the repose of my father's and mother's and sister's and brother's and my own soul. The masses will be said according to the directions of Thomas J. Fenlon and J. P. Watt, of Maple Grove, Wis., and I hereby appoint them to direct where and when to say said masses. I hereby appoint J. P. Watt, of Maple Grove, Wis., as executor of this my last will and testament.

Signed and acknowledged this ninth day of March, 1908. his

James X Kavanaugh
mark

Signed and acknowledged by said testator in the presence of us who hereunto subscribe our names in the presence of said testator and of each other. John E. Mullens.

M. J. Kavanaugh.

The county court held that the provision in the will, which provides that "after the payment of my just debts and funeral expenses, I give, devise, and bequeath all the rest of my property, both real and personal, for masses for the repose of my father's and mother's and sister's and brother's and my own soul," is wholly void and of no effect. On appeal the circuit court affirmed the judgment of the county court and entered judgment accordingly, from which this appeal was taken.

Messrs. E. L. Kelley and P. H. Martin, for appellant:

A bequest for masses is a valid public charity.

Hoeffler v. Cloghan, 171 Ill. 462, 40 L.R.A. 730, 63 Am. St. Rep. 241, 49 N. E. 527; Re 28 L.R.A.(N.S.)

Schouler, 134 Mass. 426; Rhymer's Appeal, 93 Pa. 142, 39 Am. Rep. 736; Seibert's Appeal, 3 Sadler (Pa.) 412, 18 W. N. C. 276, 6 Atl. 105; Harrison v. Brophy, 59 Kan. 1, 40 L.R.A. 721, 51 Pac. 883; Webster v. Sughrow, 69 N. H. 380, 48 L.R.A. 100, 45 Atl. 139; Sherman v. Baker, 20 R. I. 446, 40 L.R.A. 717, 40 Atl. 11; Hadley v. Forsee, 14 L.R.A.(N.S.) 96, note; Coleman v. O'Leary, 114 Ky. 388, 70 S. W. 1068; Hood v. Dorer, 107 Wis. 149, 82 N. W. 546; Kronshage v. Varrell, 120 Wis. 161, 97 N. W. 928; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; Webster v. Morris, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353; Sawtelle v. Witham, 94 Wis. 412, 69 N. W. 72; Re Hegna, 133 Wis. 513, 113 N. W. 982.

Mr. J. S. Anderson, with Messrs. Burke & Craite, and Nash & Nash, for respondents:

The will attempts to create a private trust, in violation of statute.

McHugh v. McCole, 97 Wis. 166, 40 L.R.A. 724, 65 Am. St. Rep. 106, 72 N. W. 631; 2 Phillips, Ev. 710; Cook v. Barr, 44 N. Y. 156; Jones, Ev. p. 130; State ex rel. Weiss v. District Board, 76 Wis. 191, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; Lichter v. Thiers, 139 Wis. 481, 121 N. W. 153; Willard, Eq. Jur. p. 598.

Kerwin, J., delivered the opinion of the court:

The respondents, heirs at law, attack the will under consideration upon the grounds: (1) That it is void, independent of any statute, for uncertainty and indefiniteness; (2) that it attempts to create a private trust in violation of statute; and (3) that, if it attempts to create a public trust, it is nevertheless void because, under the equity powers of the court, it is too indefinite and uncertain to be enforced. On the part of the appellant it is insisted that the will is simple, the intent plain, and the purpose lawful; that it creates a public charity and as such is valid. Respondents rely mainly upon McHugh v. McCole, 97 Wis. 166, 40 L.R.A. 724, 65 Am. St. Rep. 106, 72 N. W. 631. Starting with the proposition laid down in McHugh v. McCole, supra, that the trust was private and, therefore, too indefinite and uncertain to be enforced by a court of equity, the court easily reached the conclusion that the bequest for masses was void. No proof was made in the McHugh Case that the masses were not private in their nature, and for the sole benefit of the souls of the giver and others specifically mentioned. No evidence was offered as to the nature of the masses, whether public or private, and the court rested its opinion upon the idea that the trust was purely private. Had the court started with the proposition that a bequest

for masses is a public charity, a different conclusion, doubtless, would have been reached in the *McHugh Case*.

Counsel for respondents insist that the bequest violates § 2081, Stat. If, as was assumed in the *McHugh Case*, the trust were private, there would be much force in this contention, since under this section the trust must be fully expressed and clearly defined on the face of the instrument creating it. But this argument is based upon the proposition that the trust created in the case before us is a private trust, not a public charity. So we are brought to the question whether a bequest for masses is a "public charity." Bequests for religious purposes date very far back in judicial history. Some reference is made to them, and cases collected, in a quaint old book entitled, "Law of Charitable Uses, Revised and Much Enlarged; with Many Cases in Law Both Ancient and Modern," printed in 1676 under the censorship of Francis North. At page 35 of this work is found a will dated January 17, 1524, from which we quote some of the "items."

"Item, I Will, after my decease, that A., my wife, have my House called C. during her natural Life, and she to keep up the reparations of said House, and the Lords Rent to pay, and she to find four Tapers of four pounds of Wax; that is, one before the Rude under the Rude Loft, and another before our Lady; another before St. Thomas, and one before St. Anthony.

"Item, I Will, That she keep mine Obit every year during her Life, and to have every year three Priests, and they to have Eight pence a piece, and two dozen of Bread, and a Kinderkin of double Beer, and two Cheeses, price of Twenty pence.

"Item, I Will, and appoint after my decease That all and singular my Evidences, and my Copies, that they be delivered into the custody of the Churchwardens of the Parish of Peter and Paul, of T. aforesaid.

"Item, I Will, That after the natural life of A., my wife, that them my House called C. with all the Appurtenances belonging thereunto, as is more plainly specified by my deeds; that it shall remain evermore unto the Church aforesaid; First, to keep mine Obit yearly, and the four Tapers of four pounds of Wax. Moreover, I Will, That after the decease of A., my wife, that the Churchwardens do buy six pounds of Wax, and make the common Light, and the Taper before the Rude, to the full of two pounds of Wax apiece, and so to continue for evermore; and the residue of the Rent to remain to the reparations of the Church aforesaid."

Also, on page 41, another will, dated July 1, 1523, by the terms of which there was given

"several of her Lands to the use of the Priests Service, in the Church of St. Peter in Stowe-Market, to pray for her Soul, and the Souls of her Husbands and others, for 99 years and the Lands to be sold by her Co-Feoffees, and the one half of the Money to go to the making of the High-way, between Stowe and Ipswich; and the other to be divided, one part to a Priest, to say Prayers in the said Church of S. Peter, for her Soul, and the Souls of the afore-rehearsed. . . ."

The following authorities also relate to charitable bequests pertaining to religious purposes: *Baker v. Sutton*, 1 Keen, 224; *Felan v. Russell*, 4 Ir. Eq. Rep. 701; *Powerscourt v. Powerscourt*, 1 Molloy, 616; *Moggridge v. Thackwell*, 1 Ves. Jr. 464; *Doe ex dem. Phillips v. Aldridge*, 4 T. R. 264; *Tysen, Charitable Bequests*, chap. 10, p. 118; *Re Michel*, 28 Beav. 39; *Tudor, Charities & Mortmain*.

There is much conflict in the early and some in the late cases as to what is and what is not a "public charity." Many of the bequests in England were held void as being to superstitious uses; but no such rule or principle obtains in this country. Hence the decisions declaring gifts or bequests void as gifts to superstitious uses have no application here. *McHugh v. McCole*, supra. The doctrine of superstitious uses under the statute of 1 Edw. VI. chap. 14, under which devises for masses were held void, has never obtained in the United States, where there is absolute religious equality. *Webster v. Sughrow*, 69 N. H. 380, 48 L.R.A. 100, 45 Atl. 139, and cases cited.

Indeed, the question is not new in this state. In *McHugh v. McCole*, supra, it was held that, had the bequest been direct to a bishop or priest for masses for the repose of the souls of the persons named in the will, it would have been valid, but that the contested provisions of the will were void trusts and not valid personal bequests. No claim is made by appellant that the trust is private. The main questions for determination, therefore, are whether the bequest for masses is a public charity and sufficiently definite for enforcement by a court of equity. No proof was made in the *McHugh Case* that masses are public in their nature, or for the benefit of mankind generally, and whether the court should have taken notice of this fact without proof we need not consider here, because in the case before us such proof was made. It was shown by competent evidence that the sacrifice of the mass is a public service, not alone for the repose of the souls of the deceased members mentioned, but for the benefit of all mankind, and so understood by all members of the Catholic Church. So, while the masses may

be intended to benefit the souls of the departed mentioned, the benefits are public as well, therefore, come within the designation of a public charity. Masses are religious observances, and come within the religious or pious uses which are upheld as public charities. *Re Schouler*, 134 Mass. 426; *Rhymer's Appeal*, 93 Pa. 142, 39 Am. Rep. 736; *Hoeffler v. Clogan*, 171 Ill. 462, 40 L.R.A. 730, 63 Am. St. Rep. 241, 49 N. E. 527; *Webster v. Sughrow*, supra; *Seda v. Huble*, 75 Iowa, 429, 9 Am. St. Rep. 495, 39 N. W. 685; *Sherman v. Baker*, 20 R. I. 446, 40 L.R.A. 717, 40 Atl. 11. A gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, is a "charity." *Jackson v. Phillips*, 14 Allen, 539. In *Hoeffler v. Clogan*, supra, the bequest was of certain property "to sell the same and expend the proceeds of said sale in saying masses for the repose of my soul and the souls of my deceased wife, Margaret Clogan, my mother-in-law, Ellen Hurley, and my brother-in-law, James Hurley." The bequest was held valid, and many cases are cited and discussed in the opinion. The tendency of the courts is to uphold charitable trusts, in accordance with the intent of the donor and consistently with rules of law, and this court has asserted the doctrine in no uncertain terms in several cases. The question has been so exhaustively treated in *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103, and *Harrington v. Pier*, 105 Wis. 485, 50 L.R.A. 307, 76 Am. St. Rep. 924, 82 N. W. 345, that further discussion seems unnecessary.

According to the doctrine of the Catholic Church as established by the proof in this case, the whole church profits by every mass, since the prayers of the mass include all of the faithful, living and dead. The sacrifice of the mass contemplates that all mankind shall participate in its benefits and fruit. "The mass is the unbloody sacrifice of the cross, and the object for which it is offered up is, in the first place, to honor and glorify God; secondly, to thank Him for His favors; third, to ask His blessing; fourth, to propitiate Him for the sins of all mankind. The individuals who participate in the fruits of this mass are the person or persons for whom the mass is offered, all of those who assist at the mass, the celebrant himself, and for all mankind, within or without the fold of the church." So, it seems clear upon reason and authority, under the doctrine of the Catholic Church, as established by the evidence in this case, that a bequest for masses is a "charitable bequest," and valid as such, although the repose of the souls of particular persons be

mentioned. But it is said that the present bequest is too indefinite and uncertain to be enforceable, and is void under the statutes of this state, and independent of any statute. The contention that the will is void for uncertainty, independent of any statute, is without foundation under the authorities. The fundamental principle to observe in the construction of wills is to seek out the intention of the testator. This rule has been so often stated by this court that citation of authority is unnecessary. The intention of the testator in this case is plain from the terms of the will, namely, that his property be applied, first, to the payment of his debts, and the residue devoted by Fenlon and Watt to the celebration of masses. The bequest for masses being, as we have seen, a charitable bequest and for the benefit of mankind in general, the statute relating to trusts (§ 2081) does not apply. *Dodge v. Williams*, and *Harrington v. Pier*, supra. It is true, as stated by this court in *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353, and again in *Harrington v. Pier*, supra, that some degree of certainty must be observed in charitable bequests. "The scheme of charity must be sufficiently indicated, or a method provided whereby it may be ascertained, and its object made sufficiently certain, to enable the court to enforce the execution of the trust according to such scheme and for such object. It must be of such a tangible nature that the court can deal with it. The mere direction to expend money 'for charitable purposes' at large is too indefinite to be carried into execution." The certainty must be determined not with reference to § 2081, Stat., or that which is required in regard to private trusts, "but with reference to those liberal rules for judicial construction applicable to charitable trusts." *Harrington v. Pier*, supra.

Counsel also contend that, since the estate of the testator consisted principally of real estate, and the will not providing for a disposition of the lands to anyone, it is void. But this contention brings us again to the distinction between a private trust and a public or charitable bequest. In the former, statutory certainty is required, while in the latter it is not. The certainty of beneficiaries holding the title in cases of private trusts does not obtain in cases of public trusts. And this is necessarily so from the nature of public trusts as distinguished from private trusts. This subject has been fully covered in *Harrington v. Pier*, supra. At page 514 of 105 Wis., the court said: "It follows that indefiniteness of beneficiaries who can invoke judicial authority to enforce the trust, want of a

trustee if there be a trust in fact, or indefiniteness in details of the particular purpose declared, the general limits being reasonably ascertainable, or indefiniteness of mode of carrying out the particular purpose, does not militate against the validity of a trust for charitable uses. Given a trust, with or without a trustee, a particular purpose,—as education, or relief of the poor, as distinguished from a bequest to charity generally,—and a class great or small, and without regard to location, necessarily, as 'worthy indigent females' or 'indigent young men studying for the ministry' or 'resident poor,' or 'indigent children of Rock county,' or 'the boys and girls of California' (People ex rel. Ellert v. Cogswell, 113 Cal. 129, 35 L.R.A. 269, 45 Pac. 270), and we have a good trust for charitable uses. The court, through its strictly judicial power, may fill the office of trustee if necessary, the trustee can select the immediate beneficiaries or objects within the designated class and scheme; he can determine upon the details necessary to effect the intention of the donor within the general limits of his declared purpose, and execute the trust accordingly; and the proper public agencies, if necessary, can invoke judicial power to enforce such execution."

Section 2075, Stat., which provides that "every disposition of lands, whether by deed or devise, hereafter made, except as otherwise provided in these statutes, shall be directly to the person in whom the right to the possession and the profits shall be intended to be vested, and not to any other, to the use of or in trust for such person, and if made to one or more persons in trust for or to the use of another, no estate or interest, legal or equitable, shall vest in the trustee,"—is also relied upon by respondents as rendering the will void. But this statute is not controlling in cases of public trusts where indefiniteness is of the essence of the charity; nor is it controlling in this case, because the will created an equitable conversion, and the estate of the testator must be treated as personal property. The terms of the will could not be carried out without converting the real estate into personalty. The evidence shows that the estate left amounted to about \$6,000, consisting of real and personal property. The real estate was mortgaged for \$1,200 or \$1,500. The debts allowed by the county court amounted to about \$917. The amount of money left was \$400, and the personal estate was insufficient to pay the debts. So it is apparent that conversion of the real estate was necessary to carry out the terms of the will. Consequently the doctrine of equitable conversion applies. *Harrington v. Pier*, 105 Wis. 28 L.R.A. (N.S.)

485, 50 L.R.A. 307, 76 Am. St. Rep. 924, 82 N. W. 345; *Becker v. Chester*, 115 Wis. 90, 91 N. W. 87, 650; *Re Albiston*, 117 Wis. 272, 94 N. W. 169; *Holmes v. Walter*, 118 Wis. 422, 62 L.R.A. 986, 95 N. W. 380.

In *Harrington v. Pier*, supra, page 492 of 105 Wis., quoting from *Given v. Hilton*, 95 U. S. 591, 24 L. ed. 458, this court said: "The blending of real estate and personal property in one fund for all the purposes of the will is generally regarded as evidencing intent that the whole estate shall be treated as personal property, even though a necessity therefor does not exist; but such evidence is not conclusive on the question."

It seems clear that the testator intended an equitable conversion. The main question in the case before us, therefore, is whether a bequest for masses is a charitable bequest, and, this being determined in the affirmative, we easily reach the conclusion that the will is valid. In *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103, and *Harrington v. Pier*, supra, it is determined, after an exhaustive review of the authorities, that chancery had jurisdiction over public trusts or charities in England before the statute of 43 Elizabeth, chap. 4, and such chancery jurisdiction became a part of our jurisprudence, and, therefore, charitable trusts may be enforced, and are not controlled by our statutes of uses and trusts. In the nature of things this was held necessary because a public trust or charitable use is necessarily indefinite and uncertain, especially as to beneficiaries; that a public trust begins where a private trust ends as regards certainty and definiteness. Of course some degree of certainty must obtain even in a public trust. The scheme of charity must be sufficiently indicated, or a method provided whereby it may be ascertained and its objects made sufficiently certain to enable the court to enforce an execution of the trust according to the scheme. *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353; *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Harrington v. Pier*, 105 Wis. 485, 50 L.R.A. 307, 76 Am. St. Rep. 924, 82 N. W. 345. In charitable bequests no trustee need be named, as a charity will not be allowed to fail for want of a trustee. The person named in the will to execute the charity will be held to be the trustee, and, if necessary that he hold the title for the purpose of carrying out the provisions of the will, he will by implication hold such title. *Kemmerer v. Kemmerer*, 223 Ill. 327, 122 Am. St. Rep. 169, 84 N. E. 256; *Harrington v. Pier*, supra. Since there was equitable conversion in the instant case, the statutes respecting perpe-

tuities need not be considered even if applicable to charitable bequests.

After the decision of this court in *Danforth v. Oshkosh*, 119 Wis. 262, 97 N. W. 258, the legislature passed chapter 511, Laws 1905, which amends § 2039, Stat., by adding to the exceptions from the operation of that section real estate devised to a charitable use. So that since the passage of this amendment the statute against perpetuities (§ 2039) does not include devises to a charitable use. However, we need not consider the effect of this amendment, because of the doctrine of equitable conversion we are only dealing with personal property. In so far as *McHugh v. McCole*, 97 Wis. 166, 40 L.R.A. 724, 65 Am. St. Rep. 106, 72 N. W. 631, conflicts with anything said in this opinion, it must be regarded overruled.

It follows that the bequest for masses is valid, and that the judgment of the court below must be reversed.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Marshall, J., concurring (filed June 10, 1910):

I choose to add a few words to the able opinion for the court by my Brother Kerwin, in order to make more significant that preservation of the public trust intended by the donor does not depend upon the doctrine of equitable conversion, and treat, briefly, some suggested infirmities in the trust, made during our consideration, which might otherwise cause doubt as to the soundness of the court's conclusions.

The full reintrenchment in the jurisprudence of this state of the common-law doctrine of charities was significantly commenced in *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103, and though thrown, unfortunately, into some confusion thereafter, was so cleared up, as was supposed, for all time in *Harrington v. Pier*, 105 Wis. 485, 50 L.R.A. 307, 76 Am. St. Rep. 924, 82 N. W. 345; *Hood v. Dorer*, 107 Wis. 149, 82 N. W. 546, and *Danforth v. Oshkosh*, 119 Wis. 262, 97 N. W. 258, as to leave no vestige of the supposed application to charities of our statutory restrictions upon conveying property in perpetuity, except as to real estate. In that situation, as suggested in the opinion of the writer, concurred in by my Brother Siebeck, in the *Danforth Case*, legislative assistance was necessary to enable the court to rescue our system from the exceptional interference to one conveying his property to charitable uses. It was confidently thought that the people of this state, with a full understanding of such interference, would

promptly, through the proper channel, and speedily make the public policy of our commonwealth conform to the well-nigh world-wide conception of the importance of promoting the wishes of possessors of privately accumulated wealth to devote the same to the betterment of mankind. At the very first opportunity thereafter chapter 511, Laws 1905, was passed, exempting real estate from the limitations upon the right to suspend the absolute power of alienation. So, now, one can freely convey his property in perpetuity, real or personal, in trust for any designated charitable use upon any general scheme to that end. Charity, sweet charity, has thus come into its own. This is deemed to be such a valuable consummation to the people of this state that, in a case like this, the doctrine of equitable conversion, so many times resorted to as a convenient way of avoiding the once supposed infirmity in our system hampering owners of property in their efforts to devote the same to the public good, no longer cuts any figure. In my judgment, if referred to at all, it should be relegated to an insignificant place. Here the donor had an undoubted right to devote his real estate to his chosen charity. True, if there was any doubt about it, in view of the statute, but there is none, he had an undoubted right to leave his property to be administered as personalty, in respect to which there has never been any interference in our written law with the power to convey in perpetuity.

An idea was advanced that the constitutional right of immunity from interference in religious matters stands in the way of public enforcement of a trust of the character created. The answer to that is that no public enforcement would ever in any event be required, except as to contractual features. The Constitution does not exempt religious orders or ministers of the Gospel from their obligations of contract. In that field they are amenable to the law of the land the same as individuals in any other field. If one should devise his property to a minister of the Gospel or a church society to build a church edifice, and the devisee should accept the trust, could such donee be heard successfully to claim immunity from legal coercion to carry out the agreement? That simple proposition, it would seem, shows clearly that, if the donee of a trust for masses accepts the offer, he thereby makes a promise subject to enforcement, like any other promise. He could not for a moment in any court be heard to say, I will not keep my agreement and am entitled to protection in my breach, under my constitutional immunity from interference in religious matters. The attorney general in proceeding to enforce such a trust is

merely asserting the inviolability of a public contract.

The suggestion is that the title to the property, considered as realty, by force of the statutes (§§ 2072 and 2073, Stat. 1898), is in the beneficiaries, since there is no power of disposition. That view overlooks the fact that the statutes have nothing to do with trusts for charity; that in such cases the legal title is always in the trustees and the equitable title in the beneficiaries. Many mistakes have been made by confusing private with charitable trusts, as shown in *Harrington v. Pier*, supra. In the latter, though the trustees have no duty whatever to perform, except to hold the title and preserve it for the designated public purpose, the nature of the right is strictly legal while the equitable interest is in the beneficiaries, which, from the very nature of the trust, must be indefinite. Any other view would defeat the law of 1905 and perpetuate the very difficulty the legislature intended, by it, to abolish. I take it that there is no room for fair controversy but what the equitable, not the legal, title, is vested in the beneficiaries, and the legal title rests in the trustee. That is the logic of *Harrington v. Pier*, supra, and of authorities generally on the subject. So, notwithstanding the form of the donation is for the repose of souls of the departed, the beneficiaries include the living as well,—the great public,—and the state, through its law officer, possesses full authority to invoke judicial remedies to prevent any abuse of the trust.

This further reason why a conveyance of realty in trust for perpetual charitable uses is not valid was advanced,—that the very constitutional status of titles to real estate precludes such a trust. In that reference was made to article 1, § 14, of the Constitution, declaring that “all lands within this state are declared to be allodial, and feudal tenures are prohibited.” By that, it is suggested, “all hindrances and obstacles in the way of free and ready sale of real property are nugatory.” The logic of that idea would render void all restraints upon the conveyance or use of real estate. No one would possess authority to hold, convey, or enjoy such property for a limited purpose or period. That doctrine was advanced in *Barker v. Dayton*, 28 Wis. 367, but rejected as unsound though ingenious. The argument of counsel who contended for the doctrine which is contrary to the practice, under our Constitution, since its adoption and similar Constitutions elsewhere, reasoned from the lexical meaning of the word “allodial” standing alone. This court rejected counsel’s logic, holding that the use of the term, “and

feudal tenures are prohibited,” following and in close connection with the term, “all lands within this state are declared to be allodial,” gave to the whole the meaning that the ownership of realty is free from those restraints which were characteristic of the feudal system; that the possessor of the title no longer is to be regarded as merely holding by the grace of a sovereign lord and subservient to “homage or fealty or military service,” but as holding by right. Properly understood the allodial character of title to real estate, instead of suggesting incapacity to convey the same to charitable uses, rather suggests absolute freedom in that regard. The contrary idea advanced during the discussion of this case, as inimical to the validity of the trust in question, would, of course, defeat any trust in real estate, whether for a limited period or in perpetuity. It would strike the public as passing strange if they were confronted with a judicial declaration that no man could hold or transfer any other than an unrestricted title to real estate characterized by unrestricted right of disposition. It seems that the idea was most emphatically rejected as unsound, some forty years ago, in *Barker v. Dayton*, supra. As there said, in effect, the only meaning of the constitutional provision is that titles to realty in this state are free from any encumbrance in the nature of rent or service or fealty to a superior, as under the feudal system.

Timlin, J., dissenting:

Eighty acres of presumably agricultural land worth \$6,000, mortgaged for \$1,500, personal property of a value not disclosed, and \$400 in money,—subject to unsecured debts of \$917,—were disposed of by the testator by will in these words: “After the payment of my just debts and funeral expenses, I give, devise, and bequeath all the rest of my property, both real estate and personal property, for masses for the repose of my father’s and mother’s and sister’s and brother’s and my own soul. The masses will be said according to the directions of Thomas J. Fenlon and J. P. Watt, of Maple Grove, Wis., and I hereby appoint them to direct when and where to say said masses. I hereby appoint J. P. Watt, of Maple Grove, Wis., as executor of this my last will and testament.”

The testator was a member of the Roman Catholic Church. It will be noticed that the property is not devised or bequeathed to any designated person nor expressly in trust, nor is there any suggestion on the face of the instrument that the testator himself intended any public benefit. This last may have been supplied, however, by proof of the fact that he was a Roman Catholic, and

that according to the tenets of that faith the celebration of masses, although expressly for the souls of certain designated deceased persons, nevertheless inures to the benefit of all participants in the ceremony and to the benefit of all mankind. A power, however, is given to two named persons to direct when and where the masses shall be said. It is further provided that the masses are to be said according to the direction of these two persons; but this cannot be taken to mean that they are to alter or modify the ceremony, but, as appears from the evidence, merely to designate whether low mass or high mass is to be said, and when and where. There appears to be a wide discretion vested in these two persons with respect to the exercise of the power. There are no active duties which require the intervention of a trustee or which might change the disposition of the property from a mere passive use to an active trust, unless we infer from the will a necessity for selling and converting the land into money. It also appears from the testimony of a priest of this church that the mass is a ceremonial prayer and sacrifice, which must be celebrated by an authorized or ordained priest, but in which any member of the public may participate. The doctrine of the church is that not only the souls of the departed for which the mass is specially offered, but all present and participating in the ceremonies, and, indeed, all mankind, derive spiritual benefit therefrom. The priest is bound to say the masses within a fixed time (not given), unless the individual ordering and paying for the masses grants unlimited time, and the stipend for a low mass is \$1, for a high mass \$5 and upward. The designation of one low mass per year as an obit would continue this trust several thousand years. I have no doubt that any person in this state, by private bequest, can devote all or any part of his property to pay for masses, by giving it to some designated person competent to take.

I have no doubt that the celebration of masses for the souls of the dead constitutes a "public charity" or a "pious use" within the meaning of these terms at common law; and I have no doubt that the court will not permit a charitable trust to fail for want of a trustee, but will appoint one to carry it out; and I have no doubt that, under the statutes of this state relating to perpetuities, charitable uses are exempted from the rules against remoteness. That statute is as follows: "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate and twenty-one years thereafter, except in

the single case mentioned in the next section, and except when real estate is given, granted, or devised to a charitable use or to literary or charitable corporations which shall have been organized under the laws of this state, for their sole use and benefit, or to any cemetery corporation, society, or association." Section 2039, Stat. 1898, as amended by chapter 511, Laws 1905. This is as far as the case was presented by the appellant, and so far I agree with him. But we have in our state Constitution (§ 18, art. 1) as follows: "The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship, nor shall any money be drawn from the treasury for the benefit of religious societies or religious or theological seminaries."

Under this constitutional provision, can this state through its courts or legislature compel, direct, or regulate the celebration of masses? Could the attorney general on relation of any of the beneficiaries of this trust, or on his own motion, maintain an action to compel or direct the saying of these masses? I think not. If he could not, the charitable trust, if one is created, is invalid, because a charitable trust that cannot be enforced is not valid. 2 Perry, Trusts 4th ed. §§ 708, 711. This question has usually arisen with reference to such great degree of indefiniteness that it has been found impossible for the courts to ascertain and enforce the wishes of the testator. But the basic principle is the inability of the state to enforce the trust. Where that inability exists, the charitable trust is void. *Heiss v. Murphey*, 40 Wis. 276; *Tilden v. Green*, 130 N. Y. 29, 14 L.R.A. 33, 27 Am. St. Rep. 487, 28 N. E. 880; *Bridges v. Pleasants*, 39 N. C. (4 Ired. Eq.) 26, 44 Am. Dec. 94, 101, and cases in note. The Constitution prohibits any control of or interference with the right of conscience. It is manifestly no answer to this to say that there is no likelihood that the masses will be refused nor no likelihood that they will be celebrated outside of this state, whereby the people of this state will have no benefit from the charity. The question is: Can the state regulate the saying of masses, and compel, if occasion requires, the saying of such masses in this state? If the state can enforce the saying of masses for the spiritual benefit of non-Catholics who are, according to the majority opinion, with Catholics the

beneficiaries of this charitable trust, the trust is valid; if not, it is invalid. It is quite idle to cite precedents upon this point from the courts of states which have no such constitutional restriction. The decision of the majority of the court, in effect, decides that the state has such power. This difficulty exists if we take the most favorable view of the devise, namely, that the will requires the real estate to be sold and converted into money and the proceeds of the sale used in paying for masses. If there is no such equitable conversion, we run into additional difficulties. If under our statute of uses (§§ 2071 and 2073, Stat. 1898) the title of the trustee to be appointed by the court is merely nominal, and is connected with no power of actual disposition or management of the land, because there is no requirement of the will that the land be sold and converted into money, then the legal title, by force of these statutes, rests in the beneficiaries. But the beneficiaries must be either the departed souls, the public, i. e., the state of Wisconsin, or the priests who receive the value of the use for saying masses. The souls cannot hold real estate, and the state cannot take title for the purpose of having its people receive this religious instruction, under the constitutional prohibition mentioned, so the title must be in the Roman Catholic Church, or in the persons who take the rents and profits for their services in celebrating the masses, or in no one. *Sullivan v. Bruhling*, 66 Wis. 472, 29 N. W. 211; *Ruth v. Oberbrunner*, 40 Wis. 238, 258; *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353; *Holmes v. Mead*, 52 N. Y. 332.

If, however, it be contended that the court may change the nature of the charitable trust by not only appointing a trustee, but also by imposing upon him active duties (other than sale and conversion into money), not found in the will, or if it be considered that charitable uses are not executed by the statute, then we have a case where the use of land is held in this state upon a tenure long ago obsolete, also forbidden by our state Constitution. If the land is not required to be sold, but may be held in trust indefinitely, and the rents and profits devoted to paying for masses for the designated souls, and incidentally for all mankind, the legal title must be in the trustee appointed by the court, the beneficial use in the religious association which receives all the rents and profits and says the masses for the public, or in the public. This is a *replica* of the tenure of frankalmoin or the tenure of divine service. The use of land cannot be held on any such tenure in this state, as I understand the law. "Tenure in frankalmoin. in *libera eleemosyna*, or free

alms, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors forever. The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the soul of the donor and his heirs, dead or alive; and therefore they did no fealty (which is incident to all other services but this), because this divine service was of a higher and more exalted nature. This is the tenure by which almost all the ancient monasteries and religious houses held their lands, and by which the parochial clergy hold them at this day. . . . And even at present, this is a tenure of a nature very distinct from all others; being not in the least feudal, but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden; but merely a complaint to the ordinary or visitor to correct it. Wherein it materially differs from what was called tenure by divine service; in which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called free alms; especially as for this, if unperformed the lord might distrain without any complaint to the visitor. All such donations are indeed now out of use; for, since the statute of quia emptores (18 Edw. I), none but the King can give lands to be holden by this tenure." 1 Cooley's Bl. Com. Bk. 11, pp. 101, 102, § 5; *People v. Van Rensselaer*, 9 N. Y. 334 and 336.

The Constitution of this state, like that of New York, Minnesota, and Arkansas, provides (§ 14, art. 1): "All lands within this state are declared to be allodial, and feudal tenures are prohibited." Allodial is defined by Blackstone as "land possessed by a man in his own right, without owing any rent or service to any superior." 2 Bl. Com. 104. "Held in free and absolute ownership," as contradistinguished from feudal tenures, which are prohibited in the same sentence and by the very next words, and the prohibition of which, with their servitudes and reservations, and all the attendant hindrances and obstacles in the way of free and ready sale and transfer of real property, constituted the chief object of the provision." *Barker v. Dayton*, 28 Wis. 367, 384, 385. I do not think the words "feudal tenure" in the Constitution should be given any such strict construction as to permit all tenures of the feudal age which were not according to the distinctions then made strictly feudal. Neither does it necessarily limit the associated word "allodial;"

but the latter word broadens the meaning of the sentence. I think the word "feudal" relates to the age and the system, rather than to specific tenures among the multi-form tenures then in existence. Under such a constitutional provision, we surely are not at liberty to revive a species of tenure which the foregoing quotation from Blackstone shows to have been long obsolete, even in this day. Conditions, rents, and services may no doubt be exacted as a consideration for a lease, but a grant in fee of the whole land or of the use thereof cannot be upon any such tenure. Someone must own the land as an allodium. The statute quia emptores is part of the common law of this state, and that statute, by construction long settled, does not permit any such tenure as that attempted to be created by this will if we find no mandatory requirements that the land be sold and converted into money. 1 Reeves, Real Prop. §§ 290, 291; Gray, Rule against Perpetuities, §§ 26, 28; Van Rensselaer v. Hays, 19 N. Y. 68, 75 Am. Dec. 278. There could not be, as I understand this constitutional provision, any rent or service reserved out of a grant or devise in fee, whether such transfer be of the title or merely of the use.

MICHIGAN SUPREME COURT.

KATE CLARK et al., Appts.,
v.

ALBERT MACK, Admr., etc., of Betsy C. Sellmann, Deceased, et al.

(— Mich. —, 126 N. W. 632.)

Will — life estate — use of property.

1. A bequest of property to testator's sisters to be used and controlled by them during their joint lives and that of the survivor, and then over, gives a life estate only to them.

Note. — Right of persons claiming through deceased relative to participate with those standing in equal degree of relationship with such relative, in provision for "next of kin," etc.

While the question above stated usually arises in connection with wills, some of the most important decisions thereon have been made in the construction of settlements. Both kinds of cases are included in this note, since, as remarked in *Avison v. Simpson*, Johns. V. C. (Eng.) 43, and *Rook v. Atty. Gen.* 31 Beav. 313, no reasonable distinction can be taken between such a limitation occurring in a deed and a similar limitation occurring in a will.

With reference to the phraseology construed, this note may be said to include 28 L.R.A. (N.S.)

Same — change of circumstances — effect.

2. Where one who has willed property to her sister for life with remainder to her nearest of kin permits the will to stand for two years after the death of the sister, until her own death, without alteration, the property will pass to the nearest of kin.

Same — nearest of kin — representatives of decedent.

3. Under a bequest to the nearest of kin of testator, his brothers and sisters will take to the exclusion of children of deceased brothers and sisters.

Same — remaindermen — time for determining.

4. Under a gift of property to one for life, remainder to testator's next of kin, the remaindermen will be determined at the death of testator, and not at that of the life tenant.

(June 6, 1910.)

APPEAL by complainants from a decree of the Circuit Court for Kalamazoo County in defendants' favor in a suit to distribute the estate and to construe the will of Betsy C. Sellmann, deceased. Affirmed.

The facts are stated in the opinion.

Mr. W. S. Powers, with Messrs. Frost & Farrell, for appellants:

The legatees took an absolute estate in fee simple.

Jones v. Jones, 25 Mich. 401; *Weir v. Michigan Stove Co.* 44 Mich. 507, 7 N. W. 78; *Dills v. La Tour*, 136 Mich. 243, 98 N. W. 1004; *Moran v. Moran*, 143 Mich. 322, 5 L.R.A. (N.S.) 323, 114 Am. St. Rep. 648, 106 N. W. 206; *Killefer v. Bassett*, 146 Mich. 1, 109 N. W. 21; *Turnbull v. Johnson*, 153 Mich. 228, 116 N. W. 1009.

Messrs. Leo T. Flansburg and E. M. Irish, for appellees:

The express terms of the gift make a life estate.

Gadd v. Stoner, 113 Mich. 689, 71 N. W.

cases where the words "next," "near," or "nearest" are used in connection with some word indicating relationship; but it does not include cases where, though property is limited to a class of persons described by some word simply indicating relationship, with or without some other qualification, such as "poor relations," the words "next," "near," or "nearest" do not appear.

Where instrument contains no other indication of intention.

The divergent conclusions reached in the decisions upon the question under discussion are due to a difference of opinion as to whether the term "next of kin," or an equivalent expression, unaccompanied by any other language indicative of the user's intention, is to be taken as having been

1111; Glover v. Reid, 80 Mich. 228, 45 N. W. 91; Cousino v. Cousino, 86 Mich. 323, 48 N. W. 1084; Defreese v. Lake, 109 Mich. 415, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 505; Morford v. Dieffenbacker, 54 Mich. 593, 20 N. W. 600; Robinson v. Finch, 116 Mich. 180, 74 N. W. 472; Fraser v. Chene, 2 Mich. 81; Gaulker v. Moran, 66 Mich. 353, 33 N. W. 513; Jones v. Deming, 91 Mich. 481, 51 N. W. 1119; Remsen, Wills, pp. 158, 159.

The brother and sister surviving at the death of the testatrix were the nearest of kin.

Van Cleve v. Van Fossen, 73 Mich. 342, 41 N. W. 258; Remsen, Wills, p. 101; Eberts v. Eberts, 42 Mich. 404, 4 N. W. 172; Fitzhugh v. Townsend, 59 Mich. 427, 27 N. W. 561.

used in its ordinary signification, as referring to those nearest in blood to the *propositus*, or as having been used in a certain technical sense, supposed to have been imparted to it by the statute of distributions, as referring to those of the blood of the *propositus* who would be entitled to share in case of intestacy. On the one side is the natural meaning of the phrase; on the other, the probability that the testator had no intention of excluding from his bounty the offspring of persons who, had they survived, would have participated therein.

—"next of kin."

The English decisions show a fluctuation of judicial opinion before the question was finally settled. Beginning with a *dictum* to the same effect in Stamp v. Cooke, 1 Cox. Ch. Cas. 234, it was held in Phillips v. Garth, 3 Bro. C. C. 64, that since the statute of James the words "next of kin" have had a particular sense in which the testator must be supposed to have used them, if it does not appear that he used them in some other; and, therefore, that the children of deceased brothers and sisters were entitled to share with testator's surviving brothers in a residuary bequest to his next of kin. The decision seems to have been based also upon an earlier case to the effect that participants in a bequest to "relations" must be limited to those who would take under the statute of distributions.

This decision, while followed in Hinckley v. Maclarens, 1 Myl. & K. 27, was disapproved in several decisions prior to the time when it was finally overruled. See Garrick v. Camden, 14 Ves. Jr. 372; Smith v. Campbell, 19 Ves. Jr. 400; Brandon v. Brandon, 3 Swanst. 312.

The question was at length definitely settled in the leading case of Elmsley v. Young, 2 Myl. & K. 780, which involved the construction of a settlement by which property was limited upon certain contingencies to such person or persons as should, at the time of the decease of the settlor, be his next of kin. It was contended that the 28 L.R.A. (N.S.)

A will speaks from the death of the testator.

Rood v. Hovey, 50 Mich. 395, 15 N. W. 525; Hibler v. Hibler, 104 Mich. 274, 62 N. W. 361.

There was no intestacy, because of the residuary clause.

Remsen, Wills, p. 221, § 2; 1 Underhill, Wills, § 335, note 2, p. 450; Mann v. Hyde, 71 Mich. 278, 39 N. W. 78.

Stone, J., delivered the opinion of the court:

In this case the bill of complaint was filed to obtain the construction of the will of Betsy C. Sellmann, deceased. The will is holographic, and was made while the testatrix was in Kansas City, Missouri, on December 1, 1890. The following is a copy of

term "next of kin" means, by force of its own natural import, the persons who take as next of kin by the statute of distributions; but the court, in ruling adversely to such contention, said that such has not been the understanding of conveyancers, and that the statute itself takes notice that persons who are to take shall be the next of kin and some other persons besides. And it was accordingly held that the only surviving brother of the settlor took to the exclusion of children of a deceased brother.

And this ruling was confirmed by a decision of the House of Lords in the case of Withy v. Mangles, 10 Clark & F. 215, in which it was said by Lord Cottenham that if "next of kin" means those who would take under the statute, it must include in many cases those who are not next of kin, and a gift to a class which in all other cases gives an equal portion to each member of the class must in this particular case be governed by a different and altogether artificial rule of construction; that the rule of the statute cannot be adopted without doing violence to the description, proximity not being exclusively a qualification under the statute; and that it had not been proved that the term "next of kin," used *simpliciter*, has, by a technical or conventional construction, obtained the meaning of "those who would be entitled in case of intestacy under the statute of distributions." But Lord Campbell, although feeling himself constrained to concur in view of the decision in Elmsley v. Young, did so with considerable reluctance, feeling that the result was to put a construction upon the terms of the settlement which could not by possibility have entered into the contemplation of the parties.

In conformity with the doctrine of the two cases immediately preceding, it has been held in a number of cases that where property is limited to "next of kin," without other indication of intention, those in the nearest degree of relationship take to the exclusion of those in a more remote degree, although the latter are the children of those who stood in the same degree of relationship as the former. Avison v. Simpson and Rook

the substantial portion of the will: "In consideration of the duty I owe those near and dear to me by ties of blood and friendship, and my desire to benefit, pecuniarily, those among them who, not having children to care for them, are likely to be most in need of help as age creeps on, and helplessness: I therefore this day, December 1, 1890, in the city of Kansas City, Missouri, in presence of these witnesses, do solemnly will and bequeath all my earthly possessions, real estate and personal property, to my two sisters, Emily A. Coe and Esther A. Coe, widow of Rubin Coe, to be equally used and controlled by them both, while both live, and should one of them die first, the one that is left shall use and control all that remains until her death, when, if anything remains,

it shall then be divided among the nearest of kin."

Testatrix was a single woman, without children, and died April 23, 1907. At the time the will was made all of the brothers and sisters of the testatrix were living, viz., Lafayette Coe and Walter Coe, brothers, and Jane Coe, Esther A. Coe, Emily A. Coe, and Ursula Gilfillin, sisters. After making this will, and prior to the death of the testatrix, Lafayette Coe, Jane Coe, Esther A. Coe, and Emily A. Coe died. Lafayette and Jane left children; Esther and Emily left no children. At the time of the death of the testatrix one brother, Walter Coe, and one sister, Ursula Gilfillin, were living. Ursula Gilfillin has since died, leaving children. The will was duly admitted

v. Atty. Gen. *supra*; *Re McVicar*, L. R. 1 Prob. & Div. 671; *Harris v. Newton*, 46 L. J. Ch. N. S. 268; *Swasey v. Jaques*, 144 Mass. 135, 59 Am. Rep. 65, 10 N. E. 758; *Fargo v. Miller*, 150 Mass. 225, 5 L.R.A. 690, 22 N. E. 1003; *Jones v. Oliver*, 38 N. C. (3 Ired. Eq.) 369; *Simmons v. Gooding*, 40 N. C. (5 Ired. Eq.) 382; *Harrison v. Ward*, 58 N. C. (5 Jones, Eq.) 240.

So, also, in *Redmond v. Burroughs*, 63 N. C. 242, in which it was argued that "next of kin" are technical words used in the statute of distributions, and so must be given such signification, rather than as meaning nearest of kin, it is said: "If next of kin were the technical words so used in the statute, it would be difficult to resist the argument. But there lies the error. Next of kin are not the words used in said statute to denote those who take. If they were, then only the living nieces and nephews would take as being next, nearest of kin, as between them and the children of deceased nieces and nephews. But the words used are not 'next of kin,' but next of kin who are equal in degree, and those who legally represent them. It will be seen, therefore, that to bring the terms used in the will within the technical words used in the statute of distributions, the words, 'and those who legally represent them,' would have to be added. We are of the opinion that the terms used in the will, 'next-of-kin,' mean 'nearest of kin,' and that the living nieces and nephews take to the exclusion of the legal representatives of deceased nieces and nephews."

But decisions are not wanting which decline to follow the rule finally adopted in England. Thus, in *Pinkham v. Blair*, 57 N. H. 226, where a testator had provided that, upon certain contingencies, his estate should go to his next of kin, the court declined to follow *Elmsley v. Young*, upon the ground that the conclusion therein reached was in conflict with their decision in *Varrell v. Wendell*, 20 N. H. 431, in which the question was as to the validity of an execution of a power to apportion certain property among "the relations" of the testator, and in which it was held that by his rela-

tions the testator must have intended his next of kin according to the statute. In view of the difference in the phraseology under construction, it is difficult to see why *Varrell v. Wendell* should have been considered as controlling. The real reason of the decision seems to have been the avowed reluctance of the court to adopt a construction which would have given the estate to testator's surviving brothers and sisters to the exclusion of children of deceased brothers.

And in *Slossom v. Lynch*, 43 Barb. 146, 28 How. Pr. 417, which involved the construction of a marriage settlement by which property was limited to the next of kin of the settlor, in default of appointment and of issue, the court, after an extensive review of the English decisions, adopted the view that the words "next of kin" have had a technical meaning since the statute of distributions, and that this statute originated and gave a technical meaning to them, saying that it is doubtful whether the words have ever acquired an ordinary, popular meaning, synonymous with nearest relations or nearest of kin.

The foregoing decision is referred to with approval in *Murdock v. Ward*, 67 N. Y. 387.

While there is a statement in the headnote to *Wright v. Methodist Episcopal Church*, Hoffm. Ch. 202, to the effect that the phrase "next of kin," when used *simpliciter*, does not mean those entitled under the statute of distributions, but the next of blood, this statement is wholly unauthorized by the decisions of the court, which merely mentions the case of *Elmsley v. Young* as bearing on the question.

In *Graham v. Whitridge*, 99 Md. 290, 66 L.R.A. 408, 57 Atl. 609, 58 Atl. 36, it is held that nephews and nieces, to the exclusion of grandnephews and nieces, children of deceased nephews and nieces, will take an estate limited in trust for one for life and upon her death to be distributed amongst her "next of kindred;" but as it appears that the same persons would have been entitled whether the phrase "next of kindred" is to be interpreted in the sense of nearest blood relations, or in the sense of relations who come in under the statute of distribu-

to probate. Defendant, Albert Mack, was appointed administrator with the will annexed of the estate, and is still acting in that capacity. The joint and several answer of Albert Mack, administrator, and Walter Coe admits all the material allegations of fact in the bill, and asks for a construction of the will. None of the other defendants appeared or answered. Defendant Walter Coe claims the advantage of a cross bill, and asks that the will be so construed as to give him one half of the estate, as one of the nearest of kin of the testatrix. The complainants claim that the legatees, Emily A. Coe and Esther A. Coe, under the will, took an absolute estate in fee simple, and that, by reason of both of the said legatees having died before the death of the testatrix, the legacy lapsed, and

the estate became intestate, and should be divided among the heirs of the deceased as provided by the statutes of this state in case of intestate estates. The claim in behalf of defendant Walter Coe is that Emily A. Coe and Esther A. Coe were entitled to a life estate in the property had they lived until the death of the testatrix, and that it should now be equally divided between himself and the heirs of his sister Ursula Gilfillin; and that he and said sister were the nearest of kin of the said testatrix at her death. The learned circuit judge took this view of the case, and decreed one half of the estate to said Walter Coe, and the other one half to the heirs of Ursula Gilfillin. The complainants have appealed.

1. We are unable to agree with the contention of counsel for complainants in the

tions, the decision cannot be regarded as taking either side of the controversy developed in the foregoing cases.

—"nearest of kin."

In *Brandon v. Brandon*, supra, where property was limited by a marriage settlement, upon certain contingencies, to the "nearest and next of kin" of the wife in equal shares, it was held that a brother took to the exclusion of nephews and nieces, children of deceased sisters, the master of the rolls saying that the words of the settlement are too explicit and definite to require or admit, for their construction, reference to the statute of distributions.

So, also, in *Boys v. Bradley*, 10 Hare, 389, it was held that under a limitation to testator's "nearest of kin," a sister took to the exclusion of the children of deceased sisters. Other decisions to the same effect are *Keniston v. Mayhew*, 169 Mass. 166, 47 N. E. 612; and *Leonard v. Haworth*, 171 Mass. 496, 51 N. E. 7.

—"near" or "nearest relations."

In *Whithorne v. Harris*, 2 Ves. Sr. 527, it was held that only such relations as would be entitled to take under the statute of distributions might share in a bequest to "near relations," this construction being adopted in conformity to cases where the bequest was simply to "relations," rendering it necessary to draw a line somewhere.

So, also, in *Edge v. Salisbury*, 1 Ambl. 70, and *Goodinge v. Goodings*, 1 Ves. Sr. 231, bequests to such of testator's nearest relations as should seem to be objects of charity were likewise held not to extend further than to such as would take under the statute of distributions. "Otherwise," said Lord Hardwicke, "it would be endless to find out everybody that were relations."

But in *Marsh v. Marsh*, 1 Bro. C. C. 293, where property was limited upon certain contingencies to testator's "nearest relation, and the nearest relations of such nearest relation, forever," it was held that his sur-

living half-sister was entitled to take to the exclusion of a son of a deceased half-brother.

And in *Locke v. Locke*, 45 N. J. Eq. 97, 16 Atl. 49, where a testator directed that after the marriage or decease of his wife; the real estate and personal property given to her should be equally divided between his "nearest relations," share and share alike, it was held that his surviving brothers were entitled to take to the exclusion of nephews and nieces, on the ground that such was the plain meaning of the language used.

Where other language used.

In some cases the language employed by the testator or settlor has been held to leave no room for doubt that those most nearly related to the *propositus* were entitled to take to the exclusion of the children of deceased persons who stood in the same degree of relationship,—as in *Wimbles v. Pitcher*, 12 Ves. Jr. 433, and anonymous, 1 Madd. Ch. 36, where the limitation was to "the next of kin in equal degree;" and in *Smith v. Campbell*, 19 Ves. Jr. 400, where the limitation was to testator's "nearest surviving relations."

But where it appears from other language used that a different meaning from that which the courts would imply in the absence of such language was intended, such meaning will be given effect.

Thus, in *Stamp v. Cooke*, 1 Cox, Ch. Cas. 234, where a testator directed the residue of his estate to be parted to "his next relations, as sisters, nephews, and nieces," it was held to be clearly the testator's intention that the children of a deceased brother and sister the relation of innkeeper and guest has sisters.

So, also, in *Garrick v. Camden*, 14 Ves. Jr. 372, where a testator left his residuary estate "to be divided amongst my next of kin as if I had died intestate," it was said that it would be difficult to say that children of deceased brothers and sisters would not be entitled to participate therein with those surviving.

A similar conclusion was reached in *Nich-*

construction of this will. It is their claim that the question is controlled by the cases of *Jones v. Jones*, 25 Mich. 401; *Moran v. Moran*, 143 Mich. 322, 5 L.R.A. (N.S.) 323, 114 Am. St. Rep. 648, 106 N. W. 206, and kindred cases. It is our opinion that Mrs. Sellmann did not intend to will the property to the sisters so that it would be theirs absolutely, but that it was the manifest intention of the testatrix to give to the sisters Emily A. Coe and Esther A. Coe, who had no children to care for them, a life estate therein; they to have the use and control thereof jointly, so long as they both should live, and the survivor to have the use and control of what should remain until her death, when, if anything remained, it should be divided among the nearest of kin. This will does not in our opinion present

a case of a gift with a repugnant clause, as was found in many of the cases cited by complainants. The disposing clause of this will is embraced in one sentence. The same form of words that is employed in bestowing the use and control of the property upon the sisters while they live is employed in bestowing the remainder upon the nearest of kin when the sisters have died. We think that the express terms of the gift created a life estate in the sisters named, and that the case is controlled by our own decisions, a part only of which are here cited. *Morford v. Dieffenbacher*, 54 Mich. 593, 20 N. W. 600; *Gaukler v. Moran*, 66 Mich. 353, 33 N. W. 513; *Glover v. Reid*, 80 Mich. 228, 45 N. W. 91; *Cousino v. Cousino*, 86 Mich. 323, 48 N. W. 1084; *Jones v. Deming*, 91 Mich. 481, 51 N. W. 1119; *Defreese v. Lake*,

ols v. Haviland, 1 Kay & J. 504, where a testamentary gift was made in default of appointment, "unto and to the use of the person or persons who at the decease of my said daughter shall be her next of kin according to the statutes of distribution of personal estate, and in the like shares and proportions as if she had died without being married."

In *Re Thompson*, L. R. 9 Ch. Div. 607, it was held, construing a bequest of personalty "to the heirs or next of kin" of a certain person, that an alternative gift was not intended, but that both terms applied to one class; and that, in view of the use of the word "heirs" with relation to personal estate, such class comprised the statutory next of kin.

In *Re Gray* [1896] 2 Ch. 802, where property was settled in trust "for the person and persons who shall be next of kin in blood to [the person for whose benefit the settlement was made] at the time of her decease, in case she had so died intestate and unmarried," it was held that a reference to the statute of distributions was intended, so that children of deceased brothers and sisters were entitled to share with living brothers and sisters,—such construction being strengthened by the circumstance that by a previous clause it was provided that certain furniture and effects comprised in the settlement should "go and belong to the next of kin in blood of . . . [the person for whose benefit the settlement was made] at her decease in the manner directed by the statutes for distribution of intestates' effects, as if she had died intestate and unmarried."

In *Duffy v. Hargan*, 62 N. J. Eq. 588, 50 Atl. 678, affirmed without opinion in 63 N. J. Eq. 802, 52 Atl. 1131, where property was limited by will, in event of the first taker's failure to make a testamentary disposition thereof, "to his next of kin according to the laws of the state of New Jersey," the court said: "If to the word 'next' in the will under consideration the literal construction of 'nearest' should be given, the result would

be that the nearest of kin would take, not the whole, but only their shares, and the testator would die intestate as to the residue. To avoid a result so plainly opposed to the intention, the courts give to the words 'next of kin,' when used in connection with the expression, 'according to the statute of distribution' (and I take it that 'according to the laws of New Jersey' is a precisely equivalent expression), the meaning 'statutory next of kin;' that is, next of kin who are in fact nearest, and those persons, also, who by statute represent or stand in the place of those who are nearest."

In *Simmons v. Gooding*, 40 N. C. (5 Ired. Eq.) 382, it is said that if to the words "next of kin" the words had been added "as in case of intestacy," or "as by the statute of distributions," or if the language of that statute had been adopted, "to the next of kin in equal degree or to those who legally represent them," the children of a deceased daughter would have been entitled to participate with sons and daughters surviving.

On the other hand, in *Harris v. Newton*, 46 L. J. Ch. N. S. 268, where a testator directed that the property left to his daughters should remain as a jointure for their use, in case of their marrying untouchable by their husbands, "but to descend to their legal or next of kin," it was contended that the language of the bequest contained a distinct reference to some legal mode of distribution, and necessarily, therefore, to that which is prescribed by the statute of distributions; but it was held that such language was insufficient to prevent the phrase "next of kin" being given its accepted meaning of nearest in blood.

And in *Halton v. Foster*, L. R. 3 Ch. 505, where a testator gave a legacy to his daughter for life, and in default of issue in trust "for her next of kin in blood as if she had died unmarried," it was held that no sufficient inference could be drawn from the language employed which would vary the settled meaning of the words "next of kin."

109 Mich. 415, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 505; Gadd v. Stoner, 113 Mich. 689, 71 N. W. 1111; Robinson v. Finch, 116 Mich. 180, 74 N. W. 472; Austin v. Hyndman, 119 Mich. 615, 78 N. W. 663.

2. Bearing in mind that the legatees, Emily A. Coe and Esther A. Coe, both died in the lifetime of the testatrix (Esther having died in April, 1904, and Emily in March, 1905, more than two years before the death of the testatrix), what is to become of the property? The will says: "It shall then be divided among the nearest of kin." It is fair to suppose that Mrs. Sellmann knew of the death of her two sisters, yet she allowed over two years to elapse without making any change in her will, and we think that she intended the last clause of the will to be effective. When a will fairly construed is susceptible of two constructions, one of which would render it inoperative, and the other give effect to it, the duty of the court is to adopt the latter construction. 30 Am. & Eng. Enc. Law, 2d ed. p. 667, and cases cited in note. In *Den ex dem. Micheau v. Crawford*, 8 N. J. L. 97, Ewing, Ch. J., in giving the opinion of the court said: "It is only when a reasonable construction and the discovery of the intent of the testator are utterly hopeless that all effect should be denied to a will." The lapse here was not in the residuary clause; and it is held that, where the lapse is not in the residuary clause, lapsed gifts of both personal property and real estate pass under that clause. Remsen, Wills, 221, and cases there cited; Mann v. Hyde, 71 Mich. 278, 39 N. W. 78. "The law in regard to lapsed legacies of personalty has always treated them as part of the general body of the estate, so that they pass to the residuary legatees." We think that the testatrix intended that the property, upon the death of Emily and Esther, should go to her nearest of kin.

3. This brings us to the question, Who were the nearest of kin? In the absence of a contrary intent, a gift to next of kin is a gift to the nearest of kin in the strictest sense, excluding persons who under the statute of distribution would be entitled to take by representation. Thus, a brother or sister would take to the exclusion of the children of a deceased brother or sister. Remsen, Wills, 101; Jarman, Wills, 6th ed. 953; Underhill, Wills, § 626; Rood, Wills, § 456.

The term "nearest of kin" in the will signifies those who stand in the nearest relationship to the testatrix according to the rules of the civil law for computing degrees of kinship. In this will there are no words suggesting that anyone is to take by the right of representation. But that idea is excluded by the words employed: "It

shall then be divided among the nearest of kin." They were the brother, Walter Coe, and the sister, Ursula Gilfillin, surviving at the death of the testatrix. Van Cleve v. Van Fossen, 73 Mich. 342, 41 N. W. 258. The death of the person whose next of kin is mentioned determines the membership of the class. "Thus, if the gift be to A for life, and after his decease to the next of kin of the testator, the persons to take as next of kin are to be ascertained at the death of the testator, and not at the death of A." Hawkins, Wills, 2d Am. ed. 99, 100; Minot v. Harris, 132 Mass. 528; Letchworth's Appeal, 30 Pa. 175; Welsh v. Crater, 32 N. J. Eq. 177; Remsen, Wills, 102. A will speaks from the death of the testator, and the estate vests at that time, unless the will contains some provision to the contrary. Rood v. Hovey, 50 Mich. 395, 15 N. W. 525; Hibler v. Hibler, 104 Mich. 274-281, 62 N. W. 361.

We conclude, therefore, as did the court below, that the property under the will in question should be divided between the defendant Walter Coe and the heirs of Ursula Gilfillin; the said Walter Coe taking one half, and the said heirs one half thereof.

The decree of the Circuit Court is affirmed, but without costs.

TENNESSEE SUPREME COURT.

T. H. WAGNER, Trustee, etc., of Wilcox Furniture Company,

v.

CITIZENS' BANK & TRUST COMPANY,
Appt.

(— Tenn. —, 122 S. W. 245.)

Bankruptcy — set-off — trust fund.

1. A bank which, through its president, as one of the creditors of a manufacturing company, has agreed with it and the other creditors that the assets of the company shall be collected and deposited in the bank, to be divided among all creditors *pro rata*, cannot, upon the institution of bankruptcy proceedings against the corporation, set off the fund so accumulated against its own claim, since the fund is a trust deposit for specific purposes, created with the knowl-

Note. — Does the fact that a bank has, by an agreement invalid as against the trustee in bankruptcy, undertaken to hold the bankrupt's deposit as a fund for creditors, prevent it from setting off deposit against its own claim.

Where a deposit in a bank represents money deposited by an insolvent debtor for the purpose of carrying out an agreement to which the bank is a party, thereafter to apply the proceeds of his business to the

edge and consent of the bank, and it cannot, for purposes of set-off, treat it as the individual property of the corporation.

Same — trustee — right to bank deposit.

2. A trustee in bankruptcy has a right to recover money which has been deposited in bank by the bankrupt, for the benefit of all his creditors.

(November 13, 1909.)

APPEAL by defendant from a decree of the Chancery Court for Hamilton County in complainant's favor in a suit to recover certain bank deposits alleged to constitute a trust fund for the creditors of the insolvent Wilcox Furniture Company. Affirmed.

The facts are stated in the opinion.

Messrs. Pritchard & Sizer, for appellant:

The bank was entitled to set off deposits which it had received with knowledge of the insolvency of the depositor, against the indebtedness of the depositor.

New York County Nat. Bank v. Massey, 192 U. S. 138, 145, 148, 48 L. ed. 380, 383, 384, 24 Sup. Ct. Rep. 199; Clark v. Northampton Nat. Bank, 160 Mass. 26, 35 N. E. 108; Lowell v. International Trust Co. 86 C. C. A. 137, 158 Fed. 781; Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053.

In order to constitute a special deposit, it must distinctly appear that the identical money or thing deposited is to be kept by the bank and returned to the depositor.

Mutual Acci. Asso. v. Jacobs, 141 Ill. 261, 16 L.R.A. 516, 33 Am. St. Rep. 302, 31 N. E. 414; State Bldg. & Sav. Asso. v. Mechanics' Sav. Bank & T. Co. (Tenn.) 36 S. W. 967; Schofield Mfg. Co. v. Cochran, 119 Ga. 901, 47 S. E. 208.

The trustee in bankruptcy cannot enforce

payment of his creditors generally, such funds are impressed with a trust in favor of the creditors, and the bank cannot apply same to a claim held by it against the depositor; and if such agreement is invalid as to a subsequently appointed trustee in bankruptcy of the debtor, it cannot hold such funds as against such trustee, nor can it apply same upon its own claim against the bankrupt. Lyman v. Belfast Nat. Bank, 98 Me. 448, 57 Atl. 799; Re Davis, 119 Fed. 950; WAGNER v. CITIZENS' BANK & TRUST Co.

This doctrine is also recognized in Clark v. Northampton Nat. Bank, 160 Mass. 26, 35 N. E. 108, which was, however, disposed of upon a finding of fact by the lower court, that the deposits made by a debtor were not made under an implied contract or understanding that same were to be applied to the creditors of the depositor generally, he being at the time insolvent. Compare 28 L.R.A. (N.S.)

the interests of the creditors, for the trustee is not vested with the rights or titles of the creditors, but only with those of the bankrupt.

York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 50 L. ed. 782, 785, 26 Sup. Ct. Rep. 481; Lowell v. International Trust Co. supra; Lynam v. Belfast Nat. Bank, 98 Me. 448, 57 Atl. 799.

Messrs. White & Martin, for appellee:

Defendant bank is not entitled to set off, as against the fund in controversy, the notes which the Wilcox Furniture Company owed it at the time the petition in bankruptcy was filed.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731; 3 Am. & Eng. Enc. Law, 2d ed. p. 837; Carter v. Martin, 22 Ind. App. 445, 53 N. E. 1066; Deal v. Mississippi County Bank, 79 Mo. App. 262; State ex rel. Carroll v. Corning State Sav. Bank, 128 Iowa, 597, 105 N. W. 159; State Bank v. McCabe, 135 Mich. 479, 98 N. W. 20; Lynam v. Belfast Nat. Bank, 98 Me. 448, 57 Atl. 799; Re Davis, 119 Fed. 950; Wilson v. Dawson, 52 Ind. 515.

The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors.

First Nat. Bank v. Staake, 202 U. S. 141-149, 50 L. ed. 967-970, 26 Sup. Ct. Rep. 580.

Messrs. Burkett, Miller, & Moore also for appellee.

McAllister, J., delivered the opinion of the court:

Complainant, as trustee in bankruptcy of the Wilcox Furniture Company, a bankrupt

with Lowell v. International Trust Co. 86 C. C. A. 137, 158 Fed. 781, which holds that a subsequently appointed trustee in bankruptcy of the estate of an insolvent depositor in a bank has no interest in an arrangement theretofore made between the creditors of the bankrupt, including the trust company with whom he carried his account, by which he was to continue his business until it could be profitably closed out, and deposit the proceeds with the trust company, to be applied upon his indebtedness generally, and hence the trust company, as against his trustee, was entitled to apply money deposited under this arrangement upon its claim against the bankrupt.

For a more extended discussion and analysis of the cases considered herein, see the opinion in WAGNER v. CITIZENS' BANK & TRUST Co., wherein the question is considered at length, and these cases extensively commented on.

corporation, filed the present bill to recover the sum of \$6,110.98, alleged to be due the bankrupt. The bill alleges that at the date of the adjudication of bankruptcy against said Wilcox Furniture Company, and also at the date of the appointment of the complainant as trustee in bankruptcy of said company, there was on deposit in the custody of the Citizens' Bank & Trust Company a fund, amounting to \$6,110.98, belonging to said Wilcox Furniture Company, and which fund was a part of its assets. It is alleged that said fund was impressed with the character of a trust fund, and was accumulated under circumstances which fixed upon defendant Bank & Trust Company the character of trustee in relation to said fund. It is alleged in the bill that said money was accumulated as the result of an agreement among the creditors of the said bankrupt, including defendant bank, to the effect that the assets of the bankrupt should be collected, and the proceeds deposited in the defendant bank, and distributed *pro rata* among all the creditors. It is alleged that at the meeting of the creditors the defendant, Citizens' Bank & Trust Company, was represented by its president, G. N. Henson, and he concurred in the course then adopted, and agreed to act with the local creditors in pursuing whatever plan might be devised, and to share with them *pro rata* in the division of the proceeds which might be realized from the sale of the assets of the said Wilcox Furniture Company. It is then alleged that, after the appointment of a temporary receiver in the bankruptcy case, the defendant "set up a claim to said trust fund then on deposit in the bank, and claimed the right to set off, as against said fund, a large amount of indebtedness owing to it from the Wilcox Furniture Company."

It is then claimed that, under the facts set forth in the bill, the defendant is "estopped from appropriating said funds to its own use, to the exclusion of other creditors, or from setting up any adverse claim to the said fund, or from withholding the same from your complainant."

The defendant bank, in its answer, admitted that on the date of the adjudication in bankruptcy there was a balance of \$6,110.98 due from it to the bankrupt, on deposit in its bank; but it averred that the bankrupt was indebted to the defendant by notes in an amount exceeding said balance, and that said credit balance in favor of the bankrupt was applied *pro tanto* to the payment of said notes. The bank denied that it held any trust fund belonging to the Wilcox Furniture Company at the time of its adjudication in bankruptcy, or that it was a trustee of said bankrupt with relation to any fund. It admitted that it had refused

to pay said credit balance to complainant, and denied the allegations of the bill asserting a right in complainant to recover the same.

Proof was taken, and on the hearing the chancellor decreed that the deposit account in the defendant bank was impressed with the character of a trust fund for the benefit of all the creditors of the Wilcox Furniture Company, and that defendant bank was estopped from appropriating the same to its own use, to the exclusion of the other creditors. He accordingly pronounced a decree in favor of the complainant and against the defendant bank for the sum of \$5,810.98, but declined to allow any interest on the recovery, and adjudged the cost against the complainant.

The defendant bank appealed, and has assigned the following errors:

(1) That the bank is clearly entitled to the right of set-off claimed in its answer; and

(2) That the trustee in bankruptcy has no right to enforce the alleged trust in behalf of the creditors, even if one existed.

The material facts necessary to be noticed are that, in the spring of 1907, the Wilcox Furniture Company was indebted to various creditors in the sum of about \$40,000, and had also become delinquent in the payment of its current bills. The resident creditors, after securing inventories and examining into the condition of the company, extended to it further time on its past-due indebtedness, receiving from it notes therefor, and during the summer of 1907 the company succeeded in paying to each of the Chattanooga creditors about 25 per cent of their respective claims. In the fall of 1907, on account of the financial panic that was then prevailing, the furniture company became still further embarrassed, and about October 1st the local creditors of the concern had another meeting in the city of Chattanooga, and after conferring with the officers of the company, determined, with their consent, to convert the assets of the furniture company into cash, which should be deposited in the defendant bank, and only so much thereof used as might be necessary to defray current expenses and satisfy the claims of persistent creditors, and the surplus, after the accumulation of sufficient funds, should be divided *pro rata* among all the creditors, both local and foreign. A committee of three was appointed to represent the interests of all the creditors, and especially to see that the policy adopted by the meeting should be faithfully executed. It was also determined at the said meeting that the committee so selected should appoint a competent bookkeeper, by and with the consent of the Wilcox Furniture Com-

pany, who should be placed in the office of that company to represent the interests of the creditors, but who at the same time should be on the pay roll of the furniture company. It should be stated that the defendant bank, as a creditor of the furniture company, was represented at said meeting by its president. At a subsequent meeting a rule was adopted, with the consent of the defendant bank, whereby all the checks drawn by the president of the Wilcox Furniture Company against its bank deposit should be countersigned by the representative of the creditors' committee, and without such signature should not be honored by the bank.

The clear weight of the proof is that Mr. G. N. Henson, president of the Citizens' Bank & Trust Company, attended a number of meetings held by the creditors of the Wilcox Furniture Company, and definitely agreed to the policy adopted by the committee, of husbanding the resources of the furniture company, which should be deposited in the defendant bank, and after a sufficient accumulation the fund should be divided *pro rata* among all the creditors of the furniture company. We cannot, of course, undertake to detail the testimony establishing this proposition, and can only state our conclusion as to the weight of the testimony from an examination of the record. We think it undeniable on this record that the Wilcox Furniture Company was insolvent, at least from the date of the appointment of J. L. Morrison as the representative of the committee, and that this fact was known to the bank. The fact is, the Wilcox Furniture Company was unable to meet its obligations as they matured in the usual course of business during the spring, summer, and fall of 1907. The proof shows that J. L. Morrison, the representative of the creditors' committee, prepared weekly financial reports of the condition of the furniture company, which he submitted to the creditors' committee. These reports commenced November 21, 1907, and continued down to the close of the week ending January 4, 1908. Mr. Morrison testifies that he kept Mr. Henson advised daily as to the condition of its affairs, and that Mr. Henson approved of the policy of the committee. The trustee in bankruptcy testified that claims amounting to \$33,718.90 had been proven against the bankrupt mercantile corporation. He further testified that all the assets of the furniture company had been disposed of, and the entire amount that came into his hands was \$9,941.02. It appears that the furniture company was indebted to the defendant bank, when the bankruptcy proceedings were commenced, in the sum of \$7,363, and that 28 L.R.A. (N.S.)

after the present suit was commenced the defendant bank applied the sum of \$6,110.98, standing to the credit of the furniture company on the books of the bank at the close of banking hours on January 17, 1908, to the indebtedness of the Wilcox Furniture Company, leaving the sum of \$1,252.50 as the balance due the bank, which it filed as a claim against the bankrupt. It appears that on January 7, 1908, the cash balance standing to the credit of the Wilcox Furniture Company in the Citizens' Bank & Trust Company was only \$217.17. It appears that the receipts from the total sales of the business, conducted in the usual manner, were not more than sufficient to defray the current expenses. The creditors of the company were becoming impatient, and some were threatening litigation. In this crisis the creditors' committee determined to throw the stock of goods on the market, and dispose of them at auction sale. This mode of converting the stock of the company into cash was approved by the creditors, including the defendant bank. Accordingly, auction sales were commenced on January 8th, and were continued from day to day until January 11th, when certain nonresident creditors of the Wilcox Furniture Company filed a petition of involuntary bankruptcy against it. At this date there was on deposit in the defendant bank the sum of \$4,761.25, which had been accumulated as the result of the first three days of the auction sale. Application was made to the trustee in bankruptcy to allow the sales to continue, and under an arrangement with the trustee the sales were continued for two or three days after the petition in bankruptcy was filed. The sum of \$2,301.72 was realized from the auction sales after the petition in bankruptcy was filed. We find from the proof that the fund which the bank is now seeking to set off against the indebtedness due it from the furniture company was accumulated as the result of the auction sales, and that it was understood by the defendant bank that this fund was being deposited with it as a special fund for *pro rata* distribution among all the creditors of the Wilcox Furniture Company.

The defendant bank bases its right to a set-off on § 68a of the bankruptcy act of 1898 (Act July 1, 1898, chap. 541, 30 Stat. at L. 565, U. S. Comp. Stat. 1901, p. 3450), as follows: "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

In the case of New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380,

24 Sup. Ct. Rep. 199, the Supreme Court of the United States, in dealing with the clause just mentioned, says: "Section 68a of the bankruptcy act of 1898 is almost a literal reproduction of § 20 of the act of 1867."

In *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731, in construing § 20 of the act of 1867 (act March 2, 1867, 14 Stat. at L. 526, chap. 176), the court said as follows: "This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it."

The general rule is that the relation of the bank to the depositor is that of debtor and creditor, and the bank is the debtor of the depositor. *Harris v. Second Nat. Bank*, 110 Tenn. 249, 75 S. W. 1053.

"The bank holds a lien upon the deposits in its hands to secure the repayment of the depositor's indebtedness, and may enforce that lien as the debts mature by applying the debtor's deposits upon them, thus setting the two off against each other." 3 Am. & Eng. Enc. Law, 2d ed. p. 835.

It is also stated: "The right of the bank to apply deposits to the extinguishment of the depositor's indebtedness as it matures grows out of the doctrine that the relationship between the bank and depositor is that of debtor and creditor." 3 Am. & Eng. Enc. Law, 2d ed. p. 835.

But it is well settled that a bank does not have "a lien upon special deposits or moneys deposited for a specific purpose, as for collateral security, or for the payment of a particular debt." 3 Am. & Eng. Enc. Law, 2d ed. p. 837, and cases cited.

Again it is said: "The proposition that there is no right of set-off against a trust deposit, nor any lien for the trustee's personal debts, is axiomatic." 3 Am. & Eng. Enc. Law, 2d ed. p. 837, and cases cited.

In *State ex rel. Carroll v. Corning State Sav. Bank*, 128 Iowa, 597, 105 N. W. 159, it is said: "Where a bank which was a creditor of an insolvent estate received a deposit of funds from the receiver, it could not apply such funds on its claims, nor plead such claims as an offset against the deposit."

In *State Bank v. McCabe*, 135 Mich. 479, 98 N. W. 20, it is said: "Where a bank deals with a depositor as a trustee, and recognizes funds standing in his name as trust funds, knowing them to be such, it cannot appropriate them to the payment of the trustee's individual indebtedness to the bank."

This question arose in *Re Davis* (D. C.) 119 Fed. 950, wherein an insolvent partnership sold its stock of goods, and, by its di-

rection, the purchaser deposited its price in the bank, taking a receipt therefor, showing that the money was to be prorated among the several creditors of the firm, as their interests might appear. Subsequently, on petition of creditors, the partnership was adjudicated an involuntary bankrupt. After said adjudication, the bank undertook to apply the money so deposited on certain notes of the firm held by it and another creditor, without the consent of the depositor or the bankrupt, and to refuse the demands of the trustee therefor. Held, that the bank held the deposit in a fiduciary capacity as a trust fund, which precluded it from asserting an adverse claim thereto after the bankruptcy, as against the trustee.

Among other things, the court said: "Upon the merits of the controversy, would the bank be in a position to successfully contest the right of the trustee to the money? Its ability to do so would depend upon its right to apply the fund to its own use. While a general deposit by a merchant of money in a bank creates the relation of debtor and creditor, and authorizes the bank to use the money as its own, such result does not obtain when the deposit is made for a special purpose, as, for example, to be paid to creditors, as was the case here."

In *Wilson v. Dawson*, 52 Ind. 515, it was said: "It is a general rule that funds deposited in a bank for a special purpose, known to the bank, cannot be withheld from that purpose, to the end that they may be set off by the bank against a debt due to it from the depositor."

In *Lyman v. Belfast Nat. Bank*, 98 Me. 448, 57 Atl. 799, it appeared that in June, 1902, the Standard Granite Company sent to each of its creditors, including the Belfast National Bank, a circular letter stating that it was unable to meet its obligations. A few days later in the same month it called a meeting of its creditors, at which meeting the Belfast National Bank was represented by one of its directors. At this meeting a committee of three creditors was appointed, with instructions to secure, if possible, the discharge of certain attachments which had been placed upon the property of the granite company. On September 4th, following, the directors of the granite company passed a resolution, admitting the inability of the company to pay its debts, and its willingness to be adjudged a bankrupt on that ground. On the day following, the granite company sent to the Belfast National Bank a deposit of \$800. At that time the granite company had a balance of \$1.04 standing to its credit on the books of the Belfast National Bank. The intention of the Standard Granite Com-

pany in making this deposit of \$800 was that it should be held by the bank until a trustee in bankruptcy for the granite company should be appointed; but no notice of such intention was given to the bank, and the deposit was credited to the account of the granite company and added to the balance of \$1.04 then standing on the books of the company.

At the time this deposit was made, the granite company was indebted to the bank to the amount of several thousand dollars. On the day following the making of this deposit of \$800, a petition in bankruptcy was filed against the granite company, and it was duly adjudged a bankrupt, and one Lynam was appointed and qualified as its trustee in bankruptcy. Said trustee made a demand on the bank for the \$800, which demand was refused; the bank claiming that it would offset the deposit on the past-due notes of the granite company.

For some time past, all the efforts of the granite company "and that of its creditors had been to obtain a distribution of its assets equitably, and to that end the first attempt was to discharge the attachments. Honest dealing on the part of the granite company, which is to be presumed, required that all of its assets should be husbanded for the benefit of all its creditors. Pending the effort to obtain an assignment or adjudication of bankruptcy, it had \$800 in money, which it intended to retain, and ought to retain, as part of its general assets. As some time would elapse before it could be thus administered, it was deposited in the bank, really for safekeeping. All these facts were well known to the bank when it received the deposit. It knew it was not intended as a payment, and did not treat it as such. The bank could not fail to understand that it was intended that this money should be added to the other assets for the general benefit, as it equitably ought to be. It certainly understood that the granite company, under the then-existing circumstances, would not voluntarily subject this portion of its assets to a set-off by the bank, to the injury of other creditors.

"Upon consideration of all the circumstances, and the situation of the parties, we think it a fair inference that the bank understood that the deposit was intended only for safe-keeping, to be ultimately appropriated for the benefit of all the creditors of the granite company, and that in fact it was a deposit in trust for that purpose. And it being charged with such trust, the plaintiff, as trustee in bankruptcy, is entitled to recover."

We are of opinion that these authorities are applicable in the present instance. It 28 L.R.A.(N.S.)

distinctly appears on this record that the funds accumulated in the defendant bank were deposited for a special purpose, with the knowledge and consent of the president of the bank; that the funds could not be checked out by the president of the furniture company without the signature of J. L. Morrison, representative of the creditors' committee. The fund thereby became a trust deposit for specific purposes, with the knowledge and consent of the bank, and the latter had no right of set-off in said fund against the bankrupt's indebtedness to the bank.

Counsel for the bank relies on several cases as announcing a contrary doctrine; namely, *New York County Nat. Bank v. Massey*, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; *Clark v. Northampton Nat. Bank*, 160 Mass. 26, 35 N. E. 108; *Lowell v. International Trust Co.* 86 C. C. A. 137, 158 Fed. 781.

In *New York County Nat. Bank v. Massey*, supra, the court said: "It cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes a part of the general fund of the bank, to be dealt with by it as other moneys,—to be lent to customers and parted with at the will of the bank; and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character."

But in that case the facts did not show a deposit for a special purpose, with the knowledge and consent of the bank, but only a deposit in the ordinary course of business. In such a case the authorities are uniform that the bank has the right to set off its notes against the deposits.

In *Clark v. Northampton Nat. Bank*, supra, the case seems to have turned on a finding of fact by the lower court. The court said as follows: "The amount of the notes is to be set off against the balance due on account of the deposits at the time of the commencement of the proceedings in bankruptcy, unless the deposits made after March 8, 1892, are to be considered as made with a view to give a preference or to effect a fraudulent transfer of property, contrary to the statute relating to insolvency, or as made upon a trust for creditors. . . . Whether these deposits were made in violation of either § 96 or § 98 of Pub. Stats. chap. 157 was a question of fact, and the court, trying the case without a jury, has found that they were not so made. . . . On the facts found by the court, the

rulings on this part of the case were right.

"We are not certain that the exceptions set out all the evidence. Enough, however, is recited to show that the plaintiff had some ground to contend that after March 8th the bank knew that the business of the Florence Tack Company was being carried on with a view of converting its assets into cash, for the benefit of its creditors, and that the company must either effect a compromise with its creditors or go into insolvency. The money received after March 8th ought, perhaps, to have been specially deposited; but this was not done, and the account of the tack company with the bank continued unchanged in form. There is evidence that the defendant's cashier understood that, after March 8th, checks were to be drawn only to 'pay the help' of the company; but there is also evidence that checks were in fact drawn for other purposes and were paid. There appears to be no doubt that the officers of the bank knew of the insolvency of the company on March 8th. Still, it is a question of fact whether the transactions between the company and the bank after March 8th were had under an implied contract or understanding on the part of both parties, different from that which existed before. The [lower] court has in effect found that after March 8th the money continued to be deposited and checks to be drawn upon the same understanding as that which existed before that time; that is, upon the understanding that the relation of the parties continued to be the ordinary one of a depositor with a bank of discount and deposit. We cannot say, as a matter of law, that this finding was wrong. It was for the court below to draw the proper inferences of fact, and the exceptions disclose no errors of law."

In *Lowell v. International Trust Co.* supra, it was said: "Portions of the propositions submitted to us by the trustee allege that the bankrupt had been insolvent for a considerable time, and that during that period it had been struggling along with its business, with some support from its creditors, and with an understanding between the International Trust Company and some other creditors, by virtue of which all of them, including the International Trust Company, should receive certain *pro rata* benefits out of whatever funds might come from the Thomas & Pike Coal Company. Therefore it is claimed that the funds now sued for are held by the International Trust Company in a quasi trust, enforceable by the trustee."

The court held: "A trustee in bankruptcy has no interest which he can enforce for the benefit of general creditors in an arrangement between the bankrupt and certain

creditors, by which money deposited with one, which was a bank, was to be held in trust and distributed *pro rata* between them, and which was not prohibited by the bankruptcy statute."

The facts appearing in *Lowell v. International Trust Co.* are very different from the facts presented on the present record. There the trustee was seeking to enforce a contract between the bankrupt and certain creditors. In the present instance, the fund was accumulated in defendant bank for the benefit of all the creditors, and the bank had become a party to the arrangement. In the present case, the trustee clearly has a right to recover a fund which had been deposited by the bankrupt for the benefit of all the creditors.

We are therefore of opinion that the bank is estopped, by its conduct and by its agreement with the other creditors, from asserting any right to a set-off against the funds derived from the sales of the stock of the furniture company, and that the decree of the chancellor, so holding, was correct; and the same is affirmed.

WISCONSIN SUPREME COURT.

A. O. FOX, Respt.,

v.

POSTAL TELEGRAPH CABLE COMPANY,
NY, Appt.

(138 Wis. 648, 120 N. W. 399.)

Conflict of laws — telegram — breach of contract.

The courts of the forum will not, in an action to recover damages for nondelivery of a telegram, enforce a provision of a contract for transmission of the message limiting the liability of the company, which is void under the public policy of the forum, although it is valid in the state where the contract was made and in that where the breach occurred, so that no action could have been brought for the breach in either state.

(March 30, 1909.)

Note. — Law governing liability of telegraph company.

This note is supplementary to notes in 5 L.R.A.(N.S.) 751, and 23 L.R.A.(N.S.) 648. These notes treat the question simply from the point of view of private international law, and do not deal with the applicability of local statutes or rules as affected by the interstate commerce clause of the Federal Constitution.

In *Western U. Teleg. Co. v. Fuel* (Ala.) 51 So. 571, an action by the sender for breach of a contract to transmit and deliver a telegram sent from a point in Ten-

APPEAL by defendant from a judgment of the Circuit Court for Dane County in plaintiff's favor in an action brought to recover damages alleged to have been caused by negligent failure promptly to deliver a telegram affirmed.

Statement by Marshall, J.:

Action for damages for negligence respecting delivery of a telegram.

These facts were stated for a cause of action: Defendant, a New York corporation, at the city of New York, December 19, 1906, at about noon, eastern time, received from plaintiff a message to be transmitted by its telegraph system to a person in the city of Chicago, at 100 Washington street, for the purpose of avoiding having such person make a useless trip from such city to the city of New York, as he contemplated doing, starting on the 2 o'clock P. M., central time, train on such day. The message was important, which fact defendant was duly notified of at the time it was delivered for transmission. Defendant was also fully informed of the necessity of the message reaching the

person to whom it was addressed before the leaving time of such train on such day.

Had the message been expeditiously transmitted and delivered, it would have been received by the person to whom it was addressed before 12 o'clock noon, central time, December 19th aforesaid, and in ample time to have prevented the addressee from starting on the journey to New York. It was received at defendant's office at the Palmer House in Chicago at forty six minutes past 11 A. M., central time, on the day it was sent, but was not delivered at the place to which it was addressed until noon of the next day. By reason thereof the addressee started and made the journey to New York when he otherwise would not have done so, to the damage of the plaintiff in the sum of \$157.37.

Defendant for a defense pleaded, among other things, that plaintiff wrote his message on one of defendant's ordinary blanks, containing on the face this language: "The Postal Telegraph Cable Company . . . transmits and delivers this message subject to the terms and conditions printed on the

nessee to a point in Alabama, the court referred the question as to the right to recover for mental anguish to the law of Alabama as the place of performance of the contract. This is in accord with other decisions in Alabama, but, as shown in the earlier notes is contrary to the weight of authority elsewhere.

Thus, no recovery can be had for mental anguish from delay in transmission of a telegram sent from a point in Missouri to a point in Arkansas (the law of which allows such damages), the negligence having occurred in Missouri, by the law of which no recovery can be had for mental anguish alone. *Western U. Teleg. Co. v. Crenshaw* (Ark.) 125 S. W. 420.

So, damages cannot be recovered for mental anguish for negligence in transmission of a telegram sent from a point in Kansas to a point in Arkansas, where the delay occurred either in Kansas or Missouri, neither of which states permits recovery for mental anguish. *Western U. Teleg. Co. v. See* (Ark.) 126 S. W. 78.

In *Brown v. Western U. Teleg. Co.* (S. C.) 67 S. E. 146, the statute of South Carolina permitting recovery for mental anguish was held applicable in an action by the sendee of a telegram sent from a point in South Carolina to a point in the District of Columbia, without reference to the place where the actual negligence occurred. From some parts of the opinion it would seem that the decision is referred to the general rule sustained by the two cases just cited and by many others cited in the earlier notes, that the contract is governed by the law of the place in which it is made and from which the telegram is sent; but other parts of the opinion seem to indicate that the decision was on the ground that the delict was to be regarded as

having its situs in South Carolina, from which state the telegram was sent, irrespective of the place where the negligence actually occurred. The latter view would seem to be opposed to the position in *Balderston v. Western U. Teleg. Co.* 79 S. C. 160, 60 S. E. 435 (cited in the note in 23 L.R.A.(N.S.) 651), that the situs of the delict is in the state in which the telegram is to be delivered, irrespective of the place of the actual negligence. If the decision in the *Brown Case* may be regarded as referable to the principle above stated with reference to the contract of the telegraph company, it is reconcilable with the result reached in the *Balderston Case*, which was an action *ex delicto*, and was governed, as the court expressly said, not by the principles applicable to contracts, but by those applicable to torts. See, in this connection, the case of *Western U. Teleg. Co. v. Griffin*, 92 Ark. 219, 122 S. W. 489 (discussed in the note in 23 L.R.A.(N.S.) 652).

In *Western U. Teleg. Co. v. Burris*, 179 Fed. 72, an action by the addressee of a telegram sent from a point in Oklahoma addressed to a point in Arkansas, which, because of the negligence of the company, never reached destination, the court held, in effect, that the rule of the Federal court which denies recovery against a telegraph company for mental anguish caused by delay in the delivery of a message would govern except so far as the question might be affected by local statute, and further, upon the authority of Arkansas cases cited in the previous notes, that there could be no recovery under the Arkansas statutes under the circumstances of the case, the negligence not having occurred in Arkansas, but in Missouri, by the law of which there can be no recovery for mental anguish alone, un-

back of this blank. . . . Send the following message without repeating subject to the terms and conditions printed on the back hereof, which are hereby agreed to." The indorsement contained this language: "To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this one-half regular rate is charged in addition. It is agreed between the sender of the message written on the face hereof and the Postal Telegraph Cable company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeatd message beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of an unrepeatd message beyond fifty times the sum received for sending the same, unless specially insured. . . ." Plaintiff did not request to have the message repeated nor to have it insured. The sum paid for the service was 40 cents.

The case turned on whether the language of the indorsement was binding upon plaintiff as a part of his contract with defendant respecting the transmission and delivery of the message. In respect thereto the trial court decided in plaintiff's favor, and also found all matters of fact set forth in the complaint, and held, by reason thereof, that plaintiff was entitled to judgment as prayed for in the complaint. Judgment was accordingly rendered.

Messrs. Tenneys, Hall, Davies, & Sanderson, for appellant:

The courts of one state will enforce a valid contract of another state which is contrary to the provisions of the law or the public policy of the former, if such contract in fact is not *contra bonos mores*.

accompanied by personal injury or pecuniary loss. (The question, however, whether the right to recover damages for mental anguish, or other questions affecting the contract, are to be determined in accordance with the rule of the state courts or in accordance with the rule of the Federal courts, is not within the scope of these notes.)

In *Stone v. Postal Teleg. Co.* (R. I.) 76 Atl. 762, it was held, in an action by the sendee, that the validity and effect of regulations printed on the back of the form on which the message was written, making the filing of a written notice of claim within sixty days a condition of liability, and exempting the company from liability beyond the cost of the message unless the same is repeated, were to be determined by the law of another state where the message originated, notwithstanding that the delay occurred in Rhode Island in the delivery of the tele-

Bull v. Augustine, 23 Wis. 383; *Schoenberg v. Adler*, 105 Wis. 649, 81 N. W. 1055; *Shaw v. Postal Teleg. & Cable Co.* 79 Miss. 670, 56 L.R.A. 496, 39 Am. St. Rep. 606, 31 So. 222; *Brown v. American Finance Co.* 31 Fed. 516.

The transmission of the telegram in question was business done outside of the forum by contract made outside thereof, was entirely to be performed outside thereof, and is not governed by the public policy, nor by the express law thereof, since it is a New York contract and falls within the approval of the public policy of the United States relative to the control of interstate commerce.

Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; *Western U. Teleg. Co. v. Coggin*, 15 C. C. A. 231, 32 U. S. App. 245, 68 Fed. 137; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 62 Fed. 906.

Messrs. Olin & Butler, for respondent:

The condition as to defendant's liability will not be enforced in Wisconsin, even though valid where made, since it contravenes the public policy of this state.

The Kensington, 183 U. S. 263, 269, 46 L. ed. 190, 193, 22 Sup. Ct. Rep. 102; *Lake Shore & M. S. R. Co. v. Teeters*, 166 Ind. 335, 5 L.R.A. (N.S.) 425, 77 N. E. 599; *International & G. N. R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 107 S. W. 560; *Atlanta & W. P. R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355; *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 508; *Northern P. R. Co. v. Kempton*, 71 C. C. A. 246, 138 Fed. 992; *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703; *Wight v. Rindskopf*, 43 Wis. 344; *Bain v. Northern P. R. Co.* 120 Wis. 412, 98 N. W. 241; *Dearing v. McKinnon Dash & Hardware Co.* 165 N. Y. 78, 80 Am. St. Rep. 708, 58 N. E. 773; *Logan v. Postal Teleg. & Cable Co.* 157 Fed. 570; *Mackey v. Pettijohn*, 6

gram in that state. The court said that the plaintiff's action, though in tort, could only be maintained because he was able to show the violation of some duty which the company owed to him arising out of the contract between the company and the sender of the message, and that the action was, therefore, founded upon and limited by that contract.

In *Western U. Teleg. Co. v. Douglass* (Tex. Civ. App.) 124 S. W. 488, the validity of a stipulation in a contract to transmit a message from a point in Alabama to a point in Texas, requiring notice of claim to be given within sixty days, was referred to the law of Texas, by which it was invalid, upon the ground that the stipulation was one of limitation affecting the remedy as distinguishable from the substantive rights of the parties, and was, therefore, governed by the law of the forum.

Kan. App. 57, 49 Pac. 636; Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 15 L.R.A. (N.S.) 1045, 115 Am. St. Rep. 1063, 106 N. W. 821.

No question of interstate commerce is involved in denying validity to a contract as against public policy, especially where it is invalid by the principles of the common law.

Western U. Teleg. Co. v. James, 162 U. S. 650, 660, 661, 40 L. ed. 1105, 1108, 1109, 16 Sup. Ct. Rep. 934; Postal Teleg. Cable Co. v. Umstadter, 103 Va. 742, 50 S. E. 259, 2 A. & E. Ann. Cas. 511.

Marshall, J., delivered the opinion of the court:

It may be conceded, for the purposes of this case, that the place of the contract between plaintiff and defendant was New York, and that by the law of such state the provision on the back of the message was a valid part of the agreement. Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140; Breese v. United States Teleg. Co. 48 N. Y. 132, 8 Am. Rep. 526; Young v. Western U. Teleg. Co. 65 N. Y. 163; Kiley v. Western U. Teleg. Co. 109 N. Y. 231, 16 N. E. 75; Pearsall v. Western U. Teleg. Co. 124 N. Y. 256-267, 21 Am. St. Rep. 662, 26 N. E. 534. In connection with that, it must be conceded, since the tort was committed in the state of Illinois, the cause of action, such as there was, grew out of a violation of the laws of that state. But neither of such concessions nor the fact, if it be a fact, that an action on the claimed liability could not be maintained in the courts of New York or those of Illinois, settles the question of whether it was proper for the courts of this state to entertain it.

It has long been settled here that such a provision as that in question is void as contrary to public policy. Hibbard v. Western U. Teleg. Co. 33 Wis. 558, 14 Am. Rep. 775; Candee v. Western U. Teleg. Co. 34 Wis. 471, 17 Am. Rep. 452. So we turn to this question: Can a contract which is so contrary to the public policy of this state as to be void if made here, be, nevertheless, judicially enforced here, if valid in the state where it was made or breached?

The general rule is that a contract is governed by the law of the place thereof. If by such law it is valid, it is likewise valid everywhere. That, like most general rules, is not universal. It has exceptions. The doctrine as to such exceptions is stated in 2 Kent's Com. 14th ed. 458, to the effect that the courts of one state will not enforce contracts which, though valid in the place where made, contravene their policy. Bartlett v. Collins, 109 Wis. 482, 83 Am. St. Rep. 928, 85 N. W. 703.

The doctrine as to recognition of foreign

contracts in the courts of a state, if invalid by the laws of the home jurisdiction, rests in comity. Therefore, it must necessarily rest in sound judicial discretion to limit it, and its general limitations exclude those agreements which are injurious to public rights, or offend against public morals, or contravene public policy, or violate public law as recognized in the place of the forum. Many illustrations of this are found in the books, some of which are cited to our attention by counsel for respondent. Chicago, B. & Q. R. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508; International & G. N. R. Co. v. Vandeventer, 48 Tex. Civ. App. 366, 107 S. W. 560; Building & L. Asso. v. Griffin, 90 Tex. 490, 39 S. W. 656; Northern P. R. Co. v. Kempton, 71 C. C. A. 246, 138 Fed. 992; Union Locomotive & Exp. Co. v. Erie R. Co. 37 N. J. L. 23; Commonwealth Mut. F. Ins. Co. v. Hayden Bros. 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922; Pennsylvania Co. v. Kennard Glass & Paint Co. 59 Neb. 435-445, 81 N. W. 372; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Knott v. Botany Worsted Mills, 179 U. S. 69-71, 45 L. ed. 90-93, 21 Sup. Ct. Rep. 30; The Guildhall (D. C.) 58 Fed. 796; The Glenmavis (D. C.) 69 Fed. 472; The Kensington, 183 U. S. 263-269, 46 L. ed. 190-193, 22 Sup. Ct. Rep. 102; Story, Conf. L. §§ 38, 244.

An examination of those authorities will leave no doubt respecting the principle stated. Every state, within certain limitations not necessary here to indicate, has a constitutional right to establish its own peculiar policy. That may be done by legislative enactment or by judicial conception and interpretation of the common law. When done its courts should, and always aim to, administer the public will by giving effect to such policy. "The general principle that the *lex loci* governs as to the validity of contracts is subordinate to and qualified by," as said by White, Justice, in the Kensington, supra, the supreme principle which inheres in the very nature of sovereignty, that comity cannot set at naught the public policy of a country. Under that principle courts have uniformly regarded the public policy of the place of the forum as superseding the right of a defendant to the benefit of a defense which he might have at the place of the contract, but which is directly contrary to the public policy of the jurisdiction where it is sought to be enforced. That doctrine has at times been vigorously attacked as contrary to the Constitution of the United States, but never successfully, and it has been nowhere more uniformly applied than by the Federal Supreme Court.

What has been said, necessarily, disposes

of this appeal in favor of respondent. The stipulation against responsibility for negligence, as we have seen, would be void in a Wisconsin contract by the settled unwritten law of the state, supposed to be reasonably necessary for the protection of our citizens and all persons submitting to our laws or invoking their aid through the instrumentality of our courts. It would not only be void by state policy, judicially declared, but by the written law as well. Section 1778, Stat. 1898, provides that "any person, association, or corporation operating or owning any telegraph or telephone line doing business in this state shall be liable for all damages occasioned by the failure or negligence of their operators, servants, or employees in receiving, copying, transmitting, or delivering despatches or messages." Therefore, the courts will not lend their aid to enforce such a stipulation, regardless of where made, either as a basis for attack or defense.

The judgment is affirmed.

Winslow, Ch. J., took no part.

PENNSYLVANIA SUPREME COURT.

JOHN R. CAMERON et al., Appts.,

v.

CITY OF CARBONDALE.

(227 Pa. 473, 76 Atl. 198.)

Injunction — municipality — extinguishment of fire.

A mandatory injunction will not be issued to compel a municipal corporation to extinguish a fire in a mine within its limits, which is on private property and was started without any wrongdoing on its part.

(March 14, 1910.)

APPEAL by plaintiffs from a decree of the Court of Common Pleas for Lackawanna County dismissing a bill filed to compel the city of Carbondale to extinguish a subterranean fire upon certain private property within its limits. Affirmed.

The facts are stated in the opinion.

Messrs. Vosburg & Dawson, for appellants:

A municipality can be compelled to abate a public nuisance consisting of an immense

Note. — No other case has been found involving the duty of a municipality to extinguish a mine fire within its corporate limits. The case of McCabe v. Watt, growing out of the same fire, in which the court refused to compel the mine owners to extinguish the fire, is reported in 24 L.R.A. (N.S.) 274.

28 L.R.A. (N.S.)

mine fire, which injures the health and property of a great many of the citizens thereof.

McCabe v. Watt, 224 Pa. 259, 73 Atl. 455; Tiedeman, Pol. Power, p. 440; Farnsworth v. Boston, 126 Mass. 1; Bancroft v. Cambridge, 126 Mass. 438; Welch v. Boston, 126 Mass. 442, note; Philadelphia & R. R. Co. v. Philadelphia, 47 Pa. 325; Philadelphia v. Scott, 81 Pa. 80, 22 Am. Rep. 738; Chicago v. O'Brien, 111 Ill. 532; Com. v. Easton, 8 Northampton Co. Rep. 321.

Action on the part of the city of Carbondale is not a matter of discretion.

Tiedeman, Mun. Corp. § 362, p. 747; 2 Beach, Eq. Jur. § 668, p. 745; 15 Am. & Eng. Enc. Law, p. 1157; Brower v. New York, 3 Barb. 254; Baltimore v. Marriott, 9 Md. 174, 66 Am. Dec. 326; Cochrane v. Frostburg, 81 Md. 54, 27 L.R.A. 728, 48 Am. St. Rep. 479, 31 Atl. 703; Pittsburgh v. Grier, 22 Pa. 65, 60 Am. Dec. 65; Taylor v. Cumberland, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027; Wood, Nuisances, 2d ed. § 749.

A municipal corporation is liable for allowing a nuisance to be maintained within its limits.

Mansfield v. Bristor, 76 Ohio St. 270, 10 L.R.A. (N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 A. & E. Ann. Cas. 767; Markwardt v. Guthrie, 18 Okla. 32, 9 L.R.A. (N.S.) 1150, 90 Pac. 26, 11 A. & E. Ann. Cas. 581; Lamborn v. Covington Co. 2 Md. Ch. 409.

Messrs. Louis Gramer and O'Brien & Kelly, for appellee:

The city not only is not bound to act in this matter, but it actually has no authority to act, and if it attempted to expend a large sum from the public moneys in an effort to put out the mine fire, regardless of the question of constitutional limitations, it would be an attempt to make an illegal expenditure of the money of the taxpayers.

1 Dill. Mun. Corp. 121, 127, 138; 28 Cyc. Law & Proc. p. 258; Lesley v. Kite, 192 Pa. 268, 43 Atl. 959.

The city authorities at most have a discretionary power to take action, and such discretion cannot be controlled by the courts.

19 Am. & Eng. Enc. Law, 2d ed. pp. 721, 732.

Potter, J., delivered the opinion of the court:

The city of Carbondale was not a party to the litigation which led to the decision of this court in McCabe v. Watt, 224 Pa. 259, 73 Atl. 455, and the question of the legal obligation resting upon the city to extinguish the flames of a subterranean fire upon private property within its limits was not before the court for decision. It is a mistake, therefore, to assume that the legal duty of the city to cut off or extinguish the fire un-

der such circumstances was passed upon or decided in that case. What the authorities of a municipality ought to do, in the exercise of a sound discretion, when it comes to grappling with a disastrous underground conflagration, is one thing, and the power of a court of equity to supervise or control the exercise of that discretion is another.

The case was heard upon bill and answer, and from the answer the following facts appear, which must be taken as established:

(1) There are no methods in common and ordinary use which can be utilized to put out the fire complained of in the plaintiffs' bill. (2) Whether the fire can be extinguished at all or not is a question of mining engineering, and a question of which the defendant has no knowledge. (3) Before any intelligent effort can be made to extinguish the fire, an expense amounting to approximately \$100,000 would have to be incurred, and that without any assurance that such effort, involving such a large sum of money, would be successful. (4) The defendant has no apparatus by which it or any of its officers are able to extinguish the fire, there is no department of defendant city in any way equipped for the purpose of extinguishing it, and there are no officers of the city competent to undertake to extinguish or confine it. (5) The defendant is entirely without means with which to put out the fire in question.

Upon the facts, which are undisputed, the court below refused to award a mandatory injunction against the city. Nothing appears in the record to indicate that the officers of the city are not acting in good faith, or in the exercise of their best judgment. They cannot be required to do an impossible or an impracticable thing. It may be that the cost of the effort demanded by appellants to extinguish the underground flames would exceed the damage resulting from the fire. It must be remembered that the city of Carbondale is in no way responsible for the existence of the fire. It started upon, and is still confined to, private property. The situation is an extraordinary one, and the record presents nothing to indicate that the city authorities have gone beyond their discretionary power in refusing to act in the premises. It is not for the courts to supervise or control the fair exercise of judgment or discretion by the city authorities.

A further good and sufficient reason why a mandatory injunction should be refused under the circumstances of this case is that its enforcement would require close and continuous supervision by the court for an indefinite time. As our Brother Elkin said in *McCabe v. Watt*, 224 Pa. 253, 258, 24 L.R.A. (N.S.) 274, 73 Atl. 453: "A mandatory injunction should never be granted when its

enforcement will require too great an amount of supervision by the court. It needs no citation of authorities to sustain this proposition. It is a fundamental principle, and of general application in this and other jurisdictions." He then pointed out that the enforcement of the injunction asked for in that case would "require the employment and supervision of a large force of men for a long period of time. Skilful and experienced men must be employed to direct the work, all of which involves the doing of something from day to day for an indefinite period, and this is what the courts have said will not be undertaken in the enforcement of their decrees, and, if foreseen, no such decree will be entered." This language aptly described what would be called for in the present situation, and fully justified the court below in refusing a mandatory injunction against the city of Carbondale.

As stated by counsel for appellee, it is a matter of common knowledge that mine fires in the anthracite coal regions present perplexing and baffling questions of mining engineering, most difficult to deal with, and at times impossible to grapple with successfully. The principle under which municipalities may be compelled to abate nuisances upon a public highway, or arising out of their own neglect of duty, does not apply here. The defendant city committed no tort. The fire was not permitted to start upon any property under her control, and she is innocent of any wrongdoing in connection therewith. The court below very properly refused a mandatory injunction in this case.

The appeal is dismissed, at the cost of appellants.

COLORADO SUPREME COURT.

OXFORD HOTEL COMPANY, Appt.,

v.

OLE LIND.

(47 Colo. 57, 107 Pac. 222.)

Innkeeper — Liability for money deposited.

A guest departing from a hotel acts at his own risk in leaving money with the clerk, to be deposited in the safe until he calls for it, and cannot hold the hotel keeper responsible in case it cannot be found when he returns for it.

(February 7, 1910.)

Note. — Duty of innkeeper as to effects of one who has left without intention of returning as guest.

The duty of an innkeeper with reference to the care which he is bound to exercise ov-

APPEAL by defendant from a judgment of the County Court for the City and County of Denver in plaintiff's favor in an action brought to recover certain money alleged to have been deposited in defendant's safe. Reversed.

The facts are stated in the opinion.

Messrs. Doud & Fowler, for appellant:

A gratuitous bailee is liable for gross negligence only.

Beale, *Innkeepers & Hotels*, §§ 231-233; *McDaniels v. Robinson*, 28 Vt. 387, 67 Am. Dec. 720; *Towson v. Havre-de-Grace Bank*, 6 Harr. & J. 47, 14 Am. Dec. 254; *Whitemore v. Haroldson*, 2 Lea, 312; *Hoffman v. Roessle*, 39 Misc. 787, 81 N. Y. Supp. 291; *O'Brien v. Vaill*, 22 Fla. 627, 1 Am. St. Rep. 219, 1 So. 137; *Hays v. Turner*, 23 Iowa, 214; *Schouler*,

Bailments & Carriers, §§ 285, 298; *Story*, *Bailm.* 8th ed. § 23; 5 Cyc. Law & Proc. pp. 181, 186; 22 Cyc. Law & Proc. pp. 1087, 1089; *Van Zile*, *Bailm.* § 374.

The clerk acted without authority in receiving the deposits from one who was not a guest.

Glenn v. Jackson, 93 Ala. 342, 12 L.R.A. 382, 9 So. 259; *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32, 58 Am. Rep. 785, 4 N. E. 398; *Taylor v. Downey*, 104 Mich. 532, 29 L.R.A. 92, 53 Am. St. Rep. 472, 62 N. W. 716.

Messrs. George F. Dunklee and O. E. Jackson, for appellee:

Good faith requires a bailee without reward to take reasonable care of the deposit.

er the baggage and other effects of one who has become a guest is considerably modified as to effects left upon the premises after the relation of innkeeper and guest has terminated. *Wear v. Gleason*, 52 Ark. 364, 20 Am. St. Rep. 186, 12 S. W. 756. Immediately upon the termination of that relation the liability of the former, as innkeeper, does not, however, cease, but he remains responsible for a reasonable time thereafter, the duration of which is to be estimated by the circumstances of each case, to enable the guest to remove his property. *Baehr v. Downey*, 133 Mich. 163, 103 Am. St. Rep. 444, 94 N. W. 750; *Maxwell v. Gerard*, 84 Hun, 537, 32 N. Y. Supp. 849; *Kaplan v. Titus*, 64 Misc. 81, 117 N. Y. Supp. 944; *Clark v. Ball*, 34 Colo. 223, 2 L.R.A. (N.S.) 100, 114 Am. St. Rep. 154, 82 Pac. 529; *Miller v. Peeples*, 60 Miss. 819, 45 Am. Dec. 423. And this doctrine holds true even though he receives no additional compensation, since the profit received from the entertainment of the guest is regarded as sufficient consideration for the innkeeper's promise to check baggage or deliver it to the place directed by the guest. *Giles v. Fauntleroy*, 13 Md. 126; *Towson v. Havre-de-Grace Bank*, 6 Harr. & J. 47, 14 Am. Dec. 254; *Miller v. Peeples*, supra.

But after a reasonable time for the removal of baggage has elapsed, the liability of the innkeeper, as such, terminates, and the care which he must thereafter exercise with reference to the property of a former guest is that of a gratuitous bailee, liable only for gross negligence. *Adams v. Clem*, 41 Ga. 65, 5 Am. Rep. 524; *Glenn v. Jackson*, 93 Ala. 342, 12 L.R.A. 382, 9 So. 259; *Clark v. Ball*, supra; *Murray v. Marshall*, 9 Colo. 482, 59 Am. Rep. 152, 13 Pac. 589; *Whitemore v. Haroldson*, 2 Lea, 312; *O'Brien v. Vaill*, 22 Fla. 627, 1 Am. St. Rep. 219, 1 So. 137.

Thus, an innkeeper, as such, is not liable for delivering to the wrong person a trunk left by a guest who stated that he would return in three or four days for it. *Hays v. Turner*, 23 Iowa, 214. The court intimated, however, that the plaintiff might, if he was

so advised, bring a new action charging the defendant as an ordinary bailee.

Nor is an innkeeper liable for the loss of a sum of money which a guest, upon leaving, deposited with the clerk, taking his receipt therefor, but which the guest did not return to demand until more than seven weeks had elapsed. *Whitemore v. Haroldson*, supra.

A similar decision was rendered in *McDaniels v. Robinson*, 28 Vt. 387, 67 Am. Dec. 720, with reference to an innkeeper's liability for the loss of a bag containing about \$4,000 in gold left with the innkeeper for safe-keeping, after its owner had ceased to be a guest and while he was staying at his brother's house. As was well stated in *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32, 58 Am. Rep. 785, 4 N. E. 398, it is beyond the ordinary duties of an innkeeper to undertake to run a bank for the benefit of guests carrying large sums of money.

And in *Gelley v. Clerk*, Cro. Jac. 188, one who left his property at an inn while he went to another place on business, saying that he would return for it in two or three days, was denied the right to recover the value of the goods which had been stolen. The court stated that the rule as to the innkeeper's liability as follows: "Where he [the guest] leaves goods to keep, whereof the defendant [innkeeper] is not to have any benefit, and goes from thence for two or three days, although he saith he will return, yet he is at his liberty, and therefore is not a guest during that time, nor is the innkeeper chargeable as a common hostler for the goods stolen during that time, unless he make a special promise for the safe-keeping of them; and the action ought to be grounded upon it."

An innkeeper is liable only for gross negligence in the loss of a valise left by a departing guest in the office of the hotel, without calling the attention of the clerk thereto, who not knowing to whom it belonged, placed it in a room where baggage was usually stored. *Stewart v. Head*, 70 Ga. 449.

And in *Hoffman v. Roessle*, 39 Misc. 787, 81 N. Y. Supp. 291, the court held that the

Story, Bailm. §§ 23, 62; *Smith v. First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59.

A gratuitous bailee is responsible for any loss occurring through the want of that degree of care which good business men should exercise in keeping property of such value.

Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162; *Gray v. Merriam*, 148 Ill. 180, 32 L.R.A. 769, 39 Am. St. Rep. 172, 35 N. E. 810; *Jones, Bailm.* 37 & 38; *La Rev. Civ. Code*, art. 2938; *Mariner v. Smith*, 5 Heisk. 203.

Musser, J., delivered the opinion of the court:

Inasmuch as there was a verdict in favor of the plaintiff below, who is appellee here, the testimony given in his behalf, mainly his

innkeeper was not liable for the loss of the valise of a guest who had paid his bill and departed, leaving the valise, with other baggage, in the charge of an employee of the hotel, which valise was afterwards delivered by the clerk upon the presentation of a forged order by a person whom the clerk had frequently seen in the company of the former guest. The clerk was not familiar with the signature of the guest, and did not compare the signature in the order with that on the hotel register. It does not appear how soon after the guest's departure the order referred to was presented. The court said that the baggage was stored purely for the accommodation of the plaintiff, and the defendant was therefore liable only for gross negligence. One judge dissented from the decision, on the ground that the innkeeper did not exercise the care expected of such a bailee, by delivering the baggage upon the forged order of one who had lately been a guest. This case was criticized in *Kaplan v. Titus*, supra.

The court in the *Hoffman Case* followed the doctrine laid down in *Wintermute v. Clark*, 5 Sandf. 242, in which it was held that a guest who leaves property behind him upon terminating his relation with the hotel does so at his peril.

A guest who deposited with the clerk a large sum of money a short while after he had surrendered his room cannot recover for the loss of the same, from the innkeeper, on the ground that the deposit was not made for its security while the plaintiff was a guest, but was made so as to be available when he should desire the same to defray the expenses of a proposed visit. *DeLapp v. VanCloster*, 136 Mo. App. 475, 118 S. W. 120.

An innkeeper was not held liable, as such, in *Palin v. Reid*, 10 Ont. App. Rep. 63, for the loss of a box containing papers and books left by a guest after severing his relation with the hotel, with the consent of the innkeeper, in a room used for the storage of luggage, etc., with the understanding that the owner would remove it the following day, but which, owing to illness, was not called for for several weeks thereafter, 28 L.R.A.(N.S.)

own, will alone be considered. From this it appears that the plaintiff came to the hotel of the appellant at 7 or 8 o'clock in the evening of June 9th, engaged a room, paid for it, and occupied it during the night. The plaintiff was in ill health. After engaging his room, and during the same evening, the proprietor of a sanatorium called upon him at the hotel, and arrangements were made whereby the plaintiff was to go to the sanatorium, and the proprietor was to send a conveyance to the hotel to take him there between 9 and 10 o'clock the next morning. During that evening he counted his money and separated it into two parts. The one part consisted of \$200, which he intended to deposit in a bank. The other part consisted of \$175, which he was going to take with

when it was discovered that the box could not be found. The action was not based on negligence, but the declaration merely averred that the goods were lost; this, the court held, did not disclose a good cause of action, as the box might have been lost without the defendant's negligence.

Gross negligence on the part of an innkeeper was held not to have been shown in *O'Brien v. Vaill*, supra, in which it appeared that an innkeeper, after the departure of the guest, removed from the room the latter's trunk, which the guest requested the innkeeper to keep for him until his return in some seven or eight days, and placed the same in the main hall way of the hotel, from which it was stolen, and which the proof showed was the place where baggage was usually stored. It further appeared that the only entrance to the upper rooms was through the hotel office, in which someone was always on guard. The court in this case, as it apparently did in the *Hoffman Case*, took the view that the liability of the innkeeper, as such, terminated at once when the guest paid his bill and left the hotel.

The doctrine above stated with reference to the liability of the innkeeper as a gratuitous bailee was applied with reference to the care of the baggage of a guest who was ordered to leave the hotel for failure to pay for his board, and who did leave without taking his baggage with him. *Lawrence v. Howard*, 1 Utah, 142.

Culpable indifference on the part of the landlord to the safety of the property committed to his care, rendering him liable for its loss, was shown in *Wear v. Gleason*, supra, in which it appeared that the trunk claimed to have been lost was delivered to the innkeeper after the guest had surrendered his room and paid his bill, either pursuant to an understanding that it should be held as a pledge for money loaned or in part payment for hotel accommodations. Soon after the delivery of the trunk to the innkeeper a stranger called at the hotel, claimed the trunk as his own, and ordered it to be sent to the baggage room of the depot to be checked. The innkeeper deliv-

him to the sanatorium. About 8 o'clock the next morning he left his room and went to the hotel counter. He there told the clerk that he was going away; that he did not want his room any more, and asked for the proprietor, by whom he wanted to send some money to a bank for deposit. The clerk asked him why he did not leave it in the safe at the hotel. The plaintiff asked if it would be all right, and the clerk assured him that it would be. Thereupon the plaintiff handed the clerk the \$200 which he had intended to bank. The clerk put it in an envelope, which he sealed and on which he wrote the plaintiff's name, put it in the safe, and told the plaintiff if he (the clerk) was not

there another clerk would be to give him the money when plaintiff came for it. After this, and between 9 and 10 o'clock, he left the hotel, as arranged the evening before, and proceeded to the sanatorium, where he paid \$50 in advance for two months' board and lodging, and deposited the other \$125 with the proprietor. Here he became quite ill, and about a month after he had left the hotel he returned for the money he had deposited there. No one then employed at the hotel knew anything about the money. The clerk to whom he had given it was not then in the employ of the hotel. The plaintiff then told the manager of the hotel about the deposit of the money with the clerk. This

ered the trunk as requested, and it was never heard of thereafter.

An innkeeper who undertakes to deliver the baggage of a guest to the depot, or on board a steamer, after the guest has paid his bill, is liable for its loss because taken to the wrong place. *Sasseen v. Clark*, 37 Ga. 242, *dictum*. Thus, in *Giles v. Fauntleroy*, *supra*, it was held that a guest who was entitled to his room for the whole day, but directed that his trunk be taken to a certain steamer in the afternoon of that day, is entitled to recover of the innkeeper for loss of the contents of the trunk due to the failure of the hotel porter to take it to the place directed. The fact that a portorage fee had been paid by the guest, and therefore, as the defendant claimed, the loss was caused by one carrying on an independent employment, was considered by the court not to affect the innkeeper's liability, since the profits received from the entertainment of the guest were held to afford a sufficient consideration for the undertaking to deliver the trunk as requested.

An innkeeper may also become liable for the loss of property which he has agreed to forward to a departed guest. This liability was enforced in *Baehr v. Downey*, *supra*, on the ground of breach of contract. The proof showed that a traveling salesman, at the time of severing his relation as guest, requested the hotel clerk to forward any packages which might be received at the hotel directed to the former; the clerk promised to do as requested, in accordance with the general custom on the part of hotel keepers. The court held the innkeeper liable for the loss of a package which afterwards came to the hotel for the guest. The court said that "it is no hardship to hold innkeepers to this liability. . . . Proper protection for the property of agents and their principals demands that this common-law liability attach until the innkeeper has complied with his contract for forwarding."

And in *Maxwell v. Gerard*, 84 Hun, 537, 32 N. Y. Supp. 849, the innkeeper was held liable for the loss of a trunk which the guest left in his room upon departing from the hotel, under an arrangement with the clerk of the hotel to deliver the same to the

express office for the purpose of having it sent home. The trunk was never delivered as requested, and it does not appear what became of it. It was not disputed in the case that no custom existed for innkeepers to perform such acts for departing guests, nor was it contended that the promise of the clerk was outside the ordinary routine of his work as clerk of the hotel. The court said that the innkeeper's liability continued until the trunk should have been delivered to the expressman, which was at once upon the departure of the guest, as agreed.

The unexplained loss of the baggage of a guest who has left the hotel raises a presumption of negligence against the innkeeper, and he will be held liable as a bailee, for want of ordinary care. *Heiser v. Berger Catering Co.* 128 Mo. App. 210, 106 S. W. 579; *Murray v. Clarke*, 2 Daly, 102; *Hoyt v. Clinton Hotel Co.* 35 Pa. Super. Ct. 297. This doctrine was also applied in *Murray v. Marshall*, 9 Colo. 482, 59 Am. Rep. 152, 13 Pac. 589, in which it appeared that the guest, upon leaving, handed his valise to the clerk, telling him that he would call for it; the clerk took the bag and put it behind the counter. In about forty-eight hours the guest returned, paid his bill, and demanded his baggage, but it could not be found. In holding the innkeeper liable, the court said that if the liability of the innkeeper is that of a bailee without compensation, guests would have but little or no protection, and the court held that a greater degree of care was imposed upon the innkeeper by the fact that the guest's bill was unpaid and that the former, therefore, had a lien on the property.

Likewise, in *Adams v. Clem*, 41 Ga. 65, 5 Am. Rep. 524, the proof showed that the guest, at the time of paying her bill, informed the innkeeper that a certain person would call for her trunk within ten minutes, to which the latter replied, "Very well." The one engaged to remove the trunk failed to do so, and the former guest sent her son about four days thereafter to get the property, but it was nowhere to be found. In an action for its value the court held that the guest had not delayed an unreasonable length of time before sending for her trunk, and since, in this case, the law presumed

was the first the manager knew of it. The former clerk was found, and he informed the manager and plaintiff that he could not remember that the plaintiff had deposited any money. The manager sought for the money, but it was not found. What became of it is not known. During the month after he had left the hotel the plaintiff thought of his money frequently and worried about it, but he told no one about it, nor made any effort to procure it until he went to the hotel about a month afterwards. He brought this action against the hotel company to recover his money. At the conclusion of plaintiff's case the defendant moved for a nonsuit, which motion was denied, and this ruling of the court is one of the assignments of error.

The plaintiff did not deposit his money with the clerk as a guest ordinarily deposits money with an innkeeper for safe-keeping while he is at an inn. He had separated this \$200 from his other money and intended to deposit it in a bank. The other money he intended to, and did, take with him to the sanatorium, to pay his expenses there and to supply himself with what he might otherwise need. The \$200 was to be put in a bank for safe-keeping. At the last moment he substituted the safe of the hotel for the bank, but the safe was to answer the same purpose as the bank, namely, a safe repository for his money for an indefinite period after he left the hotel. The only further use which plaintiff intended to make of the hotel was as a

want of proper care on the part of the innkeeper because of the loss, he must respond in damages.

Liability was imposed in *Clark v. Ball*, 34 Colo. 223, 2 L.R.A. (N.S.) 100, 114 Am. St. Rep. 154, 82 Pac. 529, upon one member of a partnership engaged in conducting a hotel, for the theft of a sum of money by a copartner, to whom it had been delivered for safe-keeping by the owner at the time she became a guest, although the guest had severed her relation as such to the hotel and become an employee thereof before a demand was made for the return of the money. The doctrine of the extraordinary liability of innkeepers was held to be inapplicable, and liability was imposed on the defendant on the theory that all members of a firm are liable for property received by one member thereof within the actual or apparent scope of his authority, and misappropriated by him, although the firm never received any benefit therefrom.

If, however, the guest himself is guilty of negligence with reference to his baggage he will not be permitted to recover for its loss. Thus, in *Glenn v. Jackson*, 93 Ala. 342, 12 L.R.A. 382, 9 So. 259, it appeared that the guest when about to leave the hotel gave his valise to a boy who responded to the bell call, with directions to take it downstairs and check it (although the employee had no authority to check the valise), and leave the check at the clerk's desk. The guest soon thereafter settled his bill with the clerk, without making any mention of his baggage. Some two or three days thereafter he returned, presented the check, and called for his valise, which could not be found, the number corresponding to the check, however, being found on its proper hook. The former guest did not pay for the keeping of his baggage, and there was no evidence to show that it had ever been placed in the check room. In denying the liability of the innkeeper for the loss, the court said: "It is not in the power of a bailor to force upon another the custody of his goods. It must be a duty voluntarily assumed, or one imposed by law. A deposit received by a servant, not in the line of his duty and without the expressed or

implied consent of his principal, and against positive instructions, cannot impose a liability upon the principal. In such case, the deposit is a mere personal trust in the servant." It was, however, expressly stated that the defendant would have been liable if the guest, before paying his bill, had called for his valise and it had then been stolen or lost.

Negligence on the part of the guest defeated his recovery in *Lawrence v. Howard*, supra. In this case the guest was ordered to leave, for failure to meet his hotel bills. Upon his departure he did not take his baggage with him, nor did he make any demand for it at that time, although it would have been delivered to him without hesitation if he had asked for it. The baggage was left for sometime in the room formerly occupied by the guest, but subsequently removed to the room which was the usual place for keeping baggage not called for. Sometime after, the guest demanded his property, but only one trunk could be found, and that was delivered to him. In denying a right to recover, the court said that "although the goods were not, at the time the defendant was turned away from the hotel, tendered to him, and the failure so to do may have been negligence, yet we cannot look upon it as gross negligence. . . . The defendant's own negligence contributed to the loss. Had he asked for his property when he quitted the hotel, he would have received it, and this defense would never have been set up."

And in *Miller v. Peeples*, 60 Miss. 819, 45 Am. Dec. 423, the court refused to hold the innkeeper liable for the loss of a valise left by one who had been a guest, in the room of a friend, while the former was absent in another town on business, intending to return later to remove the valise.

The act of one who had been a guest, in leaving his valise unfastened in an unfastened room, which he had occupied merely for the purpose of changing his clothes in preparation for visiting a friend, was held in *Lynar v. Mossop*, 36 U. C. Q. B. 230, to be negligence, defeating his right to recover of the innkeeper for the theft of the baggage.

place of deposit in lieu of a bank. An innkeeper is not bound to receive the goods of a person who desires the use of the inn only as a place of deposit. *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32, 46, 58 Am. Rep. 785, 4 N. E. 398. To make a hotel a substitute for a bank, and to use the hotel for no other purpose, does not ordinarily occur in the course of hotel management. Such a transaction is without the ordinary duties of an innkeeper, is foreign to the ordinary management of an inn, and must therefore be based upon a special contract. The plaintiff had done all that was necessary to do so far as this deposit is concerned, at least, in order to sever the relation of innkeeper and guest, which had existed between him and the defendant. He had made arrangements to go elsewhere. He had paid for his room and had given it up. He was going away with no intention of returning as a guest. The deposit of the money was made as in a bank, and not in view of, nor in connection with, the relation of innkeeper and guest. All this he communicated to the clerk before or at the time of the deposit, and by communicating it he then and there severed his relation as a guest of the hotel, so far, at least, as such deposit was concerned.

In *Wear v. Gleason*, 52 Ark. 364, 20 Am. St. Rep. 186, 12 S. W. 756, Boddy, a salesman of the plaintiff, was a guest at defendant's hotel. He paid his bill, obtained a loan of \$25, leaving a trunk as security. Boddy then gave defendant a duebill for the \$25 received, and defendant offered to give a check for the trunk, which was declined. Boddy gave defendant a railroad check for the trunk, and the latter sent and got it. The court said: "There is no evidence to show that Gleason received the trunk in the capacity of innkeeper. Boddy had severed his personal connection with the hotel by surrendering his room and paying his bill before the trunk was delivered to Gleason. It was subsequently delivered to him, either under an understanding that it should be held as a pledge for money loaned by him to Boddy, or only for the accommodation of Boddy." So in the case at bar, after the plaintiff, by his own acts and declarations, had severed his personal connection with the defendant, the clerk received the money for the accommodation of the plaintiff, without regard to his relation as guest. In the case of *McDaniels v. Robinson*, 28 Vt. 387, 67 Am. Dec. 720, the plaintiff was a guest of defendant, and on the evening of March 5th plaintiff delivered to the defendant a bag of gold, and immediately thereafter the plaintiff left the inn without any intention of returning, and intended to terminate his personal stay there. In that case the court plainly holds that the deposit of the gold with the defendant had

no connection with the original relation of landlord and guest, so that such relation must have ceased at the time the gold was deposited; for the court on page 390 of 28 Vt., says: "The leaving of the bag of gold in the custody of the defendant had no connection with the original relation of landlord and guest between the parties; and, when the money was lost, the plaintiff had ceased to be personally the guest of the defendant, and, indeed, we are to understand from the case that, when the plaintiff handed the gold to the defendant, he had made up his mind to leave the defendant's inn, not to return again to it as a guest, and that he did immediately thereafter leave, with the intention not again to return, and in no proper sense could the plaintiff be said to be the personal guest of the defendant at the time of the loss." In the case at bar the plaintiff had not only made up his mind to leave the hotel, and not to return to it again as a guest, but he actually communicated that fact to the clerk at or before the time of depositing the money, and he deposited the money, not as a guest ordinarily deposits something with an innkeeper, but, as we have seen, in lieu of a bank. So that, as in the Vermont case, the deposit of the money with the clerk had no connection with the original relation of innkeeper and guest. Under the special facts and circumstances of this case, the authority of the clerk to receive such deposit, so as to bind the defendant, was not within the apparent scope, nor within the ordinary course, of the clerk's employment, and the plaintiff had failed to show any special authority in the clerk to receive the deposit. The plaintiff knew, or ought to have known, that the clerk had no such authority arising from the ordinary course of his employment as a hotel clerk. That the plaintiff at least doubted such authority in the clerk is evidenced by the fact that he asked for the manager of the hotel, with whom to intrust his money for deposit in the bank. The authority which the clerk assumed was an unusual one, because it was without the apparent scope and ordinary course of the clerk's employment, and ought to have put the plaintiff on his guard; and it was a duty incumbent upon the plaintiff to act with ordinary prudence and reasonable diligence under such circumstances if he desired to hold the defendant responsible for his money. *Mechem, Agency*, § 290. The law of agency in general applies to bailments. The bailee is answerable for the acts of those he employs under him, so far as those acts are committed within the real or apparent scope of the agent's employment. *Schouler, Bailm.* 3d ed. § 19. "While an individual proprietor of an inn may incur a liability as bailee for the safe-keeping of

goods, which he has voluntarily undertaken to keep for others than guests, it is not within the course of employment of a mere clerk of such innkeeper to receive on deposit the goods of any except guests of the inn, and, if he does so, it is a transaction between him and the owner, and no liability for the loss of such goods attaches to the innkeeper." *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32, 49, 58 Am. Rep. 785, 4 N. E. 398, 405. In the cases of *Murray v. Marshall*, 9 Colo. 482, 59 Am. Rep. 152, 13 Pac. 589; *Clark v. Ball*, 34 Colo. 223, 2 L.R.A. (N.S.) 100, 114 Am. St. Rep. 154, 82 Pac. 529, and *Brown Hotel Co. v. Burckhardt*, 13 Colo. App. 59, 56 Pac. 188, referred to in the briefs, the facts, circumstances, subjects, and purposes of the bailments, are so essentially different from those in the present case that those opinions do not appear to be at all applicable here one way or the other.

From all of the foregoing, it appears that the clerk was without authority to receive plaintiff's money, so as to bind the defendant, and the plaintiff failed to connect the defendant with the loss of his money so as to make the company responsible for its loss. It follows, therefore, that it was error to overrule defendant's motion for nonsuit, and, as that error was not cured by any subsequent testimony, the judgment should be reversed, and it is so ordered.

Steele, Ch. J., and Campbell, J., concur.

MONTANA SUPREME COURT.

STATE BANK OF MOORE, Appt.,

v.

JOHN R. FORSYTH, Respt.

(— Mont. —, 108 Pac. 914.)

Note — want of consideration — defense.

1. Want of consideration is a defense to the enforcement of a note by the payee against the maker, although it purports on its face to have been given for value received.

Bank — authority of cashier — promise to maker of note.

2. The cashier of a bank has no authority to bind the bank by his promise that one signing paper without consideration, to replace that of the cashier, to enable the bank to pass inspection, shall not be held liable thereon, and one signing such paper is chargeable with notice of such want of authority, and acts at his peril in relying on the promise.

Note — substituted paper — surrender of note.

3. The surrender by a bank of paper 28 L.R.A. (N.S.)

which it holds against its cashier, in exchange for that of a stranger, is sufficient consideration to enable it to enforce the substituted paper.

Principal — knowledge of agent — notice — individual transaction.

4. A bank whose cashier induces a stranger to substitute his note for his own, which is held by the bank, is not, by reason of the cashier's knowledge, chargeable with notice that the maker received no consideration for the note.

(April 30, 1910.)

Note. — Power of bank officer to bind bank by agreement that liability of party to commercial paper shall not be enforced.

This note is confined to the power of the executive officers of the bank, such as president, cashier, etc., and does not include cases involving the power of bank directors as such.

As to power of bank officer to bind bank by agreement varying the liability of parties to commercial paper from that imported on its face, see note to *First Nat. Bank v. Lowther-Kaufman Oil & Coal Co.* post, 511.

It is a general rule recognized by the great majority of the cases, that the president or cashier or any other similar executive officer of a bank has no authority, simply by virtue of his office, to bind his bank by an agreement made with the maker or indorsers of commercial paper payable to the bank, that their liability on such paper will not be enforced. The rule applies whether the agreement is made before the paper has been signed, or after; but for convenience, the cases have been grouped according to the time the agreement was made.

Of course, if the bank ratifies the action of its officers, or fails to repudiate it within a reasonable time, then the bank will be liable,—the same as any principal who ratifies or acquiesces in the acts of his agent. Cases turning merely upon the question of ratification have not been included in this note.

Attention is called to the several cases fully set out in the foregoing opinion, which assert the general rule laid down above.

Agreement that no liability will be incurred.

The general rule has been frequently applied where a party to commercial paper claims that previous to the execution of the paper a bank officer told him that he would incur no liability.

Thus, an agreement made by the president of a bank that the defendant would not be liable if he indorsed certain notes to the bank was held, in *Loomis v. Fay*, 24 Vt. 240, not to be binding on the bank.

So, the representations by the president of a bank that the maker of a note payable to him, but discounted at the bank, will not

APPEAL by plaintiff from a judgment of the District Court for Fergus County in defendant's favor and from an order denying a new trial in an action brought to recover the amount alleged to be due on a certain promissory note. Reversed.

The facts are stated in the opinion.

Mr. O. W. Belden for appellant.

Messrs. Blackford & Blackford for respondent.

Smith, J., delivered the opinion of the court:

The plaintiff began this action in the district court of Fergus county to recover judgment against the defendant on a certain promissory note for \$1,550, dated June 20, 1907, due four months after date, with in-

be called upon to meet the note, are not binding upon the bank. *Kennedy v. Otoe County Nat. Bank*, 7 Neb. 59.

Thus, it is not within the authority of the president of a bank, when he discounts paper for the bank, to promise the maker that he need not pay it. *First Nat. Bank v. Tisdale*, 18 Hun, 151, affirmed in 84 N. Y. 655.

So, too, the president of a bank has no power to bind the bank by an agreement with the purchaser of the stock of the bank, that a note given in payment thereof will not be enforced. *Mead v. Pettigrew*, 11 S. D. 529, 78 N. W. 945.

And, in *Fowler v. Walch*, 119 App. Div. 542, 104 N. Y. Supp. 54, it was held that the president of a bank who procures a note made by himself and others to be discounted by said bank solely for the joint benefit of himself and of the other makers, by acting for or assuming to act for the bank, cannot make any agreement respecting such note which will in any manner relieve such makers, himself included, from their obligation to pay the same, when such agreement made by the president has not been ratified by the bank otherwise than by his acts as such president.

The maker of a note payable to a bank, given in renewal of another note which had been given for the amount of a draft indorsed by him solely for the purpose of identification, is not released from liability to the bank because he was assured by the cashier or the president, or both, before signing each paper, that he would incur no liability by signing the instrument. *Thompson v. McKee*, 5 Dak. 172, 37 N. W. 367.

A bank president has no inherent power as such to bind the bank by an admission to the effect that a promissory note was intended merely as a voucher. *Hodge v. First Nat. Bank*, 22 Gratt. 51.

In *National Bank v. Williams*, 46 Mo. 17, a bank cashier advanced the bank's money to the defendant to speculate in cotton, and the defendant signed a sight draft for the amount, which he claimed was without consideration so far as he was concerned and was intended only as a memorandum. 28 L.R.A. (N.S.)

terest after maturity at the rate of 10 per cent per annum. The defendant answered, admitting the corporate capacity of the plaintiff, and that the latter was the owner and holder of the note. He also admitted the making and delivery of the note, but denied that it was given for a valuable consideration, or for any consideration whatever. By way of affirmative defense he alleged that the note was made at the express instance and request of the plaintiff, without consideration, and for plaintiff's accommodation. He further pleaded in his answer that, at the time the note was made and delivered, it was agreed between him and the plaintiff that he should not be required to pay the note, and that he should not be in any manner liable thereon. As a further affirmative

The language of the court implies that it considered that the defendant could not escape liability because of the cashier's agreement not to hold him liable, but it was held that the bank, through its officers, had been guilty of laches in failing promptly to take proper steps to charge the defendant with liability, and consequently could not recover.

Agreement to release a party to a note from existing liability.

So, too, the general rule has been applied where a party to commercial paper has attempted to rely upon some agreement or act of the president or cashier, to release him from his liability upon the paper.

Thus, in *Ecker v. First Nat. Bank*, 59 Md. 291, it was held that a cashier as such has no power to accept a note signed by two parties only, in payment and discharge of a note upon which another party was also bound with the two, so as to release such third party from his indebtedness to the bank. The court said: "Such an act does not fall within the well-known range of powers and duties naturally and necessarily pertaining to the office of cashier. He cannot, *virtute officii*, release a surety upon a note even though the bank holds other security to which it might resort, nor make collateral contracts or agreements of any kind."

So, a cashier of a bank has no implied power, merely by virtue of his office, to receive money for interest in advance on a note owned by the bank, and agree to extend time of payment, and thus discharge an indorser from liability. *Bank of Ravenswood v. Wetzel*, 58 W. Va. 1, 70 L.R.A. 305, 50 S. E. 886, 6 A. & E. Ann. Cas. 48.

And in *Vanderford v. Farmers' & M. Nat. Bank*, 105 Md. 164, 10 L.R.A. (N.S.) 129, 66 Atl. 47, it was held that a cashier had no implied power by virtue of his office to alter a note by extending the time of payment without the knowledge and consent of the bank, so as to release a joint maker of the note who did not consent to the extension. The court said that this ruling was

defense he alleged that the note was procured by plaintiff through false and fraudulent representations on the part of plaintiff's cashier, with intent to deceive and defraud him. This latter defense was abandoned at the trial. The plaintiff by replication denied the new matter set forth in the answer. The cause was tried to the district court of Fergus county sitting with a jury. A verdict was returned in favor of the defendant, and judgment was entered thereon. From that judgment and an order denying a new trial the plaintiff has appealed to this court.

The note purported to have been made for value received. After the same was introduced in evidence the plaintiff rested. Thereupon the defendant testified, in part,

fully supported by the case of *Gray v. Farmers' Nat. Bank*, 81 Md. 631, 32 Atl. 518, which held that a bank cashier has no authority, *virtute officii*, to accept a new note in place of an old one, and thus release a surety upon the old note.

So, in *Merchants' Bank v. Rudolf*, 5 Neb. 527, it was held that a cashier of a bank by virtue of his office is not authorized to release a surety upon a note or bill belonging to the bank, without payment.

In *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 67, the court said: "We think the cashier of a bank has ordinarily no power to discharge a debtor of the bank without payment, or to bind the bank by an agreement that a surety should not be called upon to pay a note he had signed, or that he would have no further trouble from it."

So, in *Daviess County Sav. Asso. v. Sailor*, 63 Mo. 24, where a surety called upon the bank to ascertain whether a note on which he was surety had been paid by the principal, and was informed by the cashier that the note had not been paid, but that the bank had made arrangements with the principal by which the bank looked to him alone for payment, and that it did not look any longer to the surety, it was held that the agreement to discharge the surety was not within the ordinary scope of the cashier's authority.

A teller of a bank has no authority as such to erase the name of the signer of a note payable to the bank merely upon the signer's request, and his act in so doing does not operate as an alteration so as to release the other makers. *Marine Bank v. Ferry*, 40 Ill. 255.

The treasurer of a bank has no power to bind the bank by a promise to notify sureties upon a note of any failure to pay upon securities furnished by the principal. *New Hampshire Sav. Bank v. Downing*, 16 N. H. 188.

In *Olney v. Chadsey*, 7 R. I. 224, the court held that the president of a bank has no power by virtue of his office to surrender or release the claims of the bank against anyone.

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as follows: "This note was made in the bank at Moore, at C. W. Thurston's bank. Thurston was at that time cashier of the bank. Q. How came you to make this note?" This question was objected to on the ground that any oral contemporaneous agreement would tend to vary and change the tenor of the note, and because it had not been shown that Thurston was acting within the scope of his authority as cashier. The objection was overruled, and the witness continued: "Well, Mr. Thurston asked me to make a note, sign a note, for \$1,500, and I told him that I did not want to sign the note, and he asked me why, and I told him I could not pay the note if I was called upon to do so. He said that the bank would not hold me responsible. He said that his

In *Payne v. Commercial Bank*, 6 Smedes & M. 24, the question was raised, but not passed upon. It was contended that the court erred in charging the jury that the agent or cashier of a bank had no authority to bind the bank by any contract that would release parties from their notes. But the appellate court said that it was evident that the verdict was not predicated on a want of power in the cashier to bind the bank, but on the total absence of any binding contract.

The decision in *Wakefield Bank v. Truesdell*, 55 Barb. 602, is apparently to the contrary. Here it was held that the act of a bank's cashier in accepting interest in advance upon a note at its maturity was binding upon the bank, and the guarantor upon the note was thereby released. It may be, however, that this case is distinguishable upon the ground that the act of the cashier in accepting the interest for the bank was strictly within the scope of his authority.

Admissibility of parol evidence to prove the agreement.

In connection with the cases set out below, it should be borne in mind that they form but a very small portion of the cases dealing with the general question of the admissibility of parol evidence to vary the liability of parties to negotiable instruments. And any general conclusion as to the admissibility of parol evidence for that purpose, drawn from these cases, might be misleading, as possibly the rule as to admissibility of parol evidence in those jurisdictions might have been changed by later cases not within the scope of this note. The cases set out, however, present the then prevailing rule of the jurisdiction, as applied to the concrete question presented by the title to this note.

As to admissibility of parol evidence to vary liability of irregular party to bill or note from that declared by the negotiable instruments act, see note to *Haddock, B. & Co. v. Haddock*, 19 L.R.A. (N.S.) 136.

As to admissibility of parol evidence that written instrument for the payment of

paper would not, that the bank would not want his paper in there, and that it would not look well to the bank examiner, and I told him that was the condition under which I would sign it, that the bank would not hold me liable or responsible on the note; and he said the bank would never ask me to pay it, and that he would look after it, and that I never need bother about it. And I signed the note, and he took it and turned it in to the teller. I did not receive any of the proceeds of the note. I was not called upon to pay the note at the time of maturity. It must have been a month after the note matured before anything was said about it. Mr. Thurston was not still cashier of the bank. Mr. Hedrick, the cashier that went in afterwards, called upon me to pay the note. It is supposed Thurston got the proceeds of the note. Of course, at that time I didn't know whether he did or not. What makes me think he did is because it has been shown that he did to my mind.

It is through matters subsequently learned that I base my answer that Thurston got the proceeds of the note. Of my own knowledge I don't know anything about the matter. I had no dealings of that sort with Thurston before. He and I were in the real estate business together at that time. We were partners at that time in the Judith Basin Realty Company. At that time I was occupying an office in the State Bank of Moore; I had a back room. The Judith Basin Realty Company did not share any of the proceeds of that note. I did most of the work of the realty company."

John N. Phillips, a former bookkeeper and teller of the bank, testified: "Mr. Thurston was cashier of the bank until September 3, 1907. When this note went into the bank it took up three of Mr. Thurston's cash items, aggregating \$480.48, which had been running some little time, also two notes carried in the bank by Mr. Thurston, aggregating \$423.07. These notes were given

money was executed in reliance upon parol promise that payment was subject to a condition not incorporated therein, see note to *Gandy v. Weckerly*, 18 L.R.A. (N.S.) 434.

In some cases, it has been held that even if the agreement of the president or the cashier were binding on the bank, still parol evidence is inadmissible to show the existence of such agreement.

Thus, in *Thompson v. McKee*, 5 Dak. 172, 37 N. W. 367, it was held that an indorser or maker of a negotiable instrument cannot show by parol that he signed the instrument solely for purposes of identification and upon the assurance of the president and cashier of the bank discounting the paper that he would not be liable thereon, because the effect of such testimony is to contradict the written agreement.

And parol evidence is not admissible to show an agreement between the president of a bank and the maker of a note payable to the bank, that the latter shall not be liable upon it, because such evidence tends to prove that the defendant did not promise what the paper signed by him says that he did. *First Nat. Bank v. Tisdale*, 18 Hun, 151, affirmed in 84 N. Y. 655.

So, in *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146, where the defendant offered to prove as a defense that he accepted certain drafts on which the action was brought, for the accommodation of another, and that before they were accepted the president of the bank agreed orally that he should not be called upon to pay the draft, it was held that proof of such an agreement was incompetent, for the reason that it violated the rule of law that oral evidence was inadmissible to vary or control the terms of a written contract.

And in *First Nat. Bank v. Foote*, 12 Utah, 157, 42 Pac. 205, it was held that parol evidence is not admissible to show that, at the time the defendants signed a

note payable to the bank, the cashier thereof told them that it was intended as a mere matter of form and they would not be called upon to pay it, thus negating the written promise.

Parol evidence is not admissible to show an agreement by the president and cashier of a bank that the indorser of a promissory note shall not be liable upon his indorsement thereof. *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. ed. 316.

Parol evidence was held admissible in *First Nat. Bank v. Pegram*, 118 N. C. 671, 24 S. E. 487, to show that, at the time a note became due at a bank, the cashier informed the indorser that sufficient funds had been deposited by the assignee of the principal to pay the note, but that matters had not been fully arranged, and that it was necessary to renew the note so as to keep the bank's affairs straight, and that the indorser would incur no liability by indorsing the renewal note. No question, however, was raised as to the power of the cashier to bind the bank by the agreement.

In a few cases the objection to the admission of the testimony is not based on the so-called parol evidence rule.

Thus, in *People's Sav. Bank v. Hughes*, 62 Mo. App. 576, it was held that testimony is not admissible to prove that the cashier of a bank agreed with the surety on a note that, if the latter would procure security for a forged note which had been deposited in the bank to take up the note upon which the surety was liable, the bank would release the surety from his liability, the agreement being beyond the scope of the cashier's authority.

And a subsequent indorser is not competent to prove facts which would tend to discharge a prior indorser from the responsibility for his indorsement. *Bank of the Metropolis v. Jones*, 8 Pet. 12, 8 L. ed. 850.

to the bank by Thurston, and the proceeds of the Forsyth note, or part of it, took up those two notes. Four drafts issued by the bank on June 20, 1907, through Mr. Thurston, aggregating \$51.40, were also paid by Thurston from the proceeds of the note. Part of the other proceeds of this note went to the credit of Mr. Thurston's account, and he took cash for some of it. Under date of June 20, 1907, Thurston's account shows a credit of \$400. That \$400 came from the proceeds of the Forsyth note. The balance was taken in cash. While I was employed in the bank, Mr. Thurston had charge of making the loans; that was principally his work. He made all kinds of loans. He made loans as large as the capital of the bank would stand. I don't think he consulted any of the directors of the bank. I know positively that on certain loans he did not consult with other directors of the bank. As long as he had charge of the bank he pursued that line of conduct, or making loans of that character and size without consulting the other directors or officers of the bank. He had charge of the promissory notes taken by the bank. In making payments of notes no one was consulted but the cashier. I didn't consult anyone except Thurston. If he was away I used my own judgment in the matters. The bank had a manager. Mr. Thurston was the manager. The directors of the bank held meetings once a year, on the 1st of January. They never held any meetings after that, until September of the year 1907. Mr. Hauck, the president of the bank, was about the bank there quite often, probably twice a week, or once. He usually came into the bank and talked a little while and went out again. Mr. Thurston issued the drafts of the bank exclusively. He made the loans if he was there. If he was away, I made them in his place. Mr. Thurston used his own judgment in making loans. There was no one there for him to consult with. It was the custom to make loans immediately upon application. A great many promissory notes were taken without security. Notes were usually taken by Thurston without consulting anyone else. The president of the bank resided 10 miles from Moore, and the vice president resided 50 miles away. Thurston was in charge of the bank as manager on June 20, 1907. This note came to the bank in the usual course of business. Thurston brought it to me. The rest of the banking force were working under him. He overlooked their work. He had charge of the moneys."

At the close of defendant's case the plaintiff moved for a directed verdict in its favor. The motion was overruled. Thereupon John C. Hauck, the president of the bank,

was called as a witness for the plaintiff. He said: "I was supervisor of the affairs of the bank during the year 1907. Every once in a while we would go over the accounts and check them all up, I and Mr. Warr, the cashier of the Bank of Fergus County. We did that for about four months after the bank was started, and then we done it off and on ever since up to the time Thurston left. I went through everything that was in the bank several times in the two years, about five or six times I should judge. That was when Thurston had charge of the bank. I never, as president, authorized Thurston to make any collateral agreements that the paper of the bank should not be, or was not to be, collected. I don't think we directors had any meetings in the spring and summer of 1907."

At the close of all the testimony, the plaintiff's counsel requested the court to charge the jury that, if the State Bank of Moore paid any consideration for the note, their verdict must be for the plaintiff, and also that the alleged oral agreement of Thurston that the defendant would not be called upon to pay the note was no defense to the action. The court refused the requests. Over appropriate objection by the plaintiff, the court advised the jury that, as between the maker and payee of a promissory note, oral evidence touching the consideration thereof could be considered by them, and that if they found that the defendant received no consideration, and that the note was made for the accommodation of the plaintiff, their verdict should be for the defendant. The jury was also instructed, without objection, that "if Thurston owed to or borrowed from the plaintiff the amount of the note sued upon, and if, at the request of Thurston, the defendant gave to the plaintiff the note sued upon in satisfaction of such indebtedness of Thurston to the plaintiff, and the plaintiff accepted the note as such satisfaction, then the note was given upon sufficient consideration, and the plaintiff is entitled to recover the amount due on the note."

The court also gave to the jury instruction No. 3, as follows: "The court instructs the jury that the burden of proof was on the plaintiff to show that the note was given upon a valuable consideration, and that, if that was doubtful upon the whole evidence, plaintiff could not recover; that the admission by the defendant of the execution of the note and its production in evidence made a prima facie case for the plaintiff upon which the jury might find a verdict for plaintiff, unless the defendant introduced evidence which showed that it was not given for a valuable consideration, or evidence to render it doubtful in the minds

of the jury whether it was given on a valuable consideration, and that if not so given, or if it was doubtful whether it was given for a valuable consideration, the plaintiff could not recover." Plaintiff objected to this instruction, for the reason that it placed the burden of proving the consideration for the note upon plaintiff, whereas the burden of showing a failure of consideration was upon defendant; also because the instruction is in conflict with instruction No. 9, which reads as follows: "(9) You are instructed that the note sued upon in this case imports a consideration, and the burden of showing a want of consideration sufficient to support a written instrument lies with the party seeking to invalidate it."

Instruction No. 7 reads as follows: "The court instructs the jury that, if you find from the evidence that the defendant signed the note sued upon in this case as an accommodation maker for the plaintiff, and delivered the note to the plaintiff, or one of its officers for the bank, the defendant cannot be held liable thereon, no matter how the bank may have dealt with the note, so long as it retained ownership and control thereof; and, even though you find that the bank, after the note was delivered to it, gave Thurston the benefit of the whole or a part of it, this fact would not render defendant liable on the note." This instruction was also objected to for several reasons; among others, that it conflicts with instructions 8, 10, and 11, given by the court. These latter instructions read as follows:

"No. 8. If you find from the evidence that the note in question was made, executed, and delivered to the State Bank of Moore by John Forsyth, for the accommodation of Mr. Thurston, and that Thurston received the benefits therefrom, then you must find for the plaintiff."

"No. 10. The plaintiff in this action is a corporation, and you are instructed that a corporation is bound by the acts of its officers or agents only so far as they act within the scope of their authority. In this action, the burden is upon the defendant to prove, by a preponderance of the evidence, that in making the oral agreement, if you believe that such oral agreement was made, Thurston, the cashier of the plaintiff, was acting within the scope of his authority as such cashier, or that such agreement was subsequently ratified by the plaintiff in the action. If the defendant has failed to prove these allegations by a preponderance of the testimony, your verdict should be for the plaintiff."

"No. 11. In this action the defendant claims, among other things, that the note sued upon was made for the accommodation of the plaintiff. You are instructed that an

accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser without receiving any value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder, at the time of taking an instrument, knew him to be only an accommodation party."

We think the foregoing extracts from the instructions fairly illustrate the theory upon which the case was tried, and that the motions and exceptions of counsel for appellant are sufficient to raise the vital questions argued in this court. We shall not analyze the instructions, but will content ourselves with the statement that, assuming that they correctly state the law, the jury failed to follow them. The testimony, however, is practically uncontradicted. There is no conflict in essentials, and, in our judgment, but one inference may be drawn from it. Therefore the cause should not have been submitted to the jury. The court should have directed a verdict for the plaintiff.

1. The first question arising is whether the defense of want of consideration in the note, pleaded and attempted to be interposed by the defendant, was a valid one. In the case of *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32, the court of appeals, after a review of the New York cases on the subject, held that it was a valid defense to the enforcement of a promissory note against the maker, by the party to whom it was delivered, that the note was without consideration, and was delivered upon the condition that the maker should not be held liable thereon. To the same effect are the rulings of the courts in *Breneman v. Furniss*, 90 Pa. 186, 35 Am. Rep. 651; *Burke v. Dulaney*, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816; *Benton v. Martin*, 52 N. Y. 570; *Garfield Nat. Bank v. Colwell*, 57 Hun, 169, 10 N. Y. Supp. 864; *Simmons v. Thompson*, 29 App. Div. 559, 51 N. Y. Supp. 1018; *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408; *Juilliard v. Chaffee*, 92 N. Y. 529; *Schindler v. Muhlheiser*, 45 Conn. 153. In the case of *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977, cited by appellant in opposition to the principle laid down in the foregoing cases, it appeared that there was a consideration for the note in question, and the court said: "The law will not permit the maker of a note, where there is a consideration, to show an oral agreement that he was not to be liable at all on the note." Appellant also cites the case of *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321, but in that case the court said: "The note fixes the obligation of the appellant to pay, and

his pleadings leave open to him only the defense that it was executed without consideration. Evidence tending to support that defense is admissible." The court then proceeded to show that there was a valid consideration for the note. The case of *Davy v. Kelley*, 66 Wis. 452, 29 N. W. 232, is also called to our attention. In that case it was held that evidence of a contemporaneous oral agreement between the parties to a note, that it was not to be enforced as between them, is inadmissible. But the opinion of the court, by Mr. Justice Taylor, discloses the fact that it was finally determined that the note in suit was given upon sufficient consideration. We are of opinion that, in view of the authorities, and in principle, the rule laid down by the New York court of appeals, in *Higgins v. Ridgway*, supra, is founded in sound reason, and that the court below properly followed the same.

2. Was the bank bound by the representations of its cashier that defendant should not be called upon to pay the note? The Supreme Court of the United States, in *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428, held that, although a cashier of a bank ordinarily has no power to bind the bank except in the discharge of his customary duties, and although the ordinary business of a bank does not comprehend a contract made by a cashier, without delegation of power from the board of directors, involving the payment of money not loaned by the bank in the customary way, nevertheless it may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been suffered by the directors, without interference or inquiry, to conduct the affairs of the bank; and when, during a series of years, or in numerous business transactions, he has been permitted, in his official capacity and without objection, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. The matter involved was a legitimate transaction from which the bank derived an advantage. It will be observed that the principle of estoppel *in pais* was thus invoked against the bank.

Again, the Supreme Court of the United States, in *West St. Louis Sav. Bank v. Shawnee County Bank* (*West St. Louis Sav. Bank v. Parmalee*), 95 U. S. 557, 24 L. ed. 490, said: "Ordinarily the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of posi-

tive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of banking; . . . but certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power." Mr. Thompson in his work on Corporations (vol. 2, 2d ed. § 1532) says: "The principal limitation on the powers of a cashier is that his acts must be within his ordinary duties. It cannot be assumed that he is authorized to do every act within the powers of the bank. His implied authority is limited to acts done in the usual and ordinary course of business, and cannot be extended to cover unusual or extraordinary transactions. For the transaction of such business, special authority must be conferred upon him by the directors." In volume 1 of *Morse on Banks & Banking* (Parsons 4th ed.) § 167, we find this statement: "It can never be pretended that he [the cashier] has any incidental powers to bind the bank by declarations or admissions which are made beyond the scope of his duties. Thus, his statement or promise given to a person who is about to put his name as indorser upon a note which the bank has agreed to discount, to the effect that such person will not be held liable or shall not be looked to by the bank, is altogether inoperative and void as an undertaking of the bank." See also *Bolles*, *Modern Law of Banking*, p. 361.

In the case of *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. ed 316, the defendant offered to prove that the cashier and president of the bank gave him to understand that if he indorsed the note in suit, he would incur no risk or responsibility. The court said: "The most decisive objection to the evidence is that the agreement was not made with those persons who have power to bind the bank in such cases. It is not the duty of the cashier and president to make such contracts, nor have they the power to bind the bank except in the discharge of their ordinary duties." In *Bank of the Metropolis v. Jones*, 8 Pet. 16, 8 L. ed. 851, the court said: "It is unnecessary to add in this case, as was stated by the court in the case of *Dunn*, that the officers of the bank had no authority, as agents of the bank, to bind it by the assurances which they gave." In the *Jones Case* it appeared that the president of the plaintiff bank had assured the indorser, through the maker, that he would

incur no responsibility on the note on account of the fact that certain property, which could be subjected to its payment, was very valuable. In the case of *Thompson v. McKee*, 5 Dak. 172, 37 N. W. 367, the facts were these: McKee went to the First National Bank of Sioux Falls to identify one Wolf, and at the request of the cashier wrote his name on the back of a draft, the cashier assuring him that he should not be liable on it, his name being wanted merely to show who identified Wolf. McKee afterwards gave his note to the bank for the amount of the draft it had cashed, with an understanding with the cashier that his liability on the note should not be greater than it was on the draft, and he subsequently renewed this note, with a similar understanding with the president and cashier. The court held that the facts constituted no defense, for the reason that the president and cashier had no authority to make any such contract. Mr. Justice Spencer, speaking for the court, said: "It has been repeatedly held by the highest judicial tribunals that officers of banks have not the power to excuse or limit the legal obligations of persons to the banks they represent, by agreeing with them that they shall not be held liable or called upon to pay the obligations which they make, either as principal debtors or accommodation makers or indorsers, and on the credit of which the bank has parted with its funds." In the case of *Clafin v. Farmers' & C. Bank*, 25 N. Y. 293, it was held that the general authority of the president of a bank to certify checks drawn upon it does not extend to checks drawn by himself. The supreme judicial court of Massachusetts, in *Dedham Inst. v. Slack*, 6 Cush. 408, held that the treasurer of an incorporated institution for savings has no authority, as such, and without being specially authorized thereto, to execute a release in the name of the corporation. In *Gallery v. National Exch. Bank*, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193, it was shown that one Irwin was president of the bank and also of a railway company. With other directors of the railway company he made a note to the bank. Evidence was introduced tending to prove that the note was not to be paid by the makers thereof, but only from the assets or funds of the railroad company. It was claimed that Irwin, as president of the bank, consented to an arrangement by which the debt was assumed by a third person and the makers released. The court said: "Even, however, had he [Irwin] assumed to act for and represent the bank, being liable as maker and indorser, he could not consent to his own release and that of his comakers, and bind the bank thereby. . . . 28 L.R.A. (N.S.)

That he could not act in such a double and antagonistic capacity is well settled in this state." See also *Payne v. Commercial Bank*, 6 Smedes & M. 24; *Bank of Commerce v. Hart*, 37 Neb. 197, 20 L.R.A. 780, 40 Am. St. Rep. 479, 55 N. W. 631; *Bank of Pennsylvania v. Reed*, 1 Watts & S. 101; *Hodge v. First Nat. Bank*, 22 Gratt. 51; *Cocheco Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 68; *Daviess County Sav. Asso. v. Sailor*, 63 Mo. 24; *Sandy River Bank v. Merchants' & M. Bank*, 1 Biss. 146, Fed. Cas. No. 12,309; *Ellis v. First Nat. Bank*, 22 R. I. 565, 48 Atl. 936; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa, 737, 98 N. W. 606; *Mendel v. Boyd*, 71 Neb. 657, 99 N. W. 493.

The testimony shows that the transaction in controversy was an isolated one. The defendant testified that he had previously had no dealings of the kind with Thurston. No question of estoppel is involved. Hauck testified that he, as president, had never authorized the cashier to make the arrangement testified to by the defendant, and there is no evidence that the board of directors did so. We conclude, therefore, that the promise of Thurston was, on its face, beyond the scope of his authority, and that the defendant was chargeable with notice thereof. We hold that the cashier of a bank, by virtue of his office, has no authority to make such an arrangement as that testified to by the defendant, and that whoever accepts such an agreement and acts upon it does so at his peril.

3. But it is contended that the note was in fact given without consideration. If so, this was an available defense against the payee, regardless of whether the cashier had authority to promise that defendant should not be called upon to pay. The testimony shows conclusively that the plaintiff in fact parted with full consideration for the note, and, to our minds, the evidence of the defendant himself proves that a valid consideration passed, and that he was aware of the fact that certain assets of the bank were to be withdrawn and his note substituted in place thereof, at the time he executed and delivered the same. How otherwise can his statement that "the bank would not want to have Thurston's paper in there" be explained? The only reasonable construction to be placed upon his testimony is that he knew that Thurston was personally desirous of withdrawing his paper. But it is immaterial what phraseology was employed. The very fact that Thurston proposed to withdraw his own paper was notice to the defendant that he was acting for himself.

And there are other reasons why the judgment cannot stand. The whole transaction shows on its face that Thurston was

in fact acting for himself, and not for the bank, and that the defendant either knew the fact, or should have known it: Thurston was engaged in a palpable attempt to defraud the bank of which he was cashier, and the defendant by his acts made it possible for him to consummate the fraud. In the case of *Pauly v. O'Brien* (C. C.) 69 Fed. 460, Judge Ross said: "It is said for the defendant that the note sued on was without consideration. Not so, according to the agreed statement of facts, for it is there stated that it was executed in place of and to take up the note of Naylor, then represented by the bank officers to be past due and to be secured by collaterals which were believed to be ample to pay it, and which they represented the bank wanted to get 'out of the past-due notes,' and which, together with the collaterals, were to stand as collateral to the note executed by the defendant, upon the execution of which the Naylor note was entered as paid on the books of the bank, and the defendant's note was entered thereon 'as a discount for its face.' It thus appears that the defendant executed his first note, subsequently renewing it from time to time, and ultimately by the note in suit, for the purpose of having it take the place of the Naylor note, which, together with the collaterals, 'were to be collateral to the note' given by him. If, however, this was not really the case, but that, in truth, the transaction was a mere trick to make it appear to the government and to the creditors and stockholders of the bank that it had a valuable note when in fact it did not have one, the result must be the same; for, when parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason, as well as pure justice, to leave him bound who has bound himself. It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act. . . . It would require more credulity than I possess to believe that the defendant, when his brother, who was the bookkeeper of the bank, came to him with the proposition of its vice president, in its every suggestion and essence deceptive and fraudulent, did not know its true character and purpose. So far as appears, Naylor was a total stranger to him. Why should he execute his note to take up the note of Naylor? What moved him to do it, except to enable the officers of the bank to supplant the overdue note of Naylor with a live note, which he now insists was without consideration and purely voluntary, but which enabled the

bank officers to make a deceptive, and therefore fraudulent, showing of assets?"

In the case of *Allen v. First Nat. Bank*, 127 Pa. 51, 14 Am. St. Rep. 829, 17 Atl. 886, the facts were these: The bank brought an action to recover the sum of \$5,000 alleged to be due on a promissory note. The defendant offered to prove that Beecher, the cashier of the bank, came to him at the postoffice and said that the bank was carrying for his firm of Beecher & Copeland a quantity of oil certificates, in excess of what they were permitted to carry for one firm under the laws of the United States, and that the bank desired to have the oil carried in the name of other parties, so as to make an appearance of compliance with the law, and for that purpose he asked the defendant to become the maker of a note for \$5,000, to be secured by 5,000 barrels of oil that the bank was carrying for Beecher & Copeland; and, in compliance with this request, Allen executed the note without other consideration, and with the express agreement that he should not be held liable thereon. The trial court directed a verdict for the plaintiff bank. On appeal the supreme court said: "Assuming all the facts covered by the offers to have been proved, they would not have amounted to a defense as against the bank. The whole confusion in the case grows out of the fact that the Mr. Beecher . . . was at the same time a member of the firm of Beecher & Copeland and cashier of the . . . bank. . . . The effort here is to make the bank responsible, not merely for matters done in the scope of his duties as cashier, or by authority of the bank, but also for his acts and declarations done or made in the pursuit of his private business. His interview with the defendant at the postoffice can only be taken as an effort on his part to procure accommodation paper to the amount of \$5,000 to take up a like amount of his firm's paper at the bank. In some way his firm had obtained a larger line of discount at the bank than is permitted by the general banking law; the bank examiner was expected soon, and it became necessary for defendant's firm to retire some of its paper. It was equally necessary, perhaps, for the bank; and the defendant, as its cashier, must have been fully aware of the importance of getting the accounts of his own firm in proper condition. He succeeded in procuring from the defendant his note for \$5,000, to replace a like amount of his firm's paper, with an assurance that the defendant should never be called upon to pay it." The case of *Simmons v. Thompson*, 29 App. Div. 559, 51 N. Y. Supp. 1018, is called to our attention by the learned counsel for the respondent. In that case, however, the

court held that the vice president of the Loan & Trust Company, who induced the defendant to make the note in suit by representations that he should not be held liable upon it, was apparently clothed with authority in the premises; the facts show that he was actually engaged in carrying forward a transaction which was beneficial to his principal, and also that the corporation had ratified his acts. The question of consideration as arising from the detriment to the trust company, which advanced money on the note, is not mentioned in the majority opinion, but is quite clearly shown by the dissenting opinion of Mr. Justice Ingraham. Aside from this, we do not regard the doctrine laid down by the court in that case as a healthy one. It loses sight of the rights of innocent stockholders and depositors in banks altogether, and relieves a party who, by affirmative action, has brought about the unfortunate condition in which he finds himself.

But it is contended that the knowledge possessed by Thurston is to be imputed to the bank, and therefore the latter had notice that Forsyth received nothing for the note. The correct rule on this subject is, we think, laid down in *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282, as follows: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating. . . . A bank . . . can act only through agents, and it is generally true that, if a director who has knowledge of the fraud or illegality of the transaction acts for the bank, as in discounting a note, his act is that of the bank, and it is affected by his knowledge. . . . But this principle can have no application where the director of the bank is the party himself contracting with it. In such case the position he assumes conflicts entirely with the idea that he represents the interests of the bank. To hold otherwise might sanction gross frauds, by imputing to the bank a knowledge those properly representing it could not have possessed." See also *State Sav. Bank v. Montgomery*, 126 Mich. 327, 85 N. W. 879.

In the case at bar we have only to consider the effect of the testimony to determine that the defendant is not in a position to dispute his liability on this note. It 28 L.R.A. (N.S.)

would be a most dangerous holding if we should decide, upon the facts disclosed by the record, that he could do so. We find no evidence that he had any idea or purpose of accommodating the bank. It does not appear that Thurston was present at the trial. It does appear, however, that he used the funds of the bank from time to time, that he resigned his position there, and that it was necessary to prove his handwriting by another person. The whole record seems to show that his management of the bank was at least open to criticism, and it is not a violent conclusion, perhaps, that he was not available as a witness. The defendant was his partner at the time the note was given, and had his office in the rear of the bank. Upon being requested to sign a note for \$1,500, on account of the fact that his (Thurston's) paper in the bank would not look well, he did so without inquiry as to the amount of such paper which it was proposed to take up, and without asking what disposition was to be made of the balance, if any, of the proceeds of the note. He thus made it possible for Thurston, not only to take up two of his own notes for \$200 each, which were assets of the bank, but to also draw out a large amount in cash. It seems to us that the request of Thurston bore on its face conclusive evidence that some fraud was projected. The defendant knew that his note was to pass through the regular channels of the bank. He saw Thurston hand it to the teller. It is a penal offense in this state to knowingly make false entries in the books of a bank, or to knowingly subscribe or exhibit false papers with intent to deceive the state bank examiner. Rev. Codes. § 4001. The defendant was chargeable with knowledge of this statute, and with notice that it was Thurston's purpose to violate it. How can it be possible for a man of ordinary intelligence to suppose that a request for an accommodation note for a large amount, made by a cashier, is intended to be for the benefit of the bank? Notes are ordinarily given to a bank for the purpose of borrowing money therefrom. We can conceive of no circumstances under which a bank can require an accommodation note on its own account for any legitimate purpose. It seems to us that the mere request carries notice that the purpose for which such paper is intended to be used is not a lawful one. What legitimate end could possibly be served by carrying in a bank commercial paper which was not to be paid under any circumstances? Obviously none. The only possible design would be to deceive someone, either the stockholders, the depositors, or the bank examiner, who acts for them in the name of the state. It is only an innocent party who may take advantage

of such a defense as that attempted to be interposed in this case, when other innocent parties have suffered. The defendant cannot claim to occupy such position. The stockholders in the plaintiff bank have, through his connivance, suffered a loss of \$1,550, and a case might arise, as it often does, where the loss would fall upon the still more innocent depositors. We cannot give our assent to the proposition, whatever may have been the holdings of other courts upon the subject, that a party who has been guilty of such gross negligence as has the defendant in this case can escape liability on account of technical rules of law, and compel other persons to stand the loss caused by his total lack of care. The presumption that Thurston informed the bank, through its proper officers, of his fraudulent intention to withdraw its funds for his own personal use, through the medium of defendant's note, is fully removed by the reflection that, had he done so, his purpose would have been defeated.

The order and judgment appealed from are reversed, and the cause is remanded to the District Court of Fergus County, with directions to enter judgment in favor of the plaintiff as prayed for.

Brantly, Ch. J., and Holloway, J., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

FIRST NATIONAL BANK OF NEW MARTINSVILLE

v.

LOWTHER-KAUFMAN OIL & COAL COMPANY et al.

and

FRANK WELLS CLARK et al., Plffs. in Err.

(66 W. Va. 505, 66 S. E. 713.)

Note — action — joint judgment — necessity of protest.

1. A joint action may be maintained by the holder of a negotiable note, and a joint judgment recovered against the maker and all the indorsers, if the note has been protested, or if protest and notice has been waived by the indorsers.

Bank — authority of cashier — qualified indorsement.

2. A cashier has no authority, simply by virtue of his office, to bind his bank by an agreement made with the indorsers on a promissory note, and unknown to the directors, to the effect that each of said indorsers shall be liable only for a certain proportion of the debt; and it matters not

whether such contract relates to original notes presented for discount, or to notes taken either in payment or in renewal, or pre-existing notes.

Same — notice to director — effect.

3. Notice to one of the directors of a matter affecting the interest of the bank, which it is to the interest of such director to conceal, is not notice to the bank.

Jury — oath — objection to — waiver — appeal — presumption.

4. In a civil action, objection to the form of the oath administered to the jury to try the case cannot be made, for the first time, after verdict. If the record shows that the jury were sworn, and the form of oath administered does not appear, this court will presume that they were properly sworn.

(December 21, 1909.)

ERROR to the Circuit Court for Wetzel County to review a judgment in plaintiff's favor in an action brought to recover the amounts alleged to be due on certain promissory notes. Affirmed.

The facts are stated in the opinion.

Messrs. Thomas P. Jacobs and John M. Hamilton for plaintiffs in error.

Messrs. E. L. Robinson and Hall & Hall, for defendant in error:

A cashier cannot *virtute officii* release a surety upon a note held by the bank, even though the bank holds other security to which it might resort, but special authority is necessary to justify such a release.

Merchants' Bank v. Rudolf, 5 Neb. 527; Cochecho Nat. Bank v. Haskell, 51 N. H. 116, 12 Am. Rep. 67; Gray v. Farmers' Nat. Bank, 81 Md. 631, 32 Atl. 518; Ecker v. First Nat. Bank, 59 Md. 303; Bank of United States v. Dunn, 6 Pet. 51, 8 L. ed.

Note. — Power of bank officer to bind bank by agreement varying the liability of parties to commercial paper from that imported on its face.

As to power of bank officer to bind bank by agreement that liability of party to commercial paper will not be enforced, see note to State Bank v. Forsyth, ante, 501. The limitations prescribed in that note are also observed here.

The few reported cases upon this subject hold with FIRST NAT. BANK v. LOWTHER-KAUFMAN OIL & COAL Co. that a bank president or cashier, merely by virtue of his office, has no power to bind the bank by an agreement that the liability of parties to commercial paper shall be different from that imported upon its face.

Thus, in Bank of United States v. Dunn, 6 Pet. 51, 8 L. ed. 316, it was held that the liability of parties to bills of exchange or promissory notes has been fixed on certain principles which are essential to credit and the circulation of such paper, and parol

316; *United States v. City Bank*, 21 How. 356, 16 L. ed. 130; *Morse, Banks & Banking*, §§ 128, 169; *Bank of Ravenswood v. Wetzel*, 58 W. Va. 1, 70 L.R.A. 305, 50 S. E. 886, 6 A. & E. Ann. Cas. 48; *Hodge v. First Nat. Bank*, 22 Gratt. 51; *Clark & M. Priv. Corp.* § 2158; 4 *Thomp. Corp.* § 4750; *Dan. Neg. Inst.* § 395.

Mr. Henry M. Russell also for defendant in error.

Williams, J., delivered the opinion of the court:

Plaintiff brought an action of assumpsit in the circuit court of Wetzel county against the Lowther-Kaufman Oil & Coal Company, a corporation, the maker, and C. F. Lowther, W. R. Fitch, J. I. Norris, Brent Shriver, F. W. Clark, and J. W. Kaufman, the indorsers, of six several negotiable promissory notes aggregating, exclusive of interest, \$28,000, and on the 23d day of July, 1908, recovered a judgment for \$29,195.34. To this judgment F. W. Clark and Joseph I. Norris obtained a writ of error from this court.

The notes were indorsed for the accommodation of the maker. One of them was payable to the order of C. F. Lowther and indorsed by him and the others; another one was payable to the order of Brent Shriver and indorsed by him and the others; and the remaining four of said notes were payable to all of the said defendants and were indorsed by them. The action was tried on November 2, 1907, upon a demurrer to the defendants' evidence, and the jury found a verdict in favor of plaintiff for the amount above stated, subject to the action of the court upon the demurrer to the evidence. The court sustained the demurrer to the evidence and entered judgment upon the verdict. There was also a demurrer to the declaration, which the court overruled.

The first assignment of error relates to the action of the court in overruling the demurrer to the declaration. It is insisted that the demurrer should have been sus-

tained for the alleged reason that there is no authority in law for a joint action against the maker and the several indorsers of a negotiable note when the note has not been protested, and § 11, chap. 99, Code 1899 (Code 1906, § 3449), is relied on. This section provides that debt, or assumpsit, may be maintained and a joint judgment rendered against the maker and indorser of negotiable paper, "if the same be protested." The notes in the present case were not protested, but protest had been waived by the indorsers. The signatures of the indorsers appear under the following printed words on the backs of the notes, which were on them at the time they were indorsed, viz.: "Demand, Notice of Protest, and Nonpayment Waived." It is contended that the statute above referred to was not intended to authorize a joint action against the maker and several indorsers of a note unless it has been formally protested. We hardly think so. The declaration alleges that the indorsers waived protest and notice. The statute is remedial and should be liberally construed. Protest and notice of dishonor is intended for the protection of the indorser, and it is a right which he can waive. By waiver he makes his liability just as absolute as if the paper indorsed by him had been formally protested, and his relation to the holder and all other indorsers becomes the same in every respect as in the case of protest. The object of the statute is to give the payee, or holder of the paper, a surer and quicker remedy to collect his money than he formerly had, which was by a proceeding against each indorser in the inverse order of their indorsement: and also to avoid a multiplicity of actions. It would therefore be extremely technical and unwarranted, we think, to give the statute the limited construction contended for. It would be contrary to the spirit of the statute. It was therefore not error to overrule the demurrer to the declaration.

The next error relied on in brief of counsel is that the court erred in permitting the

evidence is not admissible to show that one who indorsed a note did so upon the assurance of the president and cashier that it was only a matter of form to satisfy the requirements of the law, and that certain bank stock had been pledged or was to be pledged as security for the payment of the note, and that the indorser was to be looked to only in case of a deficiency.

So, a cashier, in the ordinary performance of his duties as such, has no power to bind the bank by an agreement with the surety upon a note, made at the time the note was delivered to the bank, that the bank would obtain certain securities sufficient to pay the note, as collateral to the note, and the securities would be exhausted 28 L.R.A. (N.S.)

before any liability of the surety would attach. *Martin v. First Nat. Bank*, 11 Ohio C. C. N. S. 93.

A bank cashier has no power to bind the bank by an agreement with an indorser upon a protested note that, if the indorser will confess judgment thereon, the bank would hold such judgment as collateral security and endeavor to collect the debt from the maker of the note. *Bank of Pennsylvania v. Reed*, 1 Watts & S. 101.

A bank president has no power to bind the bank by an agreement made with one depositing securities to a note, to the effect that he would see that the note was paid and that the securities would not be sold. *Breyfogle v. Walsh*, 71 Fed. 898.

notes sued on to go as evidence to the jury. This involves the same question raised by the demurrer to the declaration; and, there being no error in overruling the demurrer, it necessarily follows that there is no error in admitting the notes in evidence, because of want of protest. There is a written waiver on the notes.

The next error assigned relates to the rejection of the defense set up by special pleas filed by the two plaintiffs in error. The plea of nonassumpsit was also pleaded, and issues were joined on these several pleas. The special pleas set up, as a defense, a certain written contract alleged to have been made between the several indorsers on the aforesaid notes, as directors and stockholders of the Lowther Oil Company, the predecessor in interest of the Lowther-Kaufman Oil & Coal Company, fixing and limiting their liability on account of their several indorsements, of which contract it is alleged plaintiff, through its cashier, had notice, and to the terms of which it agreed. The questions arising under these several special pleas will be considered along with the questions arising under the next assignment of error, which relates to the action of the court in sustaining the demurrer to the defendants' evidence.

The contract set up in the special pleas bears date the 7th day of November, 1901, and is made between C. F. Lowther, in his own right and as administrator of F. P. Lowther, deceased, and L. M. Merrill, F. W. Clark, W. R. Fitch, Joseph I. Norris, J. W. Kaufman, and Brent Shriver. It recites that the parties named own all the stock in the Lowther Oil Company, a corporation, in the following proportions, *viz.*: C. F. Lowther, $\frac{1}{4}$; the estate of F. P. Lowther, $\frac{1}{4}$; L. M. Merrill, $\frac{1}{8}$; F. W. Clark, $\frac{1}{8}$; W. R. Fitch, $\frac{1}{8}$; Joseph I. Norris, $\frac{1}{8}$; J. W. Kaufman, $\frac{1}{8}$; and Brent Shriver, $\frac{1}{8}$. It further recites that it may become necessary to borrow money, to execute new notes, and to renew notes already made, in order to carry on the business of the company; that in regard to such indebtedness said parties are not willing to be bound further than in proportion to the amount of their stock held in said company. The contract then proceeds to authorize and empower the president and secretary of said corporation to borrow money not exceeding \$50,000, and also to renew any outstanding indebtedness, to execute the promissory note of said corporation for any loan of money, or in renewal of notes, and concludes with a guaranty for the payment of any such note in proportion to the stock owned by each, and provides that "if in the negotiation of any such loan or renewal it becomes necessary for any of said stockholders to indorse or

sign any such notes individually in order to satisfy the rules and regulations of the bank from which any such money is borrowed, the said stockholders shall be liable to said bank and to each other upon any such note or notes in proportion to their said stock in said corporation." This contract was signed by the Lowther Oil Company and by all of the above-named parties, and below their signatures was the following memorandum or note:

The First National Bank of New Martinsville, West Virginia, hereby takes notice of this contract, and any money it may loan to said Lowther Oil Company will be loaned upon the terms therein set forth and agreed upon between the individual stockholders.

First National Bank,

By J. Lee Harne, Cash.

[Corporate Seal of
First National Bank.]

We have no doubt that such a contract, as between the parties to it, is lawful and enforceable, but it is claimed by defendant in error that it was not a party to the contract, and is not bound by it; that the cashier was not authorized to bind the bank by such a contract; that the directors never had any knowledge of it, and never ratified it. There is no evidence in the case that Cashier Harne was authorized by the board of directors to make the agreement, nor does it appear that he ever presented it to them for ratification at any of their meetings. Mr. Harne says he does not know whether he presented it to the board of directors or not. He says, "It may have been presented at a meeting and discussed, but I don't recollect positively." He also says that he does not know that he even called it to the attention of any of the officers of the bank. There is evidence, however, that Mr. C. F. Lowther, one of the indorsers, was also a director of the bank for the years 1903, 1904. But he, being a one-fourth owner of the stock of the Lowther Oil Company, is bound by the agreement for as large an amount as any other indorser, and is bound for four times as much as either Norris or Clark, the plaintiffs in error, and would therefore be interested in withholding his information from the other bank directors. Consequently, the information which C. F. Lowther had could not be imputed to the directors, who act collectively, so as to bind the bank. 1 Morse, Banks & Banking, §§ 112, 136; 5 Cyc. Law & Proc. p. 461, and numerous cases cited in note 22. No copy of the contract was deposited with the bank. Cashier Henry Koontz, who succeeded Cashier Harne in July, 1904, says that he examined the book containing the minutes

of the various meetings held by the directors, and that they contained no mention of the contract. Robert Morris, who was one of the directors of the bank ever since its organization, and who lives in the town of New Martinsville and attended most all of the directors' meetings, testifies that this contract was never called to his attention, and that he had no knowledge of it whatever. S. Bruce Hall, one of the stockholders of the bank, and also its president until January, 1902, and afterwards a director from January, 1902, to January, 1903, testified that he had no knowledge of such a contract. Both he and Robert Morris, however, testify concerning a certain written contract which was prepared by said Hall, and which, he says, occupied about a half a typewritten page, limiting the liability of the stockholders of the Lowther Oil Company upon their indorsement of one certain note of \$5,000, but that this contract applied to no other note. There were a number of \$5,000 notes given by the Lowther Oil Company that were indorsed by its directors, and the testimony of Cashier Koontz shows that two of these \$5,000 notes were paid in cash, or by check, in 1905. So that, it does not appear that either of the two \$5,000 notes sued on is the one concerning which Mr. Hall prepared the contract. But Mr. Hall furthermore testifies that the bank was not a party to the contract prepared by him, and knew nothing of it. Mr. Harne, the cashier, also testifies that, "as a rule, when any of the notes fell due, he renewed them without referring the matter to the discount committee," and that he does not remember to have referred any of the renewal notes to the "discount committee, or having them pass on them." So that, allowing full faith and credit to all the defendants' evidence, and considering all proper and reasonable inferences deducible from it, we think it fails to prove either that Cashier Harne was ever authorized by the directors of the bank to make the contract, or that they ever ratified it. The case turns then upon the following question of law, *viz.*: Had the cashier power, by virtue of his office, to bind his bank by such a contract? We think he had not. It is a well-settled principle of law that the cashier has no authority to bind his bank by acts done without authority, and beyond the scope of his duties and power. But this is too general. The question is: Was the particular act in question beyond the scope of his authority? To determine whether or not a particular act of the cashier is beyond his power is often very perplexing, because it depends largely upon the custom and usage of the particular bank affected, and also upon usage prevailing in particular localities. Hence there is much

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apparent conflict in the decisions of the courts of the various states of the Union.

Assuming, as we must do from the proof, that Cashier Harne had no express authority from the directors to surrender the notes which had the unqualified indorsements of the indorsers thereon, and to take in renewal thereof notes indorsed by the same persons, but under an agreement, separately made with them and not appearing on the notes, qualifying and limiting their several liabilities to a sum less than the full amount of the notes, it is clearly seen that he would thereby be surrendering some of the security of his bank. This he could not do without exceeding his powers. This would apply to all those notes in existence at the time the contract was made, and which were carried into any of the notes sued on, by renewals. But it appears that some of the notes sued on were taken either in payment, or renewal, of notes of the Lowther Oil Company, which were discounted after the contract was made. Had the cashier power, by virtue of his office, to lend the bank's funds, or to discount bills and notes? If he had such power without consulting the board of directors, or the discount committee, then we do not doubt that he had the power to bind his bank by the contract, because the power to discount paper with the bank's funds would carry with it the power to pass upon the sufficiency of the security, and incidentally the power to make any contract affecting the security that the directors as a body could make. But it is not shown that the cashier is authorized by the charter or the by-laws of the bank to make loans of the bank's funds. The evidence shows that it was the custom of the bank to have applications for original loans passed on by the discount committee before the paper was discounted, although Cashier Harne testifies that, in some instances, he discounted paper without referring it to the directors or to the discount committee; but he does not claim that it was the usual custom or practice for him to do so, neither does he say that he was ever authorized to do so. Witness Hall testifies that he had frequent controversies with the cashier growing out of his unwarranted assumption of authority, and that he finally refused to serve as a director on account of it. We think the evidence is insufficient to prove the authority of the cashier to make loans of the bank's funds, as a rule or custom of the bank.

In *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. ed. 316, it was held that it was not within the duty of the cashier and the president of the bank, and that they had no power to bind the bank by a contract with an indorser on a promissory note that he should

not be liable upon his indorsement. In *United States v. City Bank*, 21 How. 356, 16 L. ed. 130, the question was whether or not Moodie, the cashier of the bank, who had addressed a letter to the Secretary of the Treasury in which he stated that William Miner, one of the directors of the bank, and the bearer of the letter, was authorized to contract on behalf of the bank for the transfer of money from the East to the South or West for the government, had the authority thereby to bind his bank. In pursuance of this letter, Miner received a draft from the Secretary of the Treasury drawn upon the assistant treasurer at New York in favor of the assistant treasurer at New Orleans, for \$100,000. Miner cashed the draft in person, but did not turn the money over to the assistant treasurer at New Orleans, nor did it appear that the City Bank of Columbus had received any of the funds. In the trial of the action against the City Bank of Columbus, the following charge was given to the jury, and was upheld by the Supreme Court, *viz.*: "That if they should find that the letter written by Moodie was his own act, and had been given without the knowledge or authority of the board of directors, or any of them individually, except Miner, and that the agency of Miner was not constituted by or known to the board of directors, or the directors individually, or any of them except Miner, but was the act of the cashier alone, and if they should find that Moodie had no power as cashier, except such as belonged to the office of cashier generally, or such as are given by the charter or by the by-law or other law or usage of the said bank, that the defendant was not concluded by that letter, and is not bound by the contract made by Miner, without some subsequent ratification of the same, though the Secretary had, in contracting with Miner, relied upon it as the act of the bank."

In our view this charge, or instruction, states correctly and comprehensively the principle applicable to the present case. It is true, as counsel for plaintiffs in error argues, that there is a presumption in favor of the regularity of the act done by the cashier, and that this presumption may be invoked by the party deceived by the cashier's conduct. But this is only a rebuttable presumption, which, in the present case, is overthrown by the proof which shows that he was acting without authority and that his unauthorized act was not subsequently ratified by the directors. If the indorsers have been deceived by trusting too much to the authority of the cashier, they may properly be said to have voluntarily taken the risk in relying upon the cashier's assumption of power, and they

must suffer the consequences resulting from their failure to make further inquiry into his authority; if they had made inquiry of the board of directors at the time the notes were renewed and the contract of limited indorsement was entered into, they would have found that the cashier had not been authorized to accept their qualified indorsements in renewal of paper which they had previously indorsed unqualifiedly, and that he was likewise without authority to make new loans upon such qualified indorsements. The stockholders of the bank should not be made to suffer because of the unwarranted assumption of power on the part of the cashier.

Counsel for plaintiffs in error relies upon the following cases from this court: *Smith v. Lawson*, 18 W. Va. 212, 41 Am. Rep. 688; *First Nat. Bank v. Kimberland*, 16 W. Va. 555; *Curry v. Hale*, 15 W. Va. 867; *Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co.* 56 W. Va. 446, 49 S. E. 544. These cases do not govern, because there is no evidence in the present case, as there was in those, that the act of the cashier was afterwards ratified by the board of directors, either expressly or by implication. To constitute an implied ratification, the person, or body, affected by it, must have had knowledge of the act to be ratified; and, as before stated, there is no proof in the present case that the directors, or any of them, except C. F. Lowther, who would be interested in withholding the information from the directors, had any knowledge of the contract.

A number of decisions from the courts of other states are likewise relied on; but we deem it unnecessary to review them in this opinion, for the reason that almost all of them are distinguishable in some material respect from the present case, and for the further reason that we regard the principles announced by this court in the cases of *Lamb v. Cecil*, 25 W. Va. 288, and *Bank of Ravenswood v. Wetzel*, 58 W. Va. 1, 70 L.R.A. 305, 50 S. E. 886, 6 A. & E. Ann. Cas. 48, as determining this case. If the cashier had authority to accept a note in lieu of the bank's funds on such a qualified indorsement, we could see no reason why he would not also have authority to accept a note indorsed purely as matter of form, and under an agreement to release the indorser from all liability. The law confers no such power upon the cashier simply by virtue of his office. The stockholders of a bank intrust the lending of its money and the management of its affairs to a board of directors, and, if the bank's charter does not authorize the cashier to lend its funds, he can derive his authority to do so only from the board of directors, who must act collectively, and as a body, and who are not, individually, by virtue of their office, the several agents of

the bank. 5 Cyc. Law & Proc. p. 466; 1 Morse, Banks & Banking, § 124.

Finding, therefore, that the contract of limited indorsement set up by the special pleas does not bind the bank, it constitutes no valid defense to the plaintiff's action. Consequently, it becomes unnecessary for us to decide whether or not the series of notes executed by the Lowther-Kaufman Oil & Coal Company were taken in payment of the notes held by the bank against the Lowther Oil Company, or were simply renewals of those notes.

For the reasons hereinbefore stated, it was no error to refuse to permit witness Harne to answer the question whether or not F. W. Clark had refused to indorse notes of the Lowther Oil Company until after the contract before mentioned was signed.

It is also assigned as error that J. W. Kaufman, one of the indorsers, was proceeded against as a nonresident, upon order of publication, and judgment rendered against him jointly with the other indorsers. But this is error affecting Kaufman only; it is a matter of which he alone has any right to complain, and is in nowise prejudicial to plaintiffs in error.

It is also alleged as error that the record does not show that the jury were sworn to try the issues joined. The record shows that on October 15, 1907, issues were joined on the general plea of nonassumpsit and also on several special pleas; that the jury were selected on that day and were "charged and cautioned as the law directs," and were adjourned, and the trial of the cause likewise adjourned until the 28th of October, 1907; that on the latter date an order was made in the cause, which shows that the jury were "sworn, agreeable to their adjournment," on the 15th of October, 1907. We think this is sufficient to show that the jury were sworn to try the issues. The oath at this time could have been administered for no other purpose, inasmuch as the jury had been previously elected to try the case. It is not necessary that the record should state the form of oath administered. *State v. Sutfin*, 22 W. Va. 771; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757; *State v. Ice*, 34 W. Va. 244, 12 S. E. 695; *State v. Kellison*, 56 W. Va. 690, 47 S. E. 166. Furthermore, the record does not show that any objection was made, at the time, to the form of the oath, whatever the form was that was administered; and, if there was really any defect in the form of the oath, plaintiffs in error waived it by failing to object. *State v. Ice*, *supra*.

"The term 'issue' is collective, and in a case where there are several issues it is sufficient merely to swear the jury to try 'the issue.'" 24 Cyc. Law & Proc. p. 371; 28 L.R.A. (N.S.)

White v. Clay, 7 Leigh, 68; *Mackey v. Fuqua*, 3 Call (Va.) 19; *Hatcher v. Fowler*, 1 Bibb, 337; *Bates v. Lewis*, 1 J. J. Marsh. 316; *Pointer v. Rust*, 7 Humph. 532. It is too late to object to the form of oath after the verdict. *Thomp. & M. Juries*, § 286.

Finding no error in the record of which plaintiffs in error have any right to complain, the judgment of the lower court will be affirmed.

Petition for rehearing denied January 11, 1910.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON EX REL.
SEATTLE GENERAL CONTRACT COM-
PANY et al.,

v.

SUPERIOR COURT FOR KING COUNTY
et al.

(56 Wash. 649, 106 Pac. 150.)

Appeal — order for inspection — writ of review.

1. An order for inspection of books and papers in possession of defendant may be reviewed on appeal from the final judgment which may be entered in the case, and therefore cannot be taken up under a writ of review, where the statute authorizes such writ only where no appeal is provided.

Discovery — private papers — statutory provision.

2. A statute empowering a court to order an inspection of papers, and to enforce the order by contempt proceedings, does not apply to papers which are of such a private nature as not to be receivable in evidence.

Appeal — contempt — discovery — certiorari.

3. If the court attempts to enforce an order to allow an inspection of papers, the one against whom it is entered may appeal from the order imposing the punishment; and therefore a writ of certiorari will not lie to review an order of inspection, where the statute authorizes such writ only where no appeal is allowed.

(January 12, 1910.)

Note. — Right to review of order granting or denying motion for inspection of books or papers, apart from an appeal from final judgment.

An order for the production of books and papers is regarded as a mere interlocutory order, and for that reason not a subject of separate appeal. *Quinn v. Pennsylvania R. Co.* 219 Pa. 24, 67 Atl. 949; *Logan v. Pennsylvania R. Co.* 132 Pa. 403, 19 Atl. 137; *Harris v. Richardson*, 92 Minn. 353, 100 N. W. 92; *Western U. Teleg. Co. v. Locke*, 107 Ind. 9, 7 N. E. 579; *Illinois*

CERTIORARI to review an order of the Superior Court for King County, directing the inspection of certain documents in the possession of relators, who are parties to an action pending therein. Writ quashed.

The facts are stated in the opinion.

Messrs. Hughes, McMicken, Dovell, & Ramsey, Roberts, Battle, Hulbert, & Tennant, and Morris V. Sachs, for relators:

No order for inspection of books or papers should be made until the action is at issue.

New York State Bkg. Co. v. Van Antwerp, 23 Misc. 38, 51 N. Y. Supp. 653; Allen v. Fowler & W. Co. 45 App. Div. 506, 61 N. Y. Supp. 325; Diefendorf v. Fenn, 125 App. Div. 651, 110 N. Y. Supp. 68; Van Walters v. Children's Guardians, 132 Ind. 567, 18 L.R.A. 431, 32 N. E. 568; Kelly v. Mutual Life Ben. Asso. 1 Marv. (Del.) 183, 40 Atl. 954; Sheek v. Sain, 127 N. C. 266, 37 S. E. 334; Smithson v. Stanton, 7 D. C. 6; Palen v. Johnson, 18 Abb. Pr. 304; Thompson v. Erie R. Co. 9 Abb. Pr. N. S. 212; Com. ex rel. Keely v. Perkins, 124 Pa. 36, 2 L.R.A. 223, 16 Atl. 525; Victor G. Bloede Co. v. Joseph Bancroft & Sons Co. 98 Fed. 175; American Ore Machinery Co. v. Atlas Cement Co. 110 Fed. 53.

Trust & Sav. Bank v. Howard, 185 Ill. 332, 57 N. E. 39; Erwin v. Ottawa Circuit Judge, 138 Mich. 271, 101 N. W. 537.

And in Phipps v. Wisconsin C. R. Co. 130 Wis. 279, 110 N. W. 207, it was held that such an order was merely interlocutory, and not appealable, when made in a special statutory proceeding for the examination of witnesses, where the statute provided that in special proceedings only final orders affecting substantial rights were appealable.

The following cases, in which it was sought to have such an order reviewed on a separate appeal, are cases which were disposed of on the ground that the order was within the discretion of the court and was not reviewable; at least, unless it clearly appeared that the discretion was wrongfully exercised (Clyde v. Rogers, 87 N. Y. 625; White v. Munroe, 33 Barb. 650, 12 Abb. Pr. 357; Watt v. Watt, 2 Robt. 685; Hart v. Ogdensburg & L. C. R. Co. 69 Hun, 497, 23 N. Y. Supp. 713; Brown v. Georgi, 26 Misc. 128, 56 N. Y. Supp. 923; Palmer v. United Press, 67 App. Div. 64, 73 N. Y. Supp. 456; Allison v. Vaughan, 40 Iowa, 421; Sheldon v. Mickel, 40 Iowa, 19); or that the enforcement of the order would work irreparable injury (Horton v. Thornhill, 14 La. Ann. 139; Marks's Succession, 108 La. 494, 32 So. 401).

But in Ellinger v. Equitable Life Assur. Soc. 125 Wis. 643, 104 N. W. 811, and Noonan v. Orton, 28 Wis. 386, it was held that 28 L.R.A. (N.S.)

Messrs. George E. de Stelguier and Harold Preston, for respondents:

The materiality of the evidence may be made to appear by the pleadings.

Utah Constr. Co. v. Montana R. Co. 145 Fed. 981.

The application was not premature.

6 Enc. Pl. & Pr. p. 789; Sheek v. Sain, 127 N. C. 266, 37 S. E. 334; Harris v. Richardson, 92 Minn. 353, 100 N. W. 92.

Mount, J., delivered the opinion of the court:

The relators by this proceeding seek to review an order of the lower court, directing an inspection of certain documents in the possession of the relators. It appears that C. D. Bussell and others brought an action in the lower court against E. W. Ross, commissioner of public lands for the state of Washington, and the relators herein, seeking an accounting for the cost of filling in certain tide lands by the relators, under a contract with the state, entered into pursuant to the act of March 9, 1893 (Laws 1893, chap. 99, p. 241), which tide lands were alleged to have been purchased by the said plaintiffs from the state subsequent to and subject to said contract, and also seeking a

an order granting or refusing to require the production of books and papers was appealable under a statute making any order granting, refusing, continuing, or modifying a provisional remedy appealable.

And in Mehesy v. Kahn, 18 Jones & S. 209, the refusal of an order for the production of books was considered on appeal and affirmed, the court saying that such an order was within the discretion of the court, and should not be allowed for the purpose of enabling plaintiff to form his complaint, unless the necessity thereof was apparent.

In Lester v. Berkowitz, 125 Ill. 307, 17 N. E. 706; and Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356, the court said that while an order for the production of books or papers was not such a final order as might be reviewed on appeal or error, nevertheless, if the defendant refused to comply therewith, and was punished, appeal or error would lie from the judgment, and the propriety of the order would be considered.

But in Cleveland, C. C. & I. R. Co. v. Closser, 126 Ind. 348, 9 L.R.A. 754, 3 Inters. Com. Rep. 387, 22 Am. St. Rep. 593, 26 N. E. 159, the court said that the party was not obliged to disregard the order for the production of books and papers, suffer for its disobedience, and then appeal, and that where it objected in due season, and reserved an exception, it could be heard on appeal, although it could not have appealed from the isolated order. R. L. S.

restraining order to prevent the commissioner of public lands from issuing certificates to the relators, which certificates become a lien upon such lands, for a greater amount than the actual cost of such fill. After the service and filing of the complaint in that action, the parties therein filed and served a motion for an inspection and leave to copy certain books and papers of the relators, under § 6047, Ballinger's Anno. Codes & Statutes (Pierce's Code, § 1011). At the hearing upon this motion, the defendants appeared and demurred to the complaint upon the ground that it did not state a cause of action, and also objected to the granting of the motion, for the reason that the court was without jurisdiction to make the order, because the complaint failed to state a cause of action, and because no showing by affidavit was made as to the materiality of the books and papers, or that such books and papers contained evidence material to any issue, or upon the merits, and because the application was prematurely made before issues of fact were joined. The court denied these objections, and entered an order for an inspection of certain books and papers. Relators thereupon applied to this court for a writ of certiorari to review this order, and the writ was issued.

The respondents have moved to quash the writ upon the ground that the order is an interlocutory order, and may be reviewed upon appeal from any final judgment which may be entered in the cause. This motion must be granted. The statute authorizes the writ of review only where there is no appeal, and where there is no plain, speedy, and adequate remedy at law. Ballinger's Anno. Codes & Statutes, § 5741 (Pierce's Code, § 1396). This court has uniformly held that where there is a plain, speedy, and adequate remedy by appeal in the ordinary course, the writ of certiorari will not issue. *State ex rel. Wilkeson Coal & Coke Co. v. Superior Ct.* 49 Wash. 203, 94 Pac. 920; *State ex rel. Smith v. Superior Ct.* 47 Wash. 508, 92 Pac. 349; *State ex rel. Weymouth v. Lockhart*, 28 Wash. 460, 68 Pac. 894. The order made in this case was not a final order. It was simply an interlocutory order, made in the progress of the case. The statute under which the order was made provides: "Any court or judge thereof in which an action is pending may, upon notice, order either party to give to the other within a specified time an inspection and copy, or permission to take a copy, of any book, document, or paper in his possession or under his control, containing evidence relating to the merits of the action or defense therein. If compliance with the order be refused, the court may exclude the book, document, or paper from being given in evi-

28 L.R.A. (N.S.)

dence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing, as for contempt." Ballinger's Anno. Codes & Statutes, § 6047. It is at once apparent that any order made under this statute for the production or inspection of books or papers in an action pending is an interlocutory order in such action. *Harris v. Richardson*, 92 Minn. 353, 100 N. W. 92. It is no more than a ruling upon an offer of evidence at the trial, and is no more final than any other ruling admitting or excluding evidence in a case. For that reason no appeal can be taken directly from such ruling, even if error is manifest therein. Such rulings are reviewed upon the final judgment, and not otherwise. The fact that an appeal will not lie directly from such order is not sufficient basis for a writ of review, because the party deeming himself aggrieved has an adequate remedy by appeal from the final judgment in the case. *State ex rel. Wilkeson Coal & Coke Co. v. Superior Ct.* supra. In this case we said: "The writ of review will not, however, be issued in all cases where the court has exceeded its jurisdiction. It will be issued only in cases where there is no appeal, or where, in the judgment of the court, there is not any plain, speedy, and adequate remedy at law. The relator has the remedy of appeal, since the order attacked was one made in the course of the action, and may be reviewed on appeal from the final judgment." Any other rule would result in interminable delay and confusion in the trial of cases.

Counsel for relators argue, in substance, that these books and papers are private property of the relators, and an inspection thereof by the plaintiffs in that action will result in an invasion of the private rights, and possibly to the irreparable injury, of the relators. The statute, of course, does not contemplate that the parties to an action may have an inspection of books and papers which are not material, or which, on account of their confidential and privileged character, could not be received in evidence, and if an order were made for the inspection of such books or papers, a party would be safe in refusing to submit to such order; and if the court should attempt to enforce obedience by a fine or imprisonment for contempt, the judgment imposing a penalty would be a final order, which might be reviewed independently of the main case. *Lester v. Berkowitz*, 125 Ill. 307, 17 N. E. 706. But for books and papers, though private, which might properly be introduced in evidence in the case, the court clearly has a right to order an inspection thereof.

In the case of *Western U. Teleg. Co. v. Locke*, 107 Ind. 9, 7 N. E. 579, the supreme court of Indiana, in discussing a case somewhat similar to this, said: "It is very ingeniously and ably argued that great hardship might often result from the error of a trial court in directing the production of a document, but there are many cases in which the erroneous ruling of the trial court on a question arising in the course of the proceeding may produce great hardship; yet this consideration supplies no reason for allowing an appeal. The truth is that in every case much must necessarily be left in the first instance to the sound judgment of the trial judge; and, although he may err, and thus cause serious injury to the party, still no appeal will lie until after the final judgment, for the case cannot be cut up into parts and tried by piecemeal. An error in compelling a party to give oral testimony may be as injurious as one made in directing the production of written instruments of evidence, but certainly in such a case there can be no appeal until after final judgment. So an error may be committed in compelling the disclosure of confidential communications, or in compelling a party to submit to a personal examination, and yet there can be no appeal from such a ruling. So, also, great hardship may arise from erroneously compelling a party to produce a letter, a receipt, a promissory note, a lease, or a deed; but the hardship of the case will not entitle the party to an appeal. On the other hand, to allow appeals from such rulings before final judgment would be a great hardship to the party rightfully demanding the production of the instrument. It would also be a great injustice to the public and a burden to the courts, for it would enable litigants to take many appeals in a single cause. It is safer to trust the trial judge than the interested parties. It is consistent with experience and in harmony with sound principle to trust to the judge rather than to the parties having important interests at stake, and often angered by controversy. It is far better to presume that the judge will not unjustly require the production of a written document, than to presume that a party will not abuse the right of appeal." This language was used in reference to the right of appeal in that case, but it is particularly applicable here, and clearly expresses our ideas upon the subject in hand. We are of the opinion, therefore, that certiorari will not lie to review the order complained of, because the relators have a remedy by appeal from the final judgment in the case, where any errors made by the trial court relating to the sufficiency of the complaint, or the showing for the order of inspection, 28 L.R.A. (N.S.)

or the admissibility of the books and papers as evidence, may be reviewed.

The motion to quash is therefore sustained.

Rudkin, Ch. J., and Crow, Parker, and Dunbar, JJ., concur.

OKLAHOMA SUPREME COURT.

MAMIE H. CLARK et al., Plffs. in Err.,
v.
W. W. GRANT.

(— Okla. —, 109 Pac. 234.)

Limitation of action — payment on barred note — revival of mortgage as to subsequent lienor.

A mortgage given to secure a note is regarded as an incident thereto. Where such note and mortgage are once barred, payment of interest on the note revives not only the note, but the mortgage, so far as affects the interest of the payors, and continues it a valid and subsisting lien upon the mortgaged premises superior to the rights of subsequent judgment lienors.

(May 10, 1910.)

ERROR to the District Court for Pottawatomie County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a certain promissory note and to foreclose a real-estate mortgage given to secure same. Affirmed.

The facts are stated in the opinion.

Messrs. T. G. Cutlip and Frederick King, for plaintiffs in error:

Judgment lien holders can effectually interpose the plea of the statute of limitations to the mortgage lien against the plaintiff, the same as might have been done by the defendant Scott.

Brandenstein v. Johnson, 140 Cal. 29, 73 Pac. 744; *Wood v. Goodfellow*, 43 Cal. 185; *De Voe v. Rundle*, 33 Wash. 604, 74 Pac. 836; *George v. Butler*, 26 Wash. 456, 57 L.R.A. 396, 90 Am. St. Rep. 756, 67 Pac. 263; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271; *Raymond v. Bales*, 26 Wash. 493, 67 Pac. 269.

The property mortgaged standing as security for the debt, when the debt is barred,

Headnote by TURNER, J.

Note. — The question whether payment of acknowledgment by the mortgagor will toll the statute of limitations against his grantee, lienor, or other person holding an interest in the property through him, is discussed in a note to *Kaiser v. Idleman*, ante, 169.

the property mortgaged is released from the lien; and no act subsequent to the bar can renew the lien as against the judgment lienor.

Levy v. Williams, 20 Tex. Civ. App. 651, 49 S. W. 930, 50 S. W. 528; *Lord v. Morris*, 18 Cal. 483; *Fowler v. Wood*, 78 Hun, 304, 28 N. Y. Supp. 976; *Richey v. Sinclair*, 167 Ill. 184, 47 N. E. 364; *Waterson v. Kirkwood*, 17 Kan. 9.

The mortgage is a mere incident of the debt, or security for its payment, and when the right of recovery as to the debt is barred, the mortgage is barred also, and the lien is in repose.

Newhall v. Sherman, 124 Cal. 509, 57 Pac. 387; *McGovney v. Gwillim*, 16 Colo. App. 284, 65 Pac. 346; *Hibernian Bkg. Asso. v. Commercial Nat. Bank*, 157 Ill. 524, 41 N. E. 919; *Lilly v. Dunn*, 96 Ind. 220; *Brown v. Rockhold*, 49 Iowa, 282; *Kulp v. Kulp*, 51 Kan. 341, 21 L.R.A. 550, 32 Pac. 1118; *Stone v. McGregor*, 99 Tex. 51, 87 S. W. 334.

The mere payment of a part of a barred debt, without anything being said about the residue, will not renew the debt. It must be expressly so intended or the bar continues.

McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170; *Chadwick v. Cornish*, 26 Minn. 28, 1 N. W. 55; *Anderson v. Robertson*, 24 Miss. 389; *Crow v. Gleason*, 141 N. Y. 489, 36 N. E. 497; *Steel v. Matthews*, 7 Yerg. 313; *McKeen v. McDougall*, 3 N. S. 403.

To take the barred debt out of the statute, the intent must be clear and the statement, promise, or acknowledgment unequivocal.

Chase v. Carney, 60 Ark. 491, 31 S. W. 43; *Toothaker v. Boulder*, 13 Colo. 219, 22 Pac. 468; *Richardson v. Chanslor*, 103 Ky. 425, 45 S. W. 774; *Adams v. Olin*, 140 N. Y. 150, 35 N. E. 448; *Brown v. Latham*, 58 N. H. 30, 42 Am. Rep. 568; *Brisbin v. Farmer*, 16 Minn. 215, Gil. 187.

When the debt is barred it may be revitalized by a part payment, and it will then be good and binding as against the debtor; but such part payment will not revitalize the mortgage lien even as against the debtor, unless the debtor does some act that will renew or extend the mortgage lien.

Wells v. Harter, 56 Cal. 342; *Wood*, Limitations, § 81; *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *California Bank v. Brooks*, 126 Cal. 198, 59 Pac. 302; *Filipini v. Trobock*, 134 Cal. 441, 66 Pac. 587; *Jeffers v. Cook*, 58 Cal. 147; *Southern P. Co. v. Prossor*, 122 Cal. 413, 55 Pac. 145.

The mere interest payment indorsed on the note in suit, without the direction of Scott, is not sufficient to revive the lien.

Wells v. Harter and *Levy v. Williams*, supra; *McCarthy v. White*, 21 Cal. 495, 82 Am. 28 L.R.A. (N.S.)

Dec. 754; *Lord v. Morris*, 18 Cal. 482; *Heinlin v. Castro*, 22 Cal. 100; *Pena v. Vance*, 21 Cal. 142.

Messrs. Whit M. Grant and Samuel A. Calhoun, for defendant in error:

Where a note and mortgage have become barred by the statute of limitations, the payor thereof may revive such note and mortgage by part payment, and against himself; and in order that third persons may successfully plead the statute of limitations, it is necessary that the rights of such third persons shall have accrued prior to revivor.

Hubbard v. Missouri Valley L. Ins. Co. 25 Kan. 172; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408; *Brown v. Rockhold*, 49 Iowa, 268; *Richey v. Sinclair*, 167 Ill. 184, 47 N. E. 364.

A payment in anything of value is sufficient, and it is not necessary that cash should be paid.

25 Cyc. Law & Proc. pp. 1374, 1379, note § 3; *Cuthbertson v. Hill*, 65 Vt. 573, 27 Atl. 71; 19 Am. & Eng. Enc. Law, p. 327, and note 4.

When once the lien of a mortgage has attached to real estate, it continues until the debt shall have been paid or barred by the statute of limitations.

27 Cyc. Law & Proc. pp. 1162, 1411, notes 73, 76, 85; *Morse v. Clayton*, 13 Smedes & M. 373; *Rice v. Dewey*, 54 Barb. 455; 19 Am. & Eng. Enc. Law, 2d ed. p. 289, notes 10 & 11.

Any subsequent purchaser or lienor takes with the record showing the mortgage, which must be presumed unpaid, and all encumbrancers take at their peril.

Brown v. Rockhold, supra; *Waterson v. Kirkwood*, 17 Kan. 9; *Topeka Capital Co. v. Merriam*, 60 Kan. 397, 56 Pac. 757; *Richey v. Sinclair*, supra; *Hibernian Bkg. Asso. v. Commercial Nat. Bank*, 157 Ill. 524, 41 N. E. 919; 25 Cyc. Law & Proc. p. 1328, note 5, p. 1359, note 84, p. 1373; 19 Am. & Eng. Enc. Law, 2d ed. p. 318, note 10.

After the statute has completely run, the mortgagor cannot revive as against those whose rights have intervened after the bar and before the revivor.

27 Cyc. Law & Proc. p. 1561, note 72; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Grayson v. Mayo*, 2 La. Ann. 927; *Damon v. Leque*, 17 Wash. 573, 61 Am. St. Rep. 927, 50 Pac. 485.

A new promise or acknowledgment or part payment which revives the debt also revives the security.

25 Cyc. Law & Proc. p. 1359, note 84; 19 Am. & Eng. Enc. Law, 2d ed. p. 289, notes 10 & 11.

Turner, J., delivered the opinion of the court:

On April 22, 1907, W. W. Grant, defendant in error, sued Samuel J. Scott and Eva M. Scott in the district court of Pottawatomie county on a promissory note and to foreclose a mortgage on certain real estate in Tecumseh to secure the same, made, executed, and delivered to him by them on May 22, 1894. He alleged in his petition that Mamie H. Clark and W. W. Coleman, plaintiffs in error, and Marie L. King, claimed some interest in the mortgaged property inferior to his mortgage lien, and made them also parties defendant. All defendants defaulted except Clark and Coleman, who answered, pleaded the statutes of limitations, set up their respective liens, and sought to have them declared superior to that of plaintiff. At the close of the testimony defendants demurred to the evidence, which was overruled, and verdict and judgment rendered for plaintiff. Defendants bring the case here, and assign that the court erred in overruling their demurrer, because they say the evidence discloses plaintiff's debt was barred prior to the time their liens accrued. The note sued on is dated Tecumseh, Oklahoma territory, May 22, 1894, and thereby defendants S. J. Scott and Eva M. Scott "jointly and severally promise to pay to W. W. Grant, or order, \$500 at Whit M. Grant's office, Oklahoma City, with interest thereon at the rate of 12 per cent per annum, payable semiannually from date until paid," etc. Indorsed thereon is: "Nov. 22-94, Int. to date Pd. \$30. Int. Pd. to May 22-95, \$30. Int. Pd. to Nov. 22-95, \$30. Int. Pd. May 22-96, \$30. Int. Pd. Nov. 22-96, \$30. Int. Pd. to May 22-97, \$30. Dec. 1, 1903, paid acct. Int. \$3.60. Dec. 21, 1905, paid acct. Int. \$3.85." Plaintiff concedes that, had nothing intervened between the payment of interest evidenced by the credit on May 22, 1897, and the time of suit, the note would have been barred, but insists that the payment of \$3.60 interest, as evidenced by the indorsement of December 1, 1903, raised the bar and revived the debt and with it his mortgage lien. He relies on the Statutes of Oklahoma 1903, § 4222, which reads: "In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby." Construing this statute the Supreme Court of Kansas has repeatedly held 28 L.R.A. (N.S.)

such payment, after the bar has fallen, to revive a mortgage note and with it the lien of the mortgage. *Topeka Capital Co. v. Merriam*, 60 Kan. 397, 56 Pac. 757; 25 Cyc. Law & Proc. p. 1373. As the mortgage is a mere incident to the note, subsequent revivor thereof by part payment after it is barred revives not only the note, but also the mortgage, and that, too, as against judgment lienors, such as plaintiffs in error, whose liens did not attach to the mortgaged property until after said payment and consequent revivor. It is only such as have an interest in the mortgaged property acquired prior to the revivor whose rights thereby remain unaffected. *Childs v. Thompson*, 81 Mo. 337; *Courtner v. Etheredge*, 149 Ala. 78, 43 So. 368; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Hubbard v. Missouri Valley L. Ins. Co.* 25 Kan. 172; *Topeka Capital Co. v. Merriam*, supra.

In *Johnson v. Johnson*, 81 Mo. 336, the court said: "When the bar of the statute is complete, any act of the mortgagor which revives the debt, also revives the lien of the mortgage, unless the parties agree otherwise. *New York Life Ins. & T. Co. v. Covert*, 29 Barb. 435. *Schmucker v. Sibert*, supra. Such acts are always binding between the mortgagor and mortgagee. 2 Jones, Mortg. 3d ed. § 1202. A well-defined limitation of this rule excepts from its effect the rights of purchasers and mortgagees acquiring title after the bar is complete, and before the acts of revivor."

In *Schmucker v. Sibert*, supra, the court in the syllabus said: "Where a note and mortgage are once barred, a subsequent revivor of the note by part payment, promise, or acknowledgment of the payor, will revive the mortgage so far as it affects the interest of the payor in the mortgaged premises. But such revivor of the note will not revive the mortgage as against a grantee of the mortgagor, or any other parties who have acquired interests in the mortgaged premises prior to the revivor of the note." *Hubbard v. Missouri Valley L. Ins. Co.* 25 Kan. 172, 175.

Hubbard v. Missouri Valley L. Ins. Co. supra, was an action on a promissory note and to foreclose a mortgage. The facts were that on October 1, 1869, John M. Price executed a note and mortgage to defendant in error for \$1,500, due one year from date. He paid the interest thereon as the same became due up to April 1, 1872. On May 16, 1877, in a settlement with said company he received another credit thereon. The suit was against his grantees of the mortgaged property. They pleaded the statutes of limitations on the debt. There was judgment against them in the trial court, and on this point, in reversing the case, the

supreme court said: "It will be seen that no payment was made on the \$1,500 note and mortgage (the instruments sued on in this action) from April 1, 1872, until May 16, 1877. This was more than five years. The note and mortgage were therefore absolutely barred by the five-year statute of limitations when this last payment was made. Civil Code, § 18, subd. 1. This case will therefore come within the decision of this court made in the case of *Schmucker v. Sibert*, 18 Kan. 105, 110, 111, 26 Am. Rep. 765; that is, Price had a note, and to secure its payment executed a mortgage on certain real estate. He then conveyed the real estate to Hubbard. The note and mortgage became due, and several payments of interest were made thereon; but after that payment of the interest which was made on April 1, 1872, was made, more than five years elapsed before any other payment was made thereon. The note and mortgage, therefore, by this lapse of time without anything being done in the meantime to keep them alive, became absolutely barred by the five-year statute of limitations. Price then, by a payment thereon, and by an acknowledgment in writing of an existing liability thereon, revived the note and mortgage as against himself; but he did not and could not revive them as against Hubbard. As against Hubbard, they still remained barred." And in the syllabus said: "Where a note and mortgage have become barred by the statute of limitations, the payor thereof may revive the debt by part payment or otherwise, as against himself, but he cannot revive the note and mortgage as against a third person to whom he has sold and conveyed the mortgaged property." This is in line with the weight of authority.

In *MacMillan v. Clements*, 33 Ind. App. 120, 70 N. E. 997, the same kind of a suit, the same questions as here. There, as here, interest was paid on the note after the bar had fallen. The court said: "It is the law that a payment upon a note secured by mortgage is sufficient to take the note out of the operation of the statute of limitations, will have a like effect upon the mortgage, and, so long as any part of the debt remains unpaid, and not barred, the lien of the mortgage continues unimpaired. *Bottles v. Miller*, 112 Ind. 584, 14 N. E. 728; *Hibernian Bkg. Asso. v. Commercial Nat. Bank*, 157 Ill. 524, 41 N. E. 919; *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408; *Schifferstein v. Allison*, 123 Ill. 662, 15 N. E. 275. By the averment of the complaint the payors of the note and mortgagors paid the interest on the note up to September 6, 1889. This revived the debt, and the statute of limitations would commence to run from that date, and, under 28 L.R.A. (N.S.)

the authorities, neither the note nor the mortgage is barred by the statute of limitations." See also 25 Cyc. Law & Proc. p. 1304, and cases cited.

We are therefore of opinion that the credit of \$3.60 interest indorsed on the note December 1, 1903, revived not only the note, but the mortgage, and from that time rendered it a valid and subsisting security superior to the rights of the subsequent judgment lienors, parties defendant herein, and that the trial court did not err in so holding.

We are not unmindful of *Wood v. Goodfellow*, 43 Cal. 185, and other cases relied upon by plaintiffs in error, where the contrary is held. As the Kansas courts in construing this statute refuse to follow that case, neither will this court. Of the doctrine there announced, in *Schmucker v. Sibert*, supra, Justice Brewer, speaking for the court, said: "We are aware of the fact that in some states a distinction is drawn between the note and mortgage, and that a foreclosure of the latter may be barred even when a recovery on the note is not. And this in states such as California, where the note is the principal thing, and the mortgage only a security for the note." In so holding he doubtless was mindful of the holding of the court in *Waterson v. Kirkwood*, 17 Kan. 9, where the court said: "The decision in the case of *Wood v. Goodfellow*, supra, states the law correctly for Kansas, then the action was barred. A majority of this court think that that decision is not good law in Kansas."

It is not necessary to notice other questions raised. The judgment of the trial court is affirmed.

All the Justices concur, except Williams, J., not participating.

CALIFORNIA SUPREME COURT.

W. SCOTT SMITH, Appt.,

v.

JOSEPH T. BANGHAM et al., Respts.

(156 Cal. 359, 104 Pac. 689.)

Option — mutuality — acceptance — enforcement.

1. Acceptance, within the time limited, of an option to purchase real estate, removes

Note. — Rights of third persons intervening between the taking and the exercise of the option for purchase of real property.

The only cases included in the note are those in which the intervening rights of third persons are such as can affect the

the objection to the enforcement of the contract on the ground of want of mutuality.

Contract — performance — time.

2. One contracting for the conveyance of land upon demand must make the demand within a reasonable time, and is not privileged to postpone performance on his part indefinitely.

Option — consideration — acceptance — adequacy.

3. The inadequacy of the consideration for an option to purchase real estate cannot defeat the right to performance of the contract to convey after the option has been accepted, if the price to be paid for the land is adequate.

Same — acceptance — intervening contract — priority.

4. The acceptance, within the time specified, of an option which had been given for a nominal consideration to purchase real estate belonging to a husband, supersedes the wife's declaration of homestead upon

the property made with notice of the option, after it had taken effect.

Record — unrecorded contract — priority.

5. An unrecorded contract for the purchase of real estate has no priority over a prior unrecorded option upon the same property, which will prevent specific performance of the option.

Judgment — specific performance — strangers — effect.

6. A decree specifically enforcing performance of a contract to sell real estate in accordance with an option which had been given thereon does not affect the rights of one claiming an intermediate contract for the land who was not made a party to the suit.

(Beatty, Ch. J., and Melvin and Lorigan JJ., dissent.)

(October 8, 1909.)

holder of the option. Cases, therefore, where the exercise of the option can affect only the rights of third persons, without in any way interfering with the rights of the holder of the option, have been excluded; *e. g.*, cases involving the respective rights of heirs and next of kin where option is exercised after death of the owner. (See note in 57 L.R.A. 651.)

As a general rule the holder of an option contract for the purchase of land, founded upon a valuable consideration, may, upon the refusal of the landlord to convey, either compel a specific performance of the contract or maintain an action for damages for the breach of the contract. And the rule is the same where the landowner has conveyed the property to third persons, with notice of the rights of the holder of the option.

Thus, in *Meyer v. Markham*, 90 Minn. 230, 96 N. W. 787, it was held that where the vendor in a contract for the sale of land subsequently conveyed the land to a third person, the holder of the option had two remedies; *viz.*: (1) to acquiesce in the conveyance and seek a performance of the contract of the third party; or (2) to treat the conveyance as a breach of the contract, and resort to an action against the vendor for damages. In that case, it was held that upon notice of the conveyance the holder of the option must act promptly, and either treat the grantee as the real party in interest and offer to perform the contract, or rely wholly upon his action against the grantor; that a failure to proceed under the contract promptly will be considered as an election to resort to the remedy against the grantor for a breach of the contract, and as an abandonment of all rights or claims to a specific performance of the contract against the grantee.

Specific performance, however, will not be decreed against third persons who become purchasers for value, of property, in ignor-

ance of the option. *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220.

But all purchasers having knowledge of the option will take subject to it, and specific performance may be decreed against them. *Ibid.*; *Ross v. Parks*, 93 Ala. 153, 11 L.R.A. 148, 30 Am. St. Rep. 47, 8 So. 368; *Faraday Coal & Coke Co. v. Owens*, 26 Ky. L. Rep. 243, 80 S. W. 1171; *Whited & Wheless v. Calhoun*, 122 La. 100, 47 So. 415; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Laughead v. Beale*, 24 Pa. Co. Ct. 465; *Jackson ex dem. Livingston v. Groat*, 7 Cow. 285. And see *Boyd v. Vanderkemp*, 1 Barb. Ch. 273; *Whitehorn v. Cranz*, 20 Neb. 392, 30 N. W. 406.

But an option to purchase lands, unsupported by a valuable consideration, is not such an interest therein which a purchaser for value is bound to notice, or which equity will regard, and the want of mutuality may be urged as a bar to its specific enforcement. *Peacock v. Deweese*, 73 Ga. 570; *Graybill v. Burgh*, 89 Va. 895, 21 L.R.A. 133, 37 Am. St. Rep. 894, 17 S. E. 558. In the latter case the vendor gave the plaintiff an option in writing and under seal, for the purchase of the land, for the nominal consideration of \$1, but in fact the dollar was never paid, and it was held competent to show such fact.

A tenant who exercises an option to purchase, contained in the lease, may enforce specific performance of the contract against one who purchased the property with notice of the lease and contract to sell, and compel a conveyance of the property. *Lazarus v. Heilman*, 11 Abb. N. C. 93. This case was an action against the tenant for waste, and the defendant was permitted to set up as a counterclaim the agreement to sell contained in the lease, and demand specific performance of the contract against the plaintiff and grantee of the defendant's lessor.

A lessee with an option to purchase, al-

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in his favor for less than the relief demanded in an action brought to compel specific performance of an alleged contract for the sale of certain real estate, and to recover damages for breach thereof. Reversed.

The facts are stated in the opinion.

Messrs. Tanner, Taft, & Odell and John E. Daly, for appellant:

The wife, having no interest in the separate estate of her husband, and having actual knowledge and notice of the contract of sale entered into between her husband and plaintiff, could not impose a valid homestead upon the premises, which would operate to defeat plaintiff's contract.

though the election to purchase rests solely with him, has an equitable estate in the land under his contract of optional purchase, which may be conveyed and enforced by his grantee against a subsequent purchaser from the lessor. *Kerr v. Day*, 14 Pa. 112, 53 Atl. 526. To the same effect is *Daniels v. Davison*, 16 Ves. Jr. 253.

And possession of the tenant is constructive notice to one dealing with the landlord, of the interest of the tenant, such as the option to purchase within a given period. *Ibid.*

And so, where a lease gives the lessee therein an option to purchase the leased premises, and the lessee accepts the offer and performs the conditions, his possession becomes that of owner, and such possession gives notice of his rights as the owner to a subsequent mortgagee of the vendor or lessor, and such mortgagee would be charged with notice of the vendee's rights, and his mortgage is subject thereto. *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360.

It is the duty of a purchaser of real estate to investigate the title of his vendor, and he cannot be said to exercise due diligence in this regard if he accepts the statement of his vendor as to the binding effect of an outstanding agreement of sale with another, and makes no attempt to ascertain for himself what the agreement contains. *Ohio River Junction R. Co. v. Pennsylvania Co.* 222 Pa. 573, 72 Atl. 271.

In *Manchester Ship Canal Co. v. Manchester Racecourse Co.* [1901] 2 Ch. 37, it was held that where a landowner stipulated that he would give the plaintiff the first refusal of his land, he was not free to dispose of the land to an independent purchaser without informing the holder of the option of the proposed sale, and offering the land to him at such price as the intending purchaser was bona fide willing to give; and that upon failure to make such offer the holder of the option would be entitled to restrain the contemplated breach of the agreement.

But where the holder of an option advised the landlord some days before the expiration 28 L.R.A. (N.S.)

Re McCauley, 50 Cal. 544; *Hayford v. Kocher*, 65 Cal. 389, 4 Pac. 350; *Gilbert v. Sleeper*, 71 Cal. 290, 12 Pac. 172; *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429; *Roach v. Riverside Water Co.* 74 Cal. 263, 15 Pac. 776; *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, 44 Pac. 670; *Weber v. McCleverty*, 149 Cal. 316, 86 Pac. 706; *Yost v. Devault*, 3 Iowa, 345, 66 Am. Dec. 92.

The mutuality of a contract is to be considered as to the value promised to be paid for the land, and not as to the consideration paid for the option, and in such case the court will decree a performance.

Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44; *Spires v. Urbahn*, 124 Cal. 110, 56 Pac. 794; *Ca-*

of time limited, that he could not raise the money, and unless an extension of time was granted the option would be abandoned, he was estopped from enforcing specific performance of the contract where the landowner refused to grant the extension, made valuable improvements on the land, and leased the same in reliance on such abandonment. *Hopwood v. McCausland*, 120 Iowa, 218, 94 N. W. 469.

The death of the giver of an option to purchase real estate founded upon a valuable consideration does not impair the right of the holder to make his election within the time specified, and enforce performance of the contract against the heirs and representatives of the giver. *Mueller v. Northmann*, 116 Wis. 468, 96 Am. St. Rep. 997, 93 N. W. 538.

A wife of one who, pending negotiations for the purchase of certain lands, gave an option to a third person for the purchase thereof, is not bound, where she was not a party to the transaction, and protested against it from the time it first came to her knowledge. *Graybill v. Brugh*, *supra*.

Until the exercise of the option, the property is subject to levy on execution against the owner and giver of the option. *Ex parte Hardy*, 30 Beav. 206.

And an equitable conversion effected by an election to exercise an option to buy real estate will not relate back to the date of the contract, so as to dissolve the attachment levied on the land as that of the grantor prior to the election and while the grantor retains his ownership. *Sheehy v. Scott*, 128 Iowa, 551, 4 L.R.A. (N.S.) 365, 104 N. W. 1139.

But in *Donnally v. Parker*, 5 W. Va. 301, it was held that a contract granting an option to purchase, when duly recorded, was sufficient to put creditors of the grantor on inquiry; and that they were bound to inquire whether the election had been made; and, upon giving notice of his election to purchase, the holder of the option had an equitable interest in the land which related back to the date of the contract.

A. L. R.

lanchini v. Branstetter, 84 Cal. 249, 24 Pac. 149; *Stanton v. Singleton* (Cal.) 54 Pac. 587; *Hall v. Center*, 40 Cal. 63.

Upon the acceptance and exercise of the option by plaintiff, the contract became a mutual contract of sale and purchase.

Vassault v. Edwards, 43 Cal. 458; *Southern P. R. Co. v. Terry*, 70 Cal. 484, 11 Pac. 769; *Hay v. Mason*, 141 Cal. 723, 75 Pac. 300.

Messrs. Denio & Monk, for respondents:

The placing of a valid homestead by the wife upon the property without knowledge, consent, connivance, or instigation of defendant, and which homestead the wife refused at all times to release or abandon,—even though this were done subsequent to and with full and actual notice and knowledge of the execution of the said option by her husband,—absolutely prevented performance by defendant, even though the property out of which the homestead was carved by the wife was the separate property of the husband.

Warner v. Warner, 144 Cal. 615, 78 Pac. 24; *Ontario State Bank v. Gerry*, 91 Cal. 94, 27 Pac. 531; *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955; *Duncan v. Curry*, 124 Cal. 106, 56 Pac. 898; *Fitzell v. Leaky*, 72 Cal. 477, 14 Pac. 198; *Simonson v. Burr*, 121 Cal. 582, 54 Pac. 87.

A lack of mutuality is absolutely fatal to specific performance.

6 Pom. Eq. Jur. 773, 814.

Sloss, J., delivered the opinion of the court:

The plaintiff appeals on the judgment roll alone from a judgment in his favor for \$1. The action was based upon an alleged contract for the purchase of real estate, and the complaint contained two counts,—one averring facts upon which plaintiff asserted his right to a specific performance of the contract, and the other seeking damages for its breach.

The court found that on December 26, 1905, the plaintiff and the defendant Joseph T. Bangham entered into a written contract, whereby Bangham, in consideration of the sum of \$1, granted to plaintiff, or his assigns, "the right and privilege of exercising an option to purchase" the property in dispute "for the sum and purchase price of \$17,000, . . . provided that the said W. Scott Smith, or his assigns, shall exercise said option to purchase on or before February 26, 1906, by notifying me in writing of such exercise of option. Upon such notification within such time, I agree, on demand, to grant, sell, and convey said real estate to said W. Scott Smith, or his assigns, on the above terms, and agree to furnish and deliver within ten days after

such notification, to said W. Scott Smith, or his assigns, an unlimited certificate of title to said real estate . . . showing good marketable title of record to said real estate to be in me, free and clear of all encumbrances, and allowing the said W. Scott Smith, or his assigns, a reasonable time after said delivery to examine said certificate of title. Said notification, and the furnishing of said certificate of title within said reasonable time showing title as aforesaid, shall bind the said W. Scott Smith, or his assigns, to purchase said real estate on said terms." The property referred to in the above instrument was the separate property of the defendant Joseph T. Bangham. On February 26, 1906, the plaintiff elected to exercise the option provided for, and to purchase the land in accordance with the terms and conditions named in the writing, and notified Bangham of his election. Bangham refused, and ever since has refused and neglected, to make, execute, and deliver a deed, or to furnish the certificate of title as provided in said contract.

The court finds that, in response to plaintiff's notification of his election to purchase, Bangham informed the plaintiff that he was unable to give title to the land, for the reason that his wife (the defendant Rowena Bangham) held a homestead on the property, and "positively refuses to release it." It is found that the consideration to be paid for the said land was adequate, just, and reasonable, and that "the price for the land at the time when plaintiff notified defendant Joseph T. Bangham that he elected to buy was a fair and adequate price for said land." It is further found that the contract was unjust and unreasonable in this, "that the only consideration paid therefor was the sum of \$1," and that said sum of \$1 was grossly inadequate and unjust for said option; that the said contract is also unfair and unjust in this, that plaintiff was thereby enabled to postpone indefinitely performance on his part. It is found that the defendant Rowena Bangham, the wife of Joseph T., had actual notice and knowledge of the entering into said contract by her husband, and that she did, after the date of said contract, make and file a separate declaration of homestead on said premises; that said declaration was made by her without the knowledge or connivance of her husband. The contract referred to in the complaint has never been recorded. It is further found that the defendant Joseph T. Bangham did not act in bad faith in his failure to perform the contract; that the land had increased in value to the amount of \$5,000, as alleged in the complaint, but that plaintiff had not been damaged in any sum other than the sum of \$1 on account of

such failure. As conclusions of law the court found, with respect to the first count, that plaintiff was not entitled to recover, and that the declaration of homestead filed by defendant Rowena Bangham is valid, and is not subject and inferior to the contract relied on. On the second count the conclusion of law was that plaintiff was entitled to recover of defendant Joseph T. Bangham the sum of \$1 and interest thereon from the 26th day of December, 1905.

On these findings the plaintiff contends that he was entitled to a decree specifically enforcing the contract, and that if, for any reason, such contract should not be enforced, he should recover a judgment for \$5,000, the increase in the value of the land.

The agreement signed by the parties on December 26, 1905, was a unilateral agreement, of the kind usually known as an option. By its terms Smith was under no obligation to purchase the land or to pay for it. He was granted the right or privilege of purchasing upon certain terms, within a given time. Until he should have exercised this option he was in no way bound by the agreement. His election to accept and exercise the option within the time limited was, however, sufficient to bind him and to remove any objection to the enforcement of the contract on the ground of want of mutuality. *Hall v. Center*, 40 Cal. 63; *Ballard v. Carr*, 48 Cal. 74; *Calanchini v. Branstetter*, 84 Cal. 249, 24 Pac. 149; *Thurber v. Meves*, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44; *House v. Jackson*, 24 Or. 89, 32 Pac. 1027. The option had at least the force of an offer to sell, and the acceptance of this offer before it has expired or had been revoked constituted a valid and binding contract, from which neither party could recede. 29 Am. & Eng. Enc. Law, 2d ed. p. 601; *Vassault v. Edwards*, 43 Cal. 458; *Benson v. Shotwell*, 87 Cal. 49, 25 Pac. 249.

We think the finding of the court that the contract is unfair in that plaintiff was thereby enabled to postpone indefinitely performance on his part is based upon an erroneous construction of the terms of the agreement. The contract reads that upon notification of acceptance Bangham agrees "on demand, to grant, sell, and convey said real estate to said W. Scott Smith, or his assigns, on the above terms." It is argued that since the obligation is only to convey upon demand by Smith, the latter may indefinitely postpone the making of his demand, and thereby compel the defendant to be ready to convey to him at all times, without making himself liable for the purchase price. But the contract, reasonably interpreted, does not give him any such right of indefinite postponement. It is provided in the agreement that

the notification of acceptance, and the furnishing of a certificate of title, shall bind him to purchase the real estate "on the above terms." If, under the agreement, the exact time of conveyance and payment were to be fixed by the purchaser's demand, there can be no question that such demand would have to be made by him within a reasonable time. What would be a reasonable time is a question of fact, to be determined upon all of the circumstances of the case. So construed, the provision is in no wise inequitable or unfair.

It is found by the court that the consideration agreed to be paid for the land—i. e., the sum of \$17,000—was fair and adequate. The plaintiff having bound himself by the acceptance of the option to pay this sum, we think the question whether or not \$1 was an adequate consideration for the option is a false quantity. The plaintiff is not seeking in this action to enforce the option, but to compel compliance with the contract, which resulted from his exercise of the option. That contract was one whereby Bangham bound himself to sell the land, and Smith agreed to buy it, for the sum of \$17,000. This is found by the court to be an adequate and fair consideration for the conveyance, and on an action by the vendee for specific performance of such contract the adequacy of the price paid for the option is not a material consideration. In *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580, the court said: "The consideration named in the written agreement is \$1. As the parties agree to sell an option to buy for the sum of \$1, there is no reason why such an express consideration is not an adequate one." See also *Ross v. Parks*, 93 Ala. 153, 11 L.R.A. 148, 30 Am. St. Rep. 47, 8 So. 368. Inadequacy of consideration alone (without fraud, or something in the nature of fraud) is never considered, even in equity, except as bearing upon the right to specifically enforce an executory agreement. It affords no ground for setting aside an executed sale. Here there had been such executed sale of the option, which passed by the writing of December 26, 1905, and the payment of the agreed consideration.

The real question, then, is whether the fact that the vendor's wife declared a homestead upon the property is a sufficient answer to plaintiff's demand for a conveyance. Specific performance will not be decreed against a vendor who is unable, for want of title, to comply with his contract. *Bell v. Bank of California*, 153 Cal. 234, 239, 94 Pac. 889, and cases cited. If the homestead was valid as against a prior agreement to sell, the refusal of the wife to join in a conveyance fully justified the judgment denying specific relief. It may be remarked that neither

the pleadings nor the findings disclose the time when the homestead was declared. It is found to have been after the execution of the contract (of option), but whether before or after plaintiff had notified Bangham of his election to purchase is not shown. We think, however, that the rights of the parties would be the same in either event. It has been said that an option to purchase land does not, before acceptance, vest in the holder of the option an interest in the land. *Richardson v. Hardwick*, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. Rep. 213; *Gustin v. Union School Dist.* 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156; *Phenix Ins. Co. v. Kerr*, 66 L.R.A. 569, 64 C. C. A. 251, 129 Fed. 723. On the other hand, there are cases holding that the grant, on a valuable consideration, of an option to purchase, constitutes the grantee the equitable owner of an interest in the property. *House v. Jackson*, supra; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Telford v. Frost*, 76 Wis. 172, 44 N. W. 835; *Wall v. Minneapolis, St. P. & S. Ste. M. R. Co.* 86 Wis. 48, 56 N. W. 367. At any rate the option vests in the grantee the right or privilege of acquiring an interest in the land, and, when accepted, entitles him to call for specific performance. *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Kerr v. Day*, supra; *People's Street R. Co. v. Spencer*, 156 Pa. 85, 36 Am. St. Rep. 22, 27 Atl. 113; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580. Such right, when exercised, must necessarily relate back to the time of giving the option (*People's Street R. Co. v. Spencer*, supra), so as to cut off intervening rights acquired with knowledge of the existence of the option. A subsequent purchaser with notice of a valid and irrevocable option would certainly take subject to the right of the option holder to complete his purchase (*Bartlett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539; *Kerr v. Day*, supra), and we see no reason why the declarant of a homestead should stand in any better position.

A declaration of homestead creates no new or additional title. It attaches certain privileges and immunities to such title as may at the time be held. If the husband, for example, owns a title subject to an outstanding equity, a declaration of homestead by the wife, at least where she has knowledge of this equity, does not destroy it. Her homestead claim is impressed upon the title that her husband had; *i. e.*, the title subject to such rights against it as were known to her to be held by third parties. These conclusions seem to follow from the former adjudications of this court. In *Gilbert v. Sleeper*, 71 Cal. 290, 12 Pac. 172, the plaintiff's husband had entered into an agreement with the defendant Sleeper to exchange two tracts of

land, and each entered into possession of the tract which he was to receive. Subsequently Gilbert conveyed to his wife all of his property, including the land which he had agreed to convey to Sleeper, and plaintiff filed a homestead upon all the land so conveyed to her. It was held that plaintiff's rights in the tract agreed to be conveyed to Sleeper were subject to the rights created by the agreement. "There was no error," says the court, "in refusing to admit in evidence plaintiff's declaration of homestead. Obviously she could not, by filing it, defeat or impair the previously existing rights of defendant." In *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429, action was brought to quiet title to land which one of the plaintiffs had agreed to convey to some of the defendants; such defendants having wholly failed to pay the purchase money, or to comply with any of the conditions of their contract. The defendants relied upon a declaration of homestead filed by one of them upon the land while in possession under this contract. This was held to constitute no defense to the action. The court said: "It is further urged that because a homestead was declared upon the property by Mrs. Dunlap, the action cannot be maintained. This cannot be so. Conceding, as claimed by the appellants, that a homestead may be declared upon land held under a mere contract to convey, such declaration did not give any new title, or tend in any way to strengthen or enlarge the one then existing. Therefore, when the equitable title created by the contract, and possession under it, was lost in the manner stated, the homestead fell with it. It would be a marvelous doctrine that the filing of a declaration of homestead could create a new title, or render a bad title good." In *Hayford v. Kocher*, 65 Cal. 389, 4 Pac. 350, certain premises were by mistake excluded from a conveyance of lands. The wife of the grantor, with knowledge of the mistake, filed a declaration of homestead upon the lands so omitted. This was held not to affect the pre-existing right of the grantee to have the conveyance reformed, so as to carry title to such premises.

The fundamental basis upon which all these decisions must rest is the proposition that (except where the contrary is expressly declared by statute) a declaration of homestead is subject to all rights in the property known by the person filing the declaration to exist. And this principle, applied to the facts of the present case, requires the holding that the declaration of homestead, made by Mrs. Bangham with knowledge of the contract theretofore entered into with the plaintiff, was subject to his right to demand a conveyance of the land in accordance with his contract.

The authorities principally relied on by the respondent (*Fitzell v. Leaky*, 72 Cal. 477, 14 Pac. 198; *Ontario State Bank v. Gerry*, 91 Cal. 94, 27 Pac. 531; *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955) are not in point. These cases hold that a declaration of homestead by the wife is good as against a prior unrecorded mortgage executed by the husband, although the wife had knowledge of the existence of the mortgage. But this conclusion is based upon the express provisions of §§ 1240, 1241, of the Civil Code, which provide that the homestead is exempt from execution or forced sale except " . . . (3) on debts secured by mortgages on the premises, executed and acknowledged by husband and wife, or by an unmarried claimant; (4) on debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." Here is an express statutory declaration that certain mortgages only shall be superior to the rights created by a declaration of homestead. As the mortgages in the cases cited did not come within the terms of the statute, they necessarily were inferior to the homestead. Here, however, we have no question of an attempt to subject the land to execution or forced sale from which it is specifically exempted. The question is merely whether antecedent rights in the property shall be cut off by a declaration of homestead, or, otherwise stated, whether such declaration shall enlarge the title owned at the time of its filing. For the reasons stated, we think this question must be answered in the negative.

On the facts as hereinbefore stated the plaintiff was entitled to a decree specifically enforcing the contract of conveyance made by the defendant Bangham. But the record discloses further facts bearing on the appropriateness of this remedy. It is found that the American Avenue Building Company, a corporation, claims and has an interest in the said premises, "by virtue of a written agreement to convey by defendant Joseph T. Bangham, made in good faith and for value." If this interest is superior to that of plaintiff, it would make it impossible for Bangham to comply with his contract to convey a good marketable title free and clear of encumbrances. But the court does not find the interest of the Building Company to be superior to that of plaintiff, nor does it find facts from which the respective priorities may be determined. A purchase for value, without notice of plaintiff's unrecorded contract, would not, under our statute, protect the subsequent purchaser, unless his conveyance was "first duly recorded." Civil Code § 1214. For all that appears, the Building Company's contract was never recorded. The facts as found do not, therefore, offer any

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impediment to a decree of specific performance. But the American Avenue Building Company is not a party to this action, and obviously its rights cannot be affected by any decree that might be rendered herein. A reversal of the judgment, with directions to the court below to enter a decree of specific performance, might result in plaintiff's obtaining a conveyance which would be valueless to him. Unless the plaintiff is willing to take and pay for Bangham's title, without regard to the validity of the Building Company's claim, the question whether an effective decree for specific relief can be made should be determined in an action in which every party having an interest in the property is represented. To this end a new trial should be ordered. If, upon such new trial it should appear that specific performance cannot be decreed, the question of plaintiff's right to damages, as prayed by the second count of the complaint, will arise. The measure of damages in such cases is clearly defined by § 3306 of the Civil Code. The difference between the price agreed to be paid and the value of the estate may be recovered only where there has been bad faith on the part of the vendor. Here the court came to the conclusion that the defendant Bangham did not act in bad faith. On this appeal on the judgment roll we cannot therefore direct the allowance of damages for any greater sum than that recovered. But the question of good or bad faith should be considered anew by the trial court in the light of our views on the main question discussed in this opinion. Accordingly the issue of damages, as well as the issues arising on the prayer for specific performance, should be retried.

The judgment is reversed, and the cause remanded for a new trial. The plaintiff should have leave to amend his complaint, and to bring in new parties, if so advised.

Shaw, Angellotti, and Henshaw, JJ., concur:

Beatty, Ch. J., dissenting:

I dissent. A dollar is not an adequate consideration for such an option as is here held to defeat the right of Mrs. Bangham to declare a homestead upon property occupied as such.. It was a merely nominal consideration, and, as against a right so highly and so deservedly favored as the right of homestead, it should be disregarded by a court of equity.

Melvin, J., dissenting:

I dissent. It does not appear from the record whether or not the declaration of homestead was made prior to the 26th day of February, 1906,—the date upon which ap-

pellant notified respondent that he elected to buy the property,—but, under the rule favoring a construction in support of the regularity of a judgment, we may assume that Mrs. Bangham had filed her declaration of homestead before appellant signified his willingness to pay \$17,000 for the property. If, therefore, she could not make a valid declaration of homestead, the only thing which prevented her from doing so was the option for which plaintiff had paid the price of \$1. In other words, to find that the declaration of homestead was ineffective, we must hold that the option which the purchaser might ignore and surrender, without the loss of more than the trifling sum of \$1, was sufficient to deprive this woman of a right given her by the law under the Constitution of California. Art. 17, § 1. It may be that after the acceptance of all the terms of a sale contemplated under the provisions of a contract of this kind, and the offer of an adequate price, the wife of the owner of the property, if she knew all of the facts, would be powerless to declare a valid homestead upon it; but we are not here confronted by such a state of facts. Suppose that, instead of sixty days, a period of ten years had been named as the time within which the option of purchase might be exercised. Might a husband, by the simple device of giving such an option, deprive his wife for a term of years of the right of securing a homestead given her by statutes passed under the solemn mandate of the Constitution? Such a result, it seems to me, was never contemplated.

In the opinion of the majority of the court, great reliance is placed upon the authority of *People's Street R. Co. v. Spencer*, 156 Pa. 89, 36 Am. St. Rep. 22, 27 Atl. 113, to the effect that when an option to purchase is exercised, the right to buy the property relates back to the date of the original contract, so as to cut off intervening rights acquired by those having knowledge of the option. That was a case not involving any interpretation of the law relating to homesteads. The facts there considered showed that there had been a conveyance of property as security for a loan, but that the grantor took a lease for a nominal sum and an exclusive option of repurchase for the amount of the loan and interest. The court treated the transaction as one in which the railroad company never surrendered its equitable estate, and held that, upon the repayment of the loan, with interest, the company's title became effective as of the date of the option. It was held that upon payment of the loan and interest the railroad company became the owner of the land as it was at the date of the original

agreement, "or of the insurance money, which stood *pro tanto* in its place." The case is so dissimilar to the one at bar that I cannot see its appositeness.

Section 1238 of the Civil Code gave Mrs. Bangham the right to declare a homestead upon her husband's property. This, I submit, existed independently of any adverse equitable title, which she was not, by statute, compelled to recognize as paramount to it. I cannot subscribe to the doctrine expressed in the main opinion, that "the fundamental basis upon which all these decisions must rest is the proposition that (except where the contrary is expressly declared by statute) a declaration of homestead is subject to all rights in the property known by the person filing the declaration to exist." The Code does not declare the instances in which a homestead is not subject to execution and forced sale, but does enumerate the four kinds of judgments which are superior to it. Civil Code, § 1241. All other kinds of judgments not enumerated are ineffective because not specified in the statute, and the inference is inevitable that, without the barrier of the statute, no unexecuted judgment could avail against a homestead. By parity of reasoning we should deduce the rule that the homestead must prevail against all liens not by statute made superior to it.

Mr. Justice McFarland, in *Ontario State Bank v. Gerry*, 91 Cal. 97, 27 Pac. 531, 532, said: "But the doctrine that unrecorded deeds and mortgages are good except as against subsequent purchasers for a valuable consideration does not apply to homesteads. Rights to homesteads are defined by the provisions of the Code which directly deal with that subject. 'The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead.' And a declaration of a homestead is not a 'conveyance' as that word is used generally in the Code." And again, in the same opinion, he says: "There is no question here about the morality of the transaction. It is simply a matter of statutory provision." In the case of *Lee v. Murphy*, 119 Cal. 374, 51 Pac. 553, 955, the homestead defeated the lien of an unrecorded mortgage, of which the wife, who declared the homestead, had actual notice, and this significant language is used in the opinion: "I have not overlooked the equitable considerations so persuasive in this case, and so ably presented by counsel for respondent, but they all proceed from the assumption that the case is one for the application of general principles of equitable cognizance, whereas it is hedged in and controlled entirely by legislative enactment." In *Warner v. Warner*,

144 Cal. 615, 78 Pac. 24, a homestead on the husband's separate property was held good as against an antenuptial agreement, wherein the wife had promised not to claim her husband's property "either as heir or otherwise." In *Simonson v. Burr*, 121 Cal. 582, 54 Pac. 87, it was decided that the question of fraud of creditors cannot be raised as against a homestead which one of the spouses had the right to declare.

Following the rule that a contract is to be construed most strongly against the person seeking to sustain it, I am still of the opinion that the contract in the case at bar was properly held to be unfair, because under its terms plaintiff would be enabled to postpone indefinitely performance on his part; and I wish to repeat the language used as follows in the opinion heretofore rendered in Department 2: "While the contract provides that the option must be exercised by written notification prior to February 26, 1906, it also contains this language: 'Upon such notification within such time I agree, on demand, to grant, sell, and convey said real estate to said W. Scott Smith,' etc. The contract further provides that Bangham shall, within ten days after notification, furnish a certificate of title, that thereafter Smith or his assigns shall have 'reasonable time' to examine said certificate, and that 'said notification, and the furnishing of said certificate of title within said reasonable time, showing title as aforesaid, shall bind the said W. Scott Smith or his assigns to purchase said real estate on said terms.' Conveyance by Bangham 'on demand' being one of said 'terms,' the option might, if enforced, result in giving plaintiff the power to hold the land indefinitely, subject to his privilege of purchase, and without the expenditure of a dollar, by the simple expedient of omitting to demand from Bangham a conveyance of the title. The lower court properly declined to enforce the specific performance of a contract so inequitable and one in which the consideration was so inadequate. Civil Code, § 3391, subdiv. 1. It follows also that such a contract, being of but little more dignity than a *nudum pactum*, would be no obstacle to the declaration of a homestead by Mrs. Bangham on her husband's property. As the court found appellant suffered no detriment other than the payment of \$1 for the option, judgment in his favor for that sum on the second count was proper. Civil Code, § 3306."

I am of the opinion that the judgment of the lower court should be affirmed.

Lorligan, J., dissenting:

I concur in the foregoing dissenting opinion.

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ARKANSAS SUPREME COURT.

FIRST NATIONAL BANK OF LAKE PROVIDENCE, Appt.,

v.

LOUIS REINMAN.

(— Ark. —, 125 S. W. 443.)

Note — blank indorsement — parol explanation.

1. As between a bank holding a note and its immediate indorser in blank, parol evidence is admissible to show that he indorsed as its agent to transfer title to the note, including the fact that he sold certain property to the bank to be sold to the maker, and that the note was taken in his name and indorsed to the bank merely for its accommodation in the transaction.

Appeal — transfer to chancery — error.

2. It is reversible error to transfer to the chancery court against the objection of the plaintiff an action properly triable at law.

(February 7, 1910.)

Note. — Admissibility of parol evidence, as between indorser and indorsee, that unrestricted indorsement was made merely to transfer title to the owner.

An exception to the parol evidence rule is recognized where it is sought to introduce parol evidence in order to show, as between indorser and indorsee, that the indorsement was made merely to transfer the title to the owner of the instrument. This exception is based on the well-recognized exception that such evidence may be given to show want or failure of consideration.

Thus, in *Farmers' Sav. Bank v. Hansmann*, 114 Iowa, 49, 86 N. W. 31, it was held that an indorser might show that the note in suit was made payable to him through mistake, and that he indorsed it without consideration merely to transfer title to the owner. The court said: "It is a general rule that an indorsement is a contract, and that, like every other contract, it requires consideration; and it is held that 'between immediate parties the want of consideration invalidates it.' 3 Randolph, Com. Paper, 2d ed. § 691. If the defendant's contention is true, his indorsement was without consideration, and made for the express purpose of transferring a note which had been drawn payable to his order without his knowledge or consent, to its owner. We have held that parol evidence is competent to show the real nature of the transaction, where an indorsement in blank has been made. . . . The defendant herein cannot be in any worse situation than an indorser in blank, and we think he was clearly entitled to show want of consideration for his indorsement."

So, in *Allin v. Williams*, 97 Cal. 403, 32 Pac. 441, it was held that an indorser of a note might show, as between himself and his immediate indorsee, that the indorsement

A PPEAL by plaintiff from a decree of the Pulaski Chancery Court dismissing an action brought to recover the amount alleged to be due on a certain promissory note. Reversed.

The facts are stated in the opinion.

Mr. James A. Comer for appellant.

Mr. Baldy Vinson, for appellee:

Parol evidence is not admissible to show that the indorsement of notes to an individual not designated as the cashier of a bank was such a transfer as to vest the legal title in the bank and preclude a defense which would be good against payee. A bank which takes without indorsement from its cashier negotiable papers indorsed to him without designation of his fiscal position holds it subject to all equities existing in favor of the maker.

First Nat. Bank v. McCullough, 5 Or. 508, 17 L.R.A.(N.S.) 1105, 126 Am. St. Rep. 758, 93 Pac. 366.

When an instrument is made payable to order, the indorsement of the payee is necessary to transfer the legal title, and the transferee without indorsement takes it as a mere chose in action, and must aver and approve the consideration, and he takes it subject to all equities that attach to it in the hands of his transferrer.

1 Dan. Neg. Inst. §§ 644-741; Randolph, Com. Paper, § 788.

Frauenthal, J., delivered the opinion of the court:

This was a suit instituted originally in the Pulaski circuit court by the First National Bank of Lake Providence, Louisiana, the plaintiff below, against Louis Reinman, to recover against him as the indorser of a certain note. The note sued on was executed by B. F. Brown at Lake Providence, Louisiana, on March 15, 1905, for \$600, and was payable to the order of Louis Reinman on or before November 15, 1905; and it is stated in the note that it was given for four mules, which should remain the property of the payee until paid for. Upon the note were the following indorsements: "C. S. Wyley (Indorser)." "Louis Reinman."

was made merely to transfer the note from a nominal holder to the true owner.

And where one acting as agent for another with the latter's consent took a note in his own name in payment for lumber sold for the principal, and indorsed it to the principal, and was subsequently compelled to pay an innocent holder of the note because of the indorsement, he was held entitled to show these facts, since the indorsement was made solely for the principal's benefit to transfer his own property to him. Abraham v. Mitchell, 112 Pa. 230, 56 Am. Rep. 312, 3 Atl. 830.

And it was held in Lewis v. Brehme, 33 28 L.R.A.(N.S.)

In this complaint the plaintiff alleged that the note was transferred and indorsed to it before maturity in the usual course of business, and that due demand for payment, and protest thereof for, and notice of, nonpayment, had been made. The defendant denied that the note had been transferred and indorsed to plaintiff in the usual course of business, and denied that it had been duly protested, or that notice of nonpayment had been given to him. He alleged in substance and effect that he was the owner of the four mules set out in the note, and that said Brown desired to purchase them; but, not knowing his financial responsibility, he declined to sell to him. He mentioned the proposed purchase of the mules to one R. J. Walker, who was the cashier and business manager of the plaintiff, and it was agreed between him and said cashier of said plaintiff that defendant would sell the mules to the plaintiff or said cashier, for \$450, and that a note for \$600 should be gotten from said Brown and indorsed by said C. S. Wyley; that the note should be made payable to defendant, and that he should then transfer the note to plaintiff; that, as a matter of fact, he actually sold the mules to the plaintiff, or to Walker as its cashier, for \$450, and, only to accommodate the plaintiff in obtaining the note of Brown for \$600 on the actual sale of the mules by said plaintiff, or its cashier, to Brown, it was agreed between plaintiff and defendant that the note should be taken in the name of defendant as payee, who would then transfer it to plaintiff; and that he did not actually under said agreement sign the note as indorser, but only as agent of plaintiff, to transfer to it the title to the note. In his answer, which he also denominated a cross complaint, he asked that the cause be transferred to the chancery court, which was done. The plaintiff, at the time, objected to the transfer of the case to the chancery court, and duly saved its exception to the order of transfer that was made. In the chancery court the plaintiff filed a motion asking that the case be transferred back to the circuit court, and this

Md. 412, 3 Am. Rep. 190, that an agent who had indorsed a draft to his principal should be allowed to show that it was not the intention that he should be personally liable.

It is provided by statute in Georgia that "blank indorsements of negotiable paper may always be explained between the parties themselves, or those taking with notice of dishonor or of the actual facts of such indorsement." Galceran v. Noble, 66 Ga. 367.

For a note on right to show by parol evidence that indorsement unrestricted in form was made for the purpose of collection only, see Johnston v. Schnabaum, 17 L.R.A.(N.S.) 838.

J. T. W.

motion was overruled. The defendant adduced evidence tending to sustain the allegations of his answer relative to the manner in which and the party to whom the mules were sold, the circumstances relative to execution of the note, and the manner and object of his indorsement and transfer of the note. Upon a hearing of the case the chancellor rendered a decree dismissing the cause for the want of equity.

The defendant indorsed the note sued on in blank, and the question is whether oral testimony is admissible to explain and qualify this unrestricted indorsement. By an indorsement in blank of a note the law implies a contract made by the indorser, which is of the same force as if it was reduced to writing. That contract is that, upon due demand of the maker and nonpayment, he will pay the note, if due notice of such nonpayment is given to him. It is well settled that as a general rule of law parol evidence is not admissible to contradict or vary the terms of a written contract; and ordinarily the written contract that is entered into by an indorser when he makes an unrestricted indorsement cannot be contradicted or varied by parol evidence. In 1 Daniel on Negotiable Instruments, § 718, the author says: "For, in fact, though there be nothing but the indorser's signature, the indorser's contract is as fully expressed as that of the drawer of a bill payable to bearer. He is a new drawer on the drawee, if it be a bill; a drawer on the maker, if it be a note; and the instrument itself, with his name signed as indorser, constitutes his written contract, from which he can only be absolved by failure of demand or notice, or other delinquency of the holder. The following general view may therefore be stated, to wit: That in an action by immediate indorsee against an indorser, no evidence is admissible that would not be admissible in a suit by a party in privity with the drawer against him." *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647.

But, as between the indorser and his immediate indorsee, this general rule precluding the introduction of parol evidence to explain or qualify the indorsement has its limitations and exceptions. As is said in 1 Daniel on Negotiable Instruments, § 720: "There are three classes of cases in which evidence for this purpose is admissible." Thus, it may be shown by this character of evidence that the indorsement was without consideration, or that it was made upon trust for some special purpose; or it is admissible where, by reason of certain representations and the transaction at the time of the indorsement, the note was taken by the indorsee in sole reliance on the responsibility of the maker, and it was indorsed in

order only to transfer the title in pursuance of such transaction and agreement; and where the attempt to enforce the indorsement would be a fraud. 1 Dan. Neg. Inst. §§ 720a, 721, 722; 8 Cyc. Law & Proc. p. 255; *Lovejoy v. Citizens' Bank*, 23 Kan. 331. In 1 Daniel on Negotiable Instruments, § 722, the following case is stated: "In Pennsylvania, where defendant purchased coffee of plaintiff upon an agreement that the latter should receive certain notes in payment, without defendant assuming any responsibility, the latter handed plaintiff the notes, when he said, 'Hill, you must indorse these notes.' Defendant replied: 'That is not our understanding.' The plaintiff rejoined: 'They are made payable to you. How will you convey them to me? You must indorse them, in order that I may collect them.' Defendant then said: 'I indorse them; but, remember, I am not to be held responsible for their payment. The court said: 'The evidence went to prove a direct fraud in obtaining the indorsements, or their perversion to a use never intended,—a fraudulent purpose.' This case is distinguished from those in which a mere agreement that the indorser shall not be responsible is offered to be shown; no circumstances which would otherwise render the transactions fraudulent or showing a secret trust, appearing."

The above Pennsylvania case can only be based upon the principle that the indorsement was obtained by false and fraudulent representations; for if the indorsement was made only with the contemporaneous oral agreement that it was made without recourse or without assuming responsibility, and with no facts or circumstances showing a false or fraudulent representation which induced the indorsement, then such contemporaneous oral agreement would be inadmissible to contradict or vary the written contract of responsibility implied by the unrestricted indorsement. In the case of *Lovejoy v. Citizens' Bank*, supra, a note was made payable to the president of a bank, and was by him indorsed in blank to the bank. In that case it was held that parol evidence was admissible, showing that the note represented a debt of the maker to the bank, and that the indorsement was made merely for the purpose of transferring the title to the bank. In the case of *Johnston v. Schnabaum*, 36 Ark. 82, 17 L.R.A.(N.S.) 838, 126 Am. St. Rep. 1082, 109 S. W. 1163, 15 A. & E. Ann. Cas. 876, in speaking relative to the admissibility of testimony explaining and qualifying a blank indorsement under the circumstances of that case, this court used the following language: "No rule of evidence is, we think, violated by admitting such explanation. While the law implies, from an

unrestricted indorsement, a contract to guarantee payment of negotiable paper, still the fact may be shown that the purpose of the assignment was merely for collection, and not for a sale of the instrument; and, when this is shown, no liability as guarantor of payment is implied."

In the case at bar the testimony on the part of the defendant tended to prove that he sold the mules to the plaintiff, or its cashier, and for its convenience or accommodation took the note of the maker, payable to him as payee, and then indorsed same to plaintiff under the agreement and understanding, made at the time that this was done, merely to pass the title to the plaintiff, and not as a sale of the note and a guaranty of its payment. The face of the note was the amount of the purchase money which Brown then agreed to pay for the mules, and that amount was really payable to the plaintiff, and not to defendant; and the note was in truth and in fact, under that testimony, the property of the plaintiff. The defendant was in effect only the agent of the plaintiff in permitting the note to be made payable to him, and, in indorsing it, he was merely transferring it for the purpose of placing the title to the note in the name of the plaintiff, who was the real owner. Under these circumstances, instead of selling the note, he sold the mules to the plaintiff, or its cashier, and by his indorsement of the note he did not become liable as a guarantor of its payment. Parol evidence was admissible under these circumstances to show the nature of the transaction, and the purpose of the indorsement, and such evidence would be a complete defense to an action against the defendant, seeking to hold him liable as a guarantor of the note. The defense, however, could be made, and this evidence was admissible, in a court of law equally as in a court of equity. The defense involved no equitable right or remedy, but only the admissibility of evidence. This court has held that where none of the parties objected to the transfer of a cause triable at law from the law court to the chancery court, and did not object to the chancery court entertaining and trying the action, the chancery court would have jurisdiction to determine the cause. *Collins v. Paepcke-Leicht Lumber Co.* 74 Ark. 81, 84 S. W. 1044; *Blake v. Scott*, 92 Ark. 46, 121 S. W. 1054, 123 S. W. 1181. But where such objection was made to the transfer of a case, where the action and defense was purely legal, from the law court to the chancery court, it would be error to make such transfer, and error for the chancery court to entertain jurisdiction thereof. *Weaver v. Arkansas Nat. Bank*, 73 Ark. 462, 28 L.R.A. (N.S.)

84 S. W. 510; *Johnson v. Gillenwater*, 75 Ark. 115, 87 S. W. 439.

In the case at bar the plaintiff duly objected to the transfer of the action from the law to the chancery court. The evidence in the case was conflicting, and the plaintiff had the right to have the issue tried by a jury, and the action determined by a law court. The circuit court, therefore, erred in transferring the cause to the chancery court; and the chancery court erred in entertaining jurisdiction thereof.

For this error, the decree is reversed, and this cause is remanded, with directions to transfer the case to the Pulaski Circuit Court, and for further proceedings.

WASHINGTON SUPREME COURT.

DOMENICO GIURICEVIC, Respt.,

v.

CITY OF TACOMA, Appt.

(57 Wash. 329, 106 Pac. 908.)

Pleading — notice to municipality of injury.

1. That a claim for personal injuries was presented in writing to the city council, as required by statute, is not shown by a complaint which states that plaintiff caused the city and its officers and agents to be fully informed of the extent of the injury, and that the officers and agents investigated the same.

Municipal corporation — injury to employee — necessity of notice.

2. A statutory provision that all claims for injury alleged to have been caused by defects, want of repair, or obstruction of the streets of a city, must be presented to the council, is inapplicable to an injury to a workman engaged in repairing a street by the fall of an electric light pole maintained therein, since the injury did not result from obstruction of the street as a place of travel, and the statute did not contemplate presentation of claims arising from failure to furnish employees a safe working place.

(February 14, 1910.)

Note. — Applicability of rule requiring notice of defect or notice of injury as condition of municipal liability for personal injury on street or highway in case of injury to municipal employee.

A search discloses no authorities on this question other than the case of *Kelly v. Faribault*, 95 Minn. 293, 104 N. W. 231, cited in the above opinion, where the plaintiff, an employee of the city, was injured while working in a trench in a public street, and served no notice of his injury upon the city. The court held that the requirement

APPEAL by defendant from a judgment of the Superior Court for Pierce County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. T. L. Stiles, F. R. Baker, and F. A. Latcham for appellant.

Messrs. Ellis, Fletcher, & Evans, for respondent:

The injury was not caused by a defect, obstruction, or want of repair in a street, within the meaning of the statute requiring notice.

Pye v. Mankato, 38 Minn. 536, 38 N. W. 621; *Moran v. St. Paul*, 54 Minn. 279, 56 N. W. 80; *Kelly v. Faribault*, 95 Minn. 293, 104 N. W. 231; *McIntee v. Middletown*, 80 App. Div. 434, 81 N. Y. Supp. 124.

Gose, J., delivered the opinion of the court:

This suit was brought to recover for personal injuries. From a verdict and judgment for the plaintiff, the defendant has appealed.

The complaint states that at the time the injury was received the respondent was working for the city in grading a street in which the city had placed a large electric light pole; that in grading, the city negligently caused the earth to be excavated around the pole to such an extent that it was dangerous and liable to fall; that the city had notice of its dangerous condition prior to the injury; that the respondent, at the instance of the city, was working near the pole, filling wagons with gravel, and while so doing, and without any knowledge of its dangerous condition, the pole fell, striking

of the statute was not intended to apply in case of an injury to a city employee, saying, in the course of the opinion: "The object of the notice when required is well understood to be to give the municipality an opportunity to investigate, and to protect against fictitious claims. The reason for the rule hardly applies in a case where its own servants are injured in such work by the negligence of the master, but specifically to cases where the public are interested in using, within their rights, the property of the city. With reference to such injuries, when they occur, the municipality would seldom have notice or opportunity to obtain the requisite information of the cause thereof, or the evidence of the city's negligence, to enable it to defend, after long delay. This would not apply to an injury of the kind happening in this case, for it must be presumed that, with reference to its own servants, and the violation of its duties to them, it has and ought to have the same notice as other persons occupying the relation of em-

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the respondent, and inflicting upon him a permanent injury. The complaint further states: "That immediately after said injury, plaintiff caused the city of Tacoma and its officers and agents to be fully informed of the time, place, cause, nature, and extent of his said injury, and the said city of Tacoma and its officers and agents immediately investigated said injury and the cause thereof and the extent of the same." The appellant demurred to the complaint on the ground, among others, that it does not state facts sufficient to constitute a cause of action. The demurrer being overruled, issue was joined, and the case tried to a jury, with the result stated.

The case is brought here on the record, and the single question presented is whether the complaint states a cause of action. Section 215 of the revised city charter of the city of Tacoma provides: "All claims for injuries to the person, alleged to have been caused or sustained by reason of defects, want of repair, or obstruction of any of the highways, streets, alleys, sidewalks, or cross walks, of the city, shall be presented in writing to the city council within thirty days after such injuries shall be alleged to have been received. Such writing shall state the time, place, cause, nature, and extent of the alleged injuries, so far as practicable, and shall be verified by affidavit of the claimant to the effect that the same is true. The omission to present any such claim in the manner or within the time in this section provided shall be a bar to an action against said city therefor."

The appellant first urges that the complaint is subject to a demurrer because it does not state that the claim was presented to the city council. The respondent con-

ployer over the persons who are in direct relation with it. While a very strict and technical construction of the statute might bring the case within its letter, we are very leary it was not within its spirit, and if it is desired that it should be the relief must be obtained from the legislature."

See also the case of *McIntee v. Middletown*, 80 App. Div. 434, 81 N. Y. Supp. 124, where a charter provision for notice of injury caused by defects in, want of repair, or obstruction of any highway, street, alley, sidewalk, or public place, was held inapplicable to an injury suffered by a workman employed by the city in excavating a sewer trench. This decision, however, was upon the ground that the injury was not the result of any defect, want of repair, or obstruction of a highway, the mere fact that the sewer happened to be in the highway not bringing the accident within the letter or spirit of the charter provision. The fact that the injured man was a city employee apparently did not receive consideration.

W. A. S.

tends that, whilst the complaint may have been defective as against a motion to make it more definite and certain, as to a demurrer, every reasonable intendment and presumption should be indulged to support it, and that, when this is done, it sufficiently appears that notice was given to the city council. We grant the rule of liberal interpretation, but with this indulgence we do not think the complaint states that notice was given to the city council. It was a simple matter to plead the notice, if it had in fact been given. The complaint has the appearance of a studied effort to avoid, rather than to state, the giving of the notice to the council.

The respondent next contends that the injury did not result from any defect, want of repair, or obstruction in the street as a place of travel; that the fact that the injury happened in the street is a mere incident; and that the charter provision is inapplicable. We think this view must prevail.

The giving of a notice to the city or its governing body upon claims for injuries by tort is not necessary as a condition precedent to an action thereon against the municipality, unless expressly required by statute or charter. 28 Cyc. Law & Proc. p. 1447. A charter or statute requiring a notice or presentment of a claim as a condition precedent to the commencement of an action requires a strict construction, and cannot be extended by implication beyond its terms. 28 Cyc. Law & Proc. p. 1450. In *Pye v. Mankato*, 38 Minn. 536, 38 N. W. 621, the complaint charged the city with liability on account of the raising of the grade of certain streets so as to form embankments obstructing a water course which crossed the same, by reason of which, and because the gutters provided for carrying off the water were insufficient for that purpose, water was collected and discharged upon the plaintiff's premises. There was a special statute which provided that no action could be maintained against the city of Mankato "on account of any injury received by means of any defect in the condition of any bridge, street, sidewalk, or thoroughfare, unless such action shall be commenced within one year from the happening of the injury; nor unless notice shall have first been given in writing to the mayor of said city within thirty days of the occurrence of such injury or damage, stating the place where and the time when such injury was received." The complaint did not show a compliance with the statute, and was demurred to for that reason. The court held that the word "defect" had reference to the usefulness and safety of the streets for the purpose of travel, but that it did not include injuries resulting to adjacent property from condi-

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tions which did not render the street defective as such, and that the injury "had no natural or necessary relation to the fact that the places where the alleged acts were done were public streets."

In *Moran v. St. Paul*, 54 Minn. 279, 56 N. W. 80, the complaint alleged that the property adjoining the street had been injured by water escaping from a defective water pipe in one of the public streets. There was no averment in the complaint that a written notice of the plaintiff's claim for damages had been served upon the mayor or city clerk, as required by the defendant's charter, and it was urged, upon demurrer to the complaint, that a cause of action was not stated. The court held that the words in the charter, "any defect in the condition of any . . . street," referred to "their usefulness and safety for the purpose of travel." In *McIntee v. Middletown*, 80 App. Div. 434, 81 N. Y. Supp. 124, the plaintiff was injured by the caving of the dirt while digging a trench for a sewer in a street in the city. The court, in holding that the charter provision requiring notice to be served on the common council did not apply, said: "And the mere fact that this sewer happened to be in the highway does not bring it within the letter or the spirit of the provision of the charter."

The respondent next contends that the charter does not require or contemplate the presentation of claims arising from the failure of the city to furnish its servant a reasonably safe place in which to work. This question received consideration in *Kelly v. Faribault*, 95 Minn. 293, 104 N. W. 231, where the plaintiff was injured while at work in a trench in a public street. It was charged that the trench was defective in its construction, and was not properly braced, by reason of which the loose earth fell upon and injured the plaintiff. The plaintiff did not serve notice, as provided by law for injuries resulting from a defective street. The court held that the law requiring notice to the city had no application to its duty as master to furnish its servant a reasonably safe place in which to work; that the purpose of the law requiring notice was to give the municipality an opportunity to investigate and protect itself against fictitious claims. We think that, while the claim in the instant case is within the letter, it is clearly without the spirit of the charter provision. In arriving at the intent of a law, it is proper to consider the mischief sought to be met. Clearly, the purpose of the notice is to enable the city to protect itself against spurious and fraudulent claims. In this case the reason for the notice is absent, for it must be presumed that the city had notice of the in-

jury to its servant. *Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025, is distinguishable. The charter of the city of Seattle required "all claims for damages against the city" to be presented.

The judgment will be affirmed.

Fullerton, Chadwick, Dunbar, Mount, Crow, and Parker, JJ., concur.

ALABAMA SUPREME COURT.

FRANK SANDERS, Appt.,

v.

STATE OF ALABAMA.

(— Ala. —, 52 So. 417.)

Larceny — corpus delicti — possession of goods.

The proof of *corpus delicti* is not sufficient to support a conviction of larceny, where it merely shows that certain goods, formerly part of the stock of a merchant, were found in possession of accused, without anything to show that they were stolen, or were not sold in due course of trade.

(April 19, 1910.)

Note. — Proof of corpus delicti in larceny.

This note brings down to date the larceny branch of the note, "Proof of *corpus delicti* in criminal case," in 68 L.R.A. 33, and contains only cases decided since that time.

What constitutes.

"There can be no larceny without a taking of the property against the will of the owner." *State v. Court*, 225 Mo. 609, 125 S. W. 451.

On a prosecution for the larceny of an automobile, the court said, in *People v. Cahill*, 11 Cal. App. 685, 106 Pac. 115; "The *corpus delicti* consisted of the asportation of the machine. There can, of course, be no doubt that the evidence . . . shows that the car was taken from the garage by someone, and that there is no pretense that it was shown that it was taken with the consent of either the owner or the manager of the garage is a proposition equally as free from doubt, so far as the record discloses. In other words, the irresistible inference from the circumstances proved . . . is that the 'auto' was wrongfully and feloniously taken from the garage, and hence the *corpus delicti* was clearly established."

Necessity of proving.

"The burden rests upon the state to prove the *corpus delicti*, and unless the state has shown, *prima facie*, that a larceny has been committed, the defendant is not put upon 28 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the Circuit Court for Greene County, convicting him of larceny. Reversed.

The facts are stated in the opinion.

Messrs. Harwood and McKinley, for appellant:

There was no proof of the *corpus delicti*.

Smith v. State, 133 Ala. 150, 91 Am. St. Rep. 21, 31 So. 806; *Stringer v. State*, 135 Ala. 60, 33 So. 685, 14 Am. Crim. Rep. 462; *Orr v. State*, 107 Ala. 39, 18 So. 142; *White v. State*, 72 Ala. 200; *Bryant v. State*, 116 Ala. 452, 23 So. 40; 2 Russell, Crimes 294, 295; 2 Best, Ev. 751, 752.

Mr. Alexander M. Garber, Attorney General, for the State.

Mayfield, J., delivered the opinion of the court:

The defendant was indicted of larceny, and of receiving stolen goods. The property alleged to be stolen, and received as such, consisted of 16 pairs of pants and 3 pairs of shoes, the property of G. A. Horton.

The *corpus delicti* was not proven, and for this reason the accused should have been acquitted.

proof." *Perry v. State*, 155 Ala. 93, 46 So. 470.

"To support a conviction, there must be evidence that the property in question was actually stolen." *George v. United States*, 1 Okla. Crim. Rep. 307, 97 Pac. 1052, 100 Pac. 46.

Upon a conviction for larceny, refusal of a new trial is error, where there was no proof of the *corpus delicti*. *Franklin v. State*, 3 Ga. App. 342, 59 S. E. 835.

On a prosecution for larceny, the ownership and the fact of wrongful taking must be alleged and proved before a presumption of guilt will arise from the mere fact of possession. *State v. Loomis*, 129 Iowa, 141, 105 N. W. 397.

In the case of *People v. Mindeman*, 157 Mich. 120, 121 N. W. 488, which was a prosecution for larceny, the court said that there is no question about the rule that, in all trials for crime, the prosecution must prove the *corpus delicti* to the satisfaction of the jury, and beyond a reasonable doubt, before evidence tending to implicate the party on trial is introduced.

On a grand larceny trial, the court said, in *State v. Keeland*, 39 Mont. 506, 104 Pac. 513: "The defendant is not required in any case to answer the charge against him, in the absence of evidence upon the part of the prosecution sufficient to establish the *corpus delicti*."

In connection with confession.

In *Shires v. State*, 2 Okla. Crim. Rep. 89, 99 Pac. 1100, a prosecution for the larceny of mules, the court said: "A convic-

The alleged owner of the property testified on his direct examination as follows: "That he knew the defendant. That in January, 1909, before the finding of the indictment, he recovered from the defendant 16 pairs of pants and 3 pairs of shoes. That he (the witness) had never sold any goods like these to the defendant. That the pants were worth from \$1 to \$2.50, wholesale, and some of them \$3, a pair. That the shoes were worth \$5 a pair. That these shoes and pants came out of the witness's store at Pleasant Ridge, and, so far as the witness knew, they were obtained from said store without the witness's knowledge or consent. That witness's store is located in Greene county, Alabama. That some of said goods had defendant's cost mark on them." This was all of his testimony on direct examination. On his cross-examination he testified to no other fact tending to prove the *corpus delicti*; but, among other things, testified: That for a number of years prior to the indictment, and at that time, he was engaged in the mercantile business at Pleasant Ridge, Greene county, Alabama; that during this time there were eight persons besides himself who were authorized

to sell goods from his store, and that they did sell same; that he could not swear that the goods in question were not sold out of his store in the due course of trade; that witness was absent from his store a great deal of the time; "that witness had quite a large stock of pants in his store, and quite a large stock of shoes also; that he could not swear that he missed these goods, or any of them, out of his stock, and does not know when they went out of his store; that it was not customary for the cost mark to be removed from goods when they were sold; that witness did not sell these pants and shoes himself, but could not swear that said 16 pairs of pants and 3 pairs of shoes, or any of them, were stolen; that he could not swear that said shoes were not sold from witness's stock in the regular course of business." This was all the evidence that, in the slightest, tended to prove the *corpus delicti*.

The goods in question were found in the house of the defendant, and when questioned as to where he got them,—the parties questioning him at the time threatening to tie him,—he ran away from his house, but did not leave the neighborhood; and subsequent-

tion should not be had on extrajudicial confessions of the defendant, unsupported by corroborating facts and circumstances. Proof *aliunde* of the *corpus delicti* is required."

In order that a confession of larceny may authorize a conviction, it must be accompanied by other proof showing that the crime has been committed. *Brown v. Com.* (Ky.) 118 S. W. 945.

But while an extrajudicial confession or admission of one charged with larceny is not sufficient, of itself, to sustain a conviction, and there must be other evidence of the *corpus delicti*, yet it seems to be the rule that such a confession or admission may be considered in connection with the other evidence, to establish the *corpus delicti*, and that it is not necessary to prove the *corpus delicti* by evidence entirely independent and exclusive of the confession or admission. *State v. Brinkley* (Or.) 105 Pac. 708.

Character and sufficiency.

Corroborated statements of fact, made by a defendant in a prosecution for larceny, not amounting to admissions of guilt, are admissible to prove the facts establishing the *corpus delicti*. *Ibid.*

"*Corpus delicti* may be proved by circumstantial evidence, and if the evidence adduced affords an inference that a larceny has been committed, the question of its sufficiency is for the jury." *Perry v. State*, 155 Ala. 93, 46 So. 470.
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It seems to be a well-settled general rule that *corpus delicti* in larceny may be proved by circumstantial evidence, as held by the following cases, in which also the circumstantial evidence in each was held sufficient to establish the *corpus delicti*, or to warrant the submission of the question to the jury, and to sustain a finding of guilt: *Sheffield v. State*, 1 Ga. App. 135, 57 S. E. 969; *Ray v. State*, 4 Ga. App. 67, 60 S. E. 816; *Mason v. State*, 171 Ind. 78, 85 N. E. 776, 16 A. & E. Ann. Cas. 1212; *State v. Vinton*, 220 Mo. 90, 119 S. W. 370; *State v. Keeland*, 39 Mont. 506, 104 Pac. 513; *George v. United States*, 1 Okla. Crim. Rep. 307, 97 Pac. 1052, 100 Pac. 46.

In *Cohoe v. State*, 82 Neb. 744, 118 N. W. 1088, and *Shires v. State*, 2 Okla. Crim. Rep. 89, 99 Pac. 1100, also, it is held that *corpus delicti* in larceny may be proved by circumstantial evidence, and that the circumstantial evidence in those cases was sufficient corroboration of a voluntary confession of the accused, in the first case, to establish the *corpus delicti*, and in the second, to make the sufficiency of the proof, both of the *corpus delicti* and of the defendant's guilt, a question for the jury alone.

In the following cases of larceny, where the admissibility of circumstantial evidence to prove *corpus delicti* does not seem to have been questioned, it is held that the evidence, though circumstantial, was sufficient proof of *corpus delicti*: *Jefferson v. State*, 89 Ark. 129, 115 S. W. 1140; *People v. Cahill*, 11 Cal. App. 685, 106 Pac. 115; *State v. Collins*, 79 Kan. 411, 99 Pac.

ly he removed the goods in question to a neighbor's house, but, further than this, made no attempt to conceal them.

All the evidence offered as to the defendant's possession of the goods would have been proper and admissible if the *corpus delicti* had been proven, or any sufficient evidence offered which would authorize the jury to infer that the goods had been stolen by defendant, or by any other person; but, in the absence of such proof, it was all, of course, inadmissible.

It is but a truism to say that there can be no receiving of stolen property, unless the property in question is first stolen. It is likewise true that, in order for the possession of property to be evidence of a crime, the crime must be proven. In the recent case of *Smith v. State*, 133 Ala. 150, 91 Am. St. Rep. 21, 31 So. 807, this court reviewed some of our former cases on this subject, and spoke as follows: "It must now be regarded as settled in this state that the unexplained possession of property recently stolen does not, as matter of law, raise a presumption of guilt from the circumstance. Nor does the unexplained possession by one person of goods belonging to another raise the presumption that a larceny has been committed and that the possessor is a thief. Additional evidence is necessary to establish a *corpus delicti*. Unless the jury are satisfied beyond a reasonable doubt that the offense has been committed, the unexplained recent possession of goods will not justify the conclusion that the person in whose possession they are found is the thief. *Orr v. State*, 107 Ala. 35, 18 So. 142; *Thomas v. State*, 109 Ala. 25, 19 So. 403. 'Proof of a charge, in criminal causes, involves the proof of two distinct propositions: First, that the act itself was done; and, secondly, that it was done by the person charged, and by none other. In other words, proof of the *corpus delicti* and of the identity of the prisoner.' *Winslow v. State*, 76 Ala. 47, 5 Am. Crim. Rep. 43. It is undoubtedly true

that both of these essential propositions are generally for the determination of the jury, and both must be proven beyond a reasonable doubt. But where there is no proof of the *corpus delicti*, no testimony tending in the remotest degree to prove that the property charged to have been stolen was in fact stolen, no larceny shown to have been committed, then there can be no conviction of the prisoner should the goods described in the indictment, charged to have been stolen, be found in his possession, though no explanation as to how he came by them be given by him, or, if given, is entirely unsatisfactory. In such case, the evidence is not *prima facie* sufficient to establish the *corpus delicti*, and the court should not allow the introduction of evidence of possession by the prisoner of the goods charged in the indictment to have been stolen."

There was no proof that these particular goods in question were stolen from Horton or any other person. There was no proof that these or similar goods had ever been stolen from the alleged owner. The most that it showed was that a part of these goods, or goods like them, were once in the store of Horton. But there was no evidence that they were ever stolen or thought to be stolen, other than the fact that they were found in defendant's possession; and whether this was one day, or one or two or three years, after they were in defendant's store, did not appear. Nor was there any evidence tending to fix the time when the goods were in Horton's store, or when defendant acquired them.

To repeat, there was no evidence tending to show that the property was ever stolen by anyone. The fact that it was once in Horton's store, and was subsequently found in the defendant's possession, does not tend to show that it was stolen. There was not a particle of evidence to show that any theft was ever committed as to the property in question, or as to any other. There

817; *People v. Mindeman*, 157 Mich. 120, 121 N. W. 488; *State v. Estes*, 209 Mo. 288, 107 S. W. 1059; *State v. Court*, 225 Mo. 609, 125 S. W. 451; *State v. Wells*, 33 Mont. 291, 83 Pac. 476; *Territory v. Leslie* (N. M.) 106 Pac. 378; *People v. Klein*, 117 App. Div. 196, 102 N. Y. Supp. 289; *Hines v. United States*, 2 Okla. Crim. Rep. 639, 103 Pac. 879.

The following cases, without disputing the admissibility of circumstantial evidence to prove *corpus delicti* in larceny, hold that the evidence offered in each was not sufficient to establish the *corpus delicti*: *Franklin v. State*, 3 Ga. App. 342, 59 S. E. 835; *State v. Loomis*, 129 Iowa, 141, 105 N. W. 397; *Moseby v. Com.* (Ky.) 113 S. W. 850; *Brown v. Com.* (Ky.) 118 S. W. 945. 28 L.R.A. (N.S.)

Evidence of *corpus delicti* tending to connect accused.

In many, if not most, cases, the evidence offered to prove *corpus delicti* tends also to show the guilt of the accused; and in *George v. United States*, 1 Okla. Crim. Rep. 307, 97 Pac. 1052, the court said, on this point: "Neither is it essential that the *corpus delicti* should be established by evidence independent of that which tends to connect the accused with its perpetration. The same evidence which tends to prove one may also tend to prove the other, so that the existence of the crime and the guilt of the defendant may stand together inseparable on one foundation of circumstantial evidence."

A. C. W.

was some evidence of the "*corpus*," but none of the "*delicti*."

The rule as to sufficiency of the evidence to support a conviction, in cases like this, is thus stated in Russell on Crimes, vol. 2, pp. 294, 295: "Where the prosecutor kept a large toyshop, and the prisoner, a little boy, came into the shop dressed in a smock frock, and, after remaining there some time, from suspicion excited, he was searched, and under his smock frock were found concealed a doll, six toyhouses, and such other things, and the prosecutor swore that he believed the six toyhouses to be his property, because they exactly resembled other toyhouses of the same sort which he had in his shop, and he gave the same evidence with regard to all the other articles except the doll, and he swore that the doll had been his, as he found upon it his private mark; but he could not say that he had not sold it, and he had not missed, and could not miss, from the nature of the stock, any of the articles which the prisoner was charged with stealing. Erle, J., said: 'It seems to me that you have failed to establish in this case the *corpus delicti*. It is true the prosecutor swears that the doll was once his, but he cannot state that it was taken from him; and, for aught that appears to the contrary, the prisoner may have come by it in an honest manner.' [R. v. Dredge, 1 Cox, C. C. 235.] And an acquittal was directed."

It will be observed that there was no proof that the goods found in defendant's possession were ever lost; much less, stolen.

Mr. Best states the rule as to the sufficiency of evidence in criminal cases as follows: "There must be clear and unequivocal proof of the *corpus delicti*. Every criminal charge involves two things: First, that an offense has been committed; and, secondly, that the accused is the author, or one of the authors, of it. 'I take the rule to be this,' says Lord Stowell, in his judgment in Evans v. Evans, 1 Hagg. Consist. Rep. 35, 105: 'If you have a criminal fact ascertained, you may then take presumptive proof to show who did it; to fix the criminal, having then an actual *corpus delicti*.' . . . But to take presumptions in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature, and would, I take it, be an entire misapplication of the doctrine of presumptions.' Sir Matthew Hale, also, in his Pleas of the Crown, 2 Hale, P. C. 290, laid down the two following rules, which have met with deserved approbation: 'I would never convict any person for stealing the goods *cujusdam ignoti*, merely because he would not give an account how he came by them, un-

less there were due proof made that a felony was committed of these goods.'" 2 Best, Ev. pp. 751, 752.

It follows that the general affirmative charge should have been given for defendant.

Reversed and remanded.

Dowdell, Ch. J., and Anderson and Sayre, JJ., concur.

LOUISIANA SUPREME COURT.

WILLIAM FRANTZ et al.

v.
JACOB FINK et al.

(125 La. 1013, 52 So. 131.)

Sale — possession of chattel with power of — dation en paiement — title.

Plaintiffs placed in the hands of one Moss certain jewelry with right to sell the same under an obligation to pay them a certain amount fixed at the time. Moss sold to Fink one set of the earrings and received the price. The other set Moss transferred to Fink under *dation en paiement*. Frantz & Company brought this suit to recover and have delivered to them the jewelry, and, on default of Fink so to do, to recover the price fixed between the parties. The court of appeal rendered judgment in favor of defendant. Held, on review of that judgment that it was correct as to the jewelry which was sold to Fink, but erroneous as to the jewelry which was transferred to him under the *dation en paiement*.

(November 2, 1909.)

CERTIORARI to the Court of Appeals to review a judgment affirming a judgment of the Civil District Court for the Parish of Orleans, Division B, in defendants' favor in an action brought to recover certain goods placed in the possession of defendant Moss with power of sale, or to recover the agreed price thereof. Modified.

The facts are stated in the opinion.

Mr. J. Zach Spearing, for applicants:

Mere possession of personal property belonging to a third person, even though that possession be legal, does not authorize or justify the possessor in selling the property, and a sale by such a person does not invest the purchaser with the title and ownership.

Russell v. Kunemann, 19 La. Ann. 517; Headnote by NICHOLLS, J.

Note. — See note to Davis v. First Nat. Bank, 25 L.R.A.(N.S.) 760, as to right of one leaving his chattels in another's possession to claim title against the latter's vendees or creditors.

M'Burney v. Flagg, 11 La. 333; Perryman v. Demaret, 11 La. 347; Moore v. Lambeth, 5 La. Ann. 66; Stern Bros. v. Germania Nat. Bank, 34 La. Ann. 1119; Lallande v. His Creditors, 42 La. Ann. 705, 7 So. 895.

Mr. Charles Rosen, for respondents:

Delivery of an article at a fixed price under alternative agreement that the article is to be paid for or returned at the option of the party receiving it constitutes a sale.

2 Benjamin, Sales, §§ 798-800, p. 597; 24 Am. & Eng. Enc. Law, 2d ed. p. 1026; Braunn & Fitts v. Keally, 146 Pa. 519, 28 Am. St. Rep. 811, 23 Atl. 389; Crocker v. Gullifer, 44 Me. 491, 69 Am. Dec. 118; Holbrook v. Armstrong, 10 Me. 31; Dearborn v. Turner, 16 Me. 17, 33 Am. Dec. 630; Buswell v. Bicknell, 17 Me. 344, 35 Am. Dec. 262.

Intrusting goods to another with the knowledge that they are to be sold is equivalent to authority to sell them, and raises an equitable estoppel in favor of the person acquiring them, who has parted with his money on the faith of the apparent ownership of the person selling.

Fullerton v. Kennedy, 6 La. Ann. 312; Foster v. Foster, 11 La. 408; Stockton v. Craddick, 4 La. Ann. 285; Dozer v. Squires, 13 La. 130; Pickering v. Busk, 15 East, 38; Pickard v. Sears, 6 Ad. & El. 469; McMassters v. Atchafalaya R. & Bkg. Co. 1 La. Ann. 11; Leverich v. Richards, 1 La. Ann. 348; Gregg v. Wells, 10 Ad. & El. 90; Moore v. Lambeth, 5 La. Ann. 73; Conner v. Hill, 6 La. Ann. 7; Smith v. Clews, 105 N. Y. 283, 59 Am. Rep. 502, 11 N. E. 632; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Mechem, Agency, p. 646; Mechem, Sales, pp. 601, 977; Lewenberg v. Hayes, 91 Me. 104, 64 Am. St. Rep. 215, 39 Atl. 469.

As Moss was a dealer clothed with the *indicia* of title, Fink should be protected in his dealings with him as owner.

Fullerton v. Kennedy, 6 La. Ann. 313; Conner v. Hill, 6 La. Ann. 7; Honold v. Meyer, 36 La. Ann. 588; Walker v. Cassaway, 4 La. Ann. 20, 50 Am. Dec. 551; Moore v. Lambeth, 5 La. Ann. 73.

Although taken for an antecedent debt the transaction was a sale.

Levert v. Hebert, 51 La. Ann. 222, 25 So. 118; Warner v. Reddy, 46 La. Ann. 1099, 15 So. 365.

Even if the transfer was, as to the \$500, an antecedent debt, yet, as to the \$465, this was a contemporaneous payment, made at the very moment of transfer, for the purpose of acquiring the property purchased.

Furniss's Succession, 34 La. Ann. 1015.

Nicholls, J., delivered the opinion of the court:

The plaintiff brought suit in the civil dis-
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trict court for the parish of Orleans, in which it alleged that it was the sole and only owner of one pair of solitaire diamond earrings $3\frac{1}{2}$ carats weight, less $\frac{1}{8}$ of a carat, valued at the sum of \$502.97, and also another pair of solitaire diamond earrings valued at the sum of \$975, making a total of \$1,477.97; that on or about the 13th day of March, 1906, and on or about the 4th day of April, 1906, petitioner delivered the above-mentioned earrings, respectively, to Louis Moss, a resident of New Orleans, for his temporary use, but petitioner did not sell the said earrings, nor either of them, to the said Moss, nor did petitioner part with the ownership thereof in whole or in part, nor did petitioner authorize the said Moss to sell or dispose of the said earrings in whole or in part, or either of them, nor to pledge, pawn, or encumber the same in any manner, shape, or form; that, notwithstanding the said Moss had no legal right nor authority to do so, and notwithstanding the sole and only ownership of the said earrings in petitioner, the said Moss, in violation of the law and of the right of petitioner, did pawn and pledge and deliver all of the said earrings to Jacob Fink, a resident of the city of New Orleans, for a sum of money not known to petitioner, which said sum of money the said Moss used for his own benefit, and the same did not in any manner inure to the benefit or advantage of petitioner; that petitioner is still the sole and only owner of all of the said earrings, and was entitled to be recognized as such, and to have the said Jacob Fink condemned to deliver the said earrings to petitioner, or, in default thereof, to pay the value of the same to petitioner.

In view of the premises, petitioner prayed that Louis Moss and Jacob Fink be duly cited; that, after due and proper proceedings, there be judgment in favor of petitioner and against the said Moss and the said Fink, recognizing petitioner as the sole and only owner of one pair of diamond earrings $3\frac{1}{2}$ carats in weight, less $\frac{1}{8}$ of a carat, valued at the sum of \$502.97, and of one pair of solitaire diamond earrings valued at the sum of \$975; that they and each of them be ordered and condemned to deliver the said earrings to petitioner within a time to be fixed by this honorable court, or, in default thereof, that there be judgment in favor of petitioner and against the said Moss and Fink *in solido* for the full and true sum of \$1,477.97, or so much thereof as represents the value of such earrings as may not be delivered to petitioner, with legal interest from April 4, 1906, until paid, and costs of court, and for all equitable and general relief.

Defendant pleaded a general denial. Fur-

ther answering, he averred that Louis Moss was a vendor of diamonds and jewelry in the open market of this city, and was well recognized as such by the trade generally and by plaintiff and defendant; that said Louis Moss, being indebted unto defendant in the sum of \$500, did, in the course of his business dealings, in order to make a settlement of the said \$500, on or about April 28, 1906, sell to defendant a certain pair of solitaire diamond earrings for the sum of \$965, represented by said debt of \$500, which was thereby extinguished, and the further sum of \$465 paid by defendant to Harry Koritzky of this city for account of said Moss; that said Moss did, in the course of his business dealings, on or about March 14, 1906, sell to defendant another pair of solitaire diamond earrings for the price and sum of \$300, which defendant paid to said Moss. And defendant denied that the earrings thus purchased and acquired by him were the property of plaintiff, and defendant averred that he purchased the same and paid for the same in good faith and in open market the full value thereof, and purchased the same from one who was dealer in such articles and recognized by the trade generally and by plaintiff and defendant as such.

Defendant further averred that, so far as defendant was aware, said Moss was the owner of said property and had full power, right, and authority to sell the same to defendant, for which defendant paid the full value in good faith and in open market. Defendant further averred that if he be mistaken, and if it be true that said Moss was not the owner of said property, and if it be true that the same was placed in his possession by the said plaintiff, then defendant averred that the same was placed in the possession of said Moss by plaintiff for the purpose of sale, and they are estopped to question the authority of said Moss to sell and dispose of same; and, if there were any litigation on the right of said Moss to sell and dispose of the property, defendant averred that he had no knowledge and no means of knowing thereof, and that he should be protected in the purchase made by him as aforesaid.

In view of the premises, defendant prayed for judgment in his favor rejecting the demand of plaintiff for costs and for full general and equitable relief.

On trial of the suit judgment was rendered in favor of the defendant, and thereupon plaintiff appealed therefrom to the court of appeal. That court on hearing of the appeal rendered the following judgment: "The basis for plaintiff's right to be adjudged the owner of the two diamond earrings and, in default of their return, to have judgment for the price of said earrings

against Fink, who, it may be stated at once, is shown by the evidence to have acquired same in perfect good faith, from a regular and well-known dealer, in open market and for a valuable consideration," is that the earrings were delivered to Moss simply for "temporary use," and absolutely without any authority conferred on him to sell, dispose of, or in any manner to encumber the same.

The testimony of the plaintiff's own witnesses establishes the very contrary: The earrings were delivered by plaintiff to Moss, who was a dealer in diamonds, known as such to the trade generally and to plaintiff firm particularly, as repeated transactions of a character similar to the transaction in the instant cause were had between plaintiff and Moss, just in the same manner and for the same purpose and under the same conditions as the plaintiff delivered other jewelry to Moss on transactions prior to and subsequent to the instant transaction, and that was the purpose of sale. From the evidence of plaintiff's principal witness, the senior member of the firm, it is apparent that Moss not only had the right to sell these particular goods, but that he obtained them from the plaintiff firm with the knowledge on its part that this was the very purpose of the delivery. He was charged a fixed price for them less than the retail, so that when he sold them a margin of profit could be left to him. The agreement in this and all other similar transactions between Moss and the plaintiff firm was that the former was to have the right either to retain the goods and pay the price agreed on, or to return the goods if he so desired. In his testimony, William Frantz, the senior member of plaintiff firm, states just how this transaction occurred:

Q. Will you kindly tell the court the circumstances under which you handed these things over to Mr. Moss, and for which purpose you handed them over to him?

A. Well, Mr. Moss came into the store, and he told us that he had a customer for a pair of diamond earrings, and so he took them from us for sale.

Q. Did you sell these diamond earrings to Mr. Moss?

A. No, sir; we did not sell them to him.

Q. Well, just tell us what was to be done with them; tell us the whole story with regards to that pair of diamond earrings.

A. Well, they were delivered to Mr. Moss, and he was either to sell them or return us the earrings; he was to give us back the earrings or the money.

Again he was asked:

Q. What did he (Moss) state to you?

A. He stated to us that he had a customer for a pair of earrings.

Q. And for which purpose did you give this pair of diamond earrings to Mr. Moss?

A. For the purpose of selling them.

Q. Selling them generally, or for any one particular customer?

A. Well, he said he had a particular customer for it. He said he had a customer for a pair of diamond earrings, and so we gave them to him. . . . If the earrings were sold, he was going to bring me the price of them (the money), and, if they were not sold, then the earrings were to be returned to us. I charged him a margin of profit on them,—on both of them. I did that because he wanted to make a profit on them, and so we thought we would make a very small margin to him.

The price agreed on was \$502.97 for one pair and \$975 for the other pair of the earrings. This the witness says was within 10 or 15 per cent of the cost, adding: "This is not the value at which they would have been sold at retail. They would have been sold at retail at more than that. I made a very small price to Mr. Moss at the time because, naturally, he wanted to make something on it himself."

On cross-examination he says:

Mr. Moss was an operator in diamonds, or a vendor of diamonds, in this city, and of jewelry. He was well known among the trade as such. We charged him (Moss) for these goods on a memorandum slip. He was either to return the goods or to give up the price which we had charged against him. We gave him a bill at the time showing the price that he was to be accountable for to us. He was not to sell the goods and charge us a commission for selling them. He was not to account to us for what he might get out of the goods. Anything that he got for the goods, no matter how much it was above the price which we billed, would belong to him.

Q. And, whether he sold the goods or kept and retained them himself, all that you wanted to get back from him was the amount that you had charged him for these goods; isn't that right, Mr. Frantz?

A. Yes, sir; that is correct.

He testified that the plaintiff firm had other similar dealings with Moss:

In these instances he had always paid us the price that we charged him for the goods. We never inquired as to what he had done with the goods, because we had nothing to do with that,—what he sold them for.

From the record of the suit No. 4,594 of our docket, instituted by the plaintiff against J. W. Winehill and Louis Moss, this 28 L.R.A. (N.S.)

day decided (124 La. 680, 50 So. 650), we hear that plaintiff firm had similar transactions with Moss, one on the 28th of March, and another on the 2d of April, 1906, concerning diamond studs. This suit is for the exact price charged Moss, which is less than the actual retail value of these articles.

It is evident from the facts above recited that the transactions between plaintiff and Moss concerning the earrings in question evidences a contract of sale subject to the right to recover and return reserved to the purchaser, or what is known to the law as a contract of "sale or return."

Article 2439 of the Civil Code defines the contract of sale as "an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing," and also provides that "three circumstances concur to the perfection of the contract, to wit, the thing sold, the price, and the consent."

Here all these elements concur. Both parties had consented to the transaction, the price was fixed and binding on both, and the thing was delivered. The only reservation which was a condition subsequent was that Moss had the right of dissolving the sale by a return of the goods to be made within a reasonable delay after the transaction, no specific time being stipulated. As we have said, this was a transaction of "sale and return." Under such transactions, the title passes to the vendee.

Mr. Benjamin, in his work on Sales (p. 597), says: "The bargain called 'sale or return' was explained by the Queen's bench in *Moss v. Sweet*, 16 Q. B. 493, 20 L. J. Q. B. N. S. 167 (see *Swain v. Shepherd*, 1 Moody & R. 223), . . . to mean a sale with a right on the part of the buyer to return the goods at his option, within a reasonable time, and it was held in that case that the property passes, and an action for goods sold and delivered will lie if the goods are not returned to the seller within a reasonable time."

In *Ex parte White*, L. R. 6 Ch. 397, Lord Chief Justice James said where a party received goods to sell them at any price he thought fit, and was still only liable to pay for them at a price fixed beforehand, without any reference to the price at which he had sold them in a particular month, he was not acting in a fiduciary capacity in respect to these goods. Mellish, L. J., was of the same opinion, and, after stating that Neville purchased at a fixed price and at a fixed time, said: "Now, if it had been his duty to sell to his customers at that price . . . [payable at that time], the course of dealing would be consistent with his being merely a *del credere* agent, because I ap-

prehend that a *del credere* agent, like any other agent, is to sell according to the instructions of his principal and to make such contracts as he is authorized to make for his principal, and he is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them, and therefore, if he sells at the price . . . and upon the credit which he is authorized by his principal to give, and the customer pays him according to his contract, then no doubt he is bound like any other agent as soon as he receives the money to hand it over to the principal. But if the consignee is at liberty . . . to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent; . . . in point of law, the alleged agent in such a case is making on his own account a contract of purchase with his alleged principal and is again reselling."

Mechem on Sales, after referring to sales of goods to arrive to be shipped on approval satisfactory to buyer, if satisfactory to this party, to be weighed, to be appraised, etc., in which cases he says the title does not pass to the seller, reads that "to be distinguished from the cases in the last sections are those in which the option is the opposite, i. e., that the article is purchased and shall be paid for unless it be returned. Here there is a present sale subject to a condition subsequent. As is said in one case, an option to purchase if he lived is essentially different from an option to return a purchase, if he should not like. In one case, the title will not pass until the option is determined; in the other, the property passes at once subject to the right to rescind and return. . . . A contract of this nature . . . [is] a present sale subject to be defeated by a condition subsequent, until returned. Therefore the title is in the vendee. He may sell the goods as his own, and thus defeat the return; or they may be seized by his creditors with like effect. The risk usually is his also, as the risk follows the title excepting, perhaps, such risks as inhere in the very nature of the property, or are incidental." Sections 675-677.

Delivery of an article at a fixed price under alternative agreement that the article is to be paid for or returned at the option of the party receiving it constitutes a sale. Crocker v. Gullifer, 44 Me. 491, 69 Am. Dec. 118. When the option is with the party receiving to pay for or return the goods received, the uniform current of authority is that such alternative agreement is a sale.

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Holbrook v. Armstrong, 10 Me. 31. In Dearborn v. Turner, 16 Me. 17, 33 Am. Dec. 630, it was held that Nason, who received the property, having the alternative to return or pay, the property passed to him, and he was at liberty to sell. In Buswell v. Bicknell, 17 Me. 344, 35 Am. Dec. 262, the party receiving the article in dispute verbally agreed to pay a certain price or return the same in a given time. "The property," said the court, "in the thing delivered passes, and the remedy of the former owner rests in contract. It is the option conceded to the party receiving which produces this effect."

2. Even should the nature of the transaction between plaintiff and Moss be not that of vendor and vendee, there is one fact which stands out conspicuous in the record, indeed, it is admitted by the plaintiff firm, and that is that the goods were delivered by it to Moss for the very purpose of resale. This fact alone would as a matter of law preclude recovery from a bona fide purchaser.

"The general rule permitting the conditional vendor, as for instance in cases where the seller retains the title in the goods until the price is paid, to recover against a bona fide purchaser from the latter, very obviously should not and does not apply in these cases in which the goods have been delivered to the conditional vendee for the very purpose of being resold." Mechem on Sales, p. 601. "Merely intrusting goods to another, without knowledge that they were to be put on sale, would not raise an estoppel; . . . but knowledge that they are to be put on sale, and acquiescence in allowing them to be so exposed, is equivalent to authority to sell them, and well may raise an equitable estoppel. That is matter of law, and a defense now favored, both at law and in equity." Lewenberg v. Hayes, 91 Me. 104, 64 Am. St. Rep. 215, 39 Atl. 469.

And it has been repeatedly held that a pledgee of the person thus authorized to sell the goods may claim protection as a bona fide purchaser to the extent of his lien. Western Union Cold Storage Co. v. Bankers' Nat. Bank, 176 Ill. 260, 52 N. E. 30; Michigan C. R. Co. v. Phillips, 60 Ill. 190; Prall v. Tilt, 27 N. J. Eq. 393; Williams v. Birch, 6 Bosw. 309; Levy v. Carr, 85 Hun, 289, 32 N. Y. Supp. 1023; Parker v. Baxter, 19 Hun, 410; Mechem, Sales, p. 977. And so anyone who in the ordinary course of business makes advances. 24 Am. & Eng. Enc. Law, p. 575; 8 Am. & Eng. Enc. Law, p. 840.

The case of Lallande v. His Creditors, 42 La. Ann. 705, 7 So. 895, does not militate against this proposition, forasmuch as the factor in that case to whom the goods were

shipped was authorized to sell only as the agent and representative of the client and for the latter. His relation to the latter was of a fiduciary nature, and therefore the goods were not sent to him under a conditional or any character of sale at all. He was not authorized to sell the goods as his own.

In the cases cited *supra* the goods were delivered under conditional sales, with authority, however, to resell the same for the account and as the property of the person to whom they were delivered. No fiduciary relations existed there, and none exist in the case at bar. A leading case in which it is held that the general rule permitting the conditional vendor to recover against a bona fide purchaser from the vendee does not apply where the goods have been delivered to the conditional vendee for the very purpose of being resold is *Smith v. Clews*, 105 N. Y. 283, 59 Am. Rep. 502, 11 N. E. 632.

The opinion in that case was delivered by Peckham, J., who subsequently became an associate justice of the Supreme Court of the United States. The facts in that case are on "all fours" with the facts of the instant case. The plaintiff there had delivered to one Miers a pair of diamond earrings, which the latter said he had a customer to whom he would sell, and for which he gave the following receipt to the plaintiff:

New York, April 12, 1879.

Received from Alfred H. Smith & Company by their representative, B. W. Plumb, a pair of single-stone diamond earrings 10½ carats, of the value of \$1,400, on approval to show to my customers, said knobs to be returned to said A. H. Smith & Company on demand.

[Signed]

E. Miers.

Miers sold the earrings to Clews, and the plaintiff, not being paid for them by Miers, sued Clews to be declared the owner of the earrings, and in default of their return for judgment for their value. In the course of the opinion, the court said: "Having thus become possessed of the diamonds, Miers, as has been stated, sold them to defendant, and the question is: Did he get a good title as against the plaintiffs?"

"Taking the undisputed evidence, and reading this receipt in the light thereof, we cannot resist the conclusion that the plaintiffs conferred upon Miers the power to sell these diamonds, and, of course, to give a good title, and therefore the court should have directed a verdict for the defendant. The plaintiffs were dealers in diamonds, and they knew Miers, and that he was engaged in the business of a diamond dealer,—a seller of the stones to whomsoever he chose.

They had on two former occasions intrusted, through their agent, diamonds to Miers, who had sold and accounted for the proceeds of the sale, without any fault being found so far as appears on account of any lack of authority to sell.

"They were informed by Miers on this particular occasion that he had a customer for a pair of diamond earrings, and these diamonds were then intrusted to Miers by the plaintiffs through their agent, Plumb. Upon taking them Miers gave the receipt spoken of. Now, upon these facts, what other meaning can be attached to that receipt than that Miers had power to take these diamonds, show them to his customer, and, if approved of by the customer, sell them to him? The fact that Miers agreed to return them to plaintiffs on demand must be construed with reference to the obvious purpose for which the diamonds were intrusted to him, *viz.*, that of a sale, and, so construed, the plain meaning is that, if not already sold, the plaintiffs had the right to demand a return of the diamonds any time, and Miers would then be bound to return them. The information given to plaintiffs by Miers that he (Miers) had a customer for a pair of diamond ear knobs is susceptible of no other interpretation than that he had a customer who wanted to buy a pair.

"Under such circumstances, what could a dealer in diamonds mean by intrusting them to another dealer who had a customer who wanted to buy them, and who came to this dealer for the purpose of being supplied by him with the diamonds of a kind which his customer wanted to buy? Enlightened by these facts, the interpretation of the receipt signed by Miers is an easy matter. It can mean nothing else than an authority to sell the stones to the customer if they met his approval, and, if not actually sold before demand made, they should be returned to the plaintiffs upon such demand.

"This conclusion as to what was the actual authority given to Miers does not in the least affect the propriety of the decisions cited by the counsel for the respondents and in the opinion of the court at general term, to the effect that one intrusted simply with the possession of personal property, with no power to sell or pass title, cannot give title to the property even to a bona fide purchaser for value. The question here is simply what was the authority with which the man Miers was clothed, and, upon the undisputed evidence in the case, we hold it was an authority to sell."

We have discussed this latter view of the case simply to show that, even if the transaction between plaintiff and Moss be not regarded as a contract of sale, the plaintiff

even then could not recover. We base our decision, however, on the settled conviction that the transaction evidences a perfect sale with a condition subsequent reserved to the vendee only, to rescind the sale and return the goods, and that, under such contract, the title to the goods passed to Moss. For this reason the judgment appealed from is "affirmed." The case is before us for a review of that judgment, under an order granting the same, by this court.

An examination of the testimony in the record as to the relations between Moss and Fink, and the circumstances under which the latter acquired (as he declares) ownership of the articles involved in this suit, shows that Moss made to the defendant Fink a straight sale of the pair of solitaire diamond earrings described in the petition as being valued at \$502.97 for the sum of \$300, and that he paid the price thereof, and the same were delivered to him. That the second pair of solitaire diamond earrings described in plaintiff's petition and valued at the sum of \$975 was transferred by Moss to Fink in payment of a debt due by the former to Fink of \$962, which debt owed its origin to the following state of facts: Fink had delivered to Moss (who was a maker and repairer of, as well as a vendor of, diamonds) a number of loose stones to be made into a pin. Moss made the pin, but, instead of delivering it to Fink, pledged it to a man named Keil for a loan of \$500. Being pressed by Fink to deliver the pin to him, Moss acknowledged that he had pawned it to Keil for the amount stated. Fink called upon Keil and redeemed the pin from the pledge, paying Keil the \$500 for which it was pawned. He then demanded payment of the \$500 so paid by him from Moss. The latter told him that he had some jewelry pledged to a pawnbroker by the name of Koritzky for a loan of \$462; that it was worth \$975. He proposed to Fink that he should redeem it from Koritzky, and when so redeemed he (Moss) would give it to him "in payment" of the \$500 which had been paid to Keil and the \$462 paid to Koritzky.

The proposition was accepted. The amount due Koritzky was paid him, and the earrings under the agreement to Fink were delivered to him through a *dation en paiement*. The pair at the time of the trial was still in Fink's possession. The jewelry so given in payment was the earrings referred to in Fink's possession.

This court holds, under the state of facts so shown, that title passed to Fink to the first-mentioned pair of earrings, and the judgment of the district court and the court of appeal to that effect should be affirmed.

It holds, however, that the said judgments are erroneous in so far as they recognized and decreed the defendant Fink to be the owner of the second pair of solitaire diamond earrings referred to in plaintiffs' petition, and that the said judgment in that respect (under the recently decided case of *William Frantz & Co. v. Winehill*, 124 La. 680, 50 So. 650) should be annulled, avoided, and reversed, and judgment rendered in favor of the plaintiffs as prayed for by them for the recovery of said second pair of solitaire diamond earrings or the value thereof.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment of the court of appeals herein brought up for review and the judgment of the district court (which the court of appeal, in its said judgment brought up for review, affirmed), in so far as said judgments recognized and decreed the defendant Jacob Fink to be the owner of the said second pair of earrings described in plaintiffs' petition, and rejected the prayer of plaintiffs' petition in respect to the same, be, and the same are hereby, annulled, avoided, and reversed; and it is now recognized, ordered, adjudged, and decreed that the plaintiffs, William Frantz & Company, are the owners of the said second pair of solitaire earrings described in plaintiffs' petition and valued at the sum of \$975; that said pair of diamond earrings are in the illegal possession of Jacob Fink. It is further ordered, adjudged, and decreed that the defendant Jacob Fink do, within ten days from the date of this judgment, deliver the said pair of solitaire diamond earrings to the plaintiffs, William Frantz & Company, and, in default thereof, it is ordered, adjudged, and decreed that there be judgment in favor of the plaintiffs and against the said Jacob Fink for the sum of \$975, with legal interest thereon from judicial demand until paid.

It is further ordered and decreed that the defendant Jacob Fink pay the costs in the District Court, the Court of Appeal, and this court. Except as herein altered, the judgment of the District Court and that of the Court of Appeal is hereby affirmed.

On Rehearing.

A petition for rehearing having been filed, Provosty, J., on April 1, 1910, handed down the following additional opinion:

Moss, one of the defendants, was a maker and repairer of jewelry. He had an office on the second floor of a building on one of the principal streets of this city, and also a workshop on the third floor of the same building. What this office consisted of, or what he kept in it, the record does not show. In a small way he bought and

sold diamonds. The defendant Fink, in answer to the question, "Q. He didn't have any store?" answered, "He used to carry around a little paper of loose goods all the time; yes, sir." From this, and from the evidence generally in the case, we understand that Moss was more of an artisan—a maker and repairer of jewelry and diamond setter—than merchant; and that he traded only in a small way in jewelry. That he did this, however, was well known among the trade.

The plaintiff firm has a large jewelry establishment in this city. It had had some dealings with Moss in a small way, had sold him "some small things," for which he had duly paid, when the transactions which have given rise to the present controversy took place.

On March 16, 1906, he came into the store of the plaintiff firm, and said he had a customer for a pair of diamond earrings, and asked plaintiff to let him have the goods to show to his customer; and again, on April 4, 1906, he came with another similar request for another pair of diamond earrings; and both times plaintiff complied with his request.

A material point in the case is as to what were the terms and conditions on which the two pairs of earrings were thus put in the possession of Moss. The only witness on that point is the senior member of the plaintiff firm, and his testimony is accepted as true. He says that he fixed a price on the earrings, and let Moss have them on the condition that he should either return them or pay the price; that he did not sell them to him, but fixed the price low enough for him to make a profit in selling them to someone else. On both occasions the witness put this price on a piece of paper, and handed it to Moss, and made a memorandum for himself of what goods he had thus intrusted, and of the price set on them. This price was \$502 on the first pair, and \$975 on the second.

No time seems to have been fixed within which Moss should return the goods or pay for them, and the evidence does not show what was contemplated in that regard. It does show, however, that plaintiffs made inquiries of Moss, and were told that his customers were still deliberating.

As a matter of fact, he had taken the first pair of earrings on the day after he got them to the pawnbroker's shop of the defendant Fink and sold them to him for \$300. This was \$202 less than the low price set upon them by plaintiff.

The second pair of earrings he pledged at the pawnbroker's shop of one Koritzky for \$465. The date of this pledge is not shown.

In the early part of February the defend-

ant Fink had bought some small loose diamonds of Moss, and had left in his hands 171 small diamonds to be set in a pin or brooch. While the work was in progress, Fink kept an eye on his 171 diamonds. In one place he says that he went to Moss's shop every day; at another place he says that he went once or twice a week. After the pin had been apparently completed, Moss would not give it up, saying there was still something to be done to it. He had already been paid the price agreed on for doing the work, \$110. The pin was worth \$1,500. Fink had called at Moss's shop on several consecutive days to demand the pin, and not found him in, when, determined to have the pin, he sought him out at his house; and Moss then acknowledged that he had pledged the pin at the shop of one Keil for \$500. He, at the same time, said that he owned a pair of diamond earrings worth \$975, which he had pledged to Koritzky for \$465, and that Fink could have them if he would redeem them and pay the \$500 to Keil in redemption of the pin. This Fink agreed to do, and on the same day did do.

On the evening of that day, April 28th, a Saturday, Moss came to plaintiff with a story that two armed men had come to his shop and robbed him of the diamonds. Plaintiff did not believe him and had him arrested, and at once instituted, with the aid of detectives, a search among the pawnbrokers' shops of the city. On the first visit to the shop of the defendant Fink he denied that he had had any dealings with Moss. When Moss saw that his tale of robbery would not hold, he confessed; and Fink also, on the second visit to his shop, acknowledged his transactions with Moss, and offered to restore the goods on being reimbursed the several sums which he had paid out, namely, the \$300 to Moss, the \$465 to Koritzky, and the \$500 to Keil.

Plaintiff then brought this suit against Fink and Moss, demanding in the alternative a return of the goods or payment of the price set upon them.

Moss made no defense. Fink contends that the transactions between Moss and the plaintiff were sales; that Moss became owner of the goods, and could convey a valid title to them; that, at all events, the plaintiff firm is estopped in the premises, because it clothed Moss with the *indicia* of ownership, thereby enabling him to commit the fraud; and that, whenever one of two innocent persons must suffer by the acts of a third, he who enables such person to occasion the loss must sustain it.

The question of whether Moss became the owner of the goods or not depends upon what was the agreement of the parties. The par-

ties had a perfect right to make any agreement they chose in that regard. The rights conferred upon Moss by that agreement were: (1) To become owner of the goods on paying the price set upon them; (2) to sell the goods to someone else at a cash price of not less than that set upon them. The right was not conferred upon him to buy the goods on a credit; or, in other words, to become debtor to plaintiff for the price of the goods. Whatever money he received from the person he sold the goods to was to be plaintiff's money; and, if he failed to account for it, he would be criminally responsible. The goods were not sold to him, and the only way in which he could become the owner of them was by paying cash for them. By the terms of the arrangement Moss could not sell the goods on a credit. Either the goods or the money would have to be in his hands, to be delivered to plaintiff.

The goods not having been sold to Moss, he could transfer no title to them. *Nemo plus in alium transferre potest quam ipse habet.* 5 Cyc. Law & Proc. p. 207; 24 Am. & Eng. & Enc. Law, p. 1163.

The learned counsel for the defendant Fink contend that the transaction was of the kind known at common law as "sale and return," and the court of appeal took that view. We repeat, the nature of a transaction is what the parties agree that it should be; and the distinct agreement in this case was that the goods were not sold, or agreed to be sold, on a credit to Moss, but that the only way he could become the owner of them was by paying cash for them. For the distinction between such an agreement and what is commonly known as "sale and return," see *Sturm v. Boker*, 37 L. ed. 1099, and note (150 U. S. 323, 14 Sup. Ct. Rep. 99); *B. F. Sturtevant Co. v. Dugan*, 106 Md. 587, 68 Atl. 351, 14 A. & E. Ann. Cas. 679.

Before passing to the consideration of how far plaintiff may be estopped, we will note that the law of agency can play no part in this case. Moss had no mandate to sell the goods at less than the price set upon them, and still less had he any mandate to give them in payment of his debts. And Fink did not deal with him as the agent of the plaintiff firm, but as the owner of the goods.

Coming to a consideration of the estoppel, it is a plain proposition that the mere possession of movable property is not such *indiciu*m of ownership as will enable the possessor to convey a good title as against the true owner. If it did, the borrower or hirer of a horse could validly sell it. The owner must have done something more than merely confide the possession of his property to the

possessor before the latter can sell it or create a lien upon it. He must have to some extent accredited the title of the possessor,—clothed him with more pronounced *indiciu*m of ownership than mere possession.

This may be done in various ways, and one way would be what the plaintiff firm did in this case, namely, consent that a vendor of jewelry exhibit the jewels as part of his stock of goods, or as belonging to him. "If a wine merchant be left in possession of wine, the fair inference is that it is his own, and a person may be justified in advancing money upon the security of it." Per Bramwell, L. J., in *Meggy v. Imperial Discount Co.* L. R. 3 Q. B. Div. 717.

The decision in *Conner v. Hill*, 6 La. Ann. 7, is founded upon estoppel, agency, and ratification. From the facts as stated, the grounds of estoppel do not appear; but the writer of the present opinion knows that the flatboats coming down the Mississippi river before the War, loaded with western produce, were for sale, and that usually, if not always, those in charge of them had authority to sell; so that Anderson, who was in charge of the flatboat in that case, had more than mere possession. He had a possession which, according to custom, was accompanied by the power to sell. True, the owner had not consented to his being thus clothed with apparent authority to sell, but his son and agent had done so for him. It was upon this the court must have found the estoppel, in so far as the decision is based on estoppel.

True, Moss was more of an artisan than merchant; but it was in his character of merchant that both plaintiff and Fink dealt with him. Plaintiff consented that he should exhibit the earrings to his customers as belonging to him, and that he should do so in his quality of a trader in jewelry. Fink, knowing him to be a trader in jewels, was justified in buying from him. It follows from this that Fink acquired a good title to the first pair of earrings. Although we must say that the great disparity in price gives some room for suspicion even as to that pair of earrings.

With respect to the second pair, Fink is not in a position to invoke equitable estoppel. For him to be in a position to do so, it would be necessary that he should "not only have been destitute of knowledge of the real facts, . . . but should have also been without convenient or ready means of acquiring such knowledge." 16 Cyc. Law & Proc. p. 738. And he must have been led to change his position for the worse. 16 Cyc. Law & Proc. p. 722. "Notice is to be distinguished from knowledge, and, if the buyer has notice

of facts which would put a reasonably prudent man upon inquiry which would have resulted in the ascertainment of the adverse interest sought to be enforced against him, he will be deemed to have taken with notice, and cannot assert the rights of a bona fide purchaser." 24 Am. & Eng. Enc. Law, 2d ed. pp. 1174, 1175.

In so far as the earrings were taken in reimbursement of the \$500 which Fink had to pay to Keil for redeeming his pin, his position was not changed for the worse, since that amount would have had to be paid to Keil even if Moss had never had possession of the earrings, and since it is not pretended that he was deprived of any recourse which he would otherwise have had against Moss. As to the circumstances under which one who has received property in payment of an antecedent debt may be considered to have parted with value, see 24 Am. & Eng. Enc. Law, 2d ed. pp. 1171, 1173.

By the time Fink came to deal with Moss for this second pair of earrings, Moss had become utterly discredited. He was a confessed embezzler. He was no longer a merchant or trader having valuable goods for sale, but was a diamond setter who had pledged the goods of his employer and stood under the necessity of confessing his crime because of his inability to redeem the pledge. He was not a merchant offering to sell goods out of his stock, but at best an ex-merchant who was proposing to the person whose property he had embezzled that the latter should rescue from the pawnbroker's shop a certain piece of property and pay himself out of the margin between value of the thing and the amount for which it stood pledged. Fink testifies that he had lost confidence in Moss and would not trust him out of his sight with the \$465 for redeeming the earrings from Koritzky. The fact itself, well known to Fink, that Moss was a diamond setter to whom valuable jewelry was likely to be intrusted by third persons, was in itself sufficient to put Fink upon inquiry. We cannot help thinking that Fink was a willing victim, and that, if it had not been for the chance of getting back his \$500, he would have dealt with Moss with a good deal less of confidence.

As to this \$465, we put our decision distinctly on the fact that the earrings were not acquired from a merchant having them for sale to the public generally, but were redeemed from a pawnbroker's shop at the request of an embezzler as a means of settlement for the embezzlement.

It is therefore ordered, adjudged, and decreed that our former decree be reinstated and made the judgment of this court.

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ARKANSAS SUPREME COURT.

MRS. L. APPLING, Appt.,

v.

STATE OF ARKANSAS.

(— Ark. —, 128 S. W. 866.)

Search warrant — necessity of affidavit.

1. A warrant to search for liquors alleged to be illegally kept for sale, issued without a supporting affidavit, is not so far void as to justify resistance of its execution.

Appeal — resisting warrant — theory of trial.

2. A conviction for resisting the execution of a warrant will not be reversed because of absence of direct evidence to show that the place where the attempt at execution was made was within the jurisdiction of the officers issuing and attempting to execute it, if all the parties take it for granted at the trial that it was so.

Obstructing officer — refusing entrance to house.

3. Standing on the threshold of a house and refusing to permit an officer to enter to execute a search warrant, without further overt act, is sufficient to support a conviction of obstructing the officer in the execution of process.

(Wood and Hart, JJ., dissent.)

(May 23, 1910.)

Note. — Search warrant without an affidavit or complaint.

By the Constitution of the United States, and by the Constitutions and statutes of most of the states, it is provided that no search warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized. But few cases have been found in which, as in *APPLING v. STATE*, there was a total lack of an oath or affidavit, the cases generally turning on the sufficiency of the preliminary oath or affidavit.

In *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151, where revenue officers were sued in trespass for breaking in and entering a dwelling house, and they sought to justify by alleging that they acted under authority of a search warrant, it was held that they could offer in evidence a search warrant which recited that a complaint had been made under oath, without showing any complaint in writing under oath as a foundation for the warrant. See quotation from this case in *APPLING v. STATE*.

But in *State v. Wimbush*, 9 S. C. 309, under a constitutional provision that "all warrants shall be supported by oath or affirmation, . . . and no warrant shall be issued but in the cases and with the formalities prescribed by the laws," and a statutory provision that "all proceedings before trial justices in criminal cases shall be commenced on information under oath, plainly

APPEAL by defendant from a judgment of the Circuit Court for Sebastian County affirming a justice's judgment convicting her of obstructing an officer in the service of process. Affirmed.

The facts are stated in the opinion.

Mr. C. T. Wetherby for appellant.

Mr. Hal L. Norwood, Attorney General, and William H. Rector for the State.

McCulloch, Ch. J., delivered the opinion of the court:

Appellant was prosecuted before a justice of the peace of Sebastian county on information filed by the deputy prosecuting attorney for the offense of obstructing or resisting an officer in the service of process. She was convicted and appealed to the circuit court, where she was tried and again convicted, her punishment being fixed at a fine of \$50, which is the minimum prescribed by the statute.

The form of the writ which the officer was executing when resisted is not set forth in the bill of exceptions, but the witnesses testified, without objection, that it was a writ issued by the mayor of the incorporated town of Hartford, Arkansas, to the marshal, directing him to search the house of Lem Appling, appellant's husband, for intoxicating liquors, and to seize the liquors. The witnesses did not testify very clearly about the form of the writ, but speak of it as a search warrant or a seizure warrant; but it is fairly inferable from the testimony that it was an order issued by the mayor directing the officer to search the house for liquor, and to seize the liquor when found. No question was raised on this point, but it is insisted that, as the evidence shows that the writ was issued without an affidavit being filed, the writ was therefore void, and no offense was committed in resisting or obstructing the officer in serving it.

This question has given us no little concern, but, after careful consideration, we have reached the conclusion that, in the absence of an affidavit, a writ of the kind, regular on its face, is sufficient to protect the officer to whom it is directed, and an individual cannot bid defiance to the writ

and obstruct its execution without subjecting himself to criminal prosecution under the statute. In reaching this conclusion, we are greatly aided by a very satisfactory opinion of the supreme court of New Hampshire. *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188. The authorities are fully collected in that opinion, and the subject is exhaustively treated. The court in that case said: "The general principle, however, we hold to be quite clear, that where the process or warrant is regular and legal in its frame, bearing upon its face all the legal requisites to make it perfect in form, and, so far as can be discovered from its inspection, in substance also, and it appears to have been issued by a court or magistrate having jurisdiction of the subject-matter, and of the person of the respondent, the officer is to be protected in the service, notwithstanding any error or irregularity in the previous issuing of the same, or any imposition practised upon the court in obtaining it; and that the party resisting the officer is liable,"—citing the following cases: *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181; *Rogers v. Mulliner*, 6 Wend. 597, 22 Am. Dec. 546; *Horton v. Hendershot*, 1 Hill, 118; *Fox v. Wood*, 1 Rawle, 143; *Jones v. Hughes*, 5 Serg. & R. 229, 9 Am. Dec. 364; *Paul v. Vankirk*, 6 Binn. 123; *Sturbridge v. Winslow*, 21 Pick. 83; *Harmon v. Gould*, *Wright (Ohio)* 709; *Brother v. Cannon*, 2 Ill. 200; *Robinson v. Harlan*, 2 Ill. 237; *State v. Curtis*, 2 N. C. (1 Hayw.) 471; *Foster v. Gault*, 2 McMull. L. 335.

In *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151, Chief Justice Parker, of the supreme judicial court of Massachusetts, said: "We think that the defendants could have justified the acts complained of by showing a regular warrant from a magistrate having jurisdiction over the subject, without showing that it was founded upon a complaint under oath. It will not do to require of executive officers, before they shall be held to obey precepts directed to them, that they shall have evidence of the regularity of the proceedings of the tribunal which commands the duty. Such a principle would put a stop to the execution of

and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue,"—it was held that a search warrant issued upon a statement of facts signed, but not sworn to, is null and void; and that it is not unlawful to resist an officer attempting to execute said warrant, even though the warrant erroneously recited that complaint had been made upon oath.

In view, however, of the legal principle that a ministerial officer acting under process fair upon its face, issuing from a tribunal or person having judicial powers, with

apparent jurisdiction to issue such process, is justified in obeying it against all irregularities and illegalities except his own, it is a little difficult to see how this decision can be sustained. For if an officer is justified in executing the writ, and the defendant is justified in resisting him, an anomalous situation arises certain to give rise to breaches of the peace. The rule in *APPLING v. STATE* appears to be sound. The defendant should submit, and seek his remedy against the justice or person procuring the writ.

R. A. E.

legal process, as officers so situated would be necessarily obliged to judge for themselves, and would often judge wrong as to the lawfulness of the authority under which they are required to act. It is a general and known principle that executive officers, obliged by law to serve legal writs and processes, are protected in the rightful discharge of their duty, if those precepts are sufficient in point of form, and issue from a court or magistrate having jurisdiction of the subject-matter." In *People v. Warren*, 5 Hill, 440, it was held that "a ministerial officer is protected in the execution of process regular and legal upon its face, though he has knowledge of facts rendering it void for want of jurisdiction."

It is also insisted that the judgment should be reversed because the evidence fails to show that the officer, when resisted, was serving process within the corporate limits of the town of Hartford; neither the mayor who issued the writ nor the marshal who executed it having jurisdiction beyond those limits. It is true that nowhere in the testimony is it directly stated by a witness that the house of Lem Appling was situated in the town. The witnesses all relate the circumstances of the marshal and posse going to Appling's house to search for and seize contraband liquors. They all lived at Hartford, and speak of going "around to Appling's house," or "down to Appling's house," to serve the writ. The marshal testified in the case, and told about standing on the street corner near a certain brick building talking to the mayor, when a man came along and told them that a dray load of liquor was then being unloaded "down to Appling's house," whereupon the mayor went upstairs and issued the warrant, and he (witness) summoned two others, a deputy sheriff and a constable, to go with him, and they "went down to Appling's residence" to search for the liquor. The evidence showed that appellant's acts of obstructing the officers occurred at Appling's residence. Another witness testified as to the occurrence at Appling's house, and spoke of "coming along the street" when he heard what Mrs. Appling said to the officers. Numerous other witnesses introduced by each party testified about living in Hartford, and being present when the officers raided Appling's house. Appellant testified herself about what occurred there at the house, but said nothing about the situation of the premises. She claimed that she did not resist the officers, but that, on the contrary, she told them where the liquor could be found in the house. It seems to have been taken for granted by all the parties that the Appling house was in the town, though the prosecuting attorney took pains

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to show directly by witnesses that the town of Hartford was in the Greenwood district of Sebastian county. No instructions were asked on that point. We think the judgment should not be reversed on this ground. The authorities seem to agree that a presumption should be indulged as to the regularity and validity of official acts. *Wharton*, Crim. Ev. §§ 833, 835; *Putman v. State*, 49 Ark. 449, 5 S. W. 715; *State v. Freeman*, 8 Iowa, 428, 74 Am. Dec. 317.

This presumption is not to be extended so as to cover substantive, independent facts essential to establish an issue. "The true principle intended to be asserted by this rule seems to be," says Mr. Best in his work on Evidence, § 300, "that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy." Now, when the rule stated by Mr. Best is applied to the facts proved in this case, we think the evidence is sufficient. The witnesses testified in general terms as to the form and substance of the writ, and the writ itself was not introduced, no objection being made to proving it in this way. It must be taken as established that the writ was regular in form, and commanded the officers to search for liquors in Appling's house in the town of Hartford, and to seize the same when found. The witnesses, including appellant herself, testified about the marshal serving the writ in the regular way, the only dispute being whether appellant resisted its execution. No violence is done to the presumption of innocence in favor of the accused, by holding that, under these circumstances, the jury were warranted in finding that the officer was not attempting to serve a warrant beyond the limits of his territorial jurisdiction. The only evidence offered by appellant was to the effect that she did not obstruct the execution of the writ, but, on the contrary, yielded to it. There is a sharp conflict as to whether or not appellant obstructed the officers in executing the writ, and there is also a sharp conflict as to whether the alleged acts of resistance on the part of appellant occurred before or after the liquor was found by the officers and seized. The court submitted the question to the jury, and instructed them to find appellant not guilty of the charge if they believed from the evidence "that the search had been completed at the time the

altercation happened between the officers and defendant." We conclude that there was evidence sufficient to warrant a finding that while the officers were executing the writ, appellant resisted them and obstructed their efforts to serve it. One of the officers testified that when the marshal informed her of the writ and told her he had come to seize the liquors, she said to them that they could not go in the house, and that she swore at them, called them vile names, and threatened to get a gun and kill all of them. Afterwards, while the marshal had gone to get a dray to haul off the liquors, she insisted on her son being allowed to go in the house, and assaulted one of the officers who attempted to prevent the boy from entering the house.

Error of the court is assigned in refusing to give the following instruction at appellant's request: "(4) The mere stating by defendant that the officers could not search the house, unaccompanied by any overt act or threat by her, would not be a violation of the law, and, if you should find that this was all that she did, you will acquit." This instruction is incorrect, and was properly refused. It would not do to hold that one who stands in the way and refuses to permit an officer to execute process is guiltless of obstructing the officer. Such refusal is of itself an obstruction, for the officer may desist in order to avoid violence or bloodshed, and the service of process would be thus hindered. It is the purpose of the statute to prevent this. The statute is broad, and covers any resistance or obstruction to an officer in the execution of process. If appellant stood on the threshold of the house and refused to permit the officer to enter for the purpose of executing the writ, her attitude was of itself an obstruction and resistance, and no further overt act was necessary to complete the offense. *Williams v. State*, 70 Ark. 393, 68 S. W. 241.

We are of the opinion that there is no error in the record. So the judgment is affirmed.

Wood and Hart, JJ., dissent.

KENTUCKY COURT OF APPEALS.

ED EDWARDS, Appt.,
v.

M. R. KEVIL.

(133 Ky. 392, 118 S. W. 273.)

Slander — justification — admission.

1. Admission of speaking the substance of the words charged, or of so much of them as would sustain an action for slander, is 28 L.R.A.(N.S.)

sufficient to entitle one accused of slander to justify on the ground of privilege.

Same — privilege — detection of crime.

2. A confidential communication by one whose property has been burned, to a fellow sufferer, of the fact that he had been informed of another's intention to burn the property, for the purpose of procuring his aid in ascertaining the author of the fire, is privileged.

Evidence — threats — contradiction — slander.

3. One suing for slander in being charged by another with setting fire to his building cannot be permitted to testify that he never made threats to burn the building, for the purpose of contradicting witnesses who have testified that they communicated to defendant, before the fire, the fact that they had heard plaintiff make such threats.

(April 20, 1909.)

Note. — Libel and slander: necessity that the plea of justification or privilege shall correspond to the words imputed to the defendant by the complaint.

A plea of privilege or justification in an action for a libel or slander must justify the very words or substance of those charged in the declaration or complaint, in the sense in which the innuendos express it. *Hunt v. Fidelity Mut. L. Ins. Co.* (Ala.) 51 So. 1000; *Jones v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676; *Rice v. Aleshire*, 72 Ill. App. 455; *Commercial News Co. v. Beard*, 116 Ill. App. 501; *Morse v. Times-Republican Printing Co.* 124 Iowa, 707, 100 N. W. 867; *Grubb v. Elder*, 67 Kan. 316, 72 Pac. 790; *Shipp v. Patten*, 123 Ky. 65, 93 S. W. 1033; *Palmer v. Smith*, 21 Minn. 419; *Tawney v. Stimsonson, W. & H. Co.* 109 Minn. 341, 27 L.R.A.(N.S.) 1035, 124 N. W. 229; *Pallet v. Sargent*, 36 N. H. 496; *Merrey v. Guardian Printing & Pub. Co.* (N. J. L.) 74 Atl. 464; *Stilwell v. Barter*, 19 Wend. 487; *Feely v. Jones*, 79 Hun, 18, 29 N. Y. Supp. 446, affirmed without opinion in 151 N. Y. 656, 46 N. E. 1146; *Kingsley v. Kingsley*, 79 Hun, 569, 29 N. Y. Supp. 921; *Baldwin v. Genung*, 70 App. Div. 271, 74 N. Y. Supp. 835; *Mann v. Press Pub. Co.* 133 App. Div. 29, 117 N. Y. Supp. 779; *Stock v. Keele*, 86 App. Div. 136, 83 N. Y. Supp. 133; *Jacoby v. James*, 136 App. Div. 431, 120 N. Y. Supp. 981; *Bergstrom v. Ridgway Co.* 138 App. Div. 178, 123 N. Y. Supp. 29; *Sawyer v. Bennett*, 28 Abb. N. C. 393, 20 N. Y. Supp. 45; *Bodine v. Times-Journal Pub. Co.* (Okla.) 110 Pac. 1096; *Frederitze v. Odenwalder*, 2 Yeates, 243.

But this rule does not require that every word of a defamatory charge shall be justified, but that the plea must meet the substantial imputation,—the sting of the charge,—as an ordinary reader would have understood it to have been made. *Skrocki v. Stahl* (Cal. App.) 110 Pac. 957; *Tingley v. Times Mirror Co.* 151 Cal. 1, 89 Pac. 1097.

It was said in *Skinner v. Grant*, 12 Vt.

APPEAL by plaintiff from a judgment of the Circuit Court for Caldwell County in defendant's favor in an action brought to recover damages for slander. Affirmed.

The facts are stated in the opinion.

Messrs. L. H. James and Ward Headley for appellant.

Messrs. P. H. Darby, John L. Grayot, and R. W. Lisanby for appellee.

Carroll, J., delivered the opinion of the court:

This action in slander was instituted by the appellant, who was plaintiff below, against the appellee, defendant below. The actionable words, which were charged to have been spoken during a fire that destroyed a building owned by appellee, are these: "I reckon Ed Edwards is satisfied now, he burned this out. I received word sometime ago that he intended to burn them." When asked what he meant by this language, he replied: "Well, I heard that he (Edwards) was going to burn them."

In the first paragraph of his answer, the appellee denied speaking the words charged; and, in the second paragraph, set up that the appellant, previous to the fire, had threatened frequently to burn the building, and during the fire he (appellee), in a conversation with G. C. Dollar, the owner of a building that was injured by the fire, com-

municated to Dollar in confidence, and for the purpose of aiding him and securing his assistance and co-operation in investigating the origin of the fire, the information he had received concerning the threats of appellant, and, in the course of the conversation with Dollar, said to him without malice, and for the sole purpose of procuring his aid in ascertaining the author of the fire, "I reckon Ed Edwards is satisfied now my house is burned. I was notified he intended to burn it. I couldn't think he was mean enough to do it, but I took additional insurance." It will thus be observed that appellee, while admitting he spoke substantially the language charged, claimed that it was under the circumstances a privileged communication. The point is made, however, that appellee, if he desired to justify or to claim that the words were spoken under circumstances that amounted to a privilege, must admit speaking the identical words charged in the petition.

The rule is that, when the defendant, in an action for slander, justifies, or when he pleads that the words spoken were a privileged communication, he must admit that he spoke the words charged, or words of similar import that would in themselves be actionable. It is not necessary that the defendant should admit speaking the precise words charged in the petition. It will be

456, that "there is no better settled point in slander than this, the plea must justify the same words contained in the declaration, or, at least, so many of them as are actionable. It is not enough to justify the sentiment contained in the words."

While the justification must be as broad as the charge and of the precise charge of the complaint, it need not be in the exact form thereof, although it must correspond in essence and substance. *Wallace v. Homestead Co.* 117 Iowa, 348, 90 N. W. 835.

It was held in *Bannon v. Moran*, 12 Ky. L. Rep. 989, that the admission of speaking the words of the plaintiff that he "admitted that he had been compelled to leave Liverpool because he had been suspected of being an English spy; that it looked suspicious that Mr. Power should be such a friend to that kind of a man," was an admission of substantially the same language as that charged in the petition, which was that the plaintiff "was driven out of Liverpool because it was discovered that he was an English spy. It certainly looks suspicious that Mr. Power should be such a friend of an English spy."

Where a complaint charges a libel accusing plaintiff of adultery, a plea is bad which attempts to justify the immaterial matter alleged, but not the specific charge. *Morse v. Press Pub. Co.* 49 App. Div. 375, 63 N. Y. Supp. 423.

So, a plea of justification is bad which

states the defendant's own version of what he had said, which materially differed from that set out in the complaint. *Rassam v. Budge* [1893] 1 Q. B. 571.

And such a plea is bad which justifies the words; that "counsel commented with cutting severity" upon the plaintiff's testimony where those charged were that the "plaintiff's testimony as a witness, being unsupported by any other witness, failed to have any effect on the jury, and that counsel commented with cutting severity" thereon. *Roberts v. Brown*, 10 Bing. 519.

So, a plea, justifying different words than those charged in the complaint is bad. *Starr v. Harrington Smith* (Ind.) 360.

And a plea is bad which justifies the charge of theft of a kettle and waistcoat pattern, where the words actually charged were the theft of a pot and waiter or kettle. *Eastland v. Caldwell*, 2 Bibb, 21.

So, a plea is bad which admits the speaking the words that the plaintiff "allowed whoring to be carried on in his home night after night in succession, without taking measures to stop it," where those charged in the complaint were the "keeping of a whore house." *Eaton v. White*, 2 Pinney (Wis.) 42.

And where the slander charged was that the defendant stated that the plaintiff "said the blood of Christ had nothing to do with our salvation, more than the blood of a hog," a plea of justification is bad

sufficient if he admits the substance of the words, or so much of them as would sustain an action for slander. Thus, in *Shipp v. Patten*, 123 Ky. 65, 93 S. W. 1033, the words upon which the action was based were these: "Miss Nellie, when she was employed as a clerk in my store, dishonestly took away goods from the store that did not belong to her. I found in her grip a lot of goods that she had dishonestly taken from my store and put in the grip, and I accused her of dishonestly taking these goods, and she broke down and cried and begged me not to discharge her, because it would disgrace her, and I kept her a few days longer in the store, and then discharged her. I would say this to anybody, because I can prove it, and I wouldn't hesitate to go into her own family and say just what I have said to you." The defendant in that case filed an answer, in which, after admitting that he spoke the words as charged, except that he did not use the word "dishonestly," denied that he spoke them maliciously, and further averred that they were spoken under circumstances that made them a privileged communication. The lower court required the defendant, before permitting him to rely on the defense that the words were privileged, to admit speaking the identical words charged in the petition. In criticizing this ruling of the lower

court, this court said: "To say that a defendant in a slander suit must admit all the words charged, before he is allowed to plead a qualified privilege, places the defendant in a dilemma; if he denies the speaking of the words, the plaintiff will often prove the substance of them and recover. If he is compelled to admit all the words to plead the privilege, then often he will admit that which is not true in fact, and enough to show that he was actuated by malice, which will defeat him. The plea of the appellant in this case was in its nature a plea of confession and avoidance, and, while denying the use of the word 'dishonestly,' confessed enough to give 'color' to appellee's petition,—that is, left uncontroverted enough to give her a cause of action." Adhering to the ruling of the court in the *Shipp Case*, which we believe to be correct, it follows that in an action for slander, when the defendant pleads that the words spoken were privileged, he may deny that they were spoken maliciously, and set out the exact language used by him, although it may not be identical with that charged in the petition; but it must be so nearly similar to it, and admit enough of the language charged, to maintain an action. Applying this principle to the case before us, it is manifest that the words admitted by appellee to have been spoken were

which alleges that the plaintiff said there was no more virtue in Christ's blood than in that of man or any other creature. *Skinner v. Grant*, supra.

So, where the slander alleged was a positive charge of bigamy, a plea of justification is bad which admits the speaking of conditional words that "if what D. has told me is true [the plaintiff] is not a fit man to belong to [a secret society]. He tells me [that the plaintiff] has a wife and children back in W. and you know he has a wife and children here." *Bleitz v. Carton*, 49 Wash. 545, 95 Pac. 1099.

And a plea is bad which admits the speaking of the words, "Thou hast stolen part of the velvet which I delivered to you," where the words charged were, "Thou hast played the thief with me, and hast stolen my cloth and half a yard of velvet." *Johns v. Gittings*, Cro. Eliz. pt. 1, p. 239.

So, where the words charged were that the plaintiff, a public official, "is short \$6,000 in his accounts, and if he had his just dues he would be behind the bars," and also that the defendant said to the plaintiff's son that "his dad is short \$6,000 in his accounts and ought to be behind the bars," a plea is bad which denies saying that the plaintiff was short in his accounts, but admits saying "that he ought to be behind the bars;" as the slander charged, being entire, the plea of justification must be coextensive with, and as broad as, that charged. *Stock v. Keele*, supra.

And a plea of justification is bad which admits saying of the plaintiff that "such things traitors do," where those charged were "thou art a traitor." *Billingham v. Mynors*, Cro. Eliz. pt. 1, p. 153.

So, where the libelous words alleged were that the plaintiff had appropriated to himself a play called "Flirtation," and produced it as his own composition under the title "Pique," such a plea is bad which alleges the truth thereof, and that the play therein referred to as "Flirtation" was entitled "Mock Marriage." *Daly v. Byrne*, 1 Abb. N. C. 150.

The rule that a plea of justification shall be as broad as the charge does not require that it shall embrace every slanderous charge stated in the complaint, where several distinct libels or slander are stated, as there may be a justification as to one and other pleas to the remainder. *Lanpher v. Clark*, 149 N. Y. 472, 44 N. E. 182; *Hollingsworth v. Spectator Co.* 53 App. Div. 291, 65 N. Y. Supp. 812, followed in 53 App. Div. 627, 66 N. Y. Supp. 1133; *Baldwin v. Genung*, supra; *Nunnally v. Mail & Exp. Co.* 113 App. Div. 831, 99 N. Y. Supp. 647; *Lapetina v. Santangelo*, 124 App. Div. 519, 108 N. Y. Supp. 975; *Merrey v. Guardian Printing & Pub. Co.* supra; *Clarkson v. Lawson*, 6 Bing. 587.

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actionable, and, although not the identical words charged, they were in substance and effect the same, and so the court did not err in holding the answer to be good.

Nor is there any doubt that, if the words were spoken under the circumstances described by appellee in his answer and evidence, they were privileged in the sense that appellee had the right to show the facts surrounding their publication as an excuse or justification for the utterance. A person whose property is destroyed by fire may in a confidential way confide to his neighbors and friends whom he suspects as the incendiary, if his suspicions are based upon reasonable information or grounds, and his declarations are made in good faith. *Faris v. Starke*, 9 Dana, 128, 33 Am. Dec. 536; *Grimes v. Coyle*, 6 B. Mon. 301; *Harper v. Harper*, 10 Bush, 447; *Campbell v. Bannister*, 79 Ky. 205; *Nix v. Caldwell*, 81 Ky. 293, 50 Am. Rep. 163; *Townshend, Slander & Libel*, p. 440. There was sharp conflict in the evidence as to the circumstances under which the words were spoken. According to the evidence for appellant, they were not spoken confidentially, or in good faith, or in an effort in advising or consulting with friends concerning the origin of the fire. On the other hand, the appellee testified that, in confiding his suspicions to a fellow sufferer at the fire, he believed that the information previously conveyed to him that appellant was the incendiary, was true, and used the language imputed to him in an effort to get advice and assistance from his friend, whose property was also injured. It is however, sufficient to say in respect to this conflict in the evidence, that it was a matter for the jury, under proper instructions, to decide which story they would accept as true. If the version of appellant and his witnesses was believed by the jury, the communication complained of was not a privileged one; but the jury evidently accepted appellee's account of it as correct.

On the trial of the case the appellee introduced several witnesses, who testified that previous to the fire they heard appellant make remarks that indicated an intention or desire upon his part to burn or have burned the building of appellee, and that previous to the fire they communicated to appellee these threats. After this evidence was introduced, the appellant offered to show by his own testimony that he had not made any of the statements attributed to him by the witnesses; but the trial judge refused to permit him to deny that he had made these statements, putting his ruling upon the ground that it was immaterial, so far as the question of privilege was concerned, whether he in fact made the statements or not, if the statements previous 28 L.R.A. (N.S.)

to the fire had been communicated to appellee as coming from him. Of this ruling serious complaint is made. In our opinion the decision of the trial court upon this point was correct. For the purposes of appellee's defense, it was not material whether or not appellant used the language attributed to him by the informants of appellee. If the appellee in good faith believed what was communicated to him, and it was such as a man of reasonable prudence would believe, he had the right to act upon the assumption that it was true, although as a matter of fact it may have been false. *Shipp v. Com.* 124 Ky. 643, 10 L.R.A. (N.S.) 335, 99 S. W. 945. If appellant had been permitted to deny the remarks, the effect would be to inject into the case a question of veracity that threw no light upon the issues being tried. Under circumstances like those developed in this case, when information, such as a reasonably prudent man would believe, is communicated to him, he is not required, before acting upon it in good faith in a natural and reasonable way, to investigate its truthfulness.

The judgment of the lower court is affirmed.

IOWA SUPREME COURT.

HANS F. VOLQUARSEN

v.

IOWA TELEPHONE COMPANY.

(— Iowa, —, 126 N. W. 928.)

Evidence — burden of proof — negligence of telephone company.

1. A telephone company is bound to negative only the negligence charged against it, where specific acts of negligence are charged in the complaint for failure promptly to make a connection for a customer, although

Note. — Liability of telephone company for failure to make connections for subscriber.

The case of *Lebanon, L. & L. Teleph. Co. v. Lanham Lumber Co.* 21 L.R.A. (N.S.) 115, is on all fours with that of *VOLQUARSEN v. IOWA TELEPH. Co.*, to which is appended a note upon the general question of liability of a telephone company for failure to make connections for a subscriber.

As to the right of withdrawing telephone service because of the abuse of the privilege by subscribers, see the note to *Huffman v. Marcy Mut. Teleph. Co.* 23 L.R.A. (N.S.) 1010.

Attention is called to *Southwestern Teleg. & Teleph. Co. v. Soloman* (Tex. Civ. App.) 117 S. W. 214, which holds that, as the right to maintain a statutory action for wrongful

the statute provides that in case of delay it has the burden of proof that such delay was not due to negligence on its part.

Proximate cause — burning of property — neglect to make telephone connection.

2. Failure of a telephone company for several minutes to connect a subscriber with the fire department is not the proximate cause of the destruction of his property, where the fire was under way when he awakened from sleep, and the department responded to a summons from a neighbor, so that there was not much actual delay in reaching the fire, and there is nothing to show that prompt service would have saved the property.

(June 16, 1910.)

CROSS APPEALS from an order of the District Court for Scott County granting a new trial notwithstanding a verdict for defendant in an action brought to recover damages for the destruction of plaintiff's property by fire, alleged to have been caused by the failure of defendant's servant promptly to connect plaintiff by telephone with the fire department; plaintiff appealing from so much of the order as overruled his motion for new trial as to ten grounds, and defendant appealing from so much as granted a new trial upon one ground. Affirmed on plaintiff's appeal. Reversed on defendant's appeal.

The facts are stated in the opinion.

death depends upon the right of the decedent to have recovered damages had death not intervened, it follows that a husband, who was a telephone subscriber, and his children, could not recover damages for the breach of a general contract to provide telephone services, which resulted in delay in procuring a physician, who was also a telephone subscriber of defendant company, to attend the subscriber's wife in childbirth. The court said: "The act complained of is the negligent failure to give telephone service under a general contract to do so. To have entitled the deceased to maintain an action for the negligence in the performance of the duty founded on a contract which raised the duty, no personal injury to the person or injury to her property being shown, it must appear that the contract was made by her, or was made to inure in fact to her benefit.

. . . The measure of her recovery must, we think, be determined by the general rule of law which applies to all cases of breach of contract, which rule is thus expressed in the case of *Western U. Teleg. Co. v. Edmondson*, 91 Tex. 209, 42 S. W. 549: 'When two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as arising naturally—that is, according to the usual course

Messrs. Cook & Dodge and Guernsey, Parker, & Miller for plaintiff.

Mr. Henry Thuenen, Jr., for defendant:

Delay in responding to a call of a subscriber to a telephone presumes negligence on the part of the telephone company.

Turner v. Hawkeye Teleg. Co. 41 Iowa, 458, 20 Am. Rep. 605.

Where damages are sustained by a subscriber to a telephone company, by reason of the negligence of the telephone company in responding to a call of the subscriber, the company will be liable therefor.

Mentzer v. Western U. Teleg. Co. 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1.

When the property of a subscriber to a telephone is burning, and the telephone company negligently fails to answer his call within a reasonable time, the damages which he sustains in excess of what he would have sustained are consequential upon the neglect or negligence of the telephone company.

Ibid.

Ladd, J., delivered the opinion of the court:

The defendant owns and operates the telephone system in Davenport. The plaintiff was a subscriber and patron. He conducted a wooden shoe factory on the lots where his residence was located. Shortly after 1:30 o'clock in the morning of August 2, 1905, his wife heard a crackling

of things—from such breach of the contract itself, or as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it.' Tested by this rule, we think, the damages in the circumstances are too remote, and are not such as both parties would reasonably have understood and contemplated as likely to result from the breach of the contract or the negligence of the company. If there had been a specific contract with the telephone company by which it had agreed to transmit, or to furnish facilities for transmitting, this particular message to the physician, or if the object and purpose of the deceased in having the physician summoned over the telephone, to immediately attend her, was previously made known in proper time to appellant, under the general contract of telephone service, then we may have found some analogy between this case and the various telegraph cases where telegraph companies have been held responsible for such damages for failure to promptly transmit and deliver the message; but here the unusual situation and condition of the deceased was not known to the appellant, and it had no notice or previous notice of the importance or urgency of a communication to a physician and his summons to come at the time to attend her."

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sound, and, upon looking out, noticed a fire in the factory. She wakened plaintiff, who immediately went to the telephone, and took down the receiver for the purpose of giving a fire alarm. Ordinarily, removing the receiver signals on the switch board at the central office to the employees, who then connect the line with telephone of the person with whom communication is desired. No one responded, though he called for "central" and "worked" the receiver for, as he testified, nine or ten minutes. He then handed the receiver to his wife, who got into communication with the central office in one or two minutes. Upon turning the receiver over to his wife, plaintiff went to the factory, and from there started to the fire department, which had a station about $4\frac{1}{2}$ blocks from his house, and met the hose cart on the way. A neighbor had advised the department of the fire, and the men, with apparatus, were at the scene within a minute and a half thereafter. The petition alleged that "because of the negligence of defendant company's agents in charge of said company's switch board, or because of defendant company's failure to keep sufficient or competent persons in charge of said switch board, plaintiff was unable to obtain a response from the central office of defendant company," and by reason thereof the entire factory was destroyed, when, but for said negligence, he would have been able to have given the alarm to the fire department promptly, and much of his factory building and all of the machinery would have been saved. The court submitted the issues of negligence above mentioned to the jury, but ruled, in rejecting evidence and in refusing instructions, that the damages to the building and machinery were not the proximate result thereof. The jury returned a verdict for defendant, but a new trial was granted on the ground that the court had not submitted to the jury whether "defendant was negligent in the matter of keeping its appliances for communicating with central in reasonable repair."

This ruling was based on statutes providing, in effect, that, upon proof of unreasonable delay in the transmission of a message, the burden is upon a telephone company to overcome the inference of negligence to be drawn therefrom. These statutes (Code) may be set out:

"Sec. 2163. The proprietor of a telegraph or telephone line is liable for all mistakes in transmitting or receiving messages made by any person in his employment, or for any unreasonable delay in their transmission or delivery, and for all damages resulting from failure to perform the foregoing or any other duty required by law, the provisions of any contract to the contrary notwithstanding.

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"Sec. 2164. In any action against any telegraph or telephone company for damages caused by erroneous transmission of a message, or by unreasonable delay in delivery of a message, negligence on the part of the telegraph or telephone company shall be presumed upon proof of erroneous transmission or of unreasonable delay in delivery, and the burden of proof that such error or delay was not due to negligence upon its part shall rest upon such company; but no action for the recovery of such damages shall be maintained unless a claim therefor is presented in writing to such company, officer or agent thereof, within sixty days from time cause of action accrues."

Of course, the method of communication over a telephone differs from that by telegraph. Ordinarily in the former the company merely puts the sender in connection by wire with the sendee, and the message is transmitted by word of mouth. The delay in the transmission or delivery contemplated by the statute is that of not furnishing the proper connection within a reasonable time, as well as in otherwise transmitting messages, so that upon a showing of an unreasonable delay by plaintiff it devolved upon defendant to establish by a preponderance of the evidence that such delay was not due to negligence on its part. Had the petition merely alleged unreasonable delay, without describing the particular acts of negligence occasioning it, or have alleged negligence generally, the ruling of the court might have been upheld. *Engle v. Chicago, M. & St. P. R. Co.* 77 Iowa, 661, 37 N. W. 6, 42 N. W. 512. Ordinarily the defendant is in court to answer the matters averred in the petition only. *Hcald v. Western U. Teleg. Co.* 129 Iowa, 326, 105 N. W. 588; *Edgerly v. Farmers' Ins. Co.* 43 Iowa, 587; *Wirstlin v. Chicago, M. & St. P. R. Co.* 124 Iowa, 170, 99 N. W. 697. And, if the instructions present the theory of the case as stated in the petition, the plaintiff has no cause of complaint. *Maloney v. Chicago & N. W. R. Co.* 95 Iowa, 255, 63 N. W. 690; *Denton v. Chicago R. I. & P. R. Co.* 52 Iowa, 161, 35 Am. Rep. 263, 2 N. W. 1093; *Briscoe v. Reynolds*, 51 Iowa, 673, 2 N. W. 529. Though it may not have been necessary to allege in the petition wherein defendant was negligent, plaintiff did so, and this limited the inquiry as to the grounds of negligence thus charged. The plaintiff, having asserted the particular acts or omissions which occasioned the unreasonable delay, ought not to be permitted to take exception because of defendant's omission to prove freedom from negligence in other respects. And this is the rule long since adopted by this court in cases arising under similar statutes. Section 2056 of the Code, as construed, declares a railroad company

liable *prima facie* "for all damages sustained by any person on account of loss or of injury to his property occasioned by the operation of such railroad;" the burden being on the company to exonerate itself from the charge of negligence on proof of damages sustained in the manner mentioned, and this court held in *Engle v. Chicago, M. & St. P. R. Co.* *supra*, that it is sufficient to allege the facts as indicated in the statute without specifying the respects wherein the company has been negligent in setting out the fire. But, when this is done, we have discovered no case holding that plaintiff may rely on other grounds of negligence than those alleged, or that more is exacted from the defendant to entitle it to a verdict than a showing of freedom of negligence in the respects charged in the petition. In other words, the plaintiff cannot base his claim on one kind of negligence and recover on another, and the following decisions expressly so decide: *Carter v. Kansas City, St. J. & C. B. R. Co.* 65 Iowa, 287, 21 N. W. 607; *Miller v. Chicago & N. W. R. Co.* 66 Iowa, 364, 23 N. W. 756; *Babcock v. Chicago & N. W. R. Co.* 72 Iowa, 197, 28 N. W. 644, 33 N. W. 628. The allegations of the petition restrict the field of inquiry to the grounds of negligence stated therein, and all really decided in *Engle v. Chicago, M. & St. P. R. Co.* *supra*, was that, even though alleged in the petition, the burden was on defendant to show itself free from negligence in the respects charged. The reference to the grounds as thus specified in that case as "redundant" was not accurate, but, as none of the cases last cited were mentioned, an intention to overrule them ought not to be inferred, especially when in harmony with elementary rules of pleading. It follows that, even though enough was shown to cast the burden of proving itself free from negligence upon defendant, it was not required to do more than refute the grounds specified in the petition, and for this reason the court erred in granting a new trial.

2. In ruling on the admissibility of evidence and in the refusal of instructions requested, the court held the damages to the building and machinery therein too remote, and for this reason that only nominal damages could be recovered. On this ground, also, plaintiff asked a new trial, but this was denied, and he has appealed from the ruling. As seen, the liability of a telephone company is defined by statute, but the damages recoverable must be the proximate result of the unreasonable delay proven. The duty alleged to have been violated was that to the subscriber as such, and not owing to any special undertaking to maintain a fire-alarm system in the city. Conceding the delay of the employees at the central office to furnish con-

nection promptly with the fire department of hose company No. 6 to have been unreasonable, and the negligence to be inferred therefrom under the statute unexplained, was such delay the proximate cause of the loss? If so, a new trial was rightly granted even though on another ground. If not, the verdict should have stood and judgment have been entered thereon. The fire was the primary cause of the loss. The defendant did not start it, or have aught to do with its origin. The charge against it is that the negligence intervened as the efficient cause, in the omission to do that which would have resulted in the extinction of the fire. Of course, if the failure to put out the fire was the direct and natural consequence of the unreasonable delay in making the connection, then there could be no doubt as to defendant's liability. But several links in the chain of sequences are involved in doubt and speculation. The fire was burning not only before plaintiff reached the receiver, but before he was awakened by his wife, who had heard the crackling of flames. Conceding that he was at the telephone nine or ten minutes, though minutes seem hours at such times, and that connection was made at the central office within two minutes thereafter, yet, as the hose company had been notified by another, there could not have been a delay of over more than ten or twelve minutes, and, when the firemen arrived, the fire was beyond control. At what time must they have been on the ground to have saved the property? No one can answer save from conjecture. All realize that in such emergencies time is precious, but who can say from the situation as presented in this case how many minutes meant the loss of the plaintiff's property? Suppose the connection at the central office had been made promptly, would the fireman in charge of the fire station have responded promptly and promptly have rung the fire bell? Would the members of the department have heard and promptly have repaired to the scene? Was the apparatus for extinguishing the fire in working order and the water supply accessible and sufficient? Would all of these intervening agencies have operated harmoniously and efficiently and with such promptness as to have put out the flames in time to have avoided a total loss? Manifestly these are matters of speculation, and yet all this must be assumed if the loss is to be traced to defendant's negligence. Each of these independent agencies necessarily must be linked together in a line of causation in order to connect it with the loss. None of them were under the direction or control of the telephone company. Moreover, how far the fire had spread at the time the firemen would have been likely to have reached the

scene had the connection been promptly made is left by the evidence a matter of speculation merely. And then there are the weather conditions and the character of the material to be taken into account. After the experience of ages, fighting fire, even with modern machinery and apparatus, is precarious business, and uncertain in its results. Had everything worked out as calculated, after the fire was over probably some of the building and machinery might have been saved. But the basis for a legal inference of this kind was not furnished by the evidence. The negligence of the telephone company may be ascertained, but that falls short of connecting it with the loss which is only possible through agencies entirely independent. If it, as the dominating force, acted through the intervening agencies, as mere instruments or vehicles in a natural line of causation, to the loss, there would be ground for saying defendant was liable. But the intervening agencies were independent, and what might have happened pure matter of speculation. The situation differs from that in which a hose through which water is being poured on a fire is cut and, because thereof, the flames, which were being extinguished, consume the property; for there the wrong is in preventing the fire department when actually engaged in extinguishing the fire from accomplishing its design. The circumstance that the firemen act voluntarily affords the wrongdoer no excuse. Whatever the instrumentalities, his act is the direct cause of shutting off the water supply. Thus, in *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689, the plaintiff's manufacturing plant caught fire, and the hose was extended across defendant's track and connected with the hydrant. The water derived therefrom was applied to the fire so as to diminish it, with the probability that it would have been extinguished in a short time, when a freight train came along, and, though duly warned, carelessly ran over the hose, and injured it so that it could not be seasonably repaired, and the plant was consumed. The defendant was held liable on the principle that, to extinguish fire, firemen were authorized to take possession of the right of way. Though the hose was not plaintiff's property nor the firemen its employees, they were actually furnishing water to plaintiff, and thereby extinguishing the fire, and were rendering the same service as if hired by it and using its hose. Cutting off the supply in these circumstances was "as really an interference with the plaintiff's possession as if they held the possession under a deed and as if the men were laboring under a contract." The wrong was held to have been the proximate cause. 28 L.R.A. (N.S.)

This case was followed in *Little Rock Traction & Electric Co. v. McCaskill*, 75 Ark. 133, 70 L.R.A. 680, 112 Am. St. Rep. 48, 86 S. W. 997. See *Mott v. Hudson River R. Co.* 1 Robt. 585. In *Kiernan v. Metropolitan Constr. Co.* 170 Mass. 378, 49 N. E. 648, the defendant interfered with the use of a hydrant by the firemen, delaying the connection of the hose therewith so that the plaintiff's house was destroyed, when but for such interference probably it would have been saved. The defendant was held liable, the court saying that, though "there was no obligation upon the city to extinguish the fire, it does not follow that the plaintiff was not deprived of anything to which she had a legal right if the defendant obstructed the fireman in getting water from the hydrant. She has a legal right to have firemen get the water, if they choose to do so, from a supply provided especially for that purpose, and, while the obstruction . . . may not have been a crime, . . . it was a tortious and wrongful interference with persons engaged in putting out a fire." In these cases stress is laid on the circumstances that, though the firemen or city may not be under legal obligation to extinguish the fire (*Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90), they were actually engaged therein, and, but for the direct interference with the hose or hydrant, would have extinguished the fire. It seems unnecessary to elaborate on the distinction between these cases and that at bar,—between direct interference with the work of extinguishing fire actually in progress and the negligent omission of being instrumental in procuring such work to be undertaken by others. Enough has been said to indicate our conclusion that the damages proposed to be proven were remote and speculative in character, and the court rightly so held. *Lebanon, L. & L. Teleph. Co. v. Lanham Lumber Co.* 131 Ky. 718, 21 L.R.A. (N.S.) 115, 115 S. W. 824, is directly in point. It follows that the court erred in ordering a new trial.

Reversed on defendant's appeal. Affirmed on plaintiff's appeal.

KENTUCKY COURT OF APPEALS.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appt.,
v.

JOHN G. WINN.

(— Ky. —, 126 S. W. 153.)

Parties — accounting by insurance company — other policy holders.

1. The other members of the class are not

necessary parties to a suit by the holder of a tontine policy of life insurance against the insurer for an accounting of the amount due on his policy.

Pleading — immaterial denial — striking.

2. A mere denial in a suit by the holder of a tontine insurance policy to compel an accounting of the amount due on the policy, that its books would show the amount to be due which is claimed by plaintiff, is not a good defense to the suit, and will be stricken out of the answer.

Insurance — tontine policy — right to accounting.

3. The holder of a tontine life insurance policy is entitled, upon its maturity, to an

Note. — Right of policy holder to an accounting by insurer.

The principle upon which the above decision rests, that the holder of a tontine policy is entitled to an accounting by the insurer at the expiration of the period, was declared to be the law in *Pierce v. Equitable Life Assur. Soc.* 145 Mass. 58, 1 Am. St. Rep. 433, 12 N. E. 858, and in *Peters v. Equitable Life Assur. Co.* 196 Mass. 143, 81 N. E. 964 (on subsequent appeal 200 Mass. 579, 86 N. E. 885), under a statute giving jurisdiction in equity upon accounts "where the nature of the account is such that it cannot be conveniently or properly adjusted or settled in an action at law."

And in *Fuller v. Knapp*, 24 Fed. 100, the court entertained a bill by the holder of a tontine policy for discovery and accounting, declaring it to be unnecessary to decide whether the bill would be maintainable if discovery were not sought, and, upon a subsequent hearing (37 Fed. 163), decreed an accounting.

On the other hand, in *Everson v. Equitable Life Assur. Co.* 68 Fed. 258, affirmed upon the opinion of that court in 18 C. C. A. 251, 39 U. S. App. 34, 71 Fed. 570, it was held that the holder of a semi-tontine policy who was dissatisfied with the amount apportioned to him by the insurer could not maintain a bill for an accounting and discovery, in the absence of sufficient allegations of fraud, inasmuch as the relation between him and the insurer was that of debtor and creditor merely, and involved no trust relation.

And the nature of the relationship as debtor and creditor merely was also the ground of the decision in *Uhlman v. New York L. Ins. Co.* 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363, holding that a holder of a tontine policy was not, at the expiration of the period, entitled to an accounting, in the absence of any evidence of misappropriation, wrong doing, or mistake on the part of the insurer.

And in *Hunton v. Equitable Life Assur. Soc.* 45 Fed. 661, it was held without discussion that a policy holder was not entitled to an accounting from the insurer, in the absence of any other ground of equitable

accounting by the insurer of the amount due upon it.

Same — refusal to account — right to judgment.

4. In case an insurance company refuses to render an account to the holder of a tontine policy, of the amount due on the policy, the court may enter judgment against it for the amount alleged to be due by the policy holder.

(March 18, 1910.)

APPEAL by a defendant from a judgment of the Circuit Court for Montgomery County in plaintiff's favor in an action brought to recover the amount alleged to be

jurisdiction. It may be noted here that the court also held that the Massachusetts statute upon which the Massachusetts court in the two cases from that jurisdiction, already cited, relied as giving jurisdiction, did not extend the equity jurisdiction of the Federal courts, even in suits removed from the state courts.

The Supreme Court of the United States seems to have gone to an extreme in denying such relief to a policy holder, since in *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404, reversing 81 C. C. A. 1, 151 Fed. 1, 10 A. & E. Ann Cas. 402, reversing 142 Fed. 835, it was held that frauds and mismanagement by the officers and directors of a mutual life insurance company did not entitle a policy holder to an accounting and distribution of the surplus in any other manner, or at any other time, or in any other amounts, than as provided for in the contract of insurance, where, by such contract, he was entitled to participate equitably in the distribution of some part of the surplus according to such principles and methods as should be adopted by the insurer, in the absence of any trust relationship being shown between the insurer and the policy holder.

In *Fry v. Provident Sav. Life Assur. Soc. (Tenn.)* 38 S. W. 116, it was held that the holder of a tontine policy could not maintain an action for an accounting before the expiration of the period of time during which he was to remain a policy holder in order to share in the surplus, but no opinion was intimated as to his right to maintain such an action then.

Under a statute providing that no decree for an accounting by insurance companies should be made or granted otherwise than upon the application of the attorney general, a policy holder has no legal capacity to maintain such an action. *Swan v. Mutual Reserve Fund Life Asso.* 155 N. Y. 9, 49 N. E. 258; *Greeff v. Equitable Life Assur. Soc.* 160 N. Y. 19, 46 L.R.A. 288, 73 Am. St. Rep. 659, 54 N. E. 712; *Hackett v. Equitable Life Assur. Soc.* 50 App. Div. 266, 63 N. Y. Supp. 1092; *Buford v. Equitable Life Assur. Soc.* 98 N. Y. Supp. 152.

J. A. C.

due under a certain tontine policy of life insurance. Affirmed.

The facts are stated in the opinion.

Messrs. John A. Judy, Lewis Apperson, and Humphrey & Humphrey, for appellant:

As defendant denied plaintiff's right to an accounting, it was necessary for plaintiff to prove that he was entitled to an accounting, which proof plaintiff failed to make.

1 Cyc. Law & Proc. pp. 444, 445; *Columbian Equipment Co. v. Mercantile Trust & D. Co.* 51 C. C. A. 33, 113 Fed. 23; *Baltimore Steam Packet Co. v. Williams*, 94 Va. 422, 26 S. E. 841.

The relation between the parties was not that of agency or of trust, but that of contract.

Uhlman v. New York L. Ins. Co. 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363; *Hunton v. Equitable Life Assur. Soc.* 45 Fed. 661; *Everson v. Equitable Life Assur. Co.* 68 Fed. 258; *Watts v. Equitable Life Assur. Soc.* 55 Misc. 454, 105 N. Y. Supp. 363; *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404.

Equity will not decree an accounting on the ground that accounts are complicated, where it would work a hardship on the defendant.

Uhlman v. New York L. Ins. Co. and *Hunton v. Equitable Life Assur. Soc.* supra; *Everson v. Equitable Life Assur. Co.* 68 Fed. 261; *Equitable Life Assur. Soc. v. Brown*, supra.

Mr. Robert H. Winn for appellee.

Nunn, Ch. J., delivered the opinion of the court:

This case presents the question of the right of a holder of a tontine policy of life insurance to have from the insurer an accounting of the funds to be apportioned to the policy.

Appellee, John G. Winn, in July, 1884, took out a life insurance policy in the Equitable Life Assurance Society of the United States for the sum of \$3,000, for which he agreed to pay and did pay as premiums \$82.17 a year for twenty years. The following is a provision of the contract of insurance: "That upon the completion of the tontine period, on July 19, 1904, provided this policy shall not have been terminated previously by lapse or death, said John G. Winn shall have the option either: First, to withdraw in cash this policy's entire share of the assets, i. e., the accumulated reserve, which shall be eleven hundred and twenty-nine $\frac{1}{100}$ dollars, and in addition thereto, the surplus apportioned by this society to this policy; secondly, to convert the same into a paid-up policy for an equivalent amount, provided always that if the amount of said paid-up

policy shall exceed the original amount of the assurance, a satisfactory certificate of good health from one of the society's medical examiners shall be required; thirdly, to continue the assurance for the original amount, and apply the entire tontine dividend to the purchase of an annuity, the amount derived from such annuity, together with the annual dividend on this policy, shall be paid in cash to said John G. Winn or assigns; or, fourthly, to withdraw in cash the share of the accumulated surplus apportioned by said society to this policy, and continue the policy in force on the ordinary plan." Upon the completion of the tontine period, the insured wrote the society, asking what the cash value of his policy then was, and exercised the first option under clause 5 quoted above. The society wrote him in answer that the accumulated reserve, which was stipulated in the policy to be \$1,129.05, plus the surplus apportioned by the society to the policy, was \$1,824.54, which was represented to be the cash surrender value of the policy, and which amount the society would give him for the policy. Appellee accepted the sum mentioned, relying upon the society's representations concerning the amount properly apportioned to the policy, and surrendered the policy to the society. On August 21, 1907, appellee filed this action for an accounting. The petition, after setting forth formal statements, the terms of the policy, the fact that the plaintiff had persisted as a member or policy holder for the full tontine period, paying all the premiums, his application under the first option of the fifth clause of the contract for settlement, and the defendant's representation of the amount apportionable to the policy, he then pleaded: "And that, in reliance upon said statement as true, this plaintiff was misled, and fraudulently induced to, and did, surrender said contract to said society, and to accept said sum in payment therefor, which he did in ignorance of the true sum owing him; that the amount or sum actually due this plaintiff on said July 19, 1904, was and is known to the defendant society, and will and can be shown by its books." Plaintiff (appellee) prayed for an accounting against the society and a judgment for such sum as might be due him, or, on failure of such accounting, for a judgment against the society for \$775.46, which it was alleged was the true sum due to be apportioned to the plaintiff's policy out of the funds apportionable thereto. To this petition the appellant interposed a special demurrer for lack of proper parties, and a general demurrer.

The special demurrer was properly overruled. While the insurer was a trustee in a sense for the policy holders, to invest and apportion the sums constituting the surplus,

it was not necessary that all the class be made parties to the suit for an accounting brought by one of them. This suit was not for a winding up of the society, nor for the distribution of its funds. It was only to have ascertained the plaintiff's proportion due under his contract. This suit can properly be maintained without the presence of the other policy holders of that class. The demurrers were each overruled. The appellant then answered. Its answer was a traverse of each allegation of the petition save such as set out the corporate existence of the appellant, the execution and terms of the contract, the payment of the premiums, and the plaintiff's election and the settlement had thereunder. A motion was made by the plaintiff, and in part sustained by the court, to strike from the answer certain of its allegations in the form of denials of parts of the petition; for example: "And it states that the amount or sum to the plaintiff on said date was the sum of \$1,824.54, and no more. Defendant denies that any other or different sum can be shown by this defendant's books to be due to the plaintiff." Again: "This defendant denies that the plaintiff is entitled to a showing from the defendant society, or an accounting. It denies that any trust or agency existed as between this defendant and plaintiff, and it denies that the plaintiff is entitled to any showing or any accounting of any alleged trust or agency, or that the plaintiff is entitled to any showing or accounting for the purpose of ascertaining any amount alleged to be due the plaintiff." Section 95, Civ. Code Prac., states that an answer may contain a traverse. In subsection 7, § 113, Civ. Code Prac., it is stated that a traverse is a denial by a party of facts alleged in an adverse pleading. Counsel for appellant say: "We are at a loss to understand upon what principle this motion was sustained." A traverse must negative every material fact in the adverse pleading, to constitute a complete defense. If any material fact is not put in issue, it, being admitted, precludes the pleader from denying obligations implied by law upon such admitted facts. Appellant did not deny the issuance of the policy, its engagements, the performance by the plaintiff of its conditions, his selection of an option under its terms, the settlement made, and the representations on which it was made. When so much was admitted, the law imposed upon appellant the duty of keeping accounts with its policy holders, from which it could be ascertained what was due to be apportioned among them according to the terms of the contracts. The defendant did not deny that it had kept such books. Nor did it deny that the books would

disclose the true account. It merely denied that they would show that plaintiff was entitled to the sum claimed by him in the suit. If defendant did keep books by which the true state of accounts of the policy holders of the plaintiff's class belonged, then, in an action in equity for an accounting, it was incumbent on appellant to disclose what the books did show in that respect. If it did not keep such books, a denial that its books showed any sum due the plaintiff is manifestly a bad plea. In an action upon a note, it is usual and necessary to allege that the defendant promised and agreed to pay the note; but, unless defendant denies its execution, his denial of his promise and agreement to pay is bad. He would thereby deny the law. Here the law likewise imposes certain duties and obligations upon the insurance company who undertake for pay to invest its policy holders' fund in an enterprise, such as a tontine policy of life insurance. The company cannot satisfy its contract by saying that it apportioned to the policy all that was due under it. It must show what was due under it,—how ascertained, and from what sources,—else it becomes the judge as well as contracting party. The motion to strike from the answer was properly sustained.

The court then ruled the defendant to make its answer more specific. The order is as follows: "The said defendant is now ordered and required to make the allegation of its answer herein more specific and certain; further, that by its answer it give a full, true, complete, and accurate accounting of all its transactions relative to the policy sued on; further, that it show all premiums collected from the class to which the said policy belongs; further, that it show the deaths in said class; further, that it be required to show the expenses and losses of its business apportionable to said class; further, that it show the number in said class and the amounts received from each; further, that it show the interest earnings, if any, on the sums or funds belonging to said class which were invested by the defendant; further, to show the funds contributed by said class and the plaintiff to the general surplus assets of said company; further, to disclose by its answer in full, free, and accurate accounting of all its transactions, earnings, accumulations, expenses, dividends, receipts from, payments to, and each and every fact appertaining and incident to a correct financial statement of the accounts of that tontine class of which the plaintiff was a member; and to show by said statement each and all of said facts as to the plaintiff to which the defendant objects and excepts." The de-

fendant refused to comply with the order of the court, whereupon judgment was entered for the plaintiff for the sum prayed for in the petition. Where one party is due to account to another, his refusal to do so warrants the presumption against him most favorable to his adversary from the then state of the record; for it is to be supposed that, rather than suffer default upon the matter expressly charged, the party accused would answer so as to reduce the amount could he do so conscientiously. Accordingly it is held that the court may enter decree upon such default and contumacy, treating it as an admission against his interest by the party, and affording a sufficient quantity of evidence to justify the chancellor in so proceeding to judgment. *Neal v. Keel*, 4 T. B. Mon. 162; *Peterson v. Poignard*, 8 B. Mon. 309; *Potter v. Porter*, 33 Ky. L. Rep. 129, 109 S. W. 344; *United States L. Ins. Co. v. Spinks*, 29 Ky. L. Rep. 960, 13 L.R.A. (N.S.) 1053, 96 S. W. 889.

A tontine contract of insurance is more than a policy of life insurance. In addition, it is an agreement on the part of the insurer to hold all the premiums collected on the policies forming that class for the specified period, which is called the tontine period or period of distribution, and, after paying death losses, expenses, and other losses out of the fund so accumulated, to divide the remainder among those who are alive at the end of the tontine period, and who have maintained their policies in force. The premiums include a sum which at interest at $4\frac{1}{2}$ per cent compounded will, at the end of the expiration of the expectancy of the life of the insured, pay to his estate the principal sum insured, which is called the reserve of the policy. That is always provided for and always collected in each life insurance premium. In addition, another sum is included in the premium, called the "mortality fund," which pays the death losses of that per cent who die before the expiration of their life expectancies. Their aggregate is the flat or level cost of insurance. Then there is added a sum to cover cost of conducting the business, and for such losses as may occur from other causes than death of policy holders. This "loading" of the premium is more or less arbitrary. All excess above costs, expenses, losses, death claims, and the reserve constitute what is known as the "surplus," which may also include sums realized from interest received upon the reserves at a greater rate than that upon which it was calculated, as well as from the death rate in a given year being less than the experience justified as certainly expected. 28 L.R.A. (N.S.)

At any rate, this surplus is regarded as belonging equitably to those policy holders who contribute it. In tontine insurance all who contribute agree that, instead of apportioning it among them all, it may be apportioned among those who outlive the period of distribution. The insurer undertakes to handle the fund for the parties. Its pay is in the costs and expenses which it charges as toll. The balance not only belongs equitably to those contributing to it, according to the terms of their contracts, but the insurance company agrees to so apportion it among them. Now, why should it not keep its contract? To keep it faithfully and honestly, it is required to keep books of account. Otherwise its apportionment would be a mere guess, even if it rose to that dignity. It is a trustee, an agent of those for whom it has essayed to act. It will not be heard to say that it would be too troublesome to keep the accounts, or would cost too much to render the parties a true statement, or on that account be impracticable to show to a court of chancery in a suit for accounting the state of the books.

Nor are we impressed that it is an impracticable matter to exhibit the state of accounts, if they are kept. If the directors of the society act intelligently and sincerely in apportioning the surplus among those whom they have undertaken to apportion it to, they must have before them when they act substantially the same data called for by the order of the court in this case. Any less would be such neglectful conduct as amounts to bad faith. If they had the data when the apportionment was made, then the same material could be furnished to the court. The defendant ought not be heard to say that he has undertaken to deal with so many people that it cannot find the time to make them any showing of how it has conducted their business, or that its magnitude is such it cannot afford to either keep accurate and intelligible books of account, or have statements made up from them in a case in which a party is justly and legally entitled to it. This primary accounting does not necessarily involve giving the name, number, amount, and so forth of each policy. But a fair and explicit classification of the heads of items stated in the aggregate, and subject to impeachment, should have been furnished along the line indicated in the circuit court's order. The refusal was just ground for the action of the court in entering the judgment appealed from.

Affirmed.

Petition for rehearing denied.

IOWA SUPREME COURT.

FRED H. WINSLOW

v.

COMMERCIAL BUILDING COMPANY,
Appt.

(— Iowa, —, 124 N. W. 320.)

Master — injury by fire escape — construction by independent contractor.

1. The owner of a building cannot avoid liability for injury to his servant through the fall, because of improper fastenings, of a fire escape upon which he was employed in the performance of his duties, merely because it was erected by an independent contractor selected with due care.

Trial — question for jury — master's inspection of appliances.

2. The question is for the jury whether or not reasonable inspection, on the part of the owner of a building, of a fire escape which had been erected by an independent contractor, would have revealed a defect in the fastenings and permitted the defect to be remedied prior to the injury of a servant through the attempted use of the appliance, for which the owner is sought to be held liable.

Master — unsafe fire escape — inspection — measure of duty.

3. A mere superficial inspection, by the owner of a building, of a fire escape placed on the building by an independent contractor, is not sufficient *per se* to relieve him from liability for injury to a servant who, in attempting to use the device, is injured by its fall because the fastenings are let into the wall just far enough to hold it in place until it has passed inspection.

Same — delegation of duty.

4. A master cannot delegate to an independent contractor power to exercise the care to make devices safe for servants which the law imposes upon him as a personal obligation.

(January 18, 1910.)

A PPEAL by defendant from a judgment of the District Court for Blackhawk County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Carr, Carr, & Evans and J. E. Williams for appellant.

Note. — As to liability of employer after he has assumed control of the subject-matter of the work executed by an independent contractor, see note to Choctaw, O. & W. R. Co. v. Wilker, 3 L.R.A. (N.S.) 595. As to liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer, see note to Anderson v. Fleming, 66 L.R.A. 119.
28 L.R.A. (N.S.)

Messrs. Edwards & Longley, for appellee:

The performance of a nondelegable duty by an independent contractor does not disturb the application of the rule *respondet superior*.

Moran v. Corliss Steam Engine Co. 21 R. I. 386, 45 L.R.A. 268, 43 Atl. 874; Trainor v. Philadelphia & R. Co. 137 Pa. 148, 20 Atl. 632; Toledo Brewing & Malting Co. v. Bosch, 41 C. C. A. 482, 101 Fed. 530; Gulf, C. & S. F. R. Co. v. Delaney, 22 Tex. Civ. App. 427, 55 S. W. 538; Burnes v. Kansas City, Ft. S. & M. R. Co. 129 Mo. 41, 31 S. W. 347; Thomp. Neg. §§ 533, 3737; Bailey, Personal Injuries Relating to Master & Servant, 1st ed. §§ 2561, 2571; Labatt, Mast. & S. §§ 558, 559.

Messrs. Boles & Law also for appellee.

Weaver, J., delivered the opinion of the court:

The defendant was the owner of a six-story office building in the city of Waterloo, and employed the plaintiff as a janitor therein. Upon the outer wall of this building the defendant, in obedience to law and to an ordinance of the city, constructed and maintained an iron fire escape. It was built upon the usual plan, with a platform at each floor above the first story, all being connected by flights of stairs. To connect the first platform with the ground below there was an adjustable "emergency ladder," hung upon iron or steel supports attached to or fastened in the brick wall of the building. Acting within the scope of his employment, plaintiff was engaged in superintending or assisting the work of painting the fire escape. Beginning at the top or the sixth story, he worked his way down to the lower platform, from which he entered upon the emergency ladder. Standing upon the ladder, some 15 or 20 feet above the ground, he leaned out to inspect the painting on the under side of the platform, when the supports on which the ladder was suspended pulled from their fastenings, and plaintiff was thrown down, receiving severe injuries. Defendant is charged with negligence, in that the supports of the ladder had not been properly attached to or fastened in the wall when the fire escape was constructed; that defendant knew, or in the exercise of due care ought to have known, the defective condition of the fire escape, and failed to remedy it or to warn plaintiff of the danger therefrom; that said fire escape was not constructed in accordance with the provisions of the city ordinance, which required the device to be firmly attached to the building, and plaintiff alleges that, by reason of such negligence, he was injured without contributory fault on his part, and demands a recovery.

ery in damages. The defendant admits that plaintiff was in its employment substantially as alleged by him, but denies any negligence or want of reasonable care on its part. It further alleges that the danger of injury such as plaintiff sustained was one of the risks incident to his said employment, and therefore assumed by him in accepting the position. There was a verdict and judgment for the plaintiff in the sum of \$1,750.

The plaintiff's testimony tended to show that at the time of his injury he was acting within the line of his duty in the employment of defendant, and was exercising reasonable care for his own safety. It also tended to show that the ladder supports were not properly or safely attached to the wall, and that the defect was probably one of original construction. The evidence on part of the defendant was devoted solely to the proposition that the fire escape had been constructed by an independent contractor, the defendant exercising no supervision or control as to the manner of doing the work, and that, in selecting the contractor to perform the work, it exercised due care and caution to secure one who was skilled in the business and competent to perform it in an efficient and proper manner. The sufficiency of this line of defense is the question presented by the record before us.

Stated in succinct form the question may be put in these words: "Is the master's obligation to furnish his servant a safe place to work fully satisfied and discharged by the exercise of reasonable care in selecting a competent independent contractor to make it safe?" To sustain the affirmative of this proposition, the appellant relies upon the familiar line of authorities which hold that as a general rule the doctrine of *respondeat superior*, which arises from the relation of master and servant, and makes the master answerable to third persons for the acts or omissions of the servant within the scope of his employment, has no application as between a contractee and an independent contractor, and that the former is not answerable to the servant of the latter for acts or omissions of such contractor in the performance of his contract. Were the question uncomplicated by inharmonious precedents, it would seem that the inapplicability of the rule to a case like the one at bar would be self-evident. There is nothing better settled in the law of master and servant than that the duty of the master to provide the servant a reasonably safe place to work is absolute and nondelegable. The obligation cannot be shifted from the master to a fellow servant or to any other third person. It is also a continuing duty, and care in furnishing a safe place at the beginning of the employment must be followed by reason-

able supervision, inspection, and care to keep it safe until the relation of master and servant is at an end. On the other hand, in the case of an independent contractor, he is himself the employer, and has his own servants, who look to him for the safety of their place of work, and he alone is liable to his servant or other person who is injured by his negligence in the execution of his contract. If, for instance, plaintiff had been the servant of the contractor who constructed the fire escape, and had received his injury in the progress of that work without contributory fault on his part, the rule as to independent contractors would clearly apply, and the owner of the building could not be held liable for the damages so sustained. But, when the contract was performed and the completed work accepted by the defendant, the relation of owner and independent contractor was dissolved, and thereafter could in no manner affect the obligation to such owner as an employer of labor in and about the structure thus erected. *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Gorham v. Gross*, 125 Mass. 240, 28 Am. Rep. 224; *Read v. East Providence Fire Dist.* 20 R. I. 574, 40 Atl. 760; *First Presby. Congregation v. Smith*, 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279. While the cases here cited did not arise between master and servant, they show the fundamental principle limiting and defining the extent to which the plea of "independent contractor" is available to a property owner when sued by a third person for damages occasioned by the defective condition of such owner's premises. The distinction between the responsibility of one who fails to perform a duty which the law requires him to perform and his liability for the negligence of those who are employed in doing the work is noted by Lord Blackburn in *Mersey Docks & Harbour Board v. Gibbs*, 11 H. L. Cas. 686, where he says that in cases governed by this principle "it is immaterial whether the actual actors are servants or not." In *Pickard v. Smith*, 10 C. B. N. S. 470, it is said that the rule respecting the nonliability of the owner or employer for the acts of a contractor is inapplicable to cases in which the contractor is intrusted with a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned. See also to the same effect, *Penny v. Wimbledon Urban Dist.* [1899] 2 Q. B. 72. The case as between master and servant falls within the general rule that, wherever the law imposes a personal duty upon anyone, he cannot escape responsibility therefor or for the manner of its performance by employing a substitute. 1 Thomp. Neg. §§ 532, 665; *Texas & P. R.*

Co. v. Juneman, 18 C. C. A. 394, 30 U. S. App. 541, 71 Fed. 939; Wilson v. White, 71 Ga. 506, 51 Am. Rep. 269; Houston & G. N. R. Co. v. Meador, 50 Tex. 77; Hegeman v. Western R. Corp. 16 Barb. 353; Same case on appeal, 13 N. Y. 9, 64 Am. Dec. 517. In the last-cited case a railroad company sought to escape liability to a passenger by showing that defective axle had been procured from a reputable and competent maker, and disclosed no exterior evidence of the defect. In upholding a verdict for the plaintiff, the court says that the law placed upon defendants the duty of furnishing a safe car for the passenger, and, while they were not required to become smelters of iron or builders of cars, they were required to exercise the requisite degree of care to make the car safe, and in so doing "they may construct it themselves or avail themselves of the services of others, but in either case they engage that all that well directed skill can do has been done for the accomplishment of this object. A good reputation upon the part of the builder is very well in itself, but ought not to be accepted by the public or the law as a substitute for a good vehicle." See also Brehm v. Great Western R. Co. 34 Barb. 256.

Speaking to the question whether a master can, by employing a contractor to perform a duty which he owes to his servants, relieve himself from liability for its non-performance, Mr. Labatt, a recognized authority on the law of master and servant, says: "The weight of authority would seem to be distinctly in favor of the doctrine that a master cannot escape his responsibility by such a delegation of his duties. This, it is submitted, is the only doctrine which is logically tenable and which can be reconciled with general principles." See note to Anderson v. Fleming, 66 L.R.A. 153. In Trainor v. Philadelphia & R. R. Co. 137 Pa. 148, 20 Atl. 632, the court approves the rule that "the master owes to the servant the duty of providing a reasonably safe place to work in and reasonably safe appliances with which to do the work, and the delegation of this duty to an agent or independent contractor will not relieve the master from responsibility for an injury to the servant resulting from its neglect." Many other cases and precedents lend support to this theory of the law, and, indeed, it is difficult to conceive how the courts can hold that the duty of care on the part of the master to provide a safe place to work is absolute and nondelegable, and at the same time say that he may delegate or shift the responsibility to the shoulders of a contractor. To affirm both propositions is to effectually negative both. That the decisions on the subject cannot well be reconciled may be con-

ceded. The one oftenest cited in support of appellant's position is Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311. There a contractor for the construction of a public building let the contract to another to erect a scaffold needed in the progress of the work; the subcontractor furnishing his own materials and help, and building the scaffold after his own methods. The work was so defectively done that, when the principal contractor's servant went upon the scaffold, it fell and injured him, and it was decided that the servant's cause of action was against the subcontractor alone. In our judgment the conclusion, as broadly stated in that opinion, cannot be sustained upon principle, but its scope and effect appear to have since been very materially narrowed.

In Vosburgh v. Lake Shore & M. S. R. Co. 94 N. Y. 374, 46 Am. Rep. 148, the defendant, seeking to escape responsibility for a defective bridge which it had purchased from the builder, cited the Devlin Case as an authority in point, and the court, referring to the facts on which that decision had been made to turn, says: "If the scaffold instead of a temporary had been a permanent structure intended for continuous use through the years, and imposing upon Smith the duty of an inspection by skillful and competent agents whose proper performance of that duty would have disclosed defects of construction which made it dangerous and unsafe, again a different question would have been presented." As thus restricted, Devlin v. Smith is not in point with the case at bar, for the structure here in question was a permanent structure, which, if well constructed, could be expected to answer the purpose for which it was designed practically as long as the building to which it was affixed. Defendant pleads and proves that it gave the manner and method of the construction of the fire escape no attention or supervision whatever, leaving the work wholly to the contractor, and, except the official inspection by the city when the work was completed, there is no claim that it was ever in any manner inspected, or its strength and safety in any manner tested prior to the plaintiff's injury, some two years later. It may be, as counsel argue, that reasonable inspection by defendant would not have revealed the weakness of the ladder's support, but we cannot so hold as a matter of law. It was for the jury to say whether due care would have discovered the defect and applied a remedy before the accident. The mere fact that to a superficial view the fire escape appeared to be firmly attached to the building is not a sufficient answer to this suggestion. If each and all of the several supports of the fire escape had extended but an inch or two into the wall,

just sufficient to hold the device in place until it had passed inspection, thus constituting a veritable trap for any person having occasion to use it, the surface appearance presented would doubtless have been as perfect as if it were thoroughly well made, yet it would not do to hold as a matter of law that such superficial inspection would fill the full measure of the owner's duty to provide his servant a safe place to work. Of the other cases cited by counsel, *Haley v. Jump River Lumber Co.* 81 Wis. 412, 51 N. W. 321, 956, disposes of the question without discussion and expressly upon the supposed authority of *Hackett v. Western U. Teleg. Co.* 80 Wis. 187, 49 N. W. 822, which is not parallel in fact or principle with the one we have under consideration. *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017, is a New York case of the type of *Devlin v. Smith*, and subject to the same restricted application.

It must not be understood from the foregoing discussion that care in selecting a competent contractor is not a proper fact for consideration by the jury in cases like the one at bar. The standard to which the master must conform is that of reasonable care, and his care to employ skilful and competent persons to assist him is one of the circumstances bearing upon the question whether he has done his full duty to his servant, but it is not decisive of it. He may employ third persons to do the work which his duty requires of him, but he cannot employ them to exercise the care which the law imposes upon him as a personal obligation. None of our own cases have been cited, nor are we able to find any which are in any wise inconsistent with the views we have expressed. It should be said that it is open to some doubt whether the record before us fairly presents the principal questions argued by counsel. Except as it may be included within the scope of a general denial, the answer does not claim the benefit of the rule which exempts the employer from liability for negligence of an independent contractor, and quite likely it was not necessary to plead it specially. But no request was made of the court to instruct the jury upon that theory, and the court submitted the case without objection upon the conceded general rule as to the requirement of reasonable care by the defendant to furnish plaintiff a safe place to work. We have thought it best, however, to take the case as counsel have argued it, and dispose of the points so raised according to our views of their merit.

We are of the opinion that the court properly submitted the cause to the jury, with correct instructions as to the law bearing thereon, and the judgment appealed therefrom is therefore affirmed.

28 L.R.A. (N.S.)

A petition for rehearing having been filed, the following *Per Curiam* response was handed down on May 3, 1910:

In argument of appellant upon petition for rehearing, doubt is expressed whether a paragraph of the opinion heretofore filed does not give countenance to the doctrine that the master's duty to furnish his servant a safe place to work is discharged by committing the work of construction and preparation to a competent independent contractor. To remove any possible ambiguity in that respect the opinion is modified by withdrawing so much thereof as reads as follows: "It must not be understood from the foregoing discussions that care in selecting a competent contractor is not a proper fact for consideration by the jury in cases like the one at bar. The standard to which the master must conform is that of reasonable care, and his care to employ skilful and competent persons to assist him is one of the circumstances bearing upon the question whether he has done his full duty to his servant, but it is not decisive of it. He may employ third persons to do the work which his duty requires of him, but he cannot employ them to exercise the care which the law imposes upon him as a personal obligation,"—and by inserting in place thereof the following: "The standard to which the master must conform is that of reasonable care. He may employ servants or contractors to do the work which the law requires of him, but he cannot delegate to them the exercise of the care which the law imposes upon him as a personal obligation."

With this amendment of the opinion filed upon the original submission, the petition for rehearing is overruled.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

C. B. BOX, Plff. in Err.,

v.

POSTAL TELEGRAPH-CABLE COMPANY.
NY.

(91 C. C. A. 172, 165 Fed. 138.)

Telegraph company — unrepeatd message — delay — liability.

1. A telegraph company cannot avoid liability for full damages for failure to trans-

Note. — Applicability of stipulation as to repeating telegraph messages to failure or delay in transmission or delivery.

A note to *Western U. Teleg. Co. v. Milton*, 11 L.R.A. (N.S.) 560, discusses the question of validity of limitation of liability of telegraph companies for unrepeatd messages. It will be observed by referring to that note,

mit a message within the stipulated time, under a rule limiting its liability to the amount received for transmission in case of mistake or delay in the transmission of un-repeated messages.

Trial — jury — close of telegraph office.

2. Whether or not a telegram was tendered for transmission after the close of the hours of the office of destination is for the jury where the evidence tends to show that it was tendered about 6 o'clock P. M., and that the hours of the office at destination terminated usually at 6 or 6:30 P. M., but might on occasions continue until late in the evening.

Telegraph company — delay in transmission — notification of sender.

3. A telegraph company receiving a message for transmission, with notice that it is important that it go forward promptly, is

that among the cases upholding the validity of the stipulation, and also among those refusing to uphold it, are included cases of negligent failure or delay in transmission or delivery, which did not suggest any distinction between a failure or delay in transmission or delivery and a mere error in transmission.

On the other hand, it appears also from that note, that in many jurisdictions, although the stipulation is declared valid as against mistakes or errors made in transmission, the courts therein refuse to hold that a stipulation as to un-repeated messages can have application where there is a delay in, or total failure of, delivery or transmission.

Such a case is *BOX v. POSTAL TELEG. CABLE CO.*, and it is only such cases as these, which discuss the question from this view point, that are of much value in this note.

Since no material advantage is gained by again discussing the cases set out sufficiently in the note to the *Milton Case*, attention is called to that note as containing a large number of cases necessary to a complete consideration of the question here annotated.

A case of recent date, and similar to the *Box Case*, is *Western U. Teleg. Co. v. Bennett* (Tex. Civ. App.) 124 S. W. 151, where it was held that while the usual stipulation as to un-repeated telegraph messages was lawful and reasonable for merely errors or mistakes committed in the transmission, so much of the stipulation as attempted to relieve the telegraph company from its negligence in not delivering or transmitting an un-repeated message could not be enforced.

But in *Western U. Teleg. Co. v. Elliott*, 7 Tex. Civ. App. 482, 27 S. W. 219, the usual stipulation as to un-repeated telegraph messages was held valid and applicable where there was a delay in delivery due to an error in the transmission of the address.

However, in *Postal Teleg.-Cable Co. v. Sunset Constr. Co.* 102 Tex. 148, 114 S. W. 99, where a mistake was made in addressing a telegram to J. W. Woods, instead of J. K. Woods, in consequence of which the 28 L.R.A. (N.S.)

bound to notify the sender if an obstacle to speedy transmission arises.

Same — misleading information — liability.

4. A telegraph company which receives for transmission an important message, with notice that failure to deliver it by a certain time will cause loss, and promises to notify the sender by telephone when it is sent, and subsequently erroneously states in answer to his call, at a time when other avenues of communication were still open to him, that it had been sent, cannot escape liability for the loss occasioned by failure to transmit the message in time.

(October 5, 1908.)

ERROR to the Circuit Court of the United States for the Northern District of Mis-

message was not delivered, it was held that the company was guilty of such negligence as to permit a recovery for damages, notwithstanding the usual stipulation as to un-repeated messages. The court said: "It is difficult to say that, if the message had been repeated, the mistake would not have been discovered; but it seems to us that it was ordinary if not gross negligence for the receiving agent of the Western Union Company to have made the mistake in the middle letter of the name of the addressee."

But see the discussion of the Texas cases in the earlier note.

It will be observed from the above cases, that a distinction is suggested between cases where the delay in the delivery was caused by an error in the transmission of the address, and where the failure or delay in the delivery of the message was due to the negligence of the employees or agents of the telegraph companies other than error in the transmission of the address. It would seem at least so far as jurisdictions are concerned in which the courts uphold the validity of the stipulation as to errors in transmission, that there is some basis for this distinction, for a repeating of the message including the address of the one to whom it was sent would tend to rectify the mistake.

In *Monsees v. Western U. Teleg. Co.* 127 App. Div. 289, 111 N. Y. Supp. 53, the principle that a telegraph company may limit its liability for a mere negligent error in language in an un-repeated telegraph message was also held applicable to non-delivery or delay in delivery. In this case an address was changed from H. J. Monsees to H. J. Monse, in consequence of which the message was delayed in delivery.

In New York, however, as appears in the earlier note, the stipulation, providing it was broad enough, has been held valid even in those cases where the repeating of the message could not have prevented the loss complained of.

In *Postal Teleg. Cable Co. v. Robertson*, 36 Misc. 785, 74 N. Y. Supp. 876, a stipulation limiting the telegraph company's liability in case of delay in transmission or

Mississippi to review a judgment in defendant's favor in an action brought to recover damages for failure promptly to transmit a telegram. Reversed.

The facts are stated in the opinion.

Argued before Pardee, McCormick, and Shelby, Circuit Judges.

Messrs. Stone & Sivley, with Mr. T. B. Watkins, for plaintiff in error.

Mr. D. A. Scott, with Messrs. William C. Dufour, H. Generes Dufour, and Henry Mooney, for defendant in error.

delivery of unrepeatd messages was held not to apply where the company was guilty of such gross negligence as to send a message addressed to Toledo, Ohio, to Chicago, Ill.

So, in *Postal Teleg. Cable Co. v. Nichols*, 16 L.R.A.(N.S.) 870, 89 C. C. A. 585, 159 Fed. 643, 14 A. & E. Ann. Cas. 369, it was held that provisions in a telegraph blank relieving the company from liability, beyond the price charged, for nondelivery of unrepeatd messages and for delays on connecting lines, are without effect where, upon receiving notice within a few minutes after undertaking to transmit an important message, that the lines are down, it fails to notify the sender of that fact.

There are a number of cases in which the negligence complained of was held not to come within the terms of the stipulation which purported to limit the liability of the telegraph company in sending an unrepeatd message. These cases, of course, were clearly outside the scope of the note to the *Milton Case*.

A case of this nature is *Birney v. New York & W. Printing Teleg. Co.* 18 Md. 341, 81 Am. Dec. 607, where it was held that the exemption from liability for the nontransmission and nondelivery of unrepeatd messages does not apply where no effort was made by the company to send the message. The court said: "The terms of the notice in which exemption from liability is declared clearly imply an obligation on the part of the company to attempt the transmission and delivery of a message received by it for that purpose, and it would be most unreasonable to permit it to have the benefit of an exemption from liability without first bringing itself within the scope of the exemption provided for, by a full and faithful performance of its implied duties."

So, in *Baldwin v. United States Teleg. Co.* 54 Barb. 505, reversed on other grounds in 45 N. Y. 744, 6 Am. Rep. 165, it was held that a stipulation limiting the liability of a telegraph company for "delay, error, or remissness" in sending unrepeatd messages, did not apply where there was a total failure to transmit or deliver a message. The court said: "The contract, then, was that the defendants would not be liable for delay, error, or remissness. These being the only particulars specified in the

Shelby, Circuit Judge, delivered the opinion of the court:

C. B. Box brought this suit against the Postal Telegraph-Cable Company for \$20,000 damages alleged to have resulted from delay in the transmission and delivery of a message.

On October 13, 1905, Earl Brewer signed and delivered to the plaintiff in error, who will hereafter be called the plaintiff, an option on stock held by Brewer in the Dixie Cotton Company and on notes of the com-

terms and conditions of the special contract, they cannot claim exemption or release from any which by their contract they were bound to perform, other than such as are expressly specified. They cannot, in law, receive the consideration and be bound in duty, and then neglect or refuse to perform the duty at all. The complaint charges, not any delay, error, or remissness, but that the message was never transmitted at all by the defendants to Rouseville, nor delivered to the said Eric Darling, who it is charged was then, and for a long time afterwards, at the place where the message was directed by the plaintiffs. This is denied by the sixth answer, which for this purpose stands alone. An entire neglect and refusal to perform this contract, by the defendants, does not bring them within the excepted terms. 'Delay' in sending and delivering a message implies that it was or would be sent at some time, but not sent or delivered promptly. 'Error' in sending or delivering a message implies sending or delivering a wrong message, or to the wrong place or person. 'Remissness' also implies a sending or delivering, but in a tardy, negligent, or careless manner. It is neither delay, error, nor remissness that is charged, but the entire omission or refusal to send or deliver the message, and this is admitted."

In *Bryant v. American Teleg. Co.* 1 Daly. 575, it was held that a condition of a telegraph company that they will not be responsible for mistakes or delay in the "transmission" of unrepeatd messages cannot apply where there was delay in the delivery of the message after it was correctly transmitted.

So, in *Sprague v. Western U. Teleg. Co.* 6 Daly, 200, a total failure to send a message was held not a "mistake or delay in the transmission or delivery, or a nondelivery" of the message, as used in the stipulations relieving a telegraph company from such in case of unrepeatd messages.

Although cases dealing with the question whether the stipulation in regard to "night messages" can have application where there is a failure or delay in transmission or delivery are closely related to the question here discussed, they have been expressly excluded.

G. V.

pany for \$7,500. The Dixie Cotton Company was a corporation owning land improved and equipped for planting. The notes held by Brewer were secured by a mortgage on the property, and, together with the stock, represented Brewer's interest in the property of the Dixie Cotton Company. The option, by its written terms, expired on Monday, October 16th, at 12 o'clock P. M. On that day, the plaintiff sent the following telegram to Brewer:

Memphis, Tenn., October 16, 1905.

Earl Brewer,

Friar's Point, Miss.:—

Will you extend option until Saturday.
Wire answer. C. B. Box.

Brewer did not wire answer, as requested, but answered by telephone that he would not extend the option, and that unless it was accepted by 12 o'clock that night he would not sell. For the purpose of closing the contract, the plaintiff, about 6 o'clock P. M., delivered the following telegram to the agent of the defendant in error (hereafter called the defendant), whose duty it was to receive messages:

Oct. 16, 1905.

To Earl Brewer,

Friar's Point, Miss.:—

I will buy your interest in farm price
named option C. B. Box.

On the message was printed a request to send it, and a statement that it was to be sent subject to certain conditions that appear on the blank forms used by the defendant company. So far as it is material, the conditions will be quoted later. The plaintiff explained to the defendant's agent who received the telegram at its Memphis office that its delivery to Brewer before 12 o'clock that night was important, and that it would cause plaintiff a loss of \$12,500 if it was not delivered. The defendant's agent at Memphis attempted to send the message that evening, but could not do so, because, it appears, that at the time the attempt was made no operator was in the office at Friar's Point. The plaintiff left his telephone number with the defendant's agent who received the message, and requested that notice be given him when the message was delivered. No notice was given the plaintiff of the failure to transmit the message. The plaintiff made inquiry by telephone at the defendant's Memphis office at 8 o'clock P. M., and was told by someone answering the call that the message had been delivered. This was not true. But the message was transmitted and delivered to Brewer the next

morning about 9 o'clock, after the option had expired. Brewer replied by telegram as follows:

Friar's Point, Miss., 17th Oct.

C. B. Box,

Care W. K. Burton & Co.,

Memphis, Tenn.:—

Your telegram received 9 o'clock this morning came too late. I had made other arrangements.
Earl Brewer.

While there was conflict on the subject, the evidence on the part of the plaintiff tended to show that he was damaged \$12,500 on account of his failure to close the trade by accepting the option before it expired. There was much evidence offered on both sides, material portions of which will be quoted hereafter. The trial court directed a verdict for the defendant.

The first and main contention in defense of the action of the trial court is that the plaintiff failed to have the message repeated, and that his right of action is barred by the following part of the contract, printed on the back of the telegram: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one half of the regular rate is charged in addition. It is agreed between the sender of the message written on the face hereof and the Postal Telegraph-Cable Company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated message, beyond the amount received for sending the same. The defendant made a tender of \$1 to cover the amount received by it from the plaintiff.

Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1008, is relied on as sustaining this defense. That case was a suit brought by the sender of a cipher unrepeated message. The message was not transmitted as delivered to the company. A material word in the cipher was omitted, another word with a different meaning being substituted, which caused the plaintiff to be damaged. It was apparent from the record in that case that if the plaintiff had paid the additional charge to secure the repetition of the message, the damage to him would not have occurred. The court held that the rule in question was reasonable and valid, and that the plaintiff, having failed to have the message repeated, could not recover. This case settles the validity and binding effect of the rule in question, and is an answer in this court to all authorities cited which hold that the rule is void as against public policy. The question we have to deal with is wheth-

er or not the case before us comes within the control of the rule.

The rule is not intended to secure a timely effort to send the message, but to make more certain its accurate transmission. The company is under obligation to send the message with reasonable promptness for the regular rate when it receives such rate and accepts the message. It could not, for example, wilfully or negligently fail to send, or unreasonably delay the sending or attempting to send, the message, and defend on the plea that only the regular rate was paid, and not the additional fee for repetition. The first lines of the rule show its meaning plainly: "To guard against mistakes or delays, the sender of the message should order it repeated; that is, telegraphed back to the originating office for comparison."

The message must, of course, be sent before it can be repeated; it must be sent and repeated before any comparison could be made. Although the regulation purports to be made to guard against mistakes or delays, it should be construed to refer to such mistakes and delays as could be corrected or avoided by repetition and comparison; otherwise, a delay caused by the conduct of the company in negligently failing to send or to attempt to send the message would come within the rule. And it is held that it does not apply where "no effort was made to put the message on its transit." *Birney v. New York & W. Printing Teleg. Co.* 18 Md. 341, 81 Am. Dec. 607. It is difficult to believe that this stipulation was intended by the parties to be applicable to a case in which the conduct of the company made it impossible for the message to be repeated. We believe it would be wholly unjust, and not within the intention of the contracting parties, to permit this rule to exonerate the company from liability for a failure which, like the one here charged, would not have been prevented by repeating the message. *Jones, Teleg. & Teleph. Co.* § 379; 2 *Thomp. Neg.* § 2424, and cases there cited; *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 520, 18 Am. St. Rep. 148, 7 So. 419; *Western U. Teleg. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734; *Barnes v. Western U. Teleg. Co.* 24 Nev. 125, 77 Am. St. Rep. 791, 50 Pac. 438.

In *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934, the court reaffirmed the doctrine of the *Primrose Case*, and, at page 663, observed, in refusing to apply the regulation in question, that "there was no mistake in the transmission of the message, and there was no breach of the agreement."

The message in the case at bar was delivered to the company about 6 o'clock P. M. on October 16th, and it was not transmitted till 28 L.R.A. (N.S.)

the next morning. It was correctly sent and received. Its repetition would have had no effect on the case. The alleged damage was caused by no mistake or delay that repetition would have corrected. The message was held in the receiving office till the option it was sent to close had expired. We think that, on the facts, the regulation as to repeated messages has no application.

It is claimed that the court was justified in directing the verdict, because the message was received at Memphis after the hour of closing at Friar's Point, "and that it was within the rights of the defendant corporation to establish reasonable office hours at its various offices, and that the defendant was not under obligation to the public to keep all of its agents advised of the hours of the respective offices." The court having directed a verdict for the defendant, the plaintiff has the right to ask us to consider the case in the light of the evidence which is most favorable to him. We are not called on to quote and comment on all the evidence, nor to decide what the verdict should be, but we are to decide only whether there was sufficient evidence, if believed by the jury, to sustain a verdict in the plaintiff's favor. The testimony of W. B. Marley, in charge of the office at Friar's Point, was that he "was supposed to go on duty at 7 o'clock in the morning and stayed on duty until excused by the despatcher and all trains were by, which was usually 6 or 6:30 o'clock in the afternoon." But on cross-examination the witness said that he frequently stayed in the office after night and took messages, "when I have to meet that freight train when it is 'way late.'" On the 16th of October Mr. Marley says that he left the office at 6:20 in the afternoon. Mr. Box testified that he delivered the message at the Memphis office "about 6 o'clock in the afternoon." A copy of the message offered in evidence is indorsed: "Time filed 6:20 P. M." J. F. Wilson testified for the company that he had supervision of the transmission of messages from Memphis, and that, for the purpose of sending the message in question, "we called Friar's Point at intervals of ten or fifteen minutes all along until after 8 o'clock," beginning the calls at about 6:35 P. M. It will be remembered that Mr. Box had previously sent a message asking to have the option extended. This fact, together with the explanation made by him to the Memphis agent of the nature and importance of the telegram, would make it the duty of the company's agent to inform him if it was known that there was any obstacle to the speedy transmission of the message. The fact that the Memphis agents received the message for immediate transmission tends to show that they believed the Friar's Point office to be

open. It would be unjust to them and to the company to believe otherwise, for, under the circumstances, we cannot assume that they would receive the message knowing that the Friar's Point office was closed and that it could not be transmitted till next day. After a careful examination of the evidence, we are unable to say that it shows certainly that the office hours at Friar's Point had expired or that the office was closed when the message was received at Memphis for transmission. That question, if material, was for the jury.

There is another view of the case that seems to us to make it improper to direct the verdict for the defendant on the ground now considered. When the plaintiff delivered the message at the Memphis office and paid for its transmission, he says he had a conversation with the defendant's agent:

I went to the window, and the man waiting on the window received the telegram, and I tendered him the message and told him that it was a very important message; that I had an option on some valuable property that expired that night at 12 o'clock, and that, unless I could get this telegram delivered by 12 o'clock that night, my option would expire, and I would lose \$12,500; and so I told him I wanted to send it at the regular rates and everything, and asked him what it would be, and he told me 25 cents. Now, I asked him if he would call me up at my residence and let me know the time of the delivery of that message, that I wanted to know what time it was delivered, and he said he would, and I told him my phone number, and he turned right over on the back of the original telegram and put down my phone number out at my residence, number 2973A.

Q. Who did you say put that down?

A. The operator, or the gentleman receiving the telegram in the office. . . .

Q. Well, sir, did you have any communication further with him about that at any other time subsequent to this time? If so, what was it?

A. Well, about 8 o'clock that night I hadn't heard from him, and I wanted to know about the telegram; so I called the Postal Telegraph office up by phone, and they answered, and I told the gentleman answering about the message in question, the message I had sent to Mr. Brewer at Friar's Point, and wanted to know what about it, whether they had delivered it or what about it, and he said "Wait a minute and I'll see." He went off and was gone from the phone a few minutes, and came back and said that the telegram had been delivered.

Q. What time was that, now?

A. That was about 8 o'clock that night.
28 L.R.A.(N.S.)

The evidence shows that if the defendant had notified the plaintiff that it was unable to send the message,—that it had called the Friar's Point office and found it closed,—there being other channels of communication, the plaintiff probably could have closed the option by using one of them. It is not denied that the defendant failed to give notice of its inability to transmit the message on the night of October 16th. The plaintiff's telephone number had been left with the defendant's agent and was indorsed on the back of the telegram, so that notice could be given him when the delivery was made. Not hearing from the operator at 8 o'clock, he called by telephone to inquire about the message, and was informed that it had been delivered. The defendant being employed and paid to transmit the message, and being informed of its importance and the necessity for despatch, and being furnished with the plaintiff's telephone number, we think the most obvious suggestion of diligence and good faith required it to notify the plaintiff that it had been unable to deliver the message. If the jury should believe that the defendant's agent knowingly represented to the plaintiff that the message had been delivered when it had not been transmitted, it would, to say the least, authorize the inference of a want of good faith and a disregard of the plaintiff's rights. Under the circumstances, it was unquestionably the duty of the defendant to notify the plaintiff of the failure to deliver the message. This view is sustained by many authorities. *Pacific Postal Teleg. Cable Co. v. Fleischner*, 14 C. C. A. 166, 29 U. S. App. 227, 66 Fed. 899; *Swan v. Western U. Teleg. Co.* 67 L.R.A. 153, 63 C. C. A. 550, 129 Fed. 318; *Jones, Teleg. & Teleph. Co.* § 277; 2 *Thomp. Neg.* § 2399; 2 *Joyce, Electric Law* § 744a. We are of opinion that the court erred in directing the verdict.

The judgment is reversed, and the case is remanded for a new trial.

Petition for rehearing denied December 15, 1908.

OHIO SUPREME COURT.

KATHERINE KROLL, Plff. in Err.,
v.

ALBERT C. CLOSE, Admr., etc., of John Kaercher, Deceased.

(— Ohio St. —, 92 N. E. 29.)

Estoppel — essential facts — burden of proof.

1. The burden is upon the party who relies upon estoppel to prove clearly and

Headnotes by the COURT.

unequivocally every fact essential to the estoppel.

Trial — question of reasonableness — law or fact.

2. Ordinarily, an issue as to the reasonableness or unreasonableness of anything is a mixed question of law and fact; but where the facts are clear and undisputed, it is purely a question of law.

Executor's account — allowance — funeral expenses — reasonableness — duty of court.

3. It is the duty of the probate judge, upon the hearing of an administrator's or executor's account, whether exceptions have been filed thereto or not, to scan closely the amounts claimed to have been paid for funeral expenses; and in the absence of statutory or testamentary provisions, the

allowance for such expenses must be reasonable, having regard to the amount of the estate, the station in life of the deceased, and the customs of the people in the same station, and, if unreasonable and extravagant, should be disallowed, even as against legatees and next of kin.

(May 3, 1910.)

ERROR to the Circuit Court for Erie County to review a judgment affirming a judgment of the Court of Common Pleas which reversed a judgment of the Probate Court confirming in part only the account of Albert C. Close, administrator of John Kaercher, deceased, to which exceptions had been filed. Modified.

Note. — What items and amounts are allowable as funeral expenses against deceased's estate.

This subject was treated in the note to *Fogg v. Holbrook*, 33 L.R.A. 665, and the present note is supplementary thereto.

Mourning apparel.

There appears to be a conflict on the question of the allowances for mourning apparel.

Thus, an allowance for mourning garments was made in *Re Schroeder*, 113 App. Div. 204, 99 N. Y. Supp. 176, affirmed in 186 N. Y. 537, 78 N. E. 1112.

And it was held in *Re Meuschke*, 61 Misc. 9, 114 N. Y. Supp. 722, that a reasonable expenditure for mourning for those members of the family for whose support the deceased was bound to provide was proper.

And the executor was allowed \$100 spent in furnishing the slaves of deceased with mourning dresses, in *Badillo v. Tio*, 7 La. Ann. 487.

But it was held in *Jenks v. Mathews*, 31 Me. 318, that the deceased's estate could not be charged with the expense of mourning apparel.

Burial lot.

In Massachusetts a reasonable sum for a burial lot is by statute made a part of the funeral expenses. *Marple v. Morse*, 180 Mass. 508, 62 N. E. 966; *Pettengill v. Abbott*, 167 Mass. 307, 45 N. E. 748.

Where deceased has provided a lot and monument, his executrix cannot be allowed for others purchased by her after his decease. *Re Woodbury*, 40 Misc. 143, 81 N. Y. Supp. 503.

And the expense of a cemetery lot and monument is not a funeral expense within the meaning of a statute limiting funeral expenses to \$300, and an independent allowance for such purposes will be made where the rights of creditors and legatees are not prejudiced. *Sinnott v. Kenaday*, 14 App. D. C. 1, reversed on other grounds 28 L.R.A. (N.S.)

in 179 U. S. 606, 45 L. ed. 339, 21 Sup. Ct. Rep. 233.

And a debt incurred for inclosing the burial lot cannot be considered a part of the funeral expenses. *Meyer's Estate*, 18 Phila. 42.

But one who had done marble work inclosing the burying ground was allowed to recover the value thereof, in *Crosson's Appeal*, 125 Pa. 380, 17 Atl. 423.

See also *infra*, subsection on "Burial lots," under section on "Amount allowable."

Monument or tombstone.

Expenditures for monuments and tombstones are generally held authorized as part of the funeral expenses.

Thus, in the following cases it was held that the cost of a tombstone not disproportionate to the value of deceased's estate was allowable as part of the funeral expenses: *Pierce v. Fulmer* (Ala.) 51 So. 728; *Re Koppikus*, 1 Cal. App. 84, 81 Pac. 732; *Phillips v. Duckett*, 112 Ill. App. 587; *Pease v. Christman*, 158 Ind. 642, 64 N. E. 90; *Re Gray* (Ind. App.) 91 N. E. 745; *Jackson v. Leech*, 113 Mich. 391, 71 N. W. 846; *Laird v. Arnold*, 25 Hun, 4; *Duffy's Estate*, 9 Kulp, 409; *Lutton's Estate*, 17 Pa. Super. Ct. 342; *Miles's Estate*, 13 Pa. Dist. R. 264; *Titlow's Estate*, 5 Pa. Dist. R. 40; *Fisher's Estate*, 16 Lanc. L. Rev. 333; *Menzies v. Ridley*, 2 Grant, Ch. (U. C.) 544.

In Kentucky an allowance for tombstones as part of the funeral expenses is made by statute. *Hespen v. Hespen*, 31 Ky. L. Rep. 1328, 105 S. W. 99.

In *Sheetz's Estate*, 2 Woodw. Dec. 407, it was held that an allowance for an appropriate monument might be made, the appropriateness to be ascertained by considering the position of the deceased, the amount of his estate, the traditions of his family, expenditures made by himself in the burial of his relatives, and the usages of the community where he lived.

And where the husband is poor and the wife leaves a considerable estate, the court may allow a reasonable amount from her

Statement by Davis, J.:

The plaintiff in error is the sole legatee under the last will and testament of John Kaercher, deceased. The defendant in error is the administrator with the will annexed of such estate. Exceptions were filed by the plaintiff in error to the account of the administrator. The probate court held that the charge for the coffin of the deceased was excessive, and reduced it from \$150 to \$100. In other respects the account was approved and confirmed. The administrator appealed to the court of common pleas, and, upon hearing, that court overruled the exceptions, and approved and confirmed the account. Plaintiff in error prepared, filed, and had allowed her bill of exceptions, and prosecuted proceedings in error in the circuit court. A

estate for a monument. *Re Weringer*, 100 Cal. 345, 34 Pac. 825.

But it was held in *Hisem v. Lemel*, 19 La. 425, that the cost of erecting a tomb was no part of the funeral expenses.

See also *infra*, subsection on "Tombstones" under "Amount allowable;" and *infra*, section on "Insolvent estates."

Amount allowable.

The amount allowed for the expenses of the funeral and monument should be governed by the custom of the people of like rank and position in society with the deceased. *Re Weringer*, *supra*.

Where deceased was president of a corporation, left no known heirs or unpaid creditors, funeral expenses of \$896 are not extravagant, although he left but \$2,800, he having had a large number of friends who attended the funeral. *Howard's Estate*, 27 Pa. Co. Ct. 608.

And an allowance of \$381.50 for funeral expenses of one who never earned large wages, but left \$7,000 or \$8,000 has been held proper where incurred in good faith. *Re Meuschke*, 61 Misc. 9, 114 N. Y. Supp. 722.

And an item of \$144.75, including the expense of the funeral and of the masses at the church, was allowed in *White's Estate*, 13 Phila. 287.

So, an estate appraised at \$2,400 warrants an allowance of \$2 for funeral notices, \$14 for carriages, and \$15 for hearse and caring for body. *Re Osburn*, 36 Or. 8, 58 Pac. 521.

Flowers to the value of \$15, ordered by deceased's housekeeper, may be charged as a funeral expense where he left no widow or children, and his estate was valued at \$6,000. *O'Reilly v. Kelly*, 22 R. I. 151, 50 L.R.A. 483, 84 Am. St. Rep. 833, 46 Atl. 681.

In *Carpenter's Estate*, 16 Phila. 290, where an estate of about \$400 apparently was insolvent, an allowance of \$218 for funeral expenses was made, which included an item of \$69.50 incurred in taking deceased's body to another state for burial. 23 L.R.A. (N.S.)

motion was made to strike the bill of exceptions from the files, which motion was overruled, and the case heard upon its merits. The circuit court dismissed the petition in error, and gave judgment for the defendant in error. In this proceeding the plaintiff in error seeks to reverse the judgments of the circuit court and court of common pleas.

Mr. H. L. Peeke, for plaintiff in error:

It was the duty of the probate court to examine the account of the administrator, and to reject any improper items or unreasonable charges.

1 Rockel, Probate Pr. ¶ 733, p. 656; Giaugue, Settlement of Estate, p. 569; 18 Cyc. Law & Proc. p. 1171; Woerner, Administra-

Allowances of \$200 to an undertaker, \$58 for burial lot and church services, and \$30 for carriages, are liberal where the deceased, a domestic, left about \$2,800. *Campbell's Estate*, 9 Pa. Dist. R. 729.

An executor is entitled to an allowance of \$202.25 for funeral expenses, although the will provided for only \$100, where he did not know of the provision until after the funeral, and the several items had been proved and allowed by the probate judge. *Re Galland*, 92 Cal. 293, 28 Pac. 287.

In *Hasson's Estate*, 5 Pa. Co. Ct. 19, a charge of \$477.75 for the burial of a domestic servant who left but about \$2,000 was held excessive, although authorized by the administrator, where the circumstances were sufficient to have put the undertaker on inquiry.

So, where the slightest inquiry would have disclosed to an undertaker that deceased was worth only about \$800, a claim of \$331 for funeral expenses will be cut to \$225, notwithstanding a relative of deceased, who was a minor, had told him not to mind the expense. *Bauman's Estate*, 5 Pa. Co. Ct. 579.

And where a domestic servant left an estate of only \$1,167.36, the sum of \$810.90 charged by an undertaker requested by deceased's brother to take out letters of administration and furnish a first-class funeral is exorbitant, and will not be allowed. *Cullen's Estate*, 7 Pa. Dist. R. 304. The court in this case said: "And it is time it is clearly understood that only such a sum will be allowed for funeral expenses, cost of cemetery lot, erection of monument, etc., as will bear a just, fair, and reasonable proportion to the amount of the estate of the decedent and his or her station in life. Undertakers should also realize they take the risk of the estate proving insolvent, in which case, as against creditors, they will be held strictly to the requirements of the rule."

So, an allowance of \$455 out of an undertaker's bill for \$526, for the burial of an aged janitor whose companions were laboring men and whose estate was less than \$5,000, is excessive. *Foley v. Brocksmit*,

tion, ¶ 539, p. 1186; *Re Sanderson*, 74 Cal. 199, 15 Pac. 753.

The bill of the undertaker for \$201.40 out of an estate of less than \$800 was unreasonable, especially when no burial lot or tombstone was provided.

Bradley's Estate, 11 Phila. 87; *Woerner, Administration*, 349, 704; *Schouler, Exrs.* 421; *Re Rooney*, 3 Redf. 15; *Rockel, Probate Pr.* pp. 650, 653; *Willard, Exrs.* p. 272; *Redfield, Wills*, p. 243; 18 Cyc. Law & Proc. p. 438, note 5; *Detwiller v. Hartman*, 37 N. J. Eq. 349; *Personette v. Johnson*, 40 N. J. Eq. 174; *Wilson v. Staats*, 33 N. J. Eq. 524; *Martin v. Cullen*, 30 N. J. Eq. 426; *Curtis v. National Bank*, 39 Ohio St. 581; *Re Primer*, 49 Misc. 413, 99 N. Y. Supp. 830; *Foley v. Brooksmit*, 119 Iowa, 457, 60 L.R.A. 571, 97 Am. St. Rep. 324, 93 N. W. 344.

Messrs. Williams & Steinemann for defendant in error.

Davis, J., delivered the opinion of the court:

It is objected that the circuit court erred in refusing to strike off the bill of exceptions taken in the court of common pleas by the plaintiff in error, for the reason that the de-

fendant in error did not have the ten days provided by § 5301, Rev. Stat., in which to file his objections and amendments to the bill of exceptions. The presumption is that notice was given to counsel and that they had an opportunity to inspect and object to the bill, although the record is silent as to that fact. It does not appear that counsel did not waive the right to object to the bill within ten days after notice that it had been filed with the clerk. *State v. Wirick*, 81 Ohio St. 343, 90 N. E. 937.

There is scarcely any room for debate, and none is attempted here, as to the rule which governs in making an allowance out of an estate for funeral expenses. "The amount which will be allowed for funeral expenses, in the absence of statutory or testamentary provisions, is governed by the value of the decedent's estate, his station in life, and the customs of people of the same station; but the expenditure must in all cases be reasonable, and, if extravagant, will be disallowed, even as against the legatees and next of kin." 11 Am. & Eng. Enc. Law, 2d ed. p. 1263; 18 Cyc. Law & Proc. p. 438; *Schouler, Exrs.* 3d ed. § 421; 2 *Woerner, Am. Law of Administration*, 2d ed. § 360; 1 *Rockel, Ohio Pro-*

119 Iowa, 457, 60 L.R.A. 571, 97 Am. St. Rep. 324, 93 N. W. 344.

And where the deceased infant's estate amounted only to between six and seven thousand dollars, the court, in *Re Kiernan*, 38 Misc. 394, 77 N. Y. Supp. 924, reduced the charge for a casket from \$490 to \$175.

An item of \$950 for the entertaining of friends attending a funeral is not allowable as part of the funeral expenses. *Bard's Estate*, 13 Pa. Dist R. 552.

—tombstones.

Where deceased's estate consisted of two houses and \$273 personalty, and there were no creditors, a credit of \$1,100 for a gravestone was allowed. *Geiger's Estate*, 12 W. N. C. 439.

So, an allowance of \$450 for the construction of a vault and an allowance for repair have been held proper. *Re Fishbeck (Knapp v. Jessup)* 146 Mich. 348, 7 L.R.A. (N.S.) 617, 117 Am. St. Rep. 646, 109 N. W. 666.

And an allowance of \$150 for a monument was authorized in *Phillips v. Duckett*, 112 Ill. App. 587, where the estate was solvent and several heirs consented.

In *Conway's Estate*, 10 Pa. Dist. R. 509, an allowance of \$700 for a tombstone was sustained where the deceased was an unmarried clergyman and left \$2,500.

So, an allowance of \$50 for a monument was held authorized in *Re Meuschke*, 61 Misc. 9, 114 N. Y. Supp. 722, where the deceased left about \$8,000.

In *Sheetz's Estate*, 2 Woodw. Dec. 405, where the executor claimed \$470.50 for a

monument and iron railing around the deceased's lot, he was allowed half the cost of the monument, and his claim for the iron fence was disallowed, as was also a charge of \$55 for a monument placed over the remains of deceased's first wife.

And in *Jackson v. Leech*, 113 Mich. 391, 71 N. W. 846, \$250 was evidently allowed for a tombstone.

—burial lots.

Where the net value of deceased's estate was over \$10,000, an allowance of \$470 for a burial lot, \$200 for fencing, and \$35 for sodding, was held reasonable and allowable in *Re Liss*, 39 Misc. 123, 78 N. Y. Supp. 969.

And \$307 has been allowed under the Massachusetts statute authorizing an allowance for a burial lot, about one half the amount being for the lot and the balance for perpetual care. *Pettengill v. Abbott*, 167 Mass. 307, 45 N. E. 748.

And an allowance of \$613 for a burial lot, with perpetual care, was approved in *Marple v. Morse*, 180 Mass. 508, 62 N. E. 966, where that was the usual price in the cemetery where the deceased had expressed a desire to be buried.

See *infra*, section on "Insolvent estates."

Miscellaneous.

An expenditure for flowers to place on deceased's grave was held not a funeral expense, in *Re Schroeder*, 113 App. Div. 204, 99 N. Y. Supp. 176, affirmed in 186 N. Y. 537, 78 N. E. 1112.

For a case allowing expense for flowers,

bate Pr. § 650; Giaque, Settlement of Estates, 7th ed. 615-617. But it is insisted here (1) that the plaintiff in error is estopped; (2) that this court is concluded by the findings of the court below; and (3) that the amount paid by the administrator for funeral expenses was reasonable.

If we may admit that the liability of the administrator may be limited, and the conscience of the court circumscribed by the assent of the sole beneficiary of the decedent's will, grudgingly given and almost extorted, still it does not appear to us that the defendant in error has made out a case of estoppel against the plaintiff in error. While it is true that one who, having a right, induces another to act on the belief that the right will not be asserted, will not be afterwards allowed to exercise it, and while it is also true that one may estop himself by acquiescence or by silence when he ought to speak, nevertheless it is true that the burden is upon the party who relies on the estoppel, to prove clearly and unequivocally every fact essential to the estoppel. 11 Am. & Eng. Enc. Law, 2d ed. p. 424; 16 Cyc. Law & Proc. pp. 811, 812. Now, in this case the

defendant in error, who is claiming an estoppel against the plaintiff in error, was the superior in knowledge and experience of the duties of an administrator. He testifies that when the plaintiff in error came to the undertaker's, the Odd Fellows had already practically purchased the casket; and he and other witnesses testify that the plaintiff in error consented to, or at least silently acquiesced in, the purchase. Yet they all admit that she objected on the ground that the deceased never believed in expensive funerals, and she wanted a cheaper casket, say, from \$60 to \$90. The plaintiff in error explicitly and circumstantially denies that she assented to the purchase which was made, and her denial, and the circumstances surrounding the transaction, raise such a sharp conflict of evidence that we are unable to say that the facts which are claimed to amount to estoppel are clearly and satisfactorily proven. The estoppel therefore fails.

Next, it is claimed that the finding of the circuit court is a finding of fact, and therefore conclusive upon us. Ordinarily, an issue as to the reasonableness or unreasonableness of anything is regarded as a mixed question of law and fact; but where the facts

see *O'Reilly v. Kelly*, supra, section on "Amount allowable."

A claim for the expense of a wake was disallowed in *White's Estate*, 13 Phila. 287.

But where the expenditures for cheese and crackers and tobacco for a wake were reasonable, they were held allowable as funeral expenses, in *Johnson's Estate*, 8 Pa. Co. Ct. 1.

And in *McCullough v. McCready*, 52 Misc. 542, 102 N. Y. Supp. 633, affirmed in 122 App. Div. 888, 106 N. Y. Supp. 1135, it was held that an expenditure of \$71.25 for provisions for consumption at a wake might be allowed where it was suitable to decedent's condition in life.

In *Reeve's Estate*, 12 Kulp, 137, credit was allowed for providing dinner for friends and relatives of deceased who came to the funeral from a distance.

But it was held in *Santee's Estate*, 9 Kulp, 142, that no allowance would be made for serving dinner and supper to those who attended the funeral nor for the care and feed of such persons' horses. See also *Bard's Estate*, under section on "Amounts allowable."

And an allowance for paying the fare of executrix, her brother, sister, and husband to attend the funeral was refused in *Price Estate*. 11 Kulp, 259.

In *Hasler v. Hasler*, 1 Bradf. 248, the administrator was allowed an expense of \$12 for communicating the news of deceased's suicide to his relatives by special messenger, and also the necessary expenses of interment.

And where an estate is ample, the reasonable expenses of embalming deceased's body 28 L.R.A. (N.S.)

and transporting it from India, where he died, to Philadelphia, are allowable. *Parry's Estate*, 188 Pa. 38, 68 Am. St. Rep. 850, 41 Atl. 384.

It was held in *Foley v. Brocksmit*, 119 Iowa, 457, 60 L.R.A. 571, 97 Am. St. Rep. 324, 93 N. W. 344, that a witness's estimate of the reasonableness of the expenses of a funeral is not binding on either the jury or court.

Insolvent estates.

It was held in *Re Rooney*, 3 Redf. 15, that an undertaker who furnished a funeral, judging from appearance, suitable to deceased's condition in life, was entitled to an allowance therefor, although the estate was insolvent.

And there are *dicta* in *Phillips v. Duckett*, 112 Ill. App. 587, that an allowance for a modest tombstone might be proper although the estate is insolvent.

But credit for a tombstone was refused in *Villee's Estate*, 9 Lanc. L. Rev. 353, where the estate was insolvent, and to the same effect is *Moyer's Estate*, 5 Kulp, 167.

And in *Burbridge v. Rogers*, 7 Ky. L. Rep. 42, it was held that \$575 would not be allowed for a tombstone where the estate was insolvent.

And it was held in *Hearing's Succession*, 28 La. Ann. 149, where the succession was insolvent, that an item of \$249 for funeral expenses should be reduced to \$200, this being the largest amount which the court was authorized to allow. See also *Carpenter's Estate*, supra, section on "Amount allowable."

J. T. W.

are clear and undisputed, it is to be regarded as purely a question of law. For example, in *Tindal v. Brown*, 1 T. R. 167, it was held that what is reasonable notice of nonpayment to an indorser is a question of law; and Lord Mansfield said: "What is reasonable notice is partly a question of fact and partly a question of law. It may depend in some measure on facts; such as the distance at which the parties live from each other, the course of the posts, etc. But wherever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to by everyone for the sake of certainty." And in the same case Buller, J., remarked: "Whether the post goes out this or that day, at what time, etc., are matters of fact; but when those facts are established, it then becomes a question of law, on those facts, what notice shall be reasonable."

The same principle has been recognized in determining whether a rule of a railway company was a reasonable regulation. In *St. Louis, I. M. & S. R. Co. v. Adcock*, 52 Ark. 406, 12 S. W. 874, it was said *per curiam*: The facts being uncontroverted, it was the province of the court to declare the regulations reasonable. To submit the question to the jury for determination, under such circumstances, was simply to leave the matter to their discretion, which was error." See also, *Kansas City, Ft. S. & M. R. Co. v. Hammond*, 58 Ark. 324, 24 S. W. 723; *Illinois C. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138; *Vedder v. Fellows*, 20 N. Y. 126; *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 342, 35 Am. Rep. 278, 3 N. W. 121; *Pittsburgh, C. & St. L. R. Co. v. Lyon*, 123 Pa. 140, 2 L.R.A. 489, 10 Am. St. Rep. 517, 16 Atl. 607.

A similar rule was announced as to deviation in a marine insurance case. *Riggin v. Patapsco Ins. Co.* 7 Harr. & J. 279, 16 Am. Dec. 302. What is a reasonable time within which an act must be done may be a question of law. "Where the facts are clearly established, or are undisputed or admitted, reasonable time is a question of law." *Hill v. Hobart*, 16 Me. 164.

Where a statute imposed a penalty for issuing a marriage license without reasonable inquiry, it was held that the question as to what is reasonable inquiry, under a known state of facts, is one of law for the court. *Trolinger v. Boroughs*, 133 N. C. 312, 45 S. E. 662. Further statements of the rule and illustrations of its application by this court will be found in *Walker v. Stetson*, 14 Ohio St. 89, 84 Am. Dec. 362; *Bassenhorst v. Wilby*, 45 Ohio St. 333, 13 N. E. 75, and *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458.

We therefore hold that, upon the conceded 28 L.R.A. (N.S.)

and clearly proven facts disclosed in this record, it is within the proper province of this court to review the finding of the court below as to the reasonableness of the amount expended by the administrator for burial of the decedent.

The whole amount realized from the decedent's estate was \$798.32, and the administrator claims credit for \$201.40 paid for funeral expenses, of which the following item is most seriously contested, viz.: "One cloth casket, copper lined, with silver handles, engraved name plate, and use of car, \$150.00." The deceased was an old man, with no immediate family surviving, and, in his later years, with no stated income or occupation. He had been a sailor on the lakes and an engineer in small steamers. His tastes and habits were simple, and his expenditures modest and economical. A short time before his death he had been an inmate of the Odd Fellows' Home at Springfield, Ohio, and at the time of his death, by suicide, he was living at a place called the Kunzman Hotel. For reasons satisfactory to himself, and which afterwards seemed sufficient to a court, he made a will making the plaintiff in error his sole legatee, and excluding his collateral relatives. A committee of Odd Fellows assumed charge of the funeral, and this committee, and some of the disappointed relatives, proceeded to order the funeral and select the casket, although they had been previously apprised of the fact that the deceased had left a will, and that the plaintiff in error was the sole legatee. The administrator called in the plaintiff in error, and, while it is a disputed question whether she consented to the purchase of this casket or not, it is not denied that she did object to it as inappropriate and unnecessarily expensive. The administrator appears to have been a person having knowledge of the usual duties of an administrator, for he had been a clerk in the office of the probate judge. He was there as a trustee for creditors and the legatee. He was not bound to listen to the desires and importunities of persons who desired to be liberal with money which was not theirs to spend. He is presumed to have known the law, and that, no matter who desired it or who assented to it, his act in purchasing that casket was liable to be reviewed, either with or without exceptions, by the probate court when he should account for the assets of the estate. According to the testimony of the undertaker himself, a decent and respectable burial, with broadcloth-covered casket, mounted with silver handles and name plate, may be had for \$75, and even less. In view of all of these circumstances, and especially of the fact that the cost of this funeral was made to be one fourth of the

entire estate, we think that the amount allowed by the court of common pleas and affirmed by the circuit court should be reduced to \$100, the amount allowed by the probate court.

Judgment accordingly.

Summers, Ch. J., and Crew, Spear and Price, JJ., concur.

Petition for rehearing denied.

VERMONT SUPREME COURT.

THOMAS A. DEROSIA

v.

PETER FIRLAND.

(— Vt. —, 76 Atl. 153.)

Master — discharged servant — recovery for term.

1. A discharged employee cannot await the termination of the contract period of serv-

Note. — Right of wrongfully discharged servant to recover wages for contract period subsequent to discharge.

This subject is treated in a note in 5 L.R.A. (N.S.) 439. A few cases in point have appeared since the preparation of that note.

In *Chase v. Alaska F. & L. Co.* 2 Alaska, 82; *Durante v. Raimon*, 115 N. Y. Supp. 115; *Quick v. Swing*, 53 Or. 149, 99 Pac. 418, and *DEROSIA v. FIRLAND* it is held in effect that the remedy by an employee wrongfully discharged before the expiration of the term is not assumpsit to recover for wages for the balance of the term, on the ground of constructive services, but is an action for damages for breach of the contract.

In *G. A. Kelly Plow Co. v. London* (Tex. Civ. App.) 125 S. W. 974, the court, in discussing the question of measure of damages for wrongful discharge, said that actions of this class are not suits to recover unpaid wages, but are for damages, and compensation for the injuries sustained is the object sought. But in this case the action seems to have been brought in the latter form, so that the court was not called upon to pass on the question whether an action in the form of assumpsit to recover wages could have been maintained.

The contrary is held in *Blumenthal v. Bridges* (*Bluthenthal v. Bridges*) 24 L.R.A. (N.S.) 279, 91 Ark. 212, 120 S. W. 974, and apparently also in *Allen v. Chicago Pneumatic Tool Co.* 205 Mass. 569, 91 N. E. 887: The contrary is also held in *Thurmond v. Skannal*, 118 La. 6, 42 So. 577, probably by virtue of the Louisiana statute on the subject, though the statute is not expressly referred to (See page 453 of earlier note.)

The court in the case of *Hinchman v. Matheson Motor Car Co.* 151 Mich. 214, 115 28 L.R.A. (N.S.)

ice to hold the employer liable for the wages which would have accrued had he continued in the service to the expiration of the term.

Pleading — suit for wages — amendment.

2. The declaration in an action to recover for services rendered under a contract for labor cannot be amended so as to claim damages for a wrongful discharge from the service.

(May 7, 1910.)

EXCEPTIONS by defendant to rulings of the Franklin County Court made during the trial of an action brought to recover wages alleged to be due under an employment contract which resulted in a judgment for plaintiff. Reversed.

The facts are stated in the opinion.

Mr. D. W. Steele, for defendant:

A servant cannot recover on the common counts for work and labor done and performed, without showing that he has per-

N. W. 48, also seems to recognize the right of a wrongfully discharged employee to recover as for salary for the portion of the term of employment remaining after the discharge, though it is not entirely clear from the report of the case whether the decision in favor of the plaintiff was on the ground that the action could be maintained in that form, or upon the ground that a cause of action for damages from the wrongful discharge was sufficiently stated by the declaration, which alleged the readiness of plaintiff to continue in the performance of the duties of his employment and the refusal of the defendant to pay. In this connection it is to be noted, as pointed out in the note to *Howay v. Going-Northrup Co.* 6 L.R.A. (N.S.) 68, that by liberal construction a complaint or declaration which contains allegations appropriate to an action for wages on the ground of constructive services may, under some circumstances, be upheld as a complaint for damages for the wrongful discharge.

So, in *Quick v. Swing*, *supra*, a complaint which did not specifically aver that the plaintiff had been damaged by the wrongful discharge, but, after stating the facts as to the employment and discharge, concluded with a demand for judgment for a specified amount of money, was upheld, in the absence of a demurrer, upon the ground that it sufficiently stated a cause of action for damages.

The remedy of a wrongfully discharged servant by action for damages for breach of contract is treated in a note in 6 L.R.A. (N.S.) 50; the remedy of wrongfully discharged servant with respect to services actually rendered in a note in 5 L.R.A. (N.S.) 579; and the rights and remedies of servant discharged for good cause in a note 5 L.R.A. (N.S.) 524.

G. H. P.

formed work or labor for the defendant at his request, either expressed or implied.

Curtis v. Smith, 48 Vt. 116.

In order to maintain an action for wages, the plaintiff must have completely performed the work and fully complied with all the conditions of the executory contract, so that nothing remained to be done but payment of money.

Peeters v. Opie, 2 Wm.'s Saund. 350, note (2); *Bradley v. Phillips*, 52 Vt. 517; *Davis v. Streeter*, 75 Vt. 214, 54 Atl. 185.

And, if the plaintiff has not completely performed the work, it is necessary to declare specially if the defendant has wrongfully prevented him from performing his part of the contract.

1 Chitty, Pl. p. 360; *Hulle v. Heightman*, 2 East, 145; *Appleby v. Dods*, 8 East, 300.

As there was a positive and unqualified renunciation of the contract on the part of the defendant on account of the sale of the store, and not a mere expression of an intention not to perform, the plaintiff was discharged from the continued performance of his promise and entitled to sue at once for the breach.

Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716; *Smith v. Lewis*, 24 Conn. 624, 63 Am. Dec. 180; *Haines v. Tucker*, 50 N. H. 311; *Clement & H. Mfg. Co. v. Meserole*, 107 Mass. 362; *Parker v. Russell*, 133 Mass. 74; *Bassett v. Bassett*, 55 Me. 127.

One party to an executory contract has the power to stop performance on the other side, by an explicit direction to that effect, always subjecting himself to such damages as will compensate the other party to the compact; and the party thus forbidden or dismissed cannot go on and complete the contract and at the end recover the contract price as such; his only remedy being for breach of contract.

1 Chitty, Pl. 360; *Derby v. Johnson*, 21 Vt. 17; *Danforth v. Walker*, 37 Vt. 240; *Morgan v. Tucker*, 78 Vt. 56, 61 Atl. 863; *White v. Lumiere North American Co.* 79 Vt. 206, 6 L.R.A.(N.S.) 807, 64 Atl. 1121; *Clark v. Marsiglia*, 1 Denio, 317, 43 Am. Dec. 670; *Lord v. Thomas*, 64 N. Y. 107; *Gibbons v. Bente*, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756; *Collyer v. Moulton*, 9 R. I. 90, 93 Am. Dec. 370; *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263.

If a party be hired as a servant or clerk for a specific period, and in part perform the service and be ready to complete it, but be prevented from so doing by the employer, the wages or salary for the whole term cannot be recovered upon the indebitatus count.

Archard v. Hornor, 3 Car. & P. 349; *Smith v. Hayward*, 7 Ad. & El. 544; *Goodman v. Pocock*, 15 Q. B. 583; *Emmens v.* 28 L.R.A.(N.S.)

Elderton, 13 C. B. 507; *Derby v. Johnson*, supra; *Webster v. Enfield*, 10 Ill. 298; *Clark v. Marsiglia*, supra; *Sherman v. Champlain Transp. Co.* 31 Vt. 162.

Messrs. C. G. Austin & Sons, for plaintiff:

A servant wrongfully discharged before the end of the employment, under an entire contract for services, at an entire salary, payable in instalments, may wait until the termination of the time for which he was hired, and then maintain indebitatus assumpsit for wages under the contract.

Gandell v. Pontigny, 4 Campb. 375; *Beeston v. Collyer*, 4 Bing. 309; *Collins v. Price*, 5 Bing. 132; *Callo v. Brouncker*, 4 Car. & P. 518; *Armstrong v. Bainbridge*, 5 Sc. Sess. Cas. 2d. series, 569; *Rice v. Boscovitz*, 23 Lower Can. Jur. 141; *Wilkinson v. Black*, 80 Ala. 329; *Holloway v. Talbot*, 70 Ala. 389; *Beckwith v. Baldwin*, 12 Ala. 720; *Marx v. Miller*, 134 Ala. 347, 32 So. 765; *Moss v. Decatur Land Improv. & Furnace Co.* 93 Ala. 269, 30 Am. St. Rep. 55, 9 So. 188; *Sprague v. Morgan*, 7 Ala. 952; *Davis v. Ayres*, 9 Ala. 292; *Martin v. Everett*, 11 Ala. 375; *Ramey v. Holcombe*, 21 Ala. 567; *Fowler v. Armour*, 24 Ala. 194; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Liddell v. Chidester*, 84 Ala. 508, 5 Am. St. Rep. 387, 4 So. 426; *St. Louis, I. M. & S. R. Co. v. Paul*, 64 Ark. 83, 37 L.R.A. 504, 40 S. W. 705; *Walworth v. Pool*, 9 Ark. 394; *McDaniel v. Parks*, 19 Ark. 671; *Van Winkle v. Satterfield*, 58 Ark. 617, 23 L.R.A. 853, 25 S. W. 1113; *Webster v. Wade*, 19 Cal. 291, 79 Am. Dec. 218; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Champion v. Hartshorne*, 9 Conn. 564; *Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79; *Hallack v. Gagnon*, 4 Colo. App. 360, 36 Pac. 70; *Saxonia Min. & Reduction Co. v. Cook*, 7 Colo. 569, 4 Pac. 1111; note to *Smith v. Cashie & C. R. & Lumber Co.* 5 L.R.A.(N.S.) 439; *Cox v. Rearden*, 84 Ga. 304, 20 Am. St. Rep. 359, 10 S. E. 627; *Harris v. Moss*, 112 Ga. 95, 37 S. E. 123; *Moore v. Kelly & J. Co.* 111 Ga. 371, 36 S. E. 802; *Rogers v. Parham*, 8 Ga. 190; *Isaacs v. Davies*, 68 Ga. 169; *Britt v. Hays*, 21 Ga. 157; *Rick v. Yates*, 5 Ind. 115; *Trawick v. Peoria & Ft. C. Street R. Co.* 68 Ill. App. 156; *Chiles v. Belleville Nail Mill Co.* 68 Ill. 123; *Hamlin v. Race*, 78 Ill. 422; *American Glucose Co. v. Lubitz*, 71 Ill. App. 638; *Jones v. Dunton*, 7 Ill. App. 580; *Leche v. Claverie*, 25 La. Ann. 308; *Alba v. Moriarty*, 36 La. Ann. 680; *Decamp v. Hewitt*, 11 Rob. (La.) 290, 43 Am. Dec. 204; *Baron v. Placide*, 7 La. Ann. 229; *Miller v. Goddard*, 34 Me. 102, 56 Am. Dec. 638; *Avery v. Tyringham*, 3 Mass. 160, 3 Am. Dec. 105; *Armfield v. Nash*, 31 Miss. 361; *Murdock v. Phillips Academy*, 12 Pick. 244; *McEvoy v. Bock*,

37 Minn. 402, 34 N. W. 740; *Sterling v. Bock*, 37 Minn. 29, 32 N. W. 865; *Horn v. Western Land Asso.* 22 Minn. 233; *Dodge v. Rogers*, 9 Minn. 223, Gil. 209; *Ramsey County Bldg. Soc. v. Lawton*, 49 Minn. 362, 51 N. W. 1163; *McMullan v. Dickinson Co.* 60 Minn. 156, 27 L.R.A. 409, 51 Am. St. Rep. 511, 62 N. W. 120; *Thompson v. Detroit & L. S. Copper Co.* 80 Mich. 422, 45 N. W. 189; *Williams v. Lockett*, 77 Miss. 394, 26 So. 967; *Isaacs v. McAndrew*, 1 Mont. 437; *Norton v. Cowell*, 65 Md. 359, 57 Am. Rep. 331, 4 Atl. 408; *Olmstead v. Bach (Md.)* 18 L.R.A. 53, 25 Atl. 343, overruled in 78 Md. 132, 22 L.R.A. 74, 27 Atl. 501; *Booge v. Pacific R. Co.* 33 Mo. 212, 82 Am. Dec. 160; *Thompson v. Wood*, 1 Hilt. 93; *Taylor v. Read*, 4 Paige, 572; *Costigan v. Mohawk & H. River R. Co.* 2 Denio, 609, 43 Am. Dec. 758; *Huntington v. Ogdensburgh & L. C. R. Co.* 33 How. Pr. 416; *Badger v. Titcomb*, 15 Pick. 409, 26 Am. Dec. 611; *Colburn v. Woodworth*, 31 Barb. 381; *Heim v. Wolf*, 1 E. D. Smith, 70; *Weed v. Burt*, 78 N. Y. 191; *Decker v. Hassel*, 26 How. Pr. 528; *Klingenberg v. Werner*, 42 N. Y. S. R. 186, 16 N. Y. Supp. 853; *Boyle v. Robbins*, 71 N. C. 130; *Caldwell v. Beatty*, 69 N. C. 365; *Markham v. Markham*, 110 N. C. 356, 14 S. E. 963; *Brinkley v. Swicegood*, 65 N. C. 626; *Beck v. Devereaux*, 9 Neb. 109, 2 N. W. 365; *Kahn v. Kahn*, 24 Neb. 709, 40 N. W. 135; *Weiler v. Henarie*, 15 Or. 28, 13 Pac. 614; *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821, 6 N. E. 246; *King v. Steiren*, 44 Pa. 99, 84 Am. Dec. 419; *Allen v. Colliery Engineers' Co.* 196 Pa. 512, 46 Atl. 899; *Clay Commercial Teleph. Co. v. Root*, 1 Sadler (Pa.) 485, 17 W. N. C. 200, 4 Atl. 828; *Stewart v. Walker*, 14 Pa. 293; *Cox v. Adams*, 1 Nott & M'C. 284; *Byrd v. Boyd*, 4 M'Cord, L. 246, 17 Am. Dec. 740; *Union Bank v. Heyward*, 15 S. C. 296; *Bradshaw v. Branan*, 5 Rich. L. 465; *Jones v. Jones*, 2 Swan, 605; *Children of Israel v. Peres*, 2 Coldw. 620; *Simon v. Allen*, 76 Tex. 398, 13 S. W. 296; *Howe v. Harding*, 84 Tex. 74, 19 S. W. 363; *Howe v. Harding*, 76 Tex. 19, 18 Am. St. Rep. 17, 13 S. W. 41; *Howay v. Going-Northrup Co.* 24 Wash. 88, 6 L.R.A. (N.S.) 49, 85 Am. St. Rep. 942, 64 Pac. 135; *Gordon v. Brewster*, 7 Wis. 355; *La Courrier v. Russell*, 82 Wis. 265, 52 N. W. 176; *School Dist. No. 1. v. Dreutzer*, 51 Wis. 153, 6 N. W. 610; *Dunn v. Hereford*, 1 Wyo. 206; *Boardman v. Keeler*, 21 Vt. 83; *Paul v. School Dist. No. 2*, 28 Vt. 575; *Cashen v. School Dist. No. 12*, 50 Vt. 30; *Davis v. Streeter*, 75 Vt. 214, 54 Atl. 185.

Watson, J., delivered the opinion of the court:

The declaration is common counts in assumpsit. Plea, the general issue.

28 L.R.A.(N.S.)

The plaintiff claimed, and his evidence tended to show, that on August 12, 1907, he made a contract with the defendant whereby he was to work for the defendant as clerk and salesman in his store at Highgate Center for the term of one year from that date, for the sum of \$468, payable in instalments of \$9 per week, with the agreement that he should be given employment for the full term; that when the plaintiff had worked 8½ weeks the defendant sold his stock in the store to one Loukes, notified the plaintiff that he had no more work for him, and paid him in full for the services he had performed; that the plaintiff remained at Highgate Center during the entire year, ready and willing to work for the defendant, but was not furnished with more work, and was paid nothing by him after the time of the dismissal; that during the remainder of the year the plaintiff did some work under other employment, and, deducting what he received therefor, together with the sums received of the defendant for the services actually performed, seeks to recover here the "balance due on services" for the full term of the contract, this suit being brought after the termination of that period. It was claimed in defense, and the defendant's evidence tended to show, that he did not hire the plaintiff for the term of one year, but did hire him by the week, and paid him up to the time he was discharged. The defendant seasonably objected and excepted to the admission of any and all evidence in support of the plaintiff's claim, on the ground that the declaration is general assumpsit, and not special for breach of the contract, and at the close of the evidence the defendant moved for a verdict; for that since the testimony on both sides shows that the plaintiff was paid his wages in full up to the time of his dismissal, no recovery can be had under the common counts in assumpsit. This motion was overruled, and an exception saved.

The plaintiff contends for and relies upon the doctrine laid down in *Gandell v. Pontiguy*, 4 Campb. 375, 1 Starkie, 198. There the action was indebitatus assumpsit for work and labor, with the common money counts. The plaintiff, employed by the defendant at a yearly salary payable quarterly, was discharged from his service about the middle of a quarter, and paid for the half quarter worked. Thereupon the plaintiff denied the defendant's power to discharge him in the middle of a quarter, and the next day made an offer to do the duties of the situation, which the defendant declined. Lord Ellenborough said, if the plaintiff was discharged without a sufficient cause, the action was maintainable. "Having served a part of the quarter and being

willing to serve the residue, in contemplation of law, he may be considered to have served the whole." The doctrine of constructive service there laid down was followed in *Collins v. Price*, 5 Bing. 132, 30 Revised Rep. 542, and in other English cases. It was repudiated, however, by Lord Tenterden in *Archard v. Hornor*, 3 Car. & P. 349, as early as 1828. There the first count was special on a contract by which the plaintiff agreed that he and his wife would become the servants of the defendant at certain wages, and the defendant undertook, etc., to continue them in such service until the expiration of one year. Breach, that the defendant discharged them, without warning, before the year had expired. Pleas, nonassumpsit to the special counts, also to the other counts as to all but the sum of £11, and a tender of that sum. The tender was for the time of actual service. The plaintiff and his wife entered upon the performance of the contract in the month of December, and were discharged on the 6th day of February following. The plaintiff claimed wages for the time he had served, and for a quarter more. The evidence did not support the contract declared upon, but instead thereof showed a contract terminable at a month's notice. Consequently it was held that there could be no recovery on the special counts. And his lordship further held that wages could not be recovered, under the common count, for any more of the time than the plaintiff had actually served. In 1837 the case of *Smith v. Hayward*, 7 Ad. & El. 544, was heard before the court of King's bench. The declaration contained a special count which was not proved, and counts for work and labor, and on an account stated. Plea, nonassumpsit, and payment into court of £4 on the account for work and labor. The defendant employed the plaintiff for a quarter of a year and paid him therefor. The jury found that the agreement was subject to three months' notice. The plaintiff completed that quarter; but when he had worked some more than half a month on the second quarter he was dismissed by the defendant. The action was commenced three days later, the plaintiff having first offered to complete the second quarter's service. The money was paid into court as due for the time of actual service after the expiration of the first quarter. The plaintiff claimed pay for the whole quarter from that period. It was held that the action was brought too soon for any question to arise on this point. But in discussing the matter, Lord Chief Justice Denman said he thought the rule was granted for the purpose of bringing the case of *Gandell v. Pontiguy* into question; that the view taken by Lord Ellenborough of the point there de-

cided was different from that which Lord Tenterden took of the same point in *Archard v. Hornor*, and, "if we were bound to decide between the two authorities, I should say that the later case is grounded on the better reason. There is obviously a great difference between suing for a breach of contract in dismissing the plaintiff and for work and labor which, by reason of the dismissal, has not been performed. The defense in the last case would be the nonperformance of the work; in the other, some excuse for breaking off the contract." The other three justices expressed themselves to the same effect. In 1847 the case of *Fewings v. Tisdal*, 5 Dowl. & L. 196, 1 Exch. 295, came before the court of exchequer. The declaration was indebitatus assumpsit for work and labor as a hired servant, and on an account stated. Plea, nonassumpsit. The plaintiff, when in the defendant's employ, was dismissed without previous warning, and was paid her wages up to the time of dismissal. The action was brought to recover a month's wages, commencing from the day of her discharge. The undersheriff nonsuited the plaintiff on the ground that the declaration should have been special, and that she could not recover under the common count for work and labor. The rule was discharged, Lord Chief Baron Pollock saying he regretted that the party was unable to recover her claim "in this form of count; it is not the proper form, but it should have been a special one. The case of *Archard v. Hornor* governs the present; it has been recognized by all the courts, and has been acted upon in this court, in the case of *Broxham v. Wagstaffe*, 5 Jur. 845." Barons Parke and Alderson concurred therein, the former saying: "The good sense of the matter is to be found in *Archard v. Hornor*, which was afterwards confirmed by the court of the Queen's bench in the case of *Smith v. Hayward*, and also by this court." In *Emmens v. Elderton*, 13 C. B. 495, 4 H. L. Cas. 624, Mr. Justice Crompton of the exchequer chamber wrote as follows: "The result of the modern authorities, as to the remedies of a servant wrongfully discharged, is well discussed in the passage in *Smith's Leading Cases*. . . . He is said to have the election of treating the contract as continuing, and suing for damages for the breach by the discharge; or of treating it as, and acquiescing in its being, rescinded by the wrongful act of the master, and bringing an action on the *quantum meruit* for the work actually performed; and, it is added, that he may wait till the termination of the period for which he was hired, and may then, perhaps, sue in indebitatus assumpsit for the whole wages, relying on the doctrine of constructive service. It is clear, since the decision of *Fewings v. Tisdal*, that

this last remedy cannot be maintained in the shape of indebitatus assumpsit, for the simple reason that the allegation of his being indebted for work done is untrue." To the same effect are *Goodman v. Pocock*, 15 Q. B. 576; *Wood v. Moyes*, 1 Week. Rep. 166.

The exact question now presented does not seem to have been directly passed upon by this court. Yet in several cases determined by it kindred questions have been involved, and the decisions rendered are consonant with the rule which finally obtained in England, and are quite controlling in the case before us. In *Derby v. Johnson*, 21 Vt. 17, the action was book account, and the plaintiff presented an account for labor performed, and for materials furnished, by them, in the prosecution of work under a special contract by which the plaintiffs agreed with the defendants to do all the stone work and blasting on a certain piece of railroad, at prices specified. After the plaintiffs had worked a month in performance, the defendants directed and requested them to cease labor and to abandon the further execution of the contract, in consequence of which the plaintiffs immediately ceased laboring under the contract and abandoned its further execution. The auditor, finding that the items of plaintiff's account were reasonably and properly charged, upon the facts reported, submitted to the court the question whether the plaintiffs were entitled to recover, and, if so, what amount. It was insisted by the defendants that their request and direction to the plaintiffs to cease work and abandon the execution of the contract should be considered in the light of a proposition which the plaintiffs were at liberty to accede to or disregard, and that, having acquiesced therein by quitting the work, the contract was to be treated as having been relinquished by the mutual consent of the parties. Thus the power of the employers to stop the execution of the contract by the employees, and the right of the latter to recover for services performed, were questions before the court. It was held that the direction of the defendants to the plaintiffs to quit the work was positive and unequivocal; that the employer in a contract for labor has the power to stop the completion of it, if he choose, subjecting himself thereby to the consequences of a violation of the contract; that the workman, after notice to quit, has no right to continue his labor and claim pay for it; that the plaintiffs, having been prevented from executing their part of the contract by the act of the defendants, were entitled to recover, as upon a *quantum meruit*, the value of the services they had performed under it, without reference to the rate of

compensation specified in the contract; and that they might, in addition thereto, in another form of action, have recovered their damages for being prevented from completing the whole work. In *Sherman v. Champlain Transp. Co.* 31 Vt. 162, by the contract declared upon, the defendants were allowed to use, on two of their steamers, two machines, known as "Sickles' Patent Cut-Off," belonging to the plaintiff, and a patent right, known as "Stevens' Patent Cut-Off," also owned by the plaintiff, on another of their steamers, for an agreed sum per annum, so long as defendants continued to use said machine and said patent right. The company used the machines and the patent right for some seasons, paying therefor according to the contract, and then notified the plaintiff that they would not pay him anything further for the use of the cut-offs, but continued to use them the same as before the giving of such notice. It was urged that the company had the right to repudiate the contract, and refuse to suffer the other party to proceed under it, and thereby subject itself to damages for breach of the contract. The court said that, in cases of hiring, either party may always put an end to the contract by violating its terms, and only becomes liable for damages for the breach of the contract; stating in support thereof the rule declared in the later English cases to which we have made reference. It seemed to the court at first blush that this principle of law was applicable to the case, but upon more reflection it was determined otherwise, because of the peculiar species of the contract, and the defendants should not be allowed to repudiate it in part, and not *in toto*.

Perhaps it cannot be said that the court's statement of the law respecting the right of a party to terminate a contract of hiring, and the resulting liability, was essential to the disposition of that case, yet it was an expression of opinion upon a point argued by counsel and deliberately passed upon by the court; and if it is a *dictum*, it is "a judicial *dictum* as distinguished from a mere *obiter dictum*; i. e., an expression originating along with the judge writing the opinion, as an argument or illustration." [1 Bouvier, Law Dict. 568]. *Rhoads v. Chicago & A. R. Co.* 227 Ill. 328, 11 L.R.A.(N.S.) 623, 81 N. E. 371, 10 A. & E. Ann. Cas. 111; *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771.

In *Chamberlin v. Scott*, 33 Vt. 80, the declaration contained a general count for work and labor, and a special count upon the contract. By the contract the plaintiff agreed to draw for the defendant, from premises described, a lot of timber, and deliver such portion thereof as the defendants

should direct on board of the cars at a certain depot, and deliver the rest at one of the sawmills named as the defendants should direct, the whole job to be finished by a day specified. The evidence showed that the plaintiffs completed the drawing of the timber before the expiration of the time limited, but, as the defendant failed to furnish cars upon which to load the timber drawn to the depot until after that time had expired, they did not load it. The court reiterated the principles of law enunciated in *Derby v. Johnson*, as having been recognized in this state, and held accordingly. In *White v. Lumiere North American Co.* 70 Vt. 206, 6 L.R.A. (N.S.) 807, 64 Atl. 1121, the declaration was special to recover damages for breach of contract in dismissing the plaintiff without cause when in performance of his duties, and before the end of the period for which he was employed. The defendant excepted to the charge to the jury, that the consummation of the lease for a term which exceeded the plaintiff's employment, by the terms of which all the plant, property, and business of the defendant passed into the hands of the lessee, was a breach of the contract, entitling the plaintiff to maintain the action, unless his subsequent conduct precluded him from setting that up as a breach. This part of the charge was held to be without error, except that the last and modifying clause, relating to plaintiff's subsequent conduct, was erroneous, consequent on the further holding that the defendant had the power to dismiss the plaintiff without cause, by subjecting itself to damages for a breach of the contract, and the plaintiff was not at liberty to disregard the dismissal by continuing his labor and claiming pay therefor after notice of his discharge. The propositions of law there stated by the court were necessarily involved in the determination of the case, and consequently they are of the doctrine of the case for which the decision is authority.

Four cases from this court are cited and relied upon by the plaintiff in support of his position; but an examination shows them severally to be in harmony with those to which we have made reference. Thus, *Boardman v. Keeler*, 21 Vt. 77, was debt on bond, and general counts for work and labor. The plaintiff's intestate, *Paro*, executed a promissory note by which he promised to make for the defendant and deliver at his store four instalments of a certain number of pairs of boots, each by a day named, *Paro* to find pegs and wax, and the defendant "to find the rest of the stock." The condition of the bond was that, if *Paro* should perform the services specified in the note, and the defendant should, within ten days after "full payment" thereof, execute and deliver

to *Paro*, or his assigns, a good and valid deed of certain premises, then the bond should be void; but otherwise, in force. *Paro* complied with the provisions of the note as to the first three instalments, also as to a portion of the fourth. The assignee of the bond, within the time allowed by the contract, demanded of the defendant the leather of which to make the rest of the boots due on the note; whereupon the defendant furnished leather for part of the boots so due, and refused to furnish more, leaving thirty-four pairs still due at the expiration of the time limited. It was considered that the case showed in substance a tender of the service according to the contract, and a refusal of it by the defendant, in refusing to furnish the essential leather as demanded; and "that the tender, wrongfully refused, should have the effect of actual performance, so far as to give a right of action on the bond." The plaintiff before us relies upon the holding shown by the clause here quoted, as a precedent in his favor. Yet not only is the force of the holding limited by the concluding modifying clause, but it clearly appears from the context that the court then understood, and made it plain, that the holding could have no application to the question of a right to recover for constructive service. The court below charged the jury that the measure of damages was the value of the land at the time it should have been conveyed, with interest thereon. The rule there laid down was held to be, in general, the proper one when the entire consideration for the conveyance has been received by the party who is to give the deed; yet in the circumstances there shown the measure of damages was the value of the land only in proportion as the land had been paid for; the court saying: "But a mere tender of service operates no actual benefit to the other party. And though, if he wrongfully refuse it, he may forfeit any consideration previously advanced in payment for the service, it is another question whether he is bound to render the same prospective compensation as if the service had in fact been performed. No principle of equal and exact justice would appear to indicate such a rule. . . . The just distinction is between a consideration already advanced for the service, and a payment to be made for it after performance. The first may probably be forfeited by a wrongful refusal of the service when duly tendered. But in the latter case, though the party tendering the service will be entitled to sue upon the contract, yet the recovery should be restricted to the extent of his actual damages." *Paul v. School Dist. No. 2*, 28 Vt. 575, was an action in assumpsit to recover for services rendered

in teaching school, and damages for not being permitted to continue for the full term of the contract. The plaintiff being dismissed after part performance, it was held that, unless incompetency or unfaithfulness be shown, he could not be deprived of his right to complete the performance, without a claim to damages resulting from such breach of the contract. *Cashen v. School Dist. No. 12*, 50 Vt. 30, was in book account. When she had taught school in defendant district twenty-three days, in part performance of her contract for the term of twelve weeks, the schoolhouse was burned. After the fire, but on the same day, the plaintiff was told by the prudential committee that if he could get a place for the school she should go on with it; and she, not being discharged from the contract, nor it repudiated in any way, held herself in readiness to go on with the work through the entire term. She was given to understand that she was expected to be ready and able to resume her service of teaching, it being treated as contingent at most whether a place would be provided for a continuation of the school. It was held that she performed the service of her employment in just the way the employer enabled and required her to do it, and that she was entitled to be paid according to the terms of the contract. And *Davis v. Streeter*, 75 Vt. 214, 54 Atl. 185, the last of the four cases from this court on which the plaintiff relies, was an action of general assumpsit. There, the evidence tended to show that the plaintiff rendered services by way of work and labor for the defendant under a special contract which he forced her to abandon before complete performance. It was held that this evidence tended to support a *quantum meruit* recovery under the general count for such services performed.

No case has been called to our attention, and we have found none, in which the doctrine of constructive service has been applied, or recognized as law, in this state. On the contrary, we think the decisions of this court to which reference has been made, some of them precedential in nature, show the law here to be that a servant who was dismissed, during his performance of an entire contract, by the master, without cause, cannot, by waiting until the end of the term for which he was employed, sue for and collect wages, as such, for the portion of the term after the time of his dismissal. As before seen, the law does not permit a servant to continue to work and claim pay for it after his discharge. To allow him to do so would be inconsistent with the right of the master to stop performance by the servant, by taking upon himself the liability for resulting damages. How much more incon-

sistent would it be to say that, when no work is subsequently done by the servant, he may bring *indebitatus assumpsit*, and recover for constructive service? The reason given by Mr. Justice Crompton why such a remedy cannot be maintained, that the allegation of the master's being indebted for work done is untrue, is substantiated by the holding of this court in *Curtis v. Smith*, 48 Vt. 116, that a plaintiff cannot recover on the common count for work and labor done and performed, without showing that he has performed work and labor for the defendant at his request, either expressed or implied. It follows that the defendant's motion for a verdict should have been granted.

The plaintiff says, however, that the parties were heard on their evidence the same as they would have been had the declaration been special for damages, and hence, on the authority of *Chaffee v. Rutland R. Co.* 71 Vt. 384, 45 Atl. 750, an amendment of the declaration should be permitted by filing a special count to conform to the proof in this respect, and that on filing the same the judgment should be affirmed. The defendant objects thereto, denying that the case was fully heard on questions which would arise in a trial for damages. Regardless of the range of the evidence, leave to file such new count cannot be granted. As seen, to entitle the plaintiff to recover in the present case he must show that he performed work and labor for the defendant at his request; while in an action for damages for breach of the contract—the plaintiff's only available remedy—he would need to prove not that he performed such services, but that he was prevented by the defendant from so doing in completion of the existing contract between them. Clearly the causes of action are not the same, and the declaration cannot be amended to give the latter remedy. *Brodek & Co. v. Hirschfield*, 57 Vt. 12; *Estabrooks v. Fidelity Mut. F. Ins. Co.* 74 Vt. 202, 52 Atl. 420. And, since this suit cannot be maintained on any declaration which may be filed in amendment, final judgment will be rendered here.

Judgment reversed, and judgment for the defendant to recover his costs.

NEBRASKA SUPREME COURT.

STATE OF NEBRASKA

v.

ERNEST MCCOY.

(— Neb. —, 127 N. W. 137.)

Constitutional law — *ex post facto* laws — definition.

1. *Ex post facto* laws include enactments

Headnotes by ROSE, J.

which alter the situation of accused to his disadvantage.

Same — increasing penalty of bond.

2. An amendatory act increasing the penalty of a bond essential to the suspension of sentence in a prosecution against a husband for abandonment is *ex post facto* as to prior offenses.

(June 29, 1910.)

EXCEPTION by the state to the dismissing by the District Court for Franklin County of a prosecution for abandonment by defendant of his wife and children. Overruled.

The facts are stated in the opinion.

Messrs. George J. Marshall, George W. Ayres, E. U. Overman, and W. T. Thompson for the State.

Messrs. George W. Prather and Bernard McNeny for appellee.

Rose, J., delivered the opinion of the court:

An information was filed in the district court of Franklin county October 4, 1909, charging that on April 1, 1909, defendant unlawfully abandoned his wife and children. The prosecution was dismissed because the trial court was of the opinion that the legislature, between the dates mentioned, passed an amendatory act which deprived defendant of a substantial right possessed by him before its passage, and that the amendment was *ex post facto* as to the offense charged. For the purpose of settling the law an exception to the ruling below is presented here under § 515 of the Criminal Code.

The 1st section of the statute which defendant was charged with violating declares: "That every person who shall, without good cause, abandon his wife and wilfully neglect or refuse to maintain or provide for her, or who shall abandon his or her legitimate or illegitimate child or children under the age of sixteen years, and wilfully neglect or refuse to provide for such child or children, shall, upon conviction, be deemed guilty of a desertion and be punished by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not more than six (6) months." Sess. Laws 1903, chap. 137, p. 642; Crim. Code, § 212a, Comp. Stat. 1909, p. 2273.

When the offense charged was committed, § 2 of the act was as follows: "Provided,

Note. — A search has revealed no other cases passing upon the question as to whether an act increasing the amount of a penal bond required in a criminal case comes within the constitutional prohibition against the enactment of *ex post facto* laws.

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however, if, after conviction and before sentence, such husband or parent shall appear before the court in which conviction shall have taken place, and enter into bond to the state of Nebraska in the penal sum of \$200, to the approval of the court as to surety, conditioned that such husband will furnish said wife with necessary and proper home, food, care, and clothing, or that such parent will furnish said child or children with necessary and proper home, food, care, and clothing, then said court may suspend sentence therein. Said bond shall remain in force as long as the district judge deems the same necessary; and whenever it shall appear to said court, either by affidavit or otherwise, that such husband or parent is, in good faith, furnishing his said wife, child, or children with the necessary and proper home, food, care, and clothing, then said court may annul said bond and dismiss the prosecution against said husband or parent." Sess. Laws 1905, chap. 196, p. 689.

After the offense charged was committed and before the case was called for trial, § 2 was amended to read as follows: "If, at any time after complaint has been filed in the justice court, or the county court of the county in which the offense shall have been committed, such husband or parent shall appear before the court in which he stands charged, and shall pay or secure to be paid to the wife or to the legal representative of the child or children other than the accused such sum or sums of money or property as may be agreed upon, provided that such sum so agreed or required to be paid shall not be less than \$200 nor more than \$1,000, then said court may discharge the party accused out of custody on his paying the costs of prosecution. And if, after conviction and before sentence, the accused shall make settlement with his said wife or with the legal representative of his said children, in the same manner as herein provided for settlement before conviction, and shall enter into bond to the state of Nebraska in the penal sum of not less than \$200 nor more than \$1,000 to the approval of the court as to surety and as to sum, conditioned that such husband will furnish said wife with necessary and proper home, food, care, and clothing, or that such parent will furnish said child or children with necessary and proper home, food, care, and clothing, or will so furnish both said wife and child or children, on his paying the costs of prosecution, then the said court may suspend sentence therein. Said bond shall remain in force as long as the district judge deems the same necessary; and whenever it shall appear to said court, either by affidavit or otherwise, that said husband or parent is, in good faith, furnishing his said wife, child,

or children with the necessary and proper home, food, care, and clothing, then said court may annul said bond and dismiss the prosecution against said husband or parent." Sess. Laws 1909, chap. 165, p. 580; Comp. Stat 1909, p. 2273; Crim. Code, § 212b.

The language of the 1st section has not been changed. At the time of the abandonment charged the 2d section of the act empowered the district court, in the event of defendant's conviction, to suspend sentence upon his giving bond in the sum of \$200 to support his family. This provision was amended in 1909, after the commission of the offense charged and before trial, to authorize the district court, after conviction, to suspend sentence upon his giving bond in a sum not less than \$200 nor more than \$1,000. In other words, after the commission of the offense charged and before trial, the penalty of the bond to procure a suspension of sentence was increased from \$200 to a penal sum not less than \$200 nor more than \$1,000. The new statute contained no saving clause, nor has attention been directed to one in the Criminal Code. Was the change *ex post facto* as to the offense charged?

In support of the exception to the ruling of the trial court, it is argued that the 1st section defining the offense and prescribing penalties has never been changed, and that therefore the amendment did not deprive defendant of any pre-existing right. In this connection counsel for the state cite *Hair v. State*, 16 Neb. 601, 21 N. W. 464, and *State v. Wish*, 15 Neb. 448, 19 N. W. 686. In these cases it is held that an amendatory act which merely reduces the punishment for a crime is not *ex post facto* as to prior offenses. The provisions which first authorized the district court to suspend sentence were in the 2d section. It was in the form of a proviso, and limited the 1st section, which defined the offense and fixed the penalties. Both sections were originally parts of the same act. The legislation changing the penalty of the bond from \$200 to a penal sum not less than \$200 nor more than \$1,000 was an amendment of the proviso, and likewise limited the section defining the offense and fixing the punishment. The amendment was a substantive part of the legislation on the subject of abandonment, and cannot be detached therefrom for the purpose of holding that the 1st section remained unchanged. When the offense charged was committed, defendant was protected by a statute which authorized the district court to suspend sentence, and at that time the penalty of the bond was only \$200. He then had a right to go to trial relying upon the terms of that statute to prevent his imprisonment in case of conviction. The

proviso authorizing suspension of sentence limited the section prescribing the punishment, and the act amending the proviso changed the limitation. The question then is: Did the change in the law, when applied to the offense charged, deprive defendant of a substantial right within the meaning of that part of the Bill of Rights which declares that no *ex post facto* law shall be passed?

Ex post facto laws include an enactment "which alters the situation of the accused to his disadvantage." *Re Medley*, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384, *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443. This interpretation of the constitutional provision forbidding the enactment of *ex post facto* laws has been accepted generally by the courts and text writers, and was quoted with approval by this court in an opinion by the present chief justice in *Marion v. State*, 16 Neb. 349, 20 N. W. 289. The statutory right to have the sentence suspended upon giving bond in the sum of \$200, in the event of conviction, was a substantial one, affording a means of escaping imprisonment. The amendment permitted the court to require a bond of \$1,000 as a condition of suspending sentence. It is argued, however, that it was within the power of the court to release defendant on a \$200 bond under either statute, and that therefore he was not deprived of a substantial right. This argument does not meet the question. When the case was called for trial, it was within the power of the court to require a \$1,000 bond, if the amendment was effective as to prior offenses. Under the new act the exercise of this power depended on the will of the court, and not on the wish or financial ability of defendant. If he were unable to give bond in excess of \$200, when required by order of the court to execute a bond in a larger sum as a condition of having sentence suspended, the change in the statute would deprive him of his liberty in case of conviction. There may be a difference between a statutory right and the mercy of a court. In any event the penalty of the bond was increased. The Bill of Rights forbids the enactment of *ex post facto* laws. The command of the Constitution is directed to the legislature. It applies to legislative enactments, and makes no reference to the judgments of courts. Whether an amendment of the Criminal Code is *ex post facto* as to prior offenses depends upon the provisions of the new act, and not upon the authority or inclination of the courts to limit its operation to the purview of the statute amended. In conferring upon the court authority to require a bond in excess of \$200, the legislature intended that the power should be uniformly

exercised, without distinction as to prior and subsequent offenses. The lawmakers did not insert a saving clause in the amendatory act, nor otherwise call upon the courts to limit its operation as to prior offenses, to the terms of the original act. The amendment altered the situation of accused to his disadvantage, and to that extent the legislature exceeded its power. The exception to the ruling of the trial court is therefore overruled.

NEW YORK COURT OF APPEALS.

ANNE ROBINSON, Admr., etc., of Patrick Robinson, Deceased, Respt.,

v.

CONSOLIDATED GAS COMPANY OF NEW YORK, Appt.

(194 N. Y. 37, 86 N. E. 805.)

Master — injury to servant — res ipsa loquitur.

The fall of a scaffold upon which men are sent to work does not of itself show that it must have fallen because something was the matter with it, where it appears that at the time of the fall the men were trying to break the connection of a pipe, and were pressing against the scaffold with all their strength, which may have subjected it to excessive strain.

(January 5, 1909.)

Note. — Applicability as between master and servant of maxim, *Res ipsa loquitur*, to fall of scaffold.

As to applicability as between master and servant of maxim, *Res ipsa loquitur*, to fall of bridge, see note to Johns v. Pennsylvania R. Co. post, 591.

The question whether the maxim, *Res ipso loquitur*, is ever applicable as between master and servant, is considered in notes in 6 L.R.A.(N.S.) 337, and 16 L.R.A.(N.S.) 214. As there shown, it is denied by some courts that the maxim is ever applicable to that relation. In the present note, however, it is assumed that the maxim may be applicable, and the question here discussed is, Under what conditions may the negligence of the master be presumed from the mere fact that the scaffold has fallen and injured the servant?

The courts taking the view that the maxim may, in a proper case, be applied as between master and servant, frequently assert the rule that the mere fact that a scaffolding furnished by a master for his servant to work upon falls is prima facie evidence of negligence on his part.

Thus, in Westland v. Gold Coin Mines Co. 41 C. C. A. 193, 101 Fed. 59, the deceased servant was at work 900 feet below the surface, on a stull which had been erected by the defendant mining company in one of 28 L.R.A.(N.S.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term, Part 10, for New York County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Mr. Theron G. Strong, for appellant:

The maxim, *Res ipsa loquitur*, does not apply until, by proof of surrounding circumstances or other facts, an inference is justified that there was want of due care on the part of the master; it cannot be inferred from the mere fall of the scaffold independent of the attendant circumstances.

Cunningham v. Dady, 191 N. Y. 152, 83 N. E. 689; Duhme v. Hamburg-American Packet Co. 184 N. Y. 404, 112 Am. St. Rep. 615, 77 N. E. 386; Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925.

The inference is more natural and reasonable that the fall of the scaffold was due to the exceptional strain, than that it was due to any inherent defect.

Wiwirowski v. Lake Shore & M. S. R. Co. 124 N. Y. 420, 26 N. E. 1023; Laidlaw v. Sage, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679; Voorhees v. Hudson River Teleph. Co. 109 App. Div. 465, 95 N. Y. Supp. 703,

the levels of its mine, so as to enable the deceased with other employees to stand thereon while breaking down the mineral bearing rock. While the men were at work on the stull in the usual way shortly after a blast had been fired, the stull fell and the deceased was killed. After the accident three or more of the stull timbers were found at the bottom of the level, which were broken about in the center, and two witnesses expressed the opinion that the stull timbers were insufficient to support the weight which the stull was intended to carry. On the other hand, the defendant offered evidence that the stull was constructed with timbers of the same kind, size, and strength that were usually used for that purpose, and that the deceased and his fellow workmen had been cautioned by the foreman of the mine against firing such heavy blasts as they had once fired. The court said: "The fact that the stull fell demonstrates that it was insufficient to support the load with which it was burdened at the time it fell. The case in hand, then, is not of that kind of which it may be said that the occurrence of the accident affords no evidence of negligence. If the stull had been constructed as it should have been, it would easily have borne the weight that was upon it at the time it fell. Hence, the fall of the structure suggests forcibly that the stull timbers were insufficient either in

1167; O'Reilly v. Brooklyn Heights R. Co. 82 App. Div. 492, 81 N. Y. Supp. 572.

Mr. Edward F. Brown, for respondent:

The cause of the fall of the scaffold is a conjecture and inference, and the maxim, *Res ipsa loquitur*, applies.

Lawson, Presumptive Ev., 2d ed. 122; Griffen v. Manice, 166 N. Y. 195, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925; Guilmartin v. Solvay Process Co. 189 N. Y. 490, 82 N. E. 725; Harris v. Baltimore Mach. & Elevator Works, 188 N. Y. 141, 80 N. E. 1028.

Vann, J., delivered the opinion of the court:

On the 29th of April, 1905, the plaintiff's intestate, a plumber in the permanent em-

ployment of the defendant, was so injured through the fall of a scaffold that he died in a short time. This action was brought under the Code of Civil Procedure and the employers' liability act, to recover the pecuniary damages sustained by his next of kin.

strength or number, or that the supports let into the side walls of the vein were insufficient, and that proper care had not been exercised by those who erected it. . . . A reasonable person might very well have reached the conclusions last stated by force of the maxim, *Res ipsa loquitur*."

So, in Cleary v. General Contracting Co. 53 Wash. 254, 101 Pac. 888, the plaintiff, while in the employment of the defendant, was injured by the fall of a scaffold furnished by the defendant, and the court, in holding that the maxim applied, quoted with approval the following statement from La Bee v. Sultan Logging Co. 47 Wash. 57, 20 L.R.A.(N.S.) 405, 91 Pac. 560, rehearing, 51 Wash. 81, 20 L.R.A.(N.S.) 408, 97 Pac. 1104: "When the servant shows that the master furnished him an instrumentality to be used for a particular purpose, that he used it for the purpose intended, in the manner intended, and that it broke when being so used, and injured him, he makes out a prima facie case of negligence against the master."

And the maxim was held applicable, where the collapse of a scaffold took place at a time when there was no weight on it beyond what it was intended to bear, in Cook v. Duncan, 20 Sc. Sess. Cas. 2d series, 180, cited in 2 Labatt on Master & Servant, p. 2304.

And in Giles v. Thames Ironworks Shipbuilding Co. 1 Times L. R. 469, where the plaintiff recovered a judgment for injuries received because of the fall of an alleged defective scaffolding, a new trial was denied, one of the court observing that the plaintiff had proved the accident, and the defendant had chosen to offer no evidence as to the conditions of the scaffolding.

Where a staging erected by the side of a wood pile, and used for the purpose of enabling the workman to pile the wood higher, was built under the direct supervision of one standing in the place of the master, and fell while it was being used directly under his commands, it was held, in Prendible v. Connecticut River Mfg. Co. 160 Mass. 131, 35 N. E. 675, that the fact that it fell in the manner and under the circumstances 28 L.R.A.(N.S.)

was a proper one for consideration as tending to show that the master was negligent. So, in Arkerson v. Dennison, 117 Mass. 407, while the plaintiff and another bricklayer were at work on a scaffolding with the preparation of which the plaintiff had nothing to do, a hod carrier came up a ladder and emptied some mortar into a tub; as he turned to go, the scaffolding fell and the plaintiff was injured. There was no evidence of any other special strain upon the scaffold, and it did not appear that the mortar was dumped violently into the tub. The court said: "That it was insecure and improperly constructed in some way was sufficiently apparent from the account given of the manner of its fall."

But in Brady v. Norcross, 172 Mass. 331, 52 N. E. 528, the court said that even if it was assumed, following the Arkerson and Prendible Cases, that the giving away of a bracket holding a staging was of itself evidence of negligence in the construction on the part of someone, they did not think that it was evidence from which it could be fairly inferred that the negligence was that of the plaintiff's employers. The court said: "The evidence did not tend to show that they furnished the staging as a structure, nor that they assumed to exercise any control or supervision as to how it should be built or kept or adapted for the work, nor that they failed to furnish a sufficient quantity of suitable materials, nor that they employed improper workmen."

Section 18 of the New York labor law (Laws of 1897, chap. 415) provides that no one should "furnish or erect, or cause to be furnished or erected," any scaffolding, hoists, etc., "which are unsafe, unsuitable, or improper, and which are not so constructed, placed, and operated as to give proper protection to the life and limb of a person so employed or engaged."

Section 19 of the same act provided that all scaffolding should be so constructed as to bear four times the maximum weight required to be placed thereon. The previous law provided for the punishment of "knowingly or negligently" doing the acts prohibited in § 18, but the act of 1897 omitted these words.

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tion, it was used by the defendant, but after that its history does not appear, except that it remained in the same position in the vault until, after the lapse of a year, it was again used by the defendant. It was about 9 or 10 feet from the floor, and had no support underneath. One end was suspended by two ropes, and the other rested on a wooden brace placed horizontally between two piers to relieve the lateral strain and thus to strengthen the building. The brace was not designed to sustain a vertical strain, and it was kept in place simply by wedges driven at either end. There was no other fastening. Owing to work on the subway in the street in front, the vault was open and the brace and the wedges were exposed to the variations in moisture and temperature per-

taining to the climate for an entire year. The decedent, by the direction of the assistant foreman of the defendant in charge of its work, went upon the scaffold with another man to uncouple a large pipe overhead, but, owing to rust or some other cause, it was difficult to unscrew it. One man had a wrench and the other a pair of chain-tongs, and both exerted all their strength and put all the strain they could on the pipe and scaffold. By pushing upward, as the survivor testified, with all their "might and main," they subjected the scaffold on which they were sitting to a severe vertical strain, when the brace gave way, the scaffold fell, and the decedent was thrown to the floor with such violence as to cause his death. Upon the trial the jury found for

These sections of the labor law were held, in *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662, to enlarge the duty of the master in respect to scaffolds, and to extend it to responsibility for the safety of the scaffold itself, and thus for want of care in the details of its construction, which details previously might have been delegated to servants.

In the *Stewart Case*, in which a servant had been killed by the fall of a scaffold, there was no evidence tending to prove the cause of the fall other than the fall itself, and the trial court instructed the jury that the falling of the scaffold raised a presumption of the negligence of the defendant in its construction, and refused to charge that the happening of the accident created no presumption of negligence on the part of the defendant. The appellate court sustained the trial court, and said: "The evidence tended to show that this scaffold was not overloaded, but was bearing the weight usually required in the performance of the labor for which it was an appliance. *Prima facie* it was so constructed as to bear less than one fourth the weight required by § 19. Its fall, in the absence of evidence of other producing cause, points to the omission of the duty enjoined by the statute upon the defendant to the plaintiff in its construction, and points to it with that reasonable certainty which usually tends to produce conviction in the mind in tracing events back to their causes, and thus creates a presumption. It is circumstantial evidence, and if it does convince the jury, it justifies their verdict."

Following the principle laid down in the *Stewart Case*, the maxim was held applicable in the following cases, where the accident was of the nature indicated: *Johnson v. Roach*, 83 App. Div. 351, 82 N. Y. Supp. 203 (the falling of a scaffold on which a bricklayer was at work); *Tierney v. Vunck*, 97 App. Div. 1, 89 N. Y. Supp. 612 (the breaking of a plank in a scaffold); *Madden v. Hughes*, 104 App. Div. 101, 93 N. Y. Supp. 324, affirmed in 185 N. Y. 466, 78 N. E. 167 (the breaking of a platform consisting of 3-inch planks spliced by being

nailed together, and supported at either end by a rope looped around the plank); *Croce v. Buckley*, 115 App. Div. 354, 100 N. Y. Supp. 898 (the dropping of an elevator the top of which had been used as a platform for the support of laborers at work upon an adjoining building); *Convey v. Finn*, 130 App. Div. 440, 114 N. Y. Supp. 864 (the breaking of a board laid across stringers in an unfinished building); *Nixon v. Thompson-Starrett Co.* 131 App. Div. 152, 115 N. Y. Supp. 130 (the breaking of planks laid across iron floor beams in a building in the process of construction).

The same principle has been applied where an injury to a servant resulted from the falling in of a floor, which was unexplained (*Muhlens v. Obermeyer*, 83 App. Div. 88, 82 N. Y. Supp. 527), and to the breaking of a ladder (*Cummings v. Kenny*, 97 App. Div. 114, 89 N. Y. Supp. 579). Cases involving the falling of floors and the breaking of ladders are not, of course, within the scope of this note, and these cases are included only because they follow the *Stewart Case*.

In *Johnson v. Roach*, *supra*, the defendant gave no evidence at all, and the court said that the fall of the scaffold unexplained was *prima facie* evidence of violation of the statute.

And in *Nixon v. Thompson-Starrett Co.* *supra*, the court said: "The charge that the fact that the plank tipping up was evidence *prima facie* that it was not sufficiently laid was not error."

So, in *Croce v. Buckley*, *supra*, it was held that it was not essential to the plaintiff's cause of action to show what caused the dropping of an elevator in a building adjoining the one upon which the plaintiff's intestate was at work, which elevator was being used by the defendant as a scaffolding for the plaintiff's intestate and other workmen, as her case was established by showing that the scaffold as such was defective and improper, and that the accident resulted therefrom.

And the same principle was applied in *Huston v. Dobson*, 123 N. Y. Supp. 892, where the injured servant, who was in the

the plaintiff, and the judgment entered on the verdict was affirmed by the appellate division, one of the justices dissenting. The defendant appealed to this court, and through its counsel insisted that the judgment should be reversed on account of an error in the charge.

The trial judge in instructing the jury laid down the usual elementary propositions relating to negligence, contributory negligence, and assumption of risks. He charged further as follows: "Precisely how or why that scaffold fell is not told by any witness. There is no witness, as I recollect the testimony, who gives you any express facts to show why that scaffold fell, and therefore I instruct you under the maxim *Res ipsa loquitur*, which means that things

speak for themselves, that the scaffold must have fallen because there was something the matter with it." The defendant excepted, and asked the court "to leave to the jury the question as to whether there was negligence of any person in the service of the employer, intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition, as a question of fact." After making this request, the counsel for the defendant added: "Your honor charged practically in the language of the statute that the negligence must be that of a superintendent or a person charged with superintendence, and I except to that statement, and ask you to leave it to the jury, as a question of fact, whether there was any such negligence." The court declined, and

employ of a general contractor, made use of a scaffold of the defendant a subcontractor, at the suggestion of the defendant's foreman, in order to hasten the general contractor's work and facilitate that of the defendant contractor. There was some evidence that after the accident the timbers that had been used to support the scaffold that fell were rotten.

The court in *Stewart v. Ferguson*, supra, also said that, even before the passage of the labor law (Laws of 1897, chap. 415), it had been held that the falling of a scaffold without any apparent cause was prima facie evidence of negligence on the part of the person bound to provide it; and a number of cases support this statement.

Thus, in *Solarz v. Manhattan R. Co.* 8 Misc. 656, 29 N. Y. Supp. 1123, affirmed in 155 N. Y. 645, 49 N. E. 1104, it was held that the unexplained breaking down of a scaffold made out a case sufficiently strong to go to the jury on the question of negligence.

And in *Green v. Banta*, 16 Jones & S. 156, affirmed without opinion in 97 N. Y. 627, it was held that the fact that the scaffolding gave away was prima facie evidence of negligence. And to the same effect was the decision in *Flynn v. Gallagher*, 20 Jones & S. 524.

The same rule is asserted in *Cunningham v. Sicilian Asphalt Paving Co.* 49 App. Div. 380, 63 N. Y. Supp. 357, citing the *Solarz* and *Green* Cases, where the servant was injured by the breaking of one or two planks the ends of which were supported by the sides of bins, and upon which he was required to stand while dumping material into the bins.

So, the mere fact that a floor gave away was held prima facie evidence of negligence. in *Flynn v. Harlow*, 46 N. Y. S. R. 872, 19 N. Y. Supp. 705, citing the *Green* Case.

And in *Johnson v. Roach*, 83 App. Div. 351, 82 N. Y. Supp. 203, the court said that, irrespective of the statute, there was sufficient to take the case to the jury upon the general question of negligence. It appeared that beams were thrust out from windows and rested upon the lintels, and in some

cases upon loose bricks, and upon these beams were laid boards on which in turn rested iron scaffolds. This work was done by other servants of the defendant, and with it the bricklayers, including the plaintiff, had nothing to do, they being directed to work upon the scaffold thus provided. The evidence further tended to show that the structure was not firmly bound together. The court said that they had no difficulty in concluding that a sufficient basis was established for the finding of the jury that the defendant was negligent, the maxim being applicable.

In *Fink v. Slade*, 66 App. Div. 105, 72 N. Y. Supp. 821, the court seems to depart from the doctrine of the other New York cases when it says: "The rule of *res ipsa loquitur* can have no application in the absence of any evidence that it was the defendant's negligence which caused the injury sustained." And again the court says: "A rule that a servant can maintain an action for personal injuries against a master simply by showing attending circumstances from which the negligence of someone may be inferred, without showing either expressly or inferentially the personal negligence of the master,—some violation of his duty to the servant,—would be subversive of well-settled principles."

If, however, there is some evidence in the case as to the cause of the fall, as where it was due to the negligence of the servant himself, or to that of his fellow servants, then there is no occasion for the application of the maxim.

Thus, in *Andrews v. Reiners*, 112 App. Div. 378, 98 N. Y. Supp. 658, reargument in 115 App. Div. 909, 101 N. Y. Supp. 1111, where the scaffold was not stationary, but was suspended by ropes through pulleys, and it was part of the duty of the injured servant to raise and lower the platform as his work progressed, it was held that a verdict against the defendant could not be sustained where it rested on nothing but the proposition that the mere fact of the descent of the end of the scaffold, if it occurred, was evidence from which alone it could be found that the scaffold fell from defective-

gave the defendant an exception. In his dissenting opinion, no other being written, Mr. Justice Ingraham said: "I think it was error to refuse to charge the defendant's ninth request. The evidence is contradicted that the deceased and his associate placed considerable strain upon this scaffold in trying to unscrew a pipe, and that it was while thus straining it that the scaffold fell. There was no evidence but that the scaffold would have been perfectly safe if used in an ordinary way." [125 App. Div. 915, 109 N. Y. Supp. 1144.]

We also are of opinion that the exceptions raised reversible error, because the doctrine of *res ipsa loquitur* was improperly applied. The *res* of that maxim, which is sometimes misused, is not simply an accident resulting in injury, but the accident and the surrounding circumstances, necessarily shown by

proving how the accident occurred; or, in other words, the occurrence as it appears by proof of the accident. The doctrine does not permit a recovery without some proof of negligence, but it regulates the degree of proof required under certain circumstances. If proof of the occurrence shows that the accident was such as could not have happened without negligence, according to the ordinary experience of mankind, the doctrine is applied even if the precise omission or act of negligence is not specified, and even when it does not appear whether the accident was owing to some act done or to some act not done. It is applied when the inference of negligence is required by the nature of the occurrence. Thus, the apparent cause of the accident may be want of care in constructing or maintaining or operating a machine, and, if the occurrence

ness. The court went on to say: "The deceased may have been lowering the end of the scaffold where he was when it is claimed he fell (a thing he had to do continually at short intervals), and let the rope slip. There was no evidence that he was not doing so. The maxim only applies where the accident could not have happened except from defectiveness of the appliance."

So, in *Lorenzo v. Faillace*, 132 App. Div. 103, 116 N. Y. Supp. 326, it was held that if the defendants introduce evidence of disinterested witnesses to the effect that there was no defect in the timber which broke, but that the breaking was caused by the careless or negligent conduct of plaintiff's fellow servants in using the scaffold in a manner for which it was not designed to be used, and contrary to their express instructions, and there is nothing to contradict this testimony, either in the shape of direct testimony or circumstances tending to discredit the same, the presumption of negligence is completely overcome, and the defendants are absolved from responsibility.

So, where a master furnishes brackets in perfect condition to be used in supporting a platform or scaffold on which his workmen are to stand while putting shingles on a roof, and the appliances furnished, when properly used, provide a reasonably safe place for the workmen, it was held, in *Knapp v. Voorhis* (N. J.) 74 Atl. 440, that the slipping of the feet of one of the brackets, causing it to collapse, because not securely attached to the roof by a fellow servant who put up the scaffold, does not raise a presumption that the master did not exercise reasonable care in the selection of the appliance.

And in *Tiedjen v. National Elevator Co.* 130 App. Div. 504, 114 N. Y. Supp. 1056, the court said that the mere happening of an accident, where the scaffold itself does not give way, is not evidence that the accident was caused by a defect in the scaffold itself or in its supports and appliances, and there is nothing upon which a finding can be

based that the scaffold was an improper one for the purpose for which it was furnished and used.

The rule of *res ipsa loquitur* is not applicable where the cause of the fall of the staging was shown by the defendant, and does not seem to have been in dispute. *Parsons v. Hecla Iron Works*, 186 Mass. 221, 71 N. E. 572. And see *Brady v. Norcross*, 172 Mass. 331, 52 N. E. 528, cited *supra*.

The doctrine of *res ipsa loquitur* was held in *Ferrick v. Eidlitz*, 195 N. Y. 248, 24 L.R.A.(N.S.) 837, 88 N. E. 33, not to apply to the fall of a temporary shed erected during the construction of a building, for the protection of machinery, while employees were removing it after it had served its purpose, so as to render the master liable to an employee injured by such fall, without further evidence of negligence on his part. It was claimed that the shed was being used as a scaffold.

In *Fink v. Slade*, 66 App. Div. 105, 72 N. Y. Supp. 821, *supra*, the court said that the evidence disclosed the fact that there may have been causes for the fall of the platform other than the negligence of the defendant, and that the accident was probably caused by the negligence of fellow servants. No reference is made to the *Stewart* case, cited *supra*, and it certainly is difficult to harmonize the language used in the two cases.

In some cases involving scaffolds where the court has held that the maxim is not applicable, it is difficult to tell whether the statement was intended to be a general statement that the maxim never applies as between master and servant, or whether the case at bar was not a proper one for such application. Among such cases may be noted the following: *Schneider v. American Bridge Co.* 31 App. D. C. 420; *Bergman v. Altman*, 127 Iowa, 693, 104 N. W. 280; *Pellerin v. International Paper Co.* 96 Me. 388, 52 Atl. 842; *Quincy Min. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240.

W. M. G.

indicates that the accident could not have happened without negligence in one or more of these respects, it speaks for itself, and establishes a prima facie case for the jury to consider, even if it does not appear specifically whether or in what respect the machinery was negligently constructed, maintained, or operated. Under such circumstances, precision in the proof is not required, as the occurrence raises a presumption of negligence based on common experience, although no specific defect, act, or omission appears. The occurrence points to negligence as the cause of the accident, because, in the nature of things, there could have been no such occurrence without negligence. If the *res*, or the entire occurrence as proved, could not have happened without negligence of some kind, negligence is presumed without showing what kind, and the burden of explanation is thrown on the defendant. If, however, proof of the occurrence shows that the accident might have happened from some cause other than the negligence of the defendant, the presumption does not arise, and the doctrine cannot properly be applied. Under such circumstances, it is for the jury to find whether the accident was owing to negligence on the part of the defendant, or to some cause for which the defendant was not responsible. The principles upon which the doctrine rests, and the circumstances under which it should be applied, were so clearly pointed out by Judge Cullen in *Griffen v. Manice*, 106 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, the leading case upon the subject, that further discussion thereof is unnecessary.

In the case before us, the occurrence did not speak for itself, nor permit negligence as the only inference, for the fall of the scaffold may not have been caused by the weight of the men upon it, but by their weight only when augmented in its effect by excessive pressure applied by all the strength they could exert when pushing upward, although indirectly, against a stationary object. One of them, as it was shown, had unusual, and the other, as it is presumed, had average, strength, and the strain of the pressure may have much exceeded the strain of the weight. The jury, if permitted, might have found that this caused the accident. It was an explanation for them to consider, tending to show why the scaffold fell; but, under the charge that it "must have fallen because there was something the matter with it," no consideration thereof was possible, and the defendant was deprived of its chief defense.

For this error, we think that the judgment

appealed from should be reversed and a new trial granted, with costs to abide the event.

Cullen, Ch. J., and Gray, Edward T. Bartlett, Werner, Willard Bartlett, and Hiscock, JJ., concur.

PENNSYLVANIA SUPREME COURT.

ELIZABETH C. JOHNS, by Next Friend,
Appt.,
v.

PENNSYLVANIA RAILROAD COMPANY.

(226 Pa. 319, 75 Atl. 408.)

Master — fall of bridge — res ipsa loquitur.

1. The mere fact that a railroad bridge was carried away by the high water of the creek which it spanned, taking with it a portion of a train, and killing a brakeman, does not place upon the railroad company the burden of disproving its negligence to avoid liability for the death of the employee.

Evidence — condition after accident — admissibility.

2. Evidence of an examination of the foundation of a bridge which gave way, made five months after the accident, when conditions had so far changed that it could not be relied on as proof of the conditions existing before the bridge fell, is not admissible upon the question of negligence in the construction or maintenance of the bridge.

(January 3, 1910.)

Note. — Applicability, as between master and servant, of maxim, *Res ipsa loquitur*, to fall of bridge.

As to applicability, as between master and servant, of maxim, *Res ipsa loquitur*, to fall of scaffold, see note to *Robinson v. Consolidated Gas Co.* ante, 580. Reference is made to that note for the limitations observed in the preparation of this note.

There are but few cases involving the fall of a bridge in which the court, although recognizing the rule that the maxim, *Res ipsa loquitur*, may be applicable as between master and servant, passes upon the question whether the case at bar is a proper one for the application of the maxim, but the court has done so in a few cases.

Thus, in *Ristau v. E. Frank Coe Co.* 120 App. Div. 478, 104 N. Y. Supp. 1059 (affirmed without opinion in 193 N. Y. 630, 86 N. E. 1132), the plaintiff proved the collapse of a trestle upon which he had been at work, and rested, relying upon the maxim. No particular defect to cause the collapse of the trestle was apparent, and there was nothing but the bare fact that the trestle collapsed while in the ordinary use for which it was constructed, and that it had been built only three years; and the court held that a nonsuit was error, as the maxim applied to the case. In respect to the contention of the counsel for the defendant that

APPEAL by plaintiff from an order of the Court of Common Pleas for Allegheny County, refusing to take off a nonsuit in an action brought to recover damages for the killing of plaintiff's husband, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Horace J. Miller for appellant.

Mr. M. W. Acheson, Jr., for appellee.

Fell, J., delivered the opinion of the court:

The plaintiff's husband was a brakeman on the defendant's road and was killed in an accident caused by the falling of a bridge on which his train was passing. The bridge was about 80 feet in length, and the iron superstructure rested on abutments at its ends and a pier at the middle of the creek it spanned. The creek was ordinarily quite small, but at the time of the accident the water was unusually high, while the water in the Allegheny river nearby, into which it flowed, was low. This condition caused a very rapid current in the creek, and a strong pressure on one side of the bridge. The whole structure, including the abutments and pier, was carried away, and a freight car loaded with cement was carried 75 yards down the stream. The bridge had been used by the defendant for forty years, and there was no evidence of defective construction, or that the bridge had become unsafe.

The contention that the burden of disproving negligence was on the defendant cannot be sustained. The maxim *Res ipsa loquitur* is an exception to the general rule that negligence is not to be inferred, but must be affirmatively proved, except in cases of absolute duty or an obligation practically amounting to that of an insurer. *Stearns v. Ontario Spinning Co.* 184 Pa. 519, 39 L.R.A. 842, 63 Am. St. Rep. 807, 39 Atl.

the maxim is made applicable in a given case, if at all, only by facts and circumstances indicating negligence of the defendant, proved in connection with the happening of the accident itself, the court said: "The fault of this is that if there were other facts showing negligence, the maxim would not be needed as evidence to carry the case to the jury at all; it is only where there is nothing but the bare happening of the accident that the plaintiff needs and the law gives him the help of the maxim to escape a nonsuit."

The court further said that this case was not distinguishable from the fall of scaffolds, floors, or other places of work, and cited *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662, which is set out and discussed in the preceding note.

So, where the plaintiff, while at work

292; *Zahniser v. Pennsylvania Torpedo Co.* 190 Pa. 350, 42 Atl. 707. There was nothing in the circumstances that amounted to evidence from which negligence could be inferred, and that relieved the plaintiff from the burden of proof. An offer was made to prove by a witness that he had made an investigation to ascertain whether the bridge had a substantial foundation, and had found that there was "no permanent foundation upon the location that had been lately occupied by the pier." The accident occurred in March. This witness had testified that because of the high water no examination could be made for several weeks after the accident, and the examination he made was in August,—five months later; and that in the meantime there had been a change in the physical conditions by the action of the water, by the rebuilding of the bridge, and the dumping of stones in the bed of the stream. This offer was excluded. It was renewed, with the addition that there had been no change in the conditions, as far as the foundations were concerned, between March and August. The second offer was excluded for the reason that the testimony would be inadequate to establish a defect in original construction. The ruling of the court on the offer as first made was clearly right, and we cannot say that the exclusion of the offer as finally made calls for a reversal. The witness had testified to facts which showed that the result of his examination in August could not be relied on as proof of the condition existing before the fall of the bridge, and, if his testimony had come up to the offer, it would not have advanced the plaintiff's case. It would still have been barren of proof that the foundations which had withstood the floods of forty years were defective, and that the fall of the bridge resulted from their giving way.

The judgment is affirmed.

in a mine, was injured by the sudden giving way of a ledge upon which he was walking in going to his work, the court, in *Lentino v. Port Henry Iron Ore Co.* 71 App. Div. 466, 75 N. Y. Supp. 755, held that a nonsuit was improper where an injury results from the sudden and unexplained giving way of a place furnished to a workman in order to enable him to work, or which he is required to pass over in order to reach his work.

But, in *Texas Mexican R. Co. v. Mendez* (Tex. Civ. App.) 78 S. W. 25, it was held that a jury is not warranted in finding that the railroad company was negligent from the mere fact that the timbers of a bridge burned, leaving the rails unsupported, so that a train, in attempting to pass over the bridge at night, was precipitated, and the plaintiff injured. W. M. G.

WASHINGTON SUPREME COURT.

PORT BLAKELY MILL COMPANY et al.,
Respts.,
v.
SPRINGFIELD FIRE & MARINE INSURANCE COMPANY, Appt.

(56 Wash. 681, 106 Pac. 194.)

Insurance — conditions as to automatic sprinkler — breach — effect.

1. Temporary breach by an insured of his warranty that due diligence will be used that the automatic sprinkler system shall at all times be maintained in good working order will not prevent his recovering on the policy, if, at the time of the loss, it was in good working order, and the breach had nothing to do with the loss,—at least, where there is no express provision in the policy for its becoming void for such breach, while such provisions are found in connection with other conditions and warranties.

Same — construction — forfeiture of rights — intention.

2. Insurance policies should not be construed to work a forfeiture of either party's rights unless it plainly appears that such was the intention of both contracting parties.

Same — extending automatic sprinkler — effect.

3. A warranty in an insurance policy that insured will use due diligence that the automatic sprinkler system shall at all times be maintained in good working order is not broken by the temporary disconnection of the system for the purpose of making extensions to it, where the work of making the alterations is prosecuted with due diligence.

(Morris, J., dissents.)

(January 14, 1910.)

Note.— *Effect of temporary condition which ceased before loss, under general provision against increase of risk, or specific provision against certain conditions.*

This question is discussed in the note to Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co. 10 L.R.A.(N.S.) 736, in which it is declared that though there is a conflict of opinion as to the effect of the temporary violation of condition in a fire insurance policy, the weight of authority seems to support the rule that the breach of a provision which, by the terms of the policy, works a forfeiture thereof, merely suspends the policy during the continuance of the violation; and that, if the violation is discontinued during the life of the policy, and has no existence at the time of the loss, the policy revives, and the insurer is liable, though there was no consent on the latter's part to such violation, and the violation was of such a character that the

A PPEAL by defendant from a judgment of the Superior Court for Kitsap County in plaintiffs' favor in an action brought to recover the amount alleged to be due on a certain fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs H. T. Granger and Hughes, McMicken, Dovell, & Ramsey, for appellant:

When the risk was increased by the withdrawal of the protection afforded by the sprinklers, the policy became null and void by its express terms, and thereafter could not be revived except with the consent of the insurance company.

Imperial F. Ins. Co. v. Coos County, 151 U. S. 462-470, 38 L. ed. 235-238, 14 Sup. Ct. Rep. 379; Jump v. North British & M. Ins. Co. 44 Wash. 596, 87 Pac. 928, 12 A. & E. Ann. Cas. 257; German Ins. Co. v. Russell, 65 Kan. 373, 58 L.R.A. 234, 69 Pac. 345; Brehm Lumber Co. v. Svea Ins. Co. 36 Wash. 520, 68 L.R.A. 109, 79 Pac. 35; Cronin v. Fire Asso. of Philadelphia, 123 Mich. 277, 82 N. W. 45; Hardiman v. Fire Asso. of Philadelphia, 212 Pa. 383, 61 Atl. 991; German-American Ins. Co. v. Humphrey, 62 Ark. 348, 54 Am. St. Rep. 297, 35 S. W. 428; Hoover v. Mercantile Town Mut. Ins. Co. 93 Mo. App. 111, 69 S. W. 42; Replogle v. American Ins. Co. 132 Ind. 360, 31 N. E. 947; Hill v. Middlesex Mut. Assur. Co. 174 Mass. 542, 55 N. E. 319; Kyte v. Commercial Union Assur. Co. 149 Mass. 116, 3 L.R.A. 508, 21 N. E. 361; Concordia F. Ins. Co. v. Johnson, 4 Kan. App. 7, 45 Pac. 723; Moore v. Phoenix Ins. Co. 62 N. H. 240, 13 Am. St. Rep. 556; Reynolds v. German-American Ins. Co. 107 Md. 110, 15 L.R.A. (N.S.) 345, 68 Atl. 262; Georgia Home Ins.

insurer would have declared a forfeiture therefor had it been aware of it at the time of its existence. Since the preparation of that note, this rule was applied in Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013, and recovery was allowed for the loss of a house by fire, under a policy providing that the same should be void if the house should become vacant and unoccupied, and so remain for a specified period, though it appeared that the house became vacant and unoccupied for a term longer than the specified period, but was occupied at the time of the fire. The court declared that the meaning of the provision in question was merely that if a loss occurred during the prohibited vacancy, the policy was void, and that it should not be construed so as to accomplish more than the purpose for which it was inserted, which was to protect the insurer from the risk resulting from vacancy; and that if the risk was terminated by reoccupancy, the reason for the condition was also terminated.

Co. v. Rosenfield, 37 C. C. A. 96, 95 Fed. 358.

The provision as to automatic sprinklers was a warranty, the breach of which invalidated the policy.

Port Blakely Mill Co. v. Hartford F. Ins. Co. 50 Wash. 657, 97 Pac. 781; Wilson v. Hampden F. Ins. Co. 4 R. I. 159; Gross v. Colonial Assur. Co. (Tex. Civ. App.) 121 S. W. 517.

Negligence on the part of plaintiffs' servants constitutes a defense to the action.

First Cong. Church v. Holyoke Mut. F. Ins. Co. 158 Mass. 475, 19 L.R.A. 587, 35 Am. St. Rep. 508, 33 N. E. 573; McKenzie v. Scottish Union & Nat. Ins. Co. 112 Cal. 548, 44 Pac. 922.

Messrs. Dorr & Hadley, with Messrs. Hastings & Stedman, Walter S. Fulton, C. D. Sutton, and Titus & Creed, for respondents:

In the absence of any express agreement, the property owner, by taking out a policy of insurance, does not deprive himself of the right to use his property in the common and ordinary mode, including the right to make all proper and reasonable repairs.

Townsend v. Northwestern Ins. Co. 18 N. Y. 168.

Where due diligence is exercised, the sprinkler equipment may confessedly be actually out of order at the very time of the fire, and the assured, notwithstanding, be entitled to recover.

Cummer Lumber Co. v. Associated Mfrs. Mut. F. Ins. Corp. 67 App. Div. 151, 73 N. Y. Supp. 668, affirmed in 173 N. Y. 633, 60 N. E. 1106.

The mill company was not required to do everything possible, but only what was reasonable under the given facts and conditions.

Smith v. Scottish Union & Nat. Ins. Co. 200 Mass. 50, 85 N. E. 841; Hendricks v. Western U. Teleg. Co. 126 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 543; Keene v. New England Mut. Acci. Asso. 161 Mass. 149, 36 N. E. 891; Kentucky Life & Acci. Ins. Co. v. Franklin, 102 Ky. 512, 43 S. W. 709; Gloucester Mfg. Co. v. Howard F. Ins. Co. 5 Gray, 497, 66 Am. Dec. 376.

Even where there is an express prohibition against repairs, the making of repairs is not an increase of risk, and where an insurance company grants the express permission to make repairs, it assumes all the risk incidental to such repairs.

Townsend v. Northwestern Ins. Co. supra; Whitney v. Black River Ins. Co. 72 N. Y. 117, 28 Am. Rep. 116; Firemen's Ins. Co. v. Appleton Paper & Pulp Co. 161 Ill. 9, 43 N. E. 713; Brighton Mfg. Co. v. Reading F. Ins. Co. 33 Fed. 232; Albion Lead Works v. Williamsburg City F. Ins. Co. 2 Fed. 479.

28 L.R.A.(N.S.)

The negligence of servants will not forfeit a policy where due diligence only is required of the policy holder, and he shows that he has done all that is reasonable under the circumstances.

Daniels v. Hudson River F. Ins. Co. 12 Cush. 416, 59 Am. Dec. 192; McGannon v. Michigan Millers' Mut. F. Ins. Co. 127 Mich. 636, 89 Am. St. Rep. 501, 87 N. W. 61; Phenix Ins. Co. v. Guarantee Co. of N. A. 53 C. C. A. 360, 115 Fed. 964; Mickey v. Burlington Ins. Co. 35 Iowa, 174, 14 Am. Rep. 494; Albion Lead Works v. Williamsburg City F. Ins. Co. supra; Phoenix Assur. Co. v. Coffman, 10 Tex. Civ. App. 631, 32 S. W. 810; Burlington F. Ins. Co. v. Coffman, 13 Tex. Civ. App. 439, 35 S. W. 406; London & L. Ins. Co. v. Gerteisen, 106 Ky. 815, 51 S. W. 617; McNutt v. Virginia F. & M. Ins. Co. (Tenn.) 45 S. W. 61; Insurance Co. of N. A. v. McDowell, 50 Ill. 120, 99 Am. Dec. 497; McGannon v. Millers' Nat. Ins. Co. 171 Mo. 143, 94 Am. St. Rep. 778, 71 S. W. 160.

The use of the word "warranty" did not make the provision a warranty.

Hart v. Niagara F. Ins. Co. 9 Wash. 620, 27 L.R.A. 86, 38 Pac. 213; Goddard v. East Texas F. Ins. Co. 67 Tex. 69, 60 Am. Rep. 1, 1 S. W. 906; Redman v. Hartford F. Ins. Co. 47 Wis. 89, 32 Am. Rep. 751, 1 N. W. 393; Aetna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125; Moulor v. American L. Ins. Co. 111 U. S. 341, 28 L. ed. 449, 4 Sup. Ct. Rep. 466.

Where the alleged breach of a representation has not contributed to a loss, or damaged the insurance company in any way, the breach, if it exists, does not void the policy.

Hart v. Niagara F. Ins. Co. supra.

A temporary breach of the sprinkler provision would not *ipso facto* nullify the policy, inasmuch as the breach was repaired before the fire.

Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co. 10 L.R.A.(N.S.) 736, and note, 76 S. C. 76, 121 Am. St. Rep. 941, 56 S. E. 654, 11 A. & E. Ann. Cas. 780; Traders' Ins. Co. v. Catlin, 163 Ill. 256, 35 L.R.A. 595, 45 N. E. 255; Born v. Home Ins. Co. 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676; North British Mercantile Ins. Co. v. Union Stock Yards Co. 120 Ky. 465, 87 S. W. 285; Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co. (Tex. Civ. App.) 49 S. W. 271; 2 Cooley, Briefs on Insurance, pp. 1883, 1884.

Morris, J., delivered the opinion of the court:

Action upon a fire insurance policy written by appellant, insuring the property of the mill company against loss by fire in the

sum of \$10,000, with loss, if any, payable to the Detroit Trust Company. The policy was in the usual form, except that it had attached to it a rider containing a description of the property insured, and various special agreements with reference to the particular risk. On April 22, 1907, a fire occurred, whereby a portion of the insured property was damaged. The appellant, contending that the policy had been avoided by the failure of the mill company to observe one of the special agreements, claimed to be a "warranty," denied its liability, and this action was instituted to enforce payment, resulting in findings in favor of respondents, and a judgment in the sum of \$6,452.90, with interest from July 15, 1907, from which this appeal was taken.

Three contentions are made by appellant, upon which we are asked to reverse the judgment.

(1) That the Detroit Trust Company may not maintain an action within this state, not having paid an annual license fee nor otherwise complied with the provisions of our laws in regard to foreign corporations doing business within this state.

(2) That the policy was avoided by the breach of a warranty therein contained.

(3) That an automatic sprinkler system connected with the mill plant was not in working order at the time of the fire.

Each of these contentions has been considered, but, having reached a conclusion upon the second which is determinative of the appeal, we will not discuss the first and third. The clause in the policy which suggests the second assignment of error is as follows: "Warranted by the insured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order." The Port Blakely Mill Company was what is known in insurance circles as "a sprinkler risk," and the evidence discloses that the rate of premium upon "a sprinkler risk" was approximately 50 per cent less than upon the same mill without the sprinkler attachment. So that, by the maintenance of the sprinkler system and the insertion in the policy of the clause above referred to, the mill company obtained this policy upon the payment of \$229 premium, which otherwise would have cost it approximately \$458. It is apparent, therefore, that both parties had fully in mind at the time of the issuance of the policy the advantages that would result to each because of the existence of the sprinkler system, and the use of due diligence on the part of the insured to maintain it in good working order at all times. To the insured it meant a saving of \$229 on the premium paid; to the insurer it meant a lessening of its risk,—ample consideration

to each why this particular form of policy should be chosen, and the sprinkler clause made a part thereof; and having in mind this situation, it is not unreasonable to assume that the words used in the sprinkler clause were employed by both parties with a full understanding that it was a statement and assumption of condition and undertaking on the part of the insured, relating to the risk, and affecting its character and extent. While, as is said by Shaw, Ch. J., in *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, at page 423, 59 Am. Dec. 192, "there is undoubtedly some difficulty in determining by any simple and certain test what propositions in a contract of insurance constitute warranties;" and conceding the leaning of the courts, in order to protect the insured and avoid a forfeiture, is to hold agreements and stipulations in the policy to be representations rather than warranties in all cases where there is any room for construction, it has nevertheless become fixed and settled, except in so far as it may have been changed and modified by statute in some of the states, that all statements regarding the risk, contained in or appearing on the face of the policy, are warranties. Cooley, *Briefs on Insurance*, p. 1133. And such is the rule, irrespective of the use of the word "warranty" or "warranted." *Redman v. Hartford F. Ins. Co.* 47 Wis. 89, 32 Am. Rep. 751, 1 N. W. 393; *Wood v. Hartford F. Ins. Co.* 13 Conn. 534, 35 Am. Dec. 92; *Moulor v. American L. Ins. Co.* 111 U. S. 341, 28 L. ed. 449, 4 Sup. Ct. Rep. 466; *Barnard v. Faber* [1893] 1 Q. B. 340. Wood on *Fire Insurance*, vol. 1, at page 449, says: "The rule seems to be that such representations in or a part of the policy are construed to be warranties when it appears to the court that they have had in themselves, or in the view of the parties, a tendency to induce the company to enter into the contract on terms more favorable to the insured than without them. . . . Any statement or description of any undertaking on the part of the assured on the face of the policy, which relates to the risk, is a warranty,—an express warranty. . . . It is not necessary that it should be stated to be a warranty, or that it should be so by construction. It is enough that it appears upon the face of the policy and relates to the risk." The case before us would undoubtedly fall within such a rule as Mr. Wood refers to, when it appears that the premium on this policy upon a "sprinkler risk," and with the sprinkler clause added, was reduced approximately 50 per cent of what it would have been otherwise. This was certainly, in his language, "a tendency to induce the company to enter into the contract on terms more favorable to the in-

sured than without them." In *Wood v. Hartford F. Ins. Co.* supra, p. 544, the court says: "The general rule in regard to what constitutes a warranty in a contract of insurance is well settled. Any statement or description or any undertaking on the part of the insured, on the face of the policy, which relates to the risk, is a warranty. . . . When it is once ascertained that it relates to the risk, and was inserted in reference to that, it must be strictly observed and kept or the insurance is void." To our minds the conclusion, both upon reason and authority, is that the clause in question was and is a warranty.

Having reached this conclusion, there is but one other question to be considered: Was there a breach of this warranty? It is undisputed that from April 1st to April 21st the sprinkler system in what was known in the mill as "No. 3" was disconnected. The fire occurred on April 22d, and there is a sharp conflict in the testimony as to whether or not No. 3 was in operation at the time of the fire. But, giving due weight to the finding of the court below, that it was connected upon April 21st, there was a period of nearly three weeks when it is admitted that no protection was afforded by the sprinkler system in No. 3. The repairs undertaken by the mill during this time were permissible under the policy, but it appears that it was the work of only a few hours to disconnect system No. 3 from its old location and move it to its new. Such being the fact, it was not "due diligence," as called for in the policy, for the mill company to continue the operation of the mill without the protection of sprinkler system No. 3. It was an undoubted and material increase in the risk, contrary to the terms of the warranty, and was a breach thereof. The mill company, having broken its contract of warranty by the failure to use due diligence in maintaining the sprinkler system at all times in good working order, by such failure released the appellant from liability under the policy, and the same thereby was avoided. So that whether or not the system in No. 3 was in good working order on April 22d is immaterial, since the policy, because of the breach of the warranty, was not then in force or effect. And it was likewise immaterial whether or not this breach contributed to the loss. The policy, being at an end because of its broken warranty, no longer covered any loss or damage to the mill property, and was wholly avoided.

That such is the effect of a broken warranty in a policy of fire insurance there can no longer be any doubt. The principle has been so oft asserted and so frequently announced by both courts and text writers

that it must be regarded as settled. May on Insurance, vol. 1, § 156, thus states the rule: "Whether the fact stated or the act stipulated for be material to the risk or not is of no consequence, the contract being that the matter is as represented, or shall be as promised; and unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer, or the intervention of the law, or the act of God, the insured can have no claim." Marshall on Insurance, at page 249, states the same rule in this language: "It is also immaterial to what cause the noncompliance is attributable; for if it be not in fact complied with, though perhaps for the best of reasons, the policy is void." In the case of *McKenzie v. Scottish Union & Nat. Ins. Co.* 112 Cal. 548, 44 Pac. 923, the supreme court of California, quoting the above rules, adds: "The foregoing quotation is but the enunciation in brief form of a principle laid down by all the writers on the subject of insurance, and enunciated in the leading cases of this country and England." The Supreme Court of the United States recognizes the rule in *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379, and says: "If it appears that the contract has been terminated by the violation on the part of the assured of its conditions, then there can be no right of recovery." We have been furnished with a certified copy of the opinion of Judge Whitson in *Port Blakely Mill Co. v. Royal Ins. Co.* in the circuit court of the United States for the western district of Washington, northern division (lately decided, but not yet published), in which that learned judge, in passing upon a similar clause in a policy covering this same risk, has reached a like conclusion to the one here announced.

The judgment is reversed, and the cause remanded, with instructions to dismiss.

Rudkin, Ch. J., and Gose and Chadwick, JJ., concur.

Fullerton, J., dissents.

A petition for rehearing having been granted, **Dunbar, J.**, on August 6, 1910, handed down the following opinion, which became the opinion of the court:

Action on fire insurance contract. Judgment was obtained in the superior court by the insured, respondents in this case, on a fire insurance policy issued by the appellant. An appeal followed, and the judgment was reversed by a majority decision of department 1 of this court, filed January 14, 1910, to which reference is made for a statement of the case. 56 Wash. 681, ante. 593. 106 Pac. 194. A petition for rehearing was

filed, addressed to the court *en banc*. Said petition was granted, and the case again argued, and it is now here for final determination by the whole court.

There were three contentions made by the appellant in the first argument of the case: (1) That the Detroit Trust Company could not have maintained this action; (2) that the policy was avoided by the breach of a warranty therein contained; and (3) that the automatic sprinkler system connected with the mill plant was not in working order at the time of the fire. It was stated in the opinion that each of these contentions had been considered, but that, in view of the conclusion reached on the second, the first and third would not be discussed. Inasmuch, however, as the first proposition lay at the threshold of the case, and was determinative of the right to bring the action, the court must have decided that proposition against the contention of the appellant before it proceeded to the determination of the second proposition. In any event, we think the technical objection is without merit, for all the reasons urged by respondents. We have given painstaking consideration to the third proposition, for it involves the actual merits of this controversy. But from an examination of the long statement of facts, containing more than 600 pages, we are not convinced that the findings of the trial judge were not sustained by the weight of the evidence, and will therefore consider the case from the standpoint of such findings.

The sprinkler provision, appearing on a rider attached to the policy, was as follows: "Warranted by the assured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order." Privilege was given the assured to make additions and repairs. The fourteenth and fifteenth findings of the court, bearing on this proposition, are as follows:

"(14) That on or about the 29th day of January, 1907, it became and was necessary, essential, and requisite to the business of the Port Blakely Mill Company that an addition, alterations, and repairs be made to that portion of said plaintiff's sawmill building which was known as the lath mill, and on or about April 1st, 1907, it became and was necessary—in order to make the automatic sprinkler equipment more efficient, and in order to extend the automatic sprinkler equipment to the addition to that portion of said plaintiff's mill building known as the lath mill, and in order to have all of said sawmill building, including said lath mill, protected by automatic sprinkler equipment—to make additions, alterations, and repairs to what was known as the No. 3 automatic sprinkler division in the east-

erly portion of said sawmill, and that accordingly, on or about the 29th day of January, 1907, the plaintiff, Port Blakely Mill Company, commenced the work of making said addition, said alterations and repairs to said lath mill, and on or about April 1, 1907, commenced the work of altering, repairing, and extending said No. 3 automatic sprinkler division to the new portion or addition to said lath mill, and for that purpose, it was necessary, essential, and requisite that the water be wholly turned off of said No. 3 automatic sprinkler division, and that said repairs and alterations could not be made to said sprinkler division, and said extensions thereof could not be made, unless the water was turned off of said division. That said repairs could not safely be made while said plaintiff's sawmill was in operation; that plaintiff, Port Blakely Mill Company, on or about April 1, 1907, had progressed with the work of said additions, alterations, and repairs to said lath mill sufficiently to enable it to operate said lath mill, and accordingly the lath mill was put in operation after said date. That said Port Blakely Mill Company continued with the work of making said repairs and alterations and extensions to said sprinkler division with due diligence, and at all times used due diligence that the automatic sprinkler system should at all times be maintained in good working order; and on April 21, 1907, the said alterations, repairs, and extensions to said sprinkler division were so far completed that the water was wholly turned on in said sprinkler division No. 3. That said water was turned on until and during said fire. No. 3 automatic sprinkler system, and all other divisions of said plaintiff's sprinkler system in said mill, were supplied with water in such quantities and with such pressure, that the heat produced by said fire in and about said mill did melt and release said sprinkler heads attached to said No. 3 automatic sprinkler division and all other parts of said sprinkler system in said mill, and permitted the water to flow through the same and out through the pipes distributed throughout said mill, and caused said water to be sprinkled upon said fire. That said sprinkler system in said mill, in all its parts and divisions, was in good and thorough working order at the time of and during said fire.

"(15) That said fire originated under what was known as sprinkler division No. 4 in said sawmill building of said Port Blakely Mill Company, immediately to the westerly in said mill building of said sprinkler division No. 3, aforesaid; and said fire did not originate in said sprinkler division No. 3, aforesaid; said fire originated at what

was known as the friction pulley of and under the burner conveyor on the main floor, beneath the sawing floor of said sawmill, and spread immediately on belts and pulleys above the sawing floor to the roof of said sawmill building, causing the sprinklers in the roof of said mill to operate as the fire reached the roof; but said fire rapidly spread beyond the control of said sprinklers."

So that it must be conceded that there was no lack of diligence; that the sprinkler system was in operation at the time of the fire; that the violation of the contract, if there was any violation, was not the cause of the fire, and that the fire did not even originate in the sprinkler division where the repairs had been made. It must therefore readily be seen that, if our former opinion is sustained, it will not be upon any equitable ground, but by reason of sustaining the hard and inflexible rule contended for by appellant, that the covenant or agreement in this case amounted to a warranty or a statement of a condition precedent, a temporary violation of which would preclude a recovery, even though it affirmatively appear that such temporary suspension was not in existence at the time of the fire, and could not possibly have been the cause of the fire. This rule seems to be opposed to our primary conception of fair dealing, is not practised or tolerated in our everyday affairs with each other, is not a commendable rule of action under any circumstances, and is diametrically opposed to the general rule that only such damages can be recovered from the breach of a contract as are shown to be the result of such breach. This rule has stood the test of time, because it is based upon common sense and fair dealing, and no court has ever felt called upon to apologize for it or distinguish it out of existence. Of course, it is fundamental that courts cannot make contracts for parties, and it follows that they must enforce such contracts as are made; but, in interpreting contracts, they should not be bound by hard and fast rules or definitions which evidently were never within the minds of the contracting parties. Insurance contracts, like all other contracts, should be construed with reference to what the parties meant when interpreted in the light, not only of the language employed, but of the evident object of the contract, the benefits secured on one hand, the perils or risks sought to be avoided on the other. They should not be so construed as to work a forfeiture of either party's rights, or to defeat the very object of the contract for which a price has been paid, unless it plainly appears that such was the intention of the contracting parties, and that the effect of the language of the contract

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was well understood by them when the contract was entered into; and it ought in reason to be a sign to the court that there has been a misapprehension on the part of the contracting party whose rights are thus contracted away,—that the contract was not understood. Especially is this true in this character of contracts, where the language of the contract is the language of the insurance company, whose duty it is to see to it that, where unreasonable and one-sided provisions are incorporated into a contract, the contract is understandingly entered into.

This was the rule of interpretation indorsed by this court in *Poultry Producers' Union v. Williams* (Wash.) 107 Pac. 1040, referred to by appellant in its reply brief in support of the contention that it was the settled law of this state that the breach of a warranty rendered the policy void, even though the breach may have ceased at the time of the loss. Of course, the ordinary expression was indorsed that the truth of a warranty is a condition precedent, and there is no real objection to this statement if it means that the insured intended the representation to be a warranty which would render his contract void whether it was the cause of the loss or not. But to render a decision valuable on any given point, it is necessary to be informed what the case was which the court was deciding, and to construe the language used with reference to the facts discussed. That was an action by one Williams, an employee of the Poultry Producers' Union, who was afterwards made secretary, treasurer, and manager of the company. In this position a fidelity bond was required, and an application was made and signed by the president of the company. Among other questions asked and answered were the following: "(13) When were his accounts last examined? A. September 11, '07. (14) Were they at that time in every respect correct and funds on hand to balance? A. Yes. (15) Is there now or has there been any shortage due you by bondsmen? A. No." And the application contained the stipulation that "it is agreed that the above answers are to be taken as a condition precedent and as the basis of the said bond applied for." It was further conditioned that, "if the employee's written statement hereinbefore referred to shall be found in any respect untrue, this bond shall be void." It occurred that the answers to some of the pertinent questions were not true, and the insurance company resisted the payment of the policy on that ground; and the court said, in passing upon the question: "Whether the answers made by the applicant for a policy of indemnity or insurance are warranties or mere representations must depend upon the character of the question

and its answer, the opportunity of the insurer to guard against the representation, in the light of its consequences, or whether it is material to the risk." It will be seen that in that case the company had no way to guard against the representation; that it certainly was material to the risk, and continued to be material to the risk, for it affected the reputation and character of the party upon whom the risk was placed. This was a risk that would be a continuing risk, running throughout the life of the insurance,—a different proposition altogether from the one at bar, where, if there had been a violation of a condition at some time past, such violation had ceased at the time of the loss, and could not possibly, in any event, have had any effect upon the loss.

In this connection, counsel for appellant also relied upon *Hoeland v. Western Union L. Ins. Co.* (Wash.) 107 Pac. 866. That, also, was a case where the defense was meritorious, the risk having been taken on representations concerning the health of the applicant, and it afterwards appearing that the representations were not true, the company refused to pay the policy. There could have been no suspicion of the violation of the representations in this case, for if the representations were not true, as we have just remarked in the other case, their effect would be to follow the risk through the life of the assured, and to finally effect the loss. It is true that the court, in discussing the case, said: "The rule is that when a representation made by an applicant for insurance is carried into a contract, and expressly made a part of it, it becomes a warranty, and its materiality is settled by the agreement of the parties,"—citing *Elliott on Insurance*, § 102. But that statement must have been made with reference to the facts in the case, and the writer of the opinion could not have meant to convey the idea that it would apply to all cases, even where there was a discontinuance of the violation, for the same authority cited, *viz.*, *Elliott on Insurance*, in § 205, expressly says that such is not the rule under the weight of authority. Section 205 is as follows: "The decisions are conflicting upon the question of the effect of a violation of a condition in a fire insurance policy. The weight of authority seems to support the view that a violation of a condition that works a forfeiture of the policy merely suspends the insurance during the violation; and if the violation is discontinued during the life of the policy, and does not exist at the time of the loss, the policy revives and the company is liable, although it had never consented to the violation . . . and such violation has been
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such that the company could, had it known of it at the time, have declared a forfeiture therefor." But this question has been decided by this court in *Hart v. Niagara F. Ins. Co.* 9 Wash. 620, 27 L.R.A. 86, 38 Pac. 213, and decided on principles applicable to and necessary to the decision in this case. In that case the stipulation was as follows: "It is understood and agreed that during such time said mill is idle, or not in operation, a watchman shall be employed by the insured, to be in and upon the premises constantly, day and night."

The contention of the appellant was that the terms of the policy constituted the measure of the insurer's liability, and, in order to recover, the insured must show himself within these terms. In other words, the compliance of the insured with the terms of the contract was a condition precedent to the right to recover, and the court instructed the jury that, if they believed from the evidence that at any time during the existence of the policy the assured failed to keep a watchman while the mill was not in operation, plaintiffs could not recover; adding, "unless you further find from the evidence that said fire was not due to, or the result of, their failure to keep such watchman." That instruction was sustained by this court. The stipulation or representation made in that case was as strong as the representation made in this case, with the exception that the word "warranted" is used in the case at bar, instead of the words "it is understood and agreed." Here it is "warranted" that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order. There it was "understood and agreed" that such and such things should be done. In our judgment the word "warranted" adds nothing to the force of the stipulation. It is well understood—in fact, it is conceded—that the expression of the word "warranty" does not necessarily constitute a warranty; that there may be warranties without the use of the word; that there may not be warranties when the word is used. In *Charles Dickens Childs' History of England*, in a review of the character of Lord Dunstan, the author said that, after he died, the people called him a saint; but naïvely remarked that calling him a saint did not make him a saint, any more than calling him a coach horse would make him a coach horse. And so it is with the stipulation in this case. The word "warranty" is of such general signification and of such general and discursive use that the expression as used here is absolutely without any legal signification. It is common for people in ordinary conversation to say that "I will warrant this" or "I will warrant that," or "I

warrant this," "I warrant you" that so and so will happen, or will not happen, when there is no intention whatever on the part of the speaker to bind himself to make good the expression. The rule of construction must be that the word used is to be construed in its ordinary signification. The legal signification may have been understood by the insurance company when it employed this word, but in order to avail itself of such legal signification, it must appear that the other contracting party also understood it. While there may have been some things said in the discussion of the Hart Case, as there generally is in the discussion of cases, which were not material to the decision of the case, a review of it will show beyond question that the essential idea in the case was the same as the essential idea here, *viz.*, whether, by reason of a breach which did not continue, the policy was avoided. The court, in discussing the case, said: "In an ordinary contract, no damages can be recovered by reason of a breach if the breach does not result in damage. In this case, if the rule contended for by appellants should prevail, if the respondents had failed or neglected to keep a watchman for one day, and the mill had not burned for a month afterward, and it positively appeared that the fire was in no way attributable to such neglect or breach, the company could escape its liability by reason of a breach which was entirely immaterial, and which in no way contributed to the damage." It will be seen that this language is especially applicable to the case at bar, where it appears affirmatively from the findings of the court that the fire was in no way attributable to the breach in relation to the maintaining of the sprinkler system, and that such breach had been corrected before the fire. Again, it was said in that case, that "the rule is universal that statements contained in the application will not be construed to be warranties if elsewhere in the contract there can be found reason to suppose that such was not the clear understanding of the parties;" and the court proceeded to show by other provisions of the contract that such could not have been the undersanding.

So in this case, as showing that it was not the intention of the contracting parties that the representation in regard to the sprinkler should work a forfeiture of the contract or render it void, there are certain statements or provisions and representations made in the contract in which it is especially provided that a forfeiture or avoidance of the contract shall be the result. For instance, in the watchman clause, after stating, as does the sprinkler clause, that "it is warranted by the insured that whenever any of the following named parts of the plant," etc., shall

be idle, it is stated that; "if any of the above-named parts is idle or not in operation for a period of more than thirty days without the written consent of the company, this policy shall be void." The same provision substantially is in the "reduced rate average clause," the language being: "In consideration of the reduced rate at which this policy is written, it is expressly stipulated and made a condition of this contract that this company shall be liable for no greater proportion of any loss than the amount hereby insured bears to 70 per cent of the actual cash value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon." The term "made a condition of this contract" is probably equivalent to a stipulation that the contract shall be void if the condition is violated. Again, there is the following stipulation: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the substance thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud," etc. There would be nothing unconscionable in construing such provisions or stipulations in a contract of this kind as warranties, for the concealment or misrepresentation of any fact would work an actual hardship upon the insurance company. Again, it is provided: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease,"—another reasonable provision which is stated so definitely that there is left no room for controversy as to what was meant. Again: "This policy may, by a renewal, be continued under the original stipulation, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void,"—another positive expression concerning the avoidance of the contract, based upon reason and good conscience. In the Hart Case, *supra*, certain similar conditions were reviewed, and the court held that, under the rule of *expressio unius est exclusio alterius*, the particular clause could not be construed to be a warranty. That rule applies with especial clearness to this case, where so many provisions provide especially that the contract shall be void if they are not complied with, and where there is no such provision in the representation relied upon. In that case, quoting from May on Insurance, vol. 1, § 164, it was said: "They are not necessarily warranties because they appear on the face of the policy. In order to have the

force of a warranty, the statement must indeed constitute a part of the contract; but it by no means follows that every statement which constitutes a part of the contract is therefore a warranty. Whether they are so or not will depend upon the form of expression used, the apparent purpose of the insertion, and sometimes upon the connection or relation to other parts of the instrument." That quotation is also expressly applicable to this case; for, contrasting the form of the expression used in this representation relied upon and the form of expression used in the other representations which we have noticed, and considering the relation of the stipulation discussed to the other parts of the instrument, it must appear that it was not the intention of the parties to constitute the representation a warranty. That case has stood as the law of this state since its announcement in October, 1894, up to the time that the opinion was rendered in this case, and should not now be abrogated without being specially overruled.

But, in view of the fact that we are called upon to overrule an opinion announced by a department of this court, we will examine the authorities generally, and especially those relied upon in the opinion to sustain the decision, with a view to ascertaining if the cases cited, in consideration of the facts of the cases which were before the court, actually do sustain the appellant's contention. In the first case cited, *viz.*, *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, 59 Am. Dec. 192, it will be found that it was expressly stipulated that, under certain conditions, the insurance should be void and of no effect. In addition to the fact that the policy provided that, if any misrepresentations were made, the policy should be void and of no effect,—a statement which is not in the provision under discussion,—the decision was against the contention of the insurance company, the court saying: "The defendants, relying upon a violation of the statements in the application, contended that these statements were warranties or conditions, and if they were not strictly and literally true at the time of the application, that the policy was void; and that if they were then true, and the plaintiffs afterwards ceased to comply with them, the policy thereupon became void, whether the same were or were not material to the risk. But the presiding judge instructed the jury, that the statements of the application were not warranties, requiring an exact and literal compliance, but that they were representations; and as such, must have been substantially true and correct as to things done existing at the time the policy was issued; and that so far as they related to the future,—to things to be done, and rules and

precautions to be observed,—they were stipulations, to be fairly and substantially complied with." The supreme court said: "The court are of opinion that, looking at the policy and the application, this instruction was correct." Then follows a portion of the quotation set forth in the opinion: "There is undoubtedly some difficulty in determining by any simple and certain test what propositions in a contract of insurance constitute warranties, and what representations."

In Cooley's *Brief on Law of Insurance*, vol. 2, p. 1133, that author says: "In accordance with the principle discussed in subdivision (b), that warranties are part of the policy, it may be laid down as the well-settled rule that, subject to qualifications to be discussed hereafter, all statements regarding the risk, contained in or appearing on the face of the policy, are warranties." But the qualifications thereafter discussed render the rule announced almost without value, for no court has gone to the extent of holding that all statements regarding the risks contained in or appearing on the face of the policy are warranties; and the cases cited by Cooley to sustain the announcement made in the text treat mostly upon the qualifications which are mentioned in the citation, and hold almost uniformly that, where there is any doubt as to whether a statement in an insurance policy is an express warranty, the court should lean against that construction which imposes upon the assured the obligation of a warranty. In one of the cases cited (*National Bank v. Union Ins. Co.* 88 Cal. 497, 22 Am. St. Rep. 324, 26 Pac. 509) it was held that, although the Code of that state provided that a statement in a policy of a matter relating to the person or thing insured or to the risk as a fact is an express warranty, if, taking the entire policy in all its terms and language, it can be seen that such was not the intention of the parties, the statement of fact cannot be deemed an express warranty. *Redman v. Hartford F. Ins. Co.* 47 Wis. 89, 32 Am. Rep. 751, 1 N. W. 393, does not, either in principle or in the facts, sustain the opinion. There the court laid down the general rule that a stipulation in an application for fire insurance should be construed in a doubtful case most strongly against the insurer, by whom it was framed; and that, in a doubtful case, that construction of a contract which will save it is to be preferred to one which will destroy it; that the use of the word "warranty" in a contract does not necessarily control its construction; there may be a warranty without the use of that word, and its use will not always create one; that the stipulation in the policy, that the application shall be considered a warranty by the insured, must be construed to mean such a

warranty as is stipulated in the application itself. In that case, in answer to the question, "What material was used in lubricating the machinery?" the assured answered: "Lard and sperm oil;" and to the questions whether the machinery was regularly oiled, and, if so, by whom and how often, the answer was: "Yes, by engineer and miller, as often as necessary." The proof was that, during the whole life of the policy, an oil known as "Fire Engine Oil" was constantly used in the mill for lubricating purposes, and that the machinery was not usually oiled by the engineer or miller, but by another person, specially employed by plaintiffs for that purpose. The circuit court held that the answers to the above questions were absolute and continued undertakings in the nature of express warranties, and that the failure by the plaintiffs to use lard and sperm oil, and to have the machinery oiled by the engineer and miller invalidated the contract of insurance, and released the defendant from any and all obligations under it, and the plaintiff was nonsuited. This judgment was reversed by the supreme court, the court saying: "The stipulation was framed by the insurer, and had it been intended to require the insured to go beyond the interrogatories and disclose facts not called for therein (if any existed), material to the risk, a general interrogatory calling for such facts would have been inserted; or, at least, the stipulation would have been framed to express that intention more clearly. We cannot assume that the insurer would leave its intention in that behalf to rest in uncertain and doubtful inference, when it was so easy to express it clearly and unmistakably."

In *Wood v. Hartford F. Ins. Co.* 13 Conn. 533, 35 Am. Dec. 92, while the court laid down and indorsed some of the most radical rules, going so far as to state that any statement or description, or any undertaking on the part of the insured, on the face of the policy, which relates to the risk, is a warranty, and that whether this is declared to be warranty *totidem verbis* or is ascertained to be such by construction, is immaterial; that in either case it is an express warranty and a condition precedent; yet, as we have before indicated, to avoid the harshness of this rule, the court discriminated the facts in the particular case involved, and decided the case in favor of the plaintiffs.

In *Moulton v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. St. Rep. 466, the court reaffirmed the doctrine that, when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condi-

tion precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. This contention arose out of answers to certain interrogatories in relation to the health of the applicant and the health of his ancestors, he having answered that his father, mother, brothers, or sisters had not been afflicted with consumption or any other serious family disease such as scrofula, insanity, etc., since childhood, and that there were no circumstances which would render an insurance on his life more than usually hazardous. He also answered that, as an applicant, he "reviewed the answers to the foregoing questions, clearly understood them, and reaffirmed the answers;" and at the close of the series of questions was the following stipulation: "It is hereby declared and warranted that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that this application shall form part of the contract of insurance, and that if there be in any of the answers herein made any untrue or evasive statements or any misrepresentation or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company."

Notwithstanding this strong expression on the part of the appellant, the court held that, in the absence of explicit, unequivocal stipulations, requiring such an interpretation, it should not be inferred that a person took a life policy with the distinct understanding that it should be void, and all premiums paid thereon forfeited, if at any time in the past, however remote, he was, whether conscious of the fact or not, afflicted with some of the diseases mentioned in the question to which he was required to make a categorical answer, saying that "if those who organize and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid contract, a guaranty against the existence of diseases of the presence of which in his system he has and can have no knowledge, and which even skilful physicians are often unable, after the most careful examination, to detect, the terms of the contract to that effect must be so clear as to exclude any other conclusion;" and reversed the judgment of the lower court, which held that he could not recover. *Wood on Fire Insurance* simply states the general rule which is contended for by the appellant, only as decided by certain cases. We have been unable to obtain *Marshall on Insurance*, but as near as we can gather from quotations, the harsh and inflexible rule sought to be invoked by the appellant has been supported by courts which drew their conclu-

sions from this old work, from which a majority of the courts have receded. In *McKenzie v. Scottish Union & Nat. Ins. Co.* 112 Cal. 548, 44 Pac. 922, the decision was based upon an absolute condition stipulated, and with the stipulation that, if the building should remain shut down for more than thirty days without notice, the policy should be null and void. The condition was broken without any excuse, and the court held that the provision was a warranty. In *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379, the policy provided that it should become void if, without notice to the company, and its permission indorsed thereon, mechanics were employed in building, altering or repairing, and it was held that a violation of this worked a forfeiture of the policy under the express stipulation of the policy that "this policy should be void and of no effect if, without notice to the company and permission therefor [in writing] indorsed hereon, . . . the premises shall be used or occupied so as to increase the risk . . . or the risk be increased by any means within the knowledge or control of the assured . . . or if mechanics are employed in building, altering, or repairing premises named herein; except in dwelling houses, where not exceeding five days in one year are allowed for repairs."

It is unquestionably true, however, that there are cases, though not by any means a majority of the hundreds of cases that have been decided upon this question, that hold to the strict rule contended for; but in grateful contrast to those courts which adopt the rule of strict construction by, it seems to us, making a fetish of words, expressions, and definitions, and attributing potent magic to the word "warranty," or words of similar import, comes like a refreshing breeze from the sea of judicial enlightenment, the voice of the supreme court of Kentucky, in *Germania Ins. Co. v. Rudwig*, 80 Ky. 223, where the rule is condemned. In the course of the opinion it was said: "There is no doubt that an insurance company relies upon the truth of the representations made in either case, and equally certain that, if untrue and material to the risk, no inquiry will be directed for the purpose of determining whether the statement was fraudulently or innocently made. The injury to the insurer is the same; but when no injury can possibly result to the company, where is the breach and what is the penalty? It would certainly be no breach of warranty in a chattel if the quality was better than that warranted, unless the inferior article alone would conform to the wants of the purchaser; and if a breach, the damages would be merely nominal; but in regard to insurance contracts,

that which neither increases nor diminishes the risk, and which could not have influenced the action of either party in making the contract, is seized upon as a ground for forfeiting the entire policy, and depriving the assured not only of all the benefits of the contract, but permits the insurer to retain all the premiums paid. . . . Such contracts are to be interpreted like other agreements, and must be governed by the same rules, good faith . . . being especially required, as one of the parties is necessarily less acquainted with the details of the subject of the contract than the other." The defense in this case was raised because the applicant had made a mistake as to the age at which his father and mother died; and had also violated the provisions of the contract in relation to going outside of certain territory for a limited time, which was forbidden by the contract.

In *Westfall v. Hudson River F. Ins. Co.* 2 Duer, 490, where a clause in the policy of insurance declared against the use of camphene, etc., it was held that there was no evidence that the loss resulted from the use of camphene, and if there was no other evidence than the breach of the alleged warranty, the plaintiff was entitled to judgment. Said the court: "If the use of camphene was meant to be prohibited in the same sense as the storage of gunpowder, we can discover no reason why the prohibition was not express, in the one case as well as in the other. Had the intent been the same, it seems to us that such would have been the language."

And so in the case at bar. Had the intent been to make a warranty of the stipulation in relation to the sprinkler, it would have been so expressed, as it was in the other clauses above mentioned.

The case of *Au Sable Lumber Co. v. Detroit Mfrs. Mut. F. Ins. Co.* 89 Mich. 407, 50 N. W. 870, was cited by this court in the case of *Hart*, supra, and it was there said: "If it was intended that any failure to keep a watchman rendered the policy void, the parties would have so declared." That case was expressly in point in the case considered, and we think is as clearly in point in this case. To the same effect is *McGannon v. Michigan Millers' Mut. F. Ins. Co.* 127 Mich. 636, 54 L.R.A. 739, 89 Am. St. Rep. 501, 87 N. W. 61. *Selby v. Mutual L. Ins. Co.* (C. C.) 67 Fed. 490, was practically the same kind of a case, where the parties had fixed the penalty for breach of warranty by stipulations in the contract in relation to some things, but not in relation to the matter which constituted the defense. In *Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co.* (Tex. Civ. App.) 49 S. W. 271, it was decided that a temporary breach of a

stipulation in a policy to which there was not attached a specific forfeiture, which breach did not exist at the time of the fire loss, and which did not contribute thereto, does not prevent recovery on the policy. The appellant contends that this case is not applicable to the case at bar, but it seems to us that the case is exactly applicable, both as to what is stated in the opinion of the court, and as to the matters decided. In *Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co.* 76 S. C. 76, 10 L.R.A. (N.S.) 736, 121 Am. St. Rep. 941, 56 S. E. 654, 11 A. & E. Ann. Cas. 780, where an insurance policy provided that an increased hazard within the knowledge of the insured would avoid the policy, the owner of the building insured rented to a tenant a portion thereof, to be used for a business more hazardous than contemplated by the policy, and it was held not to avoid the policy, because the temporary hazard ended without loss, and the loss occurred from another source, the court saying: "And if a temporary change of possession, increasing the risk while it lasts, but discontinued before the fire, does not totally avoid the policy, but merely suspends it during the prohibited use, the provisions of the policy above quoted cannot avail the defendant."

This case answers the contention that is made much of, that, by reason of the provision in the policy that the sprinkler system should be employed, the insured obtained insurance at a considerably less price than he could have obtained it for if there had been no such provision. But it seems to us there is no merit in this contention, for the reason that the limited price was accorded to the insured because, by reason of the installing of the sprinkler system, there would be less liability of fire, the object and efficacy of the system being to put out incipient fires. It may have been that that object was attained in this case many times before the fire which had occurred, through the agency of this sprinkler system. But, in any event, the object was attained and insured to the benefit of the insurance company, when it is conceded that the sprinkler system was in vogue and in good running order at the time of the fire; and when it must be further conceded that, if it had not been installed at the time of the fire, the insured could not have recovered at all. The case just quoted, in the course of its argument, says: "The reasoning in *Kyte v. Commercial Union Assur. Co.* 149 Mass. 116, 3 L.R.A. 508, 21 N. E. 361, the Massachusetts case just referred to, is that, unless the policy be regarded as at an end the moment the hazard is increased, the insurance company would be held to furnish insurance for which it had not received the consideration

it was entitled to demand, and which, with knowledge of the facts, it would have demanded. But this reasoning seems fallacious, for the insurer is generally held to be not liable at all if the fire occurs during the continuance of the increased risk, and in consequence of it.

Appellant, in its reply brief, answers this case by saying that no warranty was involved in it, and there was no discussion therein of the law of warranty; but there was a decision of a case which involved the identical question which is presented in this case. The underlying principle was discussed and decided without, possibly, any mention of the word "forfeiture," and it is really a more helpful case in determining the question under discussion than if it had been hampered by a discussion of terms and expressions. In *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221, where a policy of insurance provided that, should the premises insured be applied during the term of insurance to any prohibited use, the policy thenceforth and so long as the same should be so appropriated and applied or used should cease and be of no force or effect, it was held that the application of the property to a prohibited use within the term would not affect the right of the assured to recover in case of a loss, if, at the time of the loss, the property was not being so improperly applied or used, and it did not appear that such antecedent misapplication or use increased the risk or contributed to the loss.

In *Schmidt v. Peoria M. & F. Ins. Co.* 41 Ill. 295, it was held that, where it was provided in a policy of insurance that "if after insurance is effected either by the original policy or by the renewal thereof, the risk be increased by any means or occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of none effect," these words are construed to mean that the policy shall become inoperative only while the increased risk shall be in existence, and when it terminates the liability of the company shall recommence. This case was reaffirmed in *Insurance Co. of N. A. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497. In *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 35 L.R.A. 595, 45 N. E. 255, it was held that the change of the use of an insured building, increasing the hazard, will not prevent recovery, where such use has been abandoned without the declaration of a forfeiture by the company before a loss occurred, and such increase of the hazard in no way continued to affect the risk at the time of the loss, although there had been a stipulation that there should be no increase of hazard. The language in that stipulation was plain and

emphatic, being as follows: "If the assured shall fail to make known to the company at once any fact or circumstance which renders the risk more hazardous than at the time of insuring, or if the hazard be increased by any means within the control of the assured, or if gasoline or petroleum or any of its products are deposited, used, or kept, or burning gas is made, generated, or carbureted within the building and contiguous thereto, then and in every such case this policy shall be void unless consent is indorsed by the company thereon."

It was contended by the learned attorney for the insurance company in that case that the case which we have just cited from Illinois had been determined upon the authority of *New England F. & M. Ins. Co. v. Wetmore*, supra, and that that case had not really determined the questions raised in the subsequent cases and the question which was raised in the case of the *Traders' Insurance Company*, now under consideration. But, notwithstanding that contention, which seems to have some merit in it, the court refused to retreat from the principles announced in the subsequent cases, and emphatically held that the representation was not a continuing one, and did not avoid the policy. It is contended by appellant, as in the preceding case, that the court in Illinois was not considering a warranty, and that there was no discussion in the opinion as to a breach of warranty, and no reference whatever made to the law of warranty. But we have the same answer to make to this criticism that was made supra. It is insisted, however, that the supreme court of Illinois, in the case of *Norways v. Thuringia Ins. Co.* 204 Ill. 334, 68 N. E. 551, expresses the view of the supreme court of that state on the subject of forfeiture. This case is also cited by appellant in its reply brief, but an examination of the case shows that it in no way contravenes the doctrine just cited. There the policy provided that it should be void if gasoline was kept on the premises excepting by permission, and the testimony shows that not only was gasoline kept on the premises between the time that the policy was issued and the time of the fire, but that it was on the premises at the time of the fire. The court, in its opinion, stated that that proposition had been firmly established and undisputed, and that the burden could not be thrown upon the insurance company to prove that the fire was attributable to the unlawful storing of the gasoline in the house. This opinion seems to be in consonance with both reason and authority.

In *Born v. Home Ins. Co.* 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676, where a policy on property provided a forfeiture for

mortgaging it without the company's consent, and assured did mortgage a portion of the property, but before loss paid the encumbrance, it was held that such payment operated to restore the property to the protection of the policy, and hence plaintiff was entitled to recover for the loss thereof. "The theory," said the court, "upon which an existing mortgage is held to be a violation of a clause in the policy against an increase of risk is that it does increase the risk." But, according to the opinion of the court, there was no increase of the risk after the mortgage had been paid off. So the theory upon which the insurance company in this case stipulated for the instalment of the sprinkler system was that such instalment would decrease the risk. And it did increase the risk during the time it was not in working order, but the same reasoning would apply as in the mortgage case in holding that, after its instalment, the increase of risk would be at an end.

In *Athens Mut. Ins. Co. v. Toney*, 1 Ga. App. 492, 57 S. E. 1013, the policy contained the following provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." The house covered by the policy became vacant and unoccupied and so remained for thirty days, when it was reoccupied. The house was destroyed after reoccupancy. Held, that the policy did not become absolutely void by reason of the house having become vacant and remaining so for thirty days, but the insurance was merely suspended during the period of violation, and revived upon the reoccupancy of the house, and became again of binding force and effect. In *Insurance Co. of N. A. v. Pitts*, 88 Miss. 587, 7 L.R.A.(N.S.) 627, 117 Am. St. Rep. 756, 41 So. 5, 9 A. & E. Ann. Cas. 54, under a provision of a fire policy that it should be void if the building be or become vacant or unoccupied and so remain for ten days, where the building was unoccupied for more than ten days, but a fire occurred afterwards, during its occupancy, it was held that the policy did not become void. In *Omaha F. Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740, where an insured encumbered his personal property by a chattel mortgage after such property had been insured, and contrary to the provisions of the insurance policy, he was allowed to recover the value of the insured property destroyed by showing that, at the time of its destruction, it was free from the lien of the mortgage; citing *State Ins. Co. v. Schreck*, 27 Neb. 527, 6 L.R.A. 524, 20 Am. St. Rep. 696, 43 N. W. 340. In *Hinckley v.*

Germania F. Ins. Co. 140 Mass. 38, 54 Am. Rep. 445, 1 N. E. 737, it was held that the temporary illegal use without a license of property insured, if un contemplated at the time of taking the policy, would not of itself and as a matter of law render the policy void during the whole of the rest of the time it was to run. It would simply viti ate the policy during the time of the il legal use, and, when the illegal use stopped, the policy would revive; the court saying: "It is not the necessary meaning of the word 'void,' as used in policies of insurance, that it shall, under all circumstances, imply an absolute and permanent avoidance of a pol icy which has once begun to run; but the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being,"—citing *Phillips on Insurance*, vol. 1, § 975, where it is said: "After it [the policy] has begun, so that the premium is become due, it surely is but equitable that a temporary noncompliance should have effect only during its continuance. To carry it further is to inflict a penalty upon the as sured, and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it,"—citing many cases to sustain the rule.

It is useless to cite a greater number of cases. But we are satisfied, from an exam ination of all the cases cited by both ap pellant and respondents, and of all that we have examined on our own motion, that the statement of *Elliott on Insurance*, above quot ed, to the effect that the weight of authority seems to support the view that a violation of a condition that works a forfeiture of the policy merely suspends the insurance during the violation is a correct announcement. In *Traders' Ins. Co. v. Catlin*, supra, the court, to show the fallacy of the rule contended for, says: "That a recovery on a policy on a building in the center of the burned district in Chicago's great fire should be defeated because a gallon of gasoline was therein kept and used a year before that time does not commend itself as a reasonable rule."

To still further show the fallacy, by dis torting the proposition, yet still leaving it within the bounds of possibility or even probability, under the rule contended for, if the holder of a life insurance policy in the state of Washington, which prohibits by its terms the departure of the applicant from the territory of the United States, should in advertently or otherwise straggle across the boundary line into British Columbia, and, after detecting the mistake which he had made geographically, should return to the state of Washington, live here for twenty, thirty, or forty years, paying his annual pre miums, which are accepted and appropriated by the company, upon his death, occurring

by an accidental discharge of a firearm or by being cremated in a burning theater,— causes which could not possibly have been af fected by the breach of his contract,—his beneficiary would be deprived of the benefit of his life insurance policy by reason of such violation. The thought is too abhorrent to be maintained for a moment, and yet in principle it is exactly the same.

But, in addition to all these questions which we have discussed, we think probably there is no case which would hold that the appellant in this case could successfully urge this defense, for, according to the findings of the court, there has been no violation of any contract whatever by the respondents. Con ceding that there was a warranty, there was no warranty that the assured should at all times maintain the automatic sprinkler sys tem, but the representation was only that the assured should "use due diligence" in maintaining the sprinkler system; and, as we have seen, under the findings of the court, due diligence was used in that regard. So that it seems absolutely at variance with any theory of the law to prohibit the insured from recovering under this policy.

The judgment of the lower court will therefore be affirmed.

Crow, Parker, Fullerton, and Mount, JJ., concur.

Morris, J., dissenting:

I dissent for the reasons given in the opin ion on the original hearing in Department 1, to which I still adhere. The majority opin ion, as herein expressed, wipes out the law of warranty in this state,— a principle that is as old and well founded as any other principle in insurance law. There is no con flict between the *Hart Case*, referred to in the majority opinion, and the rule announced in the opinion on the original hearing herein. The *Hart Case* deals with a representation which the court refuses to extend into a warranty, either by interpretation or impli cation, and holds that, in order to be read as a warranty, the provision must appear to be expressly so intended by the insured and insurer, and, in case of ambiguity or doubt, the construction should be that of a repre sentation rather than a warranty. The same rules are announced and adhered to in the original opinion, and there was no expressed or implied intention to depart from them. It is said in the *Hart Case* that, notwithstand ing the policy contains hard and unjust con ditions, the insurance company has the right to make such a contract, and, when so made, it is the duty of the courts to enforce them regardless of their harshness, when it ap pears such a contract was actually made. The original opinion goes no further. Find-

ing an express warranty in the policy, based upon a reduction of the premium, it gave effect to it, and in so doing followed the law, both in principle and upon authority.

ALABAMA SUPREME COURT.

MARTHA C. BURROUGHS

v.

JAMES B. BURROUGHS, Appt.

(— Ala. —, 50 So. 1025.)

Lien — vendor — agreement to support.

No vendor's lien exists where the consideration for the conveyance of land is an agreement to support the grantor during life.

(November 18, 1909.)

APPEAL by defendant from a decree of the Tuscaloosa County Court directing the enforcement of a vendor's lien. Reversed.

The facts are stated in the opinion.

Messrs. Oliver, Verner, & Rice for appellant.

Mr. Daniel Collier for appellee.

McClellan, J., delivered the opinion of the court:

The decree appealed from declared, and directed the enforcement of, a vendor's lien as prayed in complainant's (appellee's) bill. The bill, in paragraph 4, expressly alleges that the consideration for the conveyance of her land, by complainant to J. B. Burroughs, "was that Burroughs should support and maintain the complainant for the balance of her life; that the support and maintenance of the complainant for the period of her

natural life was and is the agreed purchase price for the said lands;" or that the consideration was that Burroughs should furnish reasonable amount necessary to her support during her life. The bill, in the cited paragraph, pointedly alleges that the sum recited in the deed exhibited with the bill, viz., \$150, was not the consideration for the conveyance, and that it never was paid. Following the first stated averments, the true consideration for the conveyance is alleged as quoted above. Accordingly the cause must be considered without reference to the argued inquiry, based on one of the principles treated in *Hooper v. Savannah & M. R. Co.* 69 Ala. 529, whether a vendor's lien arises where the promise or covenant of the grantee has, by agreement of the parties, a fixed, certain, monetary substitute, to be effective upon the contingency of a failure of the grantee to perform as he covenanted or agreed to do. There being no allegations in the bill on which to predicate the application of the principle mentioned, a decree rested on the principle cannot be sustained. Much of the argument of the solicitors in the cause becomes inapt on the state of the pleading here.

The question, then, is: Has a grantor a lien upon the subject of the sale and conveyance, when the sole consideration therefor is the agreement of the grantee to care for and support the grantor during life? We think there can be no doubt that one essential condition to the creation of a vendor's lien is that there is a definite, "ascertained, absolute debt, owing alone for the purchase price of the land conveyed;" on the contrary, that no such lien arises where the consideration for the conveyance is an uncertain, indefinite, contingent demand. 3 Pom. Eq. Jur. §§ 1250, 1251, and authorities cited in notes thereto. Under this doctrine, the

Note. — Agreement for support in consideration of conveyance, as basis for equitable lien.

This subject is treated in a note to *Abbott v. Sanders*, 13 L.R.A.(N.S.) 725. Some additional cases are given below.

Where the owner of lands conveys them to another in consideration that the latter will pay the former's debts and support him during life, but the grantee refuses, after receiving the deed, to put the contract in writing, or to pay the debts or furnish the support, equity will charge the lands with the debts and the support of the grantor. *Hamilton v. Barricklow*, 96 Ind. 398.

In *Norris v. Archibald*, 29 Pittsb. L. J. N. S. 289, a deed recited that it was given in consideration of \$1 and the covenant contained in a separate agreement. The agreement referred to, after reciting the giving

of the deed, bound the vendee, his heirs, executors, and administrators to support the vendor. It was held that, although the support of vendor was a personal debt, there could be no lien or charge on the land, as none was created by express words.

When land was conveyed with the verbal understanding that the income should be devoted to the support of a third person, and the grantee thereafter executed a deed of trust wherein he agreed to support such third person, but limited his liability to the rents of the land or the interest on the purchase money should the land be sold, it was held in *McArthur v. Gordon*, 51 Hun, 511, 4 N. Y. Supp. 584, that no vendor's lien exists in favor of the third person, as he is not a vendor, but is a vendee of an equity in the premises, whose rights may be enforced in equity. This case was modified in 126 N. Y. 597, 12 L.R.A. 667, 27 N. E. 1033, on another point.

28 L.R.A.(N.S.)

complainant, as upon the averments of this bill, had nor has a vendor's lien. No debt, ascertained and definite, was created by the agreement between the parties for the sale and conveyance of the land. Her remedy was "on the undertaking," as *Gardner v. Knight*, 124 Ala. 273, 274, 27 So. 298, adjudges.

The decree is reversed, and a decree will be here rendered dismissing the bill.

Dowdell, Ch. J., and Simpson and Mayfield, JJ., concur.

A petition for rehearing denied.

MINNESOTA SUPREME COURT.

CAROLINE BRUER, Respt.,

v.

LOUIS BRUER et al., Appts.

(109 Minn. 260, 123 N. W. 813.)

Deed — condition — breach — relief.

1. A parent who conveys real property to his son in consideration of the son's agreement to support and maintain the parent during the remainder of his life, whether the agreement of support constitutes a condition subsequent or not, may, for a breach of the agreement, in a proper action, have the deed or conveyance canceled or set aside, or the amount due under the agreement made a charge or lien against the land, or such other relief as the equities between the parties, as shown by the evidence, may justify.

Pleading — deed — breach of condition — relief.

2. Complaint held to state a cause of action for the relief proper to be granted in such an action.

(December 10, 1909.)

APPEAL by defendants from an order of the District Court for Nicollet County overruling a demurrer to the complaint in a suit to cancel a deed granting certain real estate in consideration of support or for other equitable relief. Affirmed.

The facts are stated in the opinion.

Messrs. Davis & Olsen for appellants.

Messrs. Somerville & Hauser, for respondent:

An absolute conveyance made upon the consideration of maintenance and support will, in case the same is not furnished, be set aside upon the ground that the consideration has failed.

Patterson v. Patterson, 81 Iowa, 626, 47

Headnotes by BROWN, J.

Note. — See note to preceding case.
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N. W. 768; *Dodge v. Dodge*, 92 Mich. 109, 52 N. W. 296; *Reeder v. Reeder*, 89 Ky. 529, 12 S. W. 1063; *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17; *Peck v. Hoyt*, 39 Conn. 9; *Penfield v. Penfield*, 41 Conn. 474; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730; *Glocke v. Glocke*, 113 Wis. 303, 57 L.R.A. 458, 89 N. W. 118; *Stebbins v. Petty*, 209 Ill. 291, 101 Am. St. Rep. 243, 70 N. E. 673; *Wanner v. Wanner*, 115 Wis. 196, 91 N. W. 671; *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787; *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642; *Childs v. Rue*, 84 Minn. 323, 87 N. W. 918; *Johnson v. Paulson*, 103 Minn. 158, 114 N. W. 739.

Brown, J., delivered the opinion of the court:

It appears from the complaint in this action that on the 17th day of February, 1893, plaintiff's husband was the owner of certain land in Nicollet county, of the value of \$4,500, which then, and for many years prior, had constituted the family homestead; that on the date stated plaintiff and her husband, being then well advanced in years, and desirous of making such disposition of the property as would secure to them sufficient support and maintenance in health and sickness during the remainder of their lives, and whereby they might be relieved of the care and responsibility in connection with the operation of the farm, entered into an agreement with Louis Bruer, their son, whereby they by warranty deed conveyed the property to said son in consideration of a contemporaneous execution by him of an agreement for their support for the remainder of their lives. This agreement was in the following form and language, viz.:

Know all men by these presents, that I, Louis Bruer, of the town of Courtland, in the county of Nicollet, and state of Minnesota, am held and firmly bound unto Caroline and Henry Bruer, her husband, of the same place, in the sum of two thousand dollars, lawful money of the United States, to be paid to the said Caroline Bruer and Henry Bruer, her husband, or the survivor thereof, their heirs, executors, administrators, or assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with my seal, and dated, this seventeenth day of February, A. D. 1893.

The condition of the above obligation is such that, whereas, the said Caroline Bruer and Henry Bruer, her husband, have this day granted, bargained, sold, and conveyed to said Louis Bruer certain valuable pieces of real property, situate in said Nicollet county; and whereas, the said Louis Bruer,

in consideration of said conveyance, covenanted and agreed to and with said Caroline Bruer and Henry Bruer, her husband, to keep and maintain them, the said Caroline Bruer and Henry Bruer, during their natural lives, and the survivor thereof during his or her natural life, in suitable lodging, board, and clothing, and necessary firewood, dried, cut, and split, in suitable size for the stove, all his own expense and free from any charges to said Caroline or Henry Bruer, this at his own residence in said county of Nicollet, if possible, and that, in case they could not agree to live peaceably together in the same house, then in that case, at the request of said Caroline Bruer, he, the said Louis Bruer, should and would build a suitable dwelling for them to live in, on his premises, and furnish them with suitable food, clothing, and firewood as above mentioned; and whereas, the said Louis Bruer further covenanted and agreed, consideration of said conveyance, to pay annually and each and every year during her natural life to said Caroline Bruer the sum of fifty dollars in lawful money of the United States, the first payment thereof to be made on the first day of December, A. D. 1893, and annually thereafter on or before each succeeding first day of December, and it being further covenanted and agreed, between the parties above named, that in the case of the death of said Louis Bruer before the death of said Caroline Bruer, that she, the said Caroline Bruer, shall be entitled to claim and receive from the estate of said Louis Bruer the sum of one thousand dollars in lieu of and in payment in full of the annuities hereinbefore mentioned to be delivered to her and her husband in full satisfaction of this bond:

Now, therefore, if the above bounden Louis Bruer shall well and truly perform all the obligations and make all the payments at such time and times as he hereinbefore to perform the same and make payment thereof, then this obligation to be null and void; otherwise, to remain in full force and virtue.

Witness my hand and seal, and dated, this seventeenth day of February, 1893.

This contract and agreement on the part of the son constituted the sole and only consideration for the conveyance of the property to him. Defendant Bertha Bruer is the wife of defendant Louis Bruer. Soon after the execution of these instruments, plaintiff's husband died. The complaint alleges that defendant has failed and refused to comply with his agreement in many substantial respects, which are particularly enumerated therein. The prayer for relief is that the deed, together with the record

thereof, be canceled and declared null and void, and that plaintiff have such other or further relief as the court may deem proper and just. Defendants joined in a general demurrer to the complaint, and appealed from an order overruling it.

As we understand the facts as pleaded, the conveyance to defendant was in the ordinary form of a warranty deed, containing no exceptions or reservations respecting the estate conveyed, and it passed to defendant the unconditional title to the property. The agreement of support, a separate contract, though a part of the same transaction, and the sole consideration of the deed, in no way limits the operation and effect of the deed, nor does it, expressly or otherwise, declare that a failure to comply with its provisions shall work a forfeiture of the title or other rights acquired by the conveyance. In view of this situation, it is the contention of defendants that, conceding the breach of the contract, plaintiff is not entitled to the relief demanded, *viz.*, cancellation of the deed, but is limited to an action for such damages as have resulted to her from defendants' failure to perform.

It is elementary that forfeitures are not favored, and that conditions in a conveyance of real property, a breach of which by the terms of the deed work a forfeiture of the estate, are construed strictly against the grantor, and if doubt arises, from the language of the instrument, whether a forfeiture or reversion of the estate was intended, it will be resolved in favor of the grantee, and the grantor put to his remedy by an action for damages; but where clearly expressed, and free from doubt, a forfeiture will be declared by the court in all cases where a breach of the conditions is shown. *Minneapolis Threshing Mach. Co. v. Hanson*, 101 Minn. 260, 118 Am. St. Rep. 623, 112 N. W. 217; *Hamel v. Minneapolis, St. P. & S. Ste. M. R. Co.* 97 Minn. 334, 107 N. W. 139. What particular provisions in a conveyance constitute conditions subsequent, as distinguished from mere covenants, the breach of which will work a forfeiture, is a subject upon which the courts are not in entire harmony. In ordinary transactions of the kind, an unconditional sale and conveyance of the property upon the promise and agreement of the grantee to pay the purchase price at some stated time in the future, or to do some other act or thing in consideration of the conveyance, where there is no express provision for re-entry, or forfeiture for a failure to perform, a forfeiture will not be declared by the court, and the remedy of the grantor is an action for damages. This rule or principle is invoked by defendants, and it must be applied, unless the particular class of contracts of

which the one under consideration is a member is for some reason removed from its operation.

Contracts and agreements of the kind are quite familiar to the courts. They are, as a rule, made by people well along in years, with a child or other relative, and are intended to secure to the old people proper and suitable support and maintenance during their declining years, at the same time relieving them of the care and responsibility incident to the management of their affairs. They part with their property in the expectation and belief that their future necessities and comforts are fully provided for, and in an abiding faith that natural affection and filial duty will prompt and secure a faithful discharge of the obligations assumed by the child to whom they convey. There is in such transactions an element of confidence reposed by the old people in their grantee, sacred in its nature, a breach of which, and retention of the benefits, no court should tolerate by a refinement upon technical rules and principles of law. By the modern trend of authority these transactions are placed in a class by themselves, and enforced without reference to the form or phraseology of the writing by which they are expressed, or whether by the strict letter of the law a forfeiture of the estate is expressly provided for. The Wisconsin supreme court recently has taken a broad view of such contracts, and laid down a rule which commends itself as fair and equitable, and results in effectuating the intention of the parties to the transaction. The agreement of support, whatever its form, is construed by that court as a condition subsequent, and not a mere covenant. *Glocke v. Glocke*, 113 Wis. 303, 57 L.R.A. 458, 89 N. W. 118. Other states apply substantially the same rule of construction, or at least afford relief commensurate with the peculiar nature and purposes of such contracts. *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642; *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; *Patterson v. Patterson*, 81 Iowa, 626, 47 N. W. 768; *Dodge v. Dodge*, 92 Mich. 109, 52 N. W. 296; *Reeder v. Reeder*, 89 Ky. 529, 12 S. W. 1063; *Stebbins v. Petty*, 209 Ill. 291, 101 Am. St. Rep. 243, 70 N. E. 673.

The question, on facts like those in the case at bar, has never before come squarely before this court. *Peters v. Tunell*, 43 Minn. 473, 19 Am. St. Rep. 252, 45 N. W. 867, though somewhat similar in its facts, did not involve the question whether the agreement of support was a condition subsequent, a breach of which would work a forfeiture of the title conveyed. That was an action to recover the purchase price of the property, both real and personal, conveyed to a

son, and to enforce the same against the land, as a vendor's lien. This the court held could not be done. The questions whether the agreement of support amounted to a condition subsequent, or whether plaintiff could have a forfeiture declared for a breach thereof, were not presented or argued by plaintiff's counsel, and the remark of the court, in the first paragraph of the opinion, that such relief could not be granted, was not necessary to a decision of the question presented, and therefore not of binding force. In so far as the court there held that the plaintiff had no remedy by way of enforcing his claim as a lien against the land, the case would seem to have been in effect overruled by *Doescher v. Spratt*, 61 Minn. 326, 63 N. W. 736, and *Childs v. Rue*, 84 Minn. 323, 87 N. W. 918, though the case was not referred to in either opinion. The opposite conclusion was reached in both those cases, and this notwithstanding the fact that the deed containing the agreement for support did not provide a forfeiture for a breach of the conditions, or in any manner make the claim for support a charge upon the land. In *Minneapolis Threshing Mach. Co. v. Hanson*, supra, the agreement was embodied in the deed, in connection with the express stipulation that, if the grantee failed to comply with it, the deed should be null and void. This was held a condition subsequent. Such were in effect the terms of the deed involved in *Johnson v. Paulson*, 103 Minn. 158, 114 N. W. 739, where the same conclusion was reached, with a qualification that a failure of performance would not necessarily require a decree of forfeiture of title, but that the particular relief to be granted would depend upon the nature and extent of the grantee's delinquency, and all the equities between the parties, as disclosed by the evidence. The case of *Ebert v. Gildemeister*, 106 Minn. 83, 118 N. W. 155, involved only the sufficiency of the evidence to support a judgment of forfeiture there declared, unless defendant should comply with its mandate and make certain money payments within the time specified therein. In *Pinger v. Pinger*, 40 Minn. 417, 42 N. W. 289, there appears to have been a failure of the grantee, after procuring a deed from his parent, to enter into the contract of support, and the effect of such an agreement was not passed upon.

So far as our research has extended, these are the only cases in which contracts of this character have been before this court, and, as pointed out, none of them are precisely like that at bar. In *Doescher v. Spratt* and *Childs v. Rue*, supra, the stipulation of support appeared in the body of the conveyance, and did not amount to a condition subsequent, yet the court held that equity would

afford appropriate relief. In the case at bar the agreement of support is contained in a separate instrument, and in the form of a bond in the penal sum of \$2,000, conditioned for the payment of that amount in the event defendant failed to perform his agreement. In this respect the case is similar to *Glocke v. Glocke*, supra, where the grantee secured his agreement of support by a mortgage upon the property conveyed to him, yet the supreme court of Wisconsin held the agreement a condition subsequent, and enforced it.

In view of the decisions of this court in the cases referred to, and the general trend of judicial opinion elsewhere (*Abbott v. Sanders*, 80 Vt. 179, 13 L.R.A.(N.S.) 725, 66 Atl. 1032, we are of opinion, and so hold, that the form of agreement of support is unimportant. Its effect is in no way changed, whether it appear in the body of the conveyance, or in a separate instrument by way of bond or mortgage; and, as it appears in this case the defendant had failed and refused to carry out the conditions of his agreement, plaintiff is entitled to such relief as the evidence may, on trial, show her entitled to. We cannot hold, in view of prior decisions, that the agreement constituted a condition subsequent, entitling plaintiff to a return of the land; but, as remarked in the *Johnson Case*, the court may grant such relief as the facts will in equity and good conscience justify. For this relief the complaint is sufficient, and contains all necessary and essential allegations.

Order affirmed

KENTUCKY COURT OF APPEALS.

JOSIE MCKINLEY, Appt.

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(— Ky. —, 127 S. W. 483.)

Carrier — ejecting trespasser — Liability.

1. A railroad company is not liable for ejecting from its train a woman whose ticket was not good on its road, and who refused to pay fare, about a mile from the station at which she embarked in a city in the night, where she made no request to be put off at any other place, except to be returned to the embarking point, if the place of ejection is as convenient to her as any place along the line, unless she should be returned to the embarking point or carried to destination.

Same — opinion as to route.

2. A carrier's agent selling a passage 28 L.R.A.(N.S.)

ticket is not bound to volunteer information unsought with respect to the route over which it must be used.

Same — direction as to train.

3. A ticket agent at a union junction point at which a passenger changes cars is not, when asked by him when a train leaves for his destination, bound to ascertain which route his ticket requires him to take, and see that he takes the right train; but performs his duty, in the absence of any special request, by stating the times at which trains leave over the several routes which reach the passenger's destination.

(April 22, 1910.)

APPEAL by plaintiff from a judgment of the Circuit Court for Daviess County dismissing the petition in an action brought to recover damages for alleged wrongful ejection from a train. Affirmed.

The facts are stated in the opinion.

Messrs. Little & Slack, for appellant:

It was the duty of the carrier's agents at the depot, on request, to instruct and advise passengers holding tickets as to time of departure of trains, and as to what train they might or should take.

1 Supp. Am. & Eng. Enc. Law, p. 887, note 4.

The agent of the Illinois Central Railroad Company, having induced plaintiff to get on one of its trains, from which she was ejected because her ticket was for another route, was guilty of actionable negligence.

Hufford v. Grand Rapids & I. R. Co. 64 Mich. 631, 8 Am. St. Rep. 862, 31 N. W. 544.

Even if plaintiff was not entitled to travel on the Illinois Central Railroad Company's train, yet it was negligence on the part of the company to put her off in a heavy rain in the nighttime, with no shelter or con-

Note. — Carriers: duty to traveler on wrong train through his own mistake.

This question is discussed in the note to *Robertson v. Boston & N. Street R. Co.* 3 L.R.A.(N.S.) 588, in which it is declared to be the law that a person who by his own mistake gets on a passenger train other than the one on which he intended to ride is nevertheless a passenger. This proposition finds support in the cases reviewed in that note, and also in *St. Louis & S. W. R. Co. v. Pruitt* (Tex. Civ. App.) 79 S. W. 598 (writ of error denied in 97 Tex. 487, 80 S. W. 72), in which it was held to be the general rule that where a passenger by mistake boards the wrong train, it is the duty of the carrier to return him to the place where the mistake occurred, or, at least, leave him at some point where he would not be subjected to any serious annoyance, and return him to the place where

veyance near, and especially when she was ill.

5 Am. & Eng. Enc. Law, p. 607; McClure v. Philadelphia, W. & B. R. Co. 34 Md. 532, 6 Am. Rep. 345.

Plaintiff was guilty of no negligence in relying on information furnished by defendants' agents.

Duling v. Philadelphia, W. & B. R. Co. 66 Md. 120, 6 Atl. 592.

Plaintiff had the right to rely on information received from the agent of defendants in answer to inquiries concerning matters material for her to know.

3 Wood, Railroads, Minor's ed. 1654; Turner v. Great Northern R. Co. 15 Wash. 213, 55 Am. St. Rep. 888, 46 Pac. 243.

The agent of defendants being notified that plaintiff held a ticket from Henderson to Nashville, it should be presumed he had notice of the route it called for, because he was put on inquiry.

Russell v. Petree, 10 D. Mon. 184.

Where a passenger is injured by the negligence of an agent at a union depot, each company employing him is answerable.

29 Am. & Eng. Enc. Law, p. 142; Jacobs v. Tutt, 33 Fed. 412.

Where a party does all he is required to do under his contract, and is prevented from reaping the benefits of it by fault or wrongful act of the other party, the law gives the first party a remedy for the breach.

New York, L. E. & W. R. Co. v. Winter. 143 U. S. 73, 36 L. ed. 80, 12 Sup. Ct. Rep. 356.

Messrs. Benjamin D. Warfield and Reuben A. Miller, with Mr. Wilbur F. Browder, for appellee Louisville & Nashville Railroad Company.

Messrs. Blewett Lee and Trabue, Doolan, & Cox, with Mr. J. D. Atchison, for appellee Illinois Central Railroad Company:

Even where the ticket agent had made a mistake in selling the ticket, the conductor is justified in ejecting the passenger, if he

attempts to travel in violation of what appears upon the face of the ticket.

Lexington & E. R. Co. v. Lyons, 104 Ky. 23, 46 S. W. 209; Illinois C. R. Co. v. Jackson, 117 Ky. 900, 79 S. W. 1187; Spink v. Louisville & N. R. Co. 21 Ky. L. Rep. 778, 52 S. W. 1067; Louisville & N. R. Co. v. Fowler, 123 Ky. 450, 96 S. W. 568; Brown v. Louisville & N. R. Co. 103 Ky. 211, 44 S. W. 648; Nutter v. Southern R. Co. 25 Ky. L. Rep. 1700, 78 S. W. 470; Com. v. Power, 7 Met. 596, 41 Am. Dec. 465, 25 Am. & Eng. Enc. Law, p. 1076; Flood v. Chesapeake & O. R. Co. 25 Ky. L. Rep. 2135, 80 S. W. 184; Spink v. Louisville & N. R. Co. 21 Ky. L. Rep. 778, 52 S. W. 1067; Paulin v. Canadian P. R. Co. 17 L.R.A. 800, 3 C. C. A. 23, 6 U. S. App. 298, 52 Fed. 197; Pence v. Louisville & N. R. Co. 23 Ky. L. Rep. 1207, 64 S. W. 905; Illinois C. R. Co. v. Walker, 32 Ky. L. Rep. 1248, 108 S. W. 278.

Where a person enters a union station used by several railroads, with a ticket over one of them, or then purchases a ticket over one of them, whatever is said to the person by the agent is said for and on behalf of the company over whose road the ticket authorizes transportation, and in such a transaction the agent is in no sense the agent of or acting for any of the other companies for whom he may sell tickets.

Cincinnati, N. O. & T. P. R. Co. v. Raine, 130 Ky. 454, 19 L.R.A. (N.S.) 753, 132 Am. St. Rep. 400, 113 S. W. 495; Mosher v. St. Louis & I. M. R. Co. 127 U. S. 390, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324; McClure v. Philadelphia, W. & B. R. Co. 34 Md. 532, 6 Am. Rep. 345; Burch v. Baltimore & P. R. Co. 3 App. D. C. 346, 26 L.R.A. 129.

Lassing, J., delivered the opinion of the court:

The appellant, Mrs. Josie McKinley, sued the Louisville & Nashville Railroad Company and the Illinois Central Railroad Company for damages alleged to have been sustained because she was wrongfully ejected from one of the trains of the Illinois

he took the wrong train by the first returning train.

But in Finnegan v. Chicago, St. P. M. & O. R. Co. 48 Minn. 378, 15 L.R.A. 399, 51 N. W. 122, it was held that a person who, after discovering that he was on the wrong train, voluntarily left the same in the dark between stations, ceased to be a passenger, and could not recover for injuries sustained by his falling into a cattle guard on the track.

In Page v. New York C. R. Co. 6 Duer, 523 (affirmed without discussing this question in 24 N. Y. 599), it was held that if a passenger, by reason of his own want of reasonable care and caution to obtain all the requisite information as to the route

to be traveled, fails to change cars at a particular station and to take cars going to the place to which he has paid his fare, and continues in the cars in which he started and is carried to another station, the result is to be attributed to his own negligence, and not to a breach of duty or contract on the part of the carrier.

As to liability of carrier on account of misdirection of passenger by employee, see notes to St. Louis Southwestern R. Co. v. White, 2 L.R.A. (N.S.) 110, and Mace v. Southern R. Co. 24 L.R.A. (N.S.) 1178.

As to passenger's rights on train which does not stop at his station, see note to McDonald v. Central R. Co. 2 L.R.A. (N.S.) 505

J. A. C.

Central Railroad Company under the following circumstances: On November 19, 1907, she purchased a ticket at Owensboro, Kentucky, entitling her to passage to Maxwell, Tennessee, by Nashville. This ticket was purchased at the union station in Owensboro of an agent who was the joint employee of the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company, and the Louisville, Henderson, & St. Louis Railroad Company. Both the Louisville & Nashville Railroad Company and the Illinois Central Railroad Company were operating lines from Henderson to Nashville, and the distance from Henderson to Nashville was practically the same over the respective lines. Plaintiff did not indicate at the time she purchased the ticket which line she desired to travel over, and the agent in charge of the station at Owensboro, who sold her the ticket, routed her over the Louisville & Nashville from Henderson. She accepted this ticket, paid for it, and shortly thereafter took passage on one of the Louisville, Henderson, & St. Louis trains for Henderson. She reached Henderson about midnight. Shortly thereafter she entered the ticket office at the union station at Henderson and told the agent in charge—who was likewise the employee of the three roads above designated—that she had a ticket from Owensboro to Nashville, and asked him how long it would be before a train would leave for Nashville. The agent informed her that there were two trains going to Nashville that night, one a Louisville & Nashville train and the other an Illinois Central train, and that either would carry her to Nashville. She remained in the depot until about 3 o'clock, at which time she boarded an Illinois Central train. As she was in the act of doing so, the brakeman asked her where she was going, and she replied Nashville; whereupon he permitted her to enter the car. After she had traveled something more than a mile on said Illinois Central train, the conductor put her off the train because she refused to pay her fare. The night was dark and it was raining. She was compelled to and did walk back to the union station, a distance of something more than a mile, carrying her baggage and a four-year-old child.

These facts were in substance set out in her petition, wherein she sought to recover damages in the sum of \$2,000 from the defendant companies. Each company filed a general demurrer to the petition. That of the defendant the Louisville & Nashville Railroad Company was sustained; but as the petition alleged that the plaintiff, when she was ejected from the train, had a ticket entitling her to passage over the Illinois Central Railroad from Henderson to Nashville,

the demurrer of the Illinois Central was overruled. It thereupon answered, and, in addition to traversing the material allegations of the petition, set up the fact that the ticket which plaintiff had did not entitle her to passage over the Illinois Central, but over the Louisville & Nashville Railroad from Henderson to Nashville, and a copy of the ticket was set up and described in the pleading. With these facts fully before it, the court permitted the defendant the Illinois Central Railroad Company to renew its demurrer, and it was sustained. Plaintiff declined to plead further, and her petition, first as to the Louisville & Nashville Railroad Company and later as to the Illinois Central Railroad Company, was dismissed. She appeals.

Two questions are raised for determination: First. Does the petition state a cause of action against either or both defendants? Second. Has plaintiff's right of appeal been lost or waived because she failed to object to the motion to dismiss her petition after the demurrer had been sustained, and failed to except to the ruling of the court when the judgment had been entered?

Appellant's ticket called for passage over the Louisville & Nashville Railroad from Henderson to Nashville, and, of course, did not entitle her to passage over the lines of the Illinois Central. As she had no ticket entitling her to passage, and refused to pay her fare, she cannot complain of the action of that company in refusing to transport her to her destination. This court has frequently upheld the right of carriers to eject passengers where they failed to produce a ticket or pay their fare. As said in the case of *Flood v. Chesapeake & O. R. Co.* 25 Ky. L. Rep. 2135, 80 S. W. 184: "One who enters a passenger train and refuses to pay fare becomes a trespasser, and may be ejected by the conductor." Of course, if, in putting the passenger off of the train, the conductor uses any unnecessary force, or offers to the passenger any insult or indignity (*Louisville & N. R. Co. v. Fowler*, 123 Ky. 450, 96 S. W. 568, or ejects him from the train at a time and place when serious injury would likely result to him (*Brown v. Louisville & N. R. Co.* 103 Ky. 211, 44 S. W. 648), the company would be liable,—not for putting him off, but for the manner in which it was done. In ejecting appellant the conductor used no force whatever; nor was he rude or insulting in his manner; nor were the circumstances and surroundings such that, in ejecting her where he did, it was likely she would receive serious injury. She wanted to go to Nashville, and it was perhaps really better for her that the conductor ejected her when he did rather than take her to the next sta-

tion, where it is most likely that, on account of the lateness of the hour, she would have had no accommodations or place of shelter, and would have been compelled to wait until the next day to get a train back; whereas, by walking the mile or so back to the depot, while no doubt fatiguing, and on account of the rain disagreeable, she was able to take the train on the Louisville & Nashville Railroad for Nashville that night. She made no request that she be not put off between stations, or that she be carried to the next station. Her demand was that she be returned to the Henderson depot. With this request, of course, the conductor could not comply, and appellee was under no duty to do so. Under all the circumstances, it was perhaps more convenient to appellant to be put off where she was than at any other place along appellant's line of road, unless she had been carried to her destination.

No ground of complaint being afforded her by being ejected from the train when, where, and as she was, if appellees or either of them were negligent, it was the failure of their agents at Owensboro and Henderson to properly instruct appellant as to how she should proceed; and it is upon this point that her counsel in the main relies. It is argued that the agent at Owensboro was negligent in not telling appellant when he sold her the ticket over which road it routed her and how she must go. Undoubtedly, if she had asked such question, it would have been his duty to have advised her, but his duty did not require him to volunteer information unsought. Appellant asked for a ticket to a certain point in Tennessee by way of Nashville. The agent had the right to presume that she not only knew where she wanted to go, but the way to reach that point. He sold her a ticket entitling her to passage from Owensboro to Maxwell, Tennessee, over the lines of the Louisville & Nashville. The ticket, in plain and unmistakable terms, showed that she was routed over the Louisville & Nashville. He had a right to presume that she could read, and if she could, and exercised any degree of care whatever, she could have easily informed herself as to the road over which she would travel. Possessed of this information, all that remained for her to learn of the agent was the time of the departure of the train from Owensboro. This she evidently learned, for it is recited in her petition that shortly after the purchase of the ticket she boarded a train for Henderson, which place she reached shortly after midnight, without accident. Clearly the agent at Owensboro who sold her the ticket cannot be charged with being negligent in any respect whatever. Upon arriving at Henderson, she

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notified the agent that she had a ticket from Owensboro to Maxwell, Tennessee, by way of Nashville, and made inquiry when the train left for Nashville. She was told by the agent that there were two trains, an Illinois Central train and a Louisville & Nashville train, and that either would take her to Nashville. The time of the departure of each was given her. This was all the information she really needed if she had read her ticket, as the ticket in her possession called for passage over the Louisville & Nashville Railroad. When the agent had informed her of the time of the departure of this train, she had received all of the information necessary to enable her to continue her journey. If she could not read so as to inform herself as to which train she must take, upon being informed that there were two trains running from Henderson to Nashville, she should have called upon the agent for information, and told him that she could not read, and did not know over which road her ticket routed her, or else should have exhibited her ticket to him and asked him to direct her what train to take. This slight care on her part would have avoided all opportunity for trouble, but, as she did neither, and the agent answered correctly and accurately the question asked of him, we fail to see wherein he was recreant in the discharge of any duty owing to her. The station agent's duty is primarily to look after the business of his employer, and to give to prospective passengers and others having business with the road such advice and information relating to their business as is sought. We are furnished with no authority which places upon the company through its station or ticket agents a duty higher than that defined in 1 Supp. Am. & Eng. Enc. Law, p. 887, note 4, which requires that, on request by a passenger or prospective passenger, it is the duty of the agent to advise him of the time of the departure of trains and as to what train he should take. This duty is entirely rested upon and arises only when the information is sought by the passenger. It need not be volunteered, and, when it is not sought or requested by the passenger, the presumption is that the passenger is already informed, and is not in need of the advice or information. No such request was made here. Appellant asked only as to the time of the departure of the train for Nashville. Of this she was informed fully. She did not advise the agent as to what road she desired to travel. She did not exhibit her ticket to him and seek his advice. He had no means of knowing over what road she was routed, and hence he gave her all of the information that it was possible for him to give under the circumstances, to wit, he told

her when the train on each road left, and this information, with that which she could have received by reading her ticket, was ample to have guided her aright. In failing to give appellant information which was not sought and which he could not know was needed, the agent at the station at Henderson violated no duty owing by defendants or either of them to appellant, and her failure to take the right train and the consequent inconvenience suffered was the result of her own negligence, for which appellees are in no wise responsible.

The trial court did not err in holding that the plaintiff stated no cause of action. It is unnecessary to pass upon the other question raised.

Judgment affirmed.

NORTH CAROLINA SUPREME COURT.

L. F. SWAIN, Appt.,

v.

C. R. JOHNSON et al.

(151 N. C. 93, 65 S. E. 619.)

Contract — inducing breach — liability.

No action lies to recover for the loss of his bargain by one who had contracted to purchase property, against another who induced the vendor to break his contract and transfer title to him, unless the vendor acted against his will or contrary to his purpose by coercion or deception.

(September 29, 1909.)

A PPEAL by plaintiff from a judgment of the Superior Court for Carteret County granting a nonsuit in an action brought to recover damages for wrongfully inducing one to breach his contract with plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Abernethy & Davis and Moore & Dunn, for appellant:

Defendant could not prevent a sale by the fraudulent conspiracy with Noble to defeat the rights of Swain, without becoming liable therefor.

14 Am. & Eng. Enc. Law, p. 147; Eason v. Petway, 18 N. C. (1 Dev. & B. L.) 47; Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 5 L.R.A. (N.S.) 1091, 53 S. E. 161, 8 A. & E. Ann. Cas. 885.

Messrs. Simmons, Ward, & Allen, for appellee Johnson:

An action will not lie against a man for procuring another to break a contract, unless it is done with malice.

Jones v. Stanly, 76 N. C. 355; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; 28 L.R.A. (N.S.)

Richardson v. Wilmington & W. R. Co. 126 N. C. 100, 35 S. E. 235; Biggers v. Matthews, 147 N. C. 299, 61 S. E. 55.

It is an exception to the general rule to allow a recovery, even where the procuring is done with malice.

Chambers v. Baldwin, 91 Ky. 121, 11 L.R.A. 545, 34 Am. St. Rep. 165, 15 S. W. 57.

Mr. Thomas D. Warren, for appellee Noble:

There must be malice or fraud in the inducement to break the contract; otherwise there can be no remedy.

Boysen v. Thorn, 21 L.R.A. 235, note. Chambers v. Baldwin, 91 Ky. 121, 11 L.R.A. 545, 34 Am. St. Rep. 165, 15 S. W. 57; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; Jones v. Stanly, 76 N. C. 355.

Brown, J., delivered the opinion of the court:

We deem it unnecessary to discuss the seventy exceptions set out in the record, as in our opinion the whole case may be reviewed in passing upon the correctness of his Honor's ruling in granting the motion

Note. — Right of action for damages for inducing breach of contract.

This subject is covered in a note to Knickerbocker Ice Co. v. Gardiner Dairy Co. 16 L.R.A. (N.S.) 746. As to the right to an injunction to restrain a third person from inducing a breach of contract or aiding therein, see note to Beekman v. Marsters, 11 L.R.A. (N.S.) 201. As to civil liability for enticing servant to quit, see note to Thacker Coal & Coke Co. v. Burke, 5 L.R.A. (N.S.) 1091. As to civil liability for procuring discharge of employee or preventing employment, in absence of conspiracy or concerted action, see note to Huskie v. Griffin, 27 L.R.A. (N.S.) 966.

It is intended to include herein only cases decided subsequently to the note in 16 L.R.A. (N.S.) 746, above referred to.

The doctrine which, as shown in the foregoing notes, is supported by the weight of authority, to the effect that a third person is liable for intentionally and maliciously inducing a breach of contract, and may be restrained therefrom, or from aiding in such breach, is supported by the cases which have considered the question subsequently thereto.

Thus, in Wheeler-Stenzel Co. v. American Window Glass Co. 202 Mass. 471, — L.R.A. (N.S.) —, 89 N. E. 28, an action for tort for damages against a third person for maliciously inducing a breach of a contract, the court said that it was well settled that it is actionable maliciously to induce another to break his contract, and added the gist of the action is maliciously or without justifiable cause inducing another to break his contract.

In South Wales Miners' Federation v.

to nonsuit. The plaintiff contends that he contracted with the defendant Noble to purchase all the pine and juniper timber on certain lands belonging to the Cox heirs, said Noble being their attorney in fact, with power to sell the land; that the defendants West and Johnson conspired together, and induced Noble to violate his contract with plaintiff by purchasing the lands from Noble for a corporation, the West Lumber Com-

pany, in which West and Johnson are interested; wherefore, for such alleged tort, the plaintiff claims substantial damage. The principle of law upon which plaintiff founds his right of action is thus stated in Comyn's Digest, Action on Case, A: "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." The intentional causing such loss to

Glamorgan Coal Co. [1905] A. C. 239, 2 A. & E. Ann. Cas. 436, it is asserted by Lord Macnaghten that malice, in the sense of spite or ill-will, is not the gist of an action by an employer against third persons for maliciously inducing employees to breach their contract of employment. The doctrine of that case, however, is in line with the foregoing Massachusetts case, the only difference being as to the sense in which the word "malice" is used. In the Massachusetts case intentionally inducing the breach of a contract for the purpose of injuring another, rather than primarily to benefit the person inducing the breach, was regarded as malicious, while in the English case similar conduct was regarded as wrongful. In this case the defense was made that persons inducing the breach were not actuated by any ill-will toward the employer. This fact was, however, held to be no defense to an intentional interference with contractual relations, without a sufficient justification for such interference.

In *Globe & F. Ins. Co. v. Firemen's Fund Ins. Co.* (Miss.) — L.R.A.(N.S.) — 52 So. 454, the court held upon demurrer that a declaration stated a cause of action by alleging that defendants conspired unlawfully and maliciously to interfere with complainant's employee by intimidating and coercing him to leave his employment for the sole purpose of harming the employer. In reaching this conclusion the court distinguished between such a state of facts, and interference with such a contract relation for the primary purpose of benefiting the persons so interfering. Upon this point it was said: "Under the facts alleged in the declaration, it may have been perfectly permissible for the defendants to have employed the agent of plaintiff and to pay him better for his services. They might employ him, or any number of plaintiff's agents similarly in the employ of plaintiff, without violating any principle of lawful right, if the object of the employment was in the honest furtherance of their own business enterprises. But the facts stated in the declaration show a determination to destroy and drive plaintiff out of business, and the declaration alleges a conspiracy for this purpose. Surely no individual or corporation may maliciously and wantonly set about to ruin a competitor. As an incident to the advance of one's own business, and for the purpose, he has the right to use all proper methods, and his competitors must be able to cope with his ingenuities."

As suggested in the preceding case, not 28 L.R.A.(N.S.)

all interference by third persons with contracts of others, which result in their breach, is an actionable wrong. Such interference may be justified on the ground of business competition, or that the primary purpose was to benefit the person interfering, and that injury caused thereby was the result of the exercise by him of an absolute right.

Thus, purchasing certain timber with knowledge that the seller had contracted with another to saw it, and refusing to allow the completion of such contract, will not render the purchaser liable in tort, although the contract for sawing was thereby breached; and this is true even though the motive of the purchaser was malicious. *Biggers v. Matthews*, 147 N. C. 299, 61 S. E. 55.

It is not an actionable wrong to make a second contract with a promisor, although he is known to have had a prior contract on the same subject with another, and the result of the second contract is a breach of the prior one. *Sweeney v. Smith*, 167 Fed. 385, affirmed in 96 C. C. A. 91, 171 Fed. 645.

And see also *Dunshee v. Standard Oil Co.* (Iowa) — L.R.A.(N.S.) —, 126 N. W. 342, wherein a person was held liable for maliciously inducing others to cancel orders given by hanging out a sign, the purpose being not to benefit the one inducing the cancelation of the orders, but to injure the person to whom the orders were given. On this point the court remarked that "any legal act done to accomplish real benefit to the actor is not actionable, no matter what the motive. But the trend of recent authority is to the effect that if one [quoting from the note to *State ex rel. Durner v. Huegin*, 62 L.R.A. 727], with the 'sole and malicious purpose of injuring another, and without any benefit, interest, or pleasure . . . to himself or others, commit an act which, if done in good faith, would be justifiable, he is liable in an action in favor of such other person for the damages he may have sustained therefrom.'"

This doctrine was also recognized and asserted in *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.* 96 L. T. N. S. 218, which held that a defendant engaged in retailing phonographs and phonographic goods was not guilty of an actionable wrong in inducing another to breach an agreement not to resell goods purchased thereunder to the defendant at particular discount prices. In reaching this conclusion the court asserted that every

another, without justifiable cause and with the malicious purpose to inflict it, is of itself a wrong. This principle has been applied in some jurisdictions to the violation of contracts for personal service, and was so applied in this state in *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780, although by a divided court. It has been applied to the malicious enticing away of workmen; to the loss of a contract of marriage by means

of a false and malicious letter; to maliciously enticing and inducing a wife to remain away from her husband; and to maliciously inducing an opera singer to abandon her contract; but we find no case in any court where it has ever been applied to breaches of contracts to convey title to property. It is true that in *Jones v. Stanly*, 76 N. C. 356, it was applied where the president of a railroad company maliciously pre-

procuring of a breach of contract did not give a right of action. The case reviews the prior English decisions on the subject, and it is pointed out that they involve interferences by third persons with contracts for personal services of a particular character, and the language of *Rigby L. J. in Exchange Teleg. Co. v. Gregory* [1896] 1 Q. B. 147, to the effect that it is not every procuring of a breach of contract that will give a right of action is quoted with approval. As an illustration of a contract a breach of which a third person would not be guilty of an actionable wrong in procuring, it is said: "Sometimes it happens that a lady having contracted to marry A is induced to change her mind and marry B, it must be presumed upon a pressing invitation by him to do so. If B was aware of the lady's previous engagement to A, can A, instead of bringing an action for breach of promise against the lady, recover damages in an action of tort against her husband, B, upon the ground that he has interfered with a contractual relation between the lady and A, and induced her to break her contract? Could A, if he commenced his action soon enough, obtain an injunction against B to restrain him from procuring the lady to marry him? If the contention of the counsel of the plaintiffs before me be correct, these questions would have to be answered in the affirmative. Again, suppose A is employed by B, with a stipulation that after the termination of the engagement he shall not enter into any similar employment in the same neighborhood: then suppose A, being no longer employed by B, enters the service of C, carrying on a similar business in the same town, can B sue C for damages, and obtain an injunction to prevent his employing A, when he is no longer in the service of B? We have heard lately that publishers, when they issue a book at a net price, stipulate that the booksellers they supply shall not resell within six months at less than such net price. Does anyone who, within six months of the publication of such a book at a net price, asks, or if you like induces, the bookseller to let him have a copy for less than the net price, render himself liable to an action at the suit of the publisher? I do not think that any contract by A with B merely not to do a particular act or particular acts—for instance, not to purchase goods from or sell goods to C—constitutes a contractual relation, though it may be a valid contract between A and B."

Compare with *Mahoney v. Roberts*, 86 28 L.R.A. (N.S.)

Ark. 130, 110 S. W. 225, wherein a stepson and the wife of a person who, in disposing of a business, contracted not to re-engage in such business, were held guilty of an actionable wrong in knowingly aiding and assisting in the breach of this contract by engaging in that business with the covenantor, and also permitting him to engage in the business in their name.

And see also *Fleckenstein Bros. Co. v. Fleckenstein*, 24 L.R.A. (N.S.) 913, wherein the court restrained third parties from, in the same manner, aiding and assisting a covenantor to breach a similar covenant.

A distinction has sometimes been made between the liability of a person for maliciously procuring the breach of a contract, and for maliciously procuring the termination of a contract terminable at will or procuring a breach of a contract not legally enforceable, and in the latter classes of cases it has been held that it does not amount to an actionable wrong to induce the termination of a contract terminable at will or the breach of a contract not legally enforceable.

Thus, in *McGuire v. Gerstley*, 26 App. D. C. 193, affirmed in 204 U. S. 489, 51 L. ed. 581, 27 Sup. Ct. Rep. 332, it was held that a third person was not liable for maliciously inducing another to terminate a contract of partnership which was terminable at will.

And in *Roberts v. Clark* (Tex. Civ. App.) 103 S. W. 417, the court refused to apply the doctrine of liability for maliciously inducing a breach of contract to an optional contract for the purchase of real estate, and the real-estate broker interested in carrying out such contract was denied the right to recover from a third person for inducing its breach by purchasing the property himself, and thereafter selling same to the original purchaser. The fact that there was a combination between such third person and the parties to the original agreement thereby to defeat the right of the real-estate broker to his commissions was said not to confer upon him the right to maintain such an action.

And in *Davidson v. Oakes* (Tex. Civ. App.) 128 S. W. 944, the doctrine of liability for inducing a breach of contract was held to have no application to the breach of a contract unenforceable at law; and procuring the breach of such a contract, even if actuated by a malicious motive, was held not to render a third person liable to the injured party.

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vented his company from performing a contract of carriage of freight, and in that case Judge Rodman says: "The same reasons cover every case where one person maliciously persuades another to break any contract with a third person." This is but a *dictum*, and in commenting on it the supreme court of Kentucky, in a well-considered opinion in *Chambers v. Baldwin*, 91 Ky. 121, 11 L.R.A. 547, 34 Am. St. Rep. 165, 15 S. W. 57, says: "We have seen no other case where the doctrine is stated so broadly." This Kentucky authority, with the voluminous notes of the annotator and the numerous cases cited, supports fully the text of Judge Cooley that "an action cannot in general be maintained for inducing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it." Cooley, *Torts*, 2d ed. p. 497. To this rule there are but two generally recognized exceptions,—one where servants and apprentices are induced from malicious motives to leave their master before the term of service expires, and the other arises where a person has been procured against his will, or contrary to his purpose, by coercion or deception of another, to break his contract. *Green v. Button*, 2 Crompt. M. & R. 707; *Ashley v. Dixon*, 48 N. Y. 430, 8 Am. Rep. 559. This is based upon the idea that a person has no right to be protected against competition, but he has a right to be free from malicious and wanton interference in his private affairs. If disturbance or loss comes as the result of competition, or the exercise of like rights by others, it is *damnum absque injuria*. *Walker v. Cronin*, 107 Mass. 564. It is only where the contract would have been fulfilled but for the false and fraudulent representations of a third person that an action will lie against such third person. *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 621, citing *Pasley v. Freeman*, 3 T. R. 51, 12 Eng. Rul. Cas. 235.

The case of *Ashley v. Dixon*, *supra*, is in every respect similar to the one under consideration. In that case the New York court holds: "If A has agreed to sell property to B, C may, at any time before the title has passed, induce A to sell it to him instead; and if not guilty of fraud or misrepresentation, he does not incur any liability; and this is so although C may have contracted to purchase the property of B. B cannot maintain an action upon the latter contract, as he cannot perform, and can only look to A for a breach of the former." This doctrine is supported by abundant authority. Cooley, *Torts*, *supra*; *Otis v. Raymond*, 3 Conn. 413; *Young v. Covell*, 8 Johns. 25, 5 Am. Dec. 316; *Johnson v. Hitchcock*, 28 L.R.A. (N.S.)

15 Johns. 185; *Gallagher v. Brunel*, 6 Cow. 347; *Hutchins v. Hutchins*, 7 Hill, 104. Tested by these generally accepted principles, the plaintiff has entirely failed, for he does not allege, and there is not a shred of evidence to prove, that Noble was ready and willing to perform his alleged contract with plaintiff, but that he was prevented against his will from so doing by the false and fraudulent representations of West and Johnson, or either of them. In fact it is hard to discover in the record any evidence that, at the time West is alleged to have purchased the timber, the plaintiff had any subsisting contract with Noble. The latter had given plaintiff an option, but it had expired. Then Noble placed the deed with his attorney, Wooten, to be delivered in case plaintiff paid the purchase money in three days as agreed, which the plaintiff failed to do. Tested by the *dictum* of Judge Rodman in *Jones v. Stanly*, *supra*, the plaintiff also fails, for under that authority, if followed, plaintiff must both allege and prove malice upon the part of West and Johnson, and he fails as to both. The evidence does not disclose any illegal act committed by either West or Johnson, much less an evil one. The latter agreed to buy the timber from plaintiff, who then held an option on it, provided his attorney, Judge Shepard, pronounced the title good. He examined it and pronounced it bad, and Johnson declined to purchase. After plaintiff had failed to take up the deed from Wooten, and pay the price agreed upon between him and Noble, West purchased the timber from Noble, and deposited the money to await the perfecting of the title. It is very hard to discover in the evidence any moral, much less legal, wrong done the plaintiff by these defendants, or either of them. He lost the purchase of the timber, not by any fraudulent practices of West or Johnson, whereby Noble was prevented from selling to the plaintiff, but because he failed to pay Wooten the money for Noble and take the deed at the time agreed upon.

The judgment is affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

THOMAS W. MILLER, Appt.,
v.

S. D. FERGUSON et al.

(— Va. —, 65 S. E. 562.)

Partnership — purchase of judgment — set-off.

One member of a partnership organized for a limited purpose may purchase with his own funds a judgment against his co-partner having no connection whatever with

the partnership transaction, prior to the institution of any proceedings affecting the partnership affairs or the existence of any funds out of which the latter is entitled to claim profits, and use the same as a set-off in settlement of its accounts.

(September 9, 1909.)

APPEAL by plaintiff from a decree of the Circuit Court for Wythe County distributing the proceeds of a sale of certain partnership property contrary to his contention in a suit to establish a special partnership. Affirmed.

The facts are stated in the opinion.

Messrs. Scott & Buchanan, for appellant:

Defendants are not entitled to use the judgment as a set-off in settlement of the partnership accounts.

Bibb v. American Coal & I. Co. 109 Va. 261, 64 S. E. 32; Alexander v. Morris, 3 Call (Va.) 89.

Messrs. Robertson & Wingfield and Robertson, Hall, Woods & Jackson, for appellees:

Defendants had as much right to buy the judgment against Miller as anyone else, and in doing so they were dealing at arm's length and violated no rule of law.

Parsons, Partn. p. 204; 1st Minor, Real Prop. § 501; McKenzie v. Dickinson, 43 Cal. 119.

Interests adverse to a copartner may be lawfully acquired by a partner when these are outside the partnership affairs, for in such transaction they are in no sense confidential agents or trustees of one another.

30 Cyc. Law & Proc. p. 454; McKenzie v. Dickinson, supra; Wheeler v. Sage, 1 Wall. 518, 17 L. ed. 646; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201.

Whittle, J., delivered the opinion of the court:

This case is before us for the second time. The original suit was brought by the ap-

pellant, Thomas W. Miller, against the appellees, Ferguson and Terry, to enforce an alleged parol agreement between the parties for the purchase of the Miller Hill property, in the city of Roanoke, upon the stipulations that Miller and Ferguson were to advance the purchase money, and the property, when acquired, should be divided into lots and sold; and, after defraying expenses and refunding the purchase price with interest, the net profit arising from the sale was to be shared equally by the parties.

The circuit court dismissed the bill, but on appeal this court reversed the decree, and, having established the partnership as outlined above, remanded the case with directions that, unless the parties in interest could reach an agreement among themselves, the circuit court should sell the property upon such terms as it might prescribe, and dispose of the proceeds of sale in accordance with the views expressed in the written opinion of this court. Miller v. Ferguson, 107 Va. 249, 122 Am. St. Rep. 840, 57 S. E. 649, 13 A. & E. Ann. Cas. 138.

The parties failing to agree, the land was sold, and it is admitted that the net proceeds of the sale amount approximately to \$18,000.

We shall dispose of the contention of the appellant that he is entitled to the entire fund under the former decision of this court, by the statement that the circuit court has correctly interpreted the opinion and decree of this court in holding that Miller "was a partner in the land transaction in the bill and proceedings mentioned, and, as such, was entitled to one third of the proceeds of the sale of the land, after defraying the expenses of obtaining the same and refunding the purchase price thereof with interest."

The sole question which claims our attention on this appeal arises upon the petition of Ferguson and Terry, in which they seek to offset the costs awarded Miller in this court with a judgment recovered by the Fidelity Loan & Trust Company against him,

Note. — Right of one partner to acquire individual claim against the other.

The decision reached in the above case finds support in McKenzie v. Dickinson, 43 Cal. 119, in which it was held that there was no principle of equity which forbade one partner from purchasing with his own funds a judgment or other evidence of indebtedness against his copartner in business, or forbidding him from enforcing its collection by a levy upon or sale of the interest of the other in the firm assets. The court declared that the obligations of copartners *inter sese*, whatever might be their nature and extent, referred only to the conduct of the business in which the firm

was engaged, and, where the partnership was not engaged in purchasing judgments or other securities, whatever transaction either partner might effect in that respect by the use of his own private means would be for his own benefit, and not for the benefit of the firm.

In Wheeler v. Sage, 1 Wall. 518, 17 L. ed. 646, and in Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201, cited with McKenzie v. Dickinson, supra, in MILLER v. FERGUSON, as supporting the rule there laid down, the decision was merely that a partner might traffic outside the scope of the partnership business for his own benefit and advantage.

J. A. C.

and to subject his interest in the fund under the control of the court to its satisfaction.

That judgment was assigned by the Fidelity Loan & Trust Company to Ferguson and Terry on July 10, 1905, a short time before the institution of the suit by Miller against them to establish the partnership. Miller, in his answer to the petition, denies that the judgment is a subsisting lien, and attempts to show that prior to the assignment the judgment had been satisfied by certain transactions between himself and the secretary and treasurer of the Fidelity Loan Trust Company.

It would serve no good purpose to trace the history of the negotiations by which Miller sought to have the judgment declared satisfied. It is sufficient to say that his efforts in that regard proved unavailing, and that the evidence shows that the judgment, subject to credits with respect to which the circuit court has directed an inquiry, constitutes a valid lien upon his property.

But it is insisted that, even though the judgment be still unsatisfied, the confidential relations arising out of the contract of partnership forbade that Ferguson and Terry should acquire a judgment against their copartner, to be used as a set-off upon the settlement of the partnership accounts.

It is true that a relation of trust and confidence exists between partners in respect to their dealings with matters pertaining to the partnership; and it is upon that principle that where one partner buys property belonging to the firm, or where he buys a claim against the firm, he acquires it for the benefit of the partnership, and can assert it against the firm only for the amount which it actually costs him.

The doctrine is thus stated in 1 Minor on Real Property, § 501: "It is a general principle of equity no less than of conscience that a trustee should not employ the property he holds in trust for his own private gain, but all profits accruing from such employment must be held to redound to the advantage of *cestui que trust*. Hence, if the trustee compounds a debt due from the trust fund, or buys it for less than its nominal amount, the benefit accrues, not to himself personally, but to the fund."

Still the purchase by one partner with his own means of an individual judgment against another partner at a time when no funds had arisen out of which the latter was entitled to claim profits, is outside of the scope of the partnership business; and whatever view may be taken of such transactions from the standpoint of propriety, we know of no rule of law which forbids it.

The case of *Alexander v. Morris*, 3 Call (Va.) 89, is relied on by the appellant to 28 L.R.A. (N.S.)

sustain the contrary doctrine. The points decided in that case are correctly set forth in the syllabus as follows: "A factor indebted to his principal at the time cannot sell the property of the principal to pay indorsements in the course of his factorage. Nor can a factor buy up the debts of his principal at an under rate, and claim credit for the nominal amount; but in such a case he will only be allowed what he actually paid, although the purchase was made after the factorage had ceased and the principal had brought suit for an account."

In *Alexander v. Morris*, the factor had been guilty of a breach of trust in withholding his employer's funds for ten years, and at the close of a protracted litigation with the principal, after his liability had been fixed, a court of equity refused to permit him to "trump up claims" against his principal by purchasing outstanding bills at a heavy discount, and to use them as set-offs at their face value.

As remarked, the purchase by Ferguson and Terry of the judgment in question was made with their individual means and before suit brought or profits accrued, and had no connection whatever with the partnership, which was of an extremely limited character, involving the single transaction of buying the Miller Hill property for the purpose of subdividing it into lots and selling them at a profit.

In 30 Cyc. Law & Proc. p. 459, after treating of prohibited transactions between partners, it is said: "Interests adverse to a copartner may, however, be lawfully acquired by a partner, when these are outside of the partnership affairs, for in such transactions they are in no sense confidential agents or trustees for each other."

This principle is well sustained by authority. Story, Agency, § 125; *McKenzie v. Dickinson*, 43 Cal. 119; *Wheeler v. Sage*, 1 Wall. 518, 17 L. ed. 646; *Latta v. Kilbourn*, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201.

For these reasons we are of opinion that there is no error in the decree complained of, and it must be affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

GUARDIAN TRUST COMPANY, Appt.,
v.

KANSAS CITY SOUTHERN RAILWAY COMPANY et al.

(96 C. C. A. 285, 171 Fed. 43.)

Injunction — suit in other court — facts — conclusion.

1. In a suit in the United States circuit

Headnotes by SANBORN, Circuit Judge.

court, founded on a creditors' bill against the belt company, a debtor, the trust company, a secured creditor, and others, the southern company, a purchaser at foreclosure sales, intervened. The purpose of the suit was to apply the property which the trust company had received from the belt company and from others to the payment of the claims of the creditors of the latter company. The issue of the state of the accounts between the trust company and the belt company had arisen, and they had stipulated that there should be an accounting between them in the creditors' suit, and that judgment for the amount due should be rendered against the party found to be the debtor. The belt company had alleged that certain of its promissory notes held by the trust company were void, and prayed that they be canceled. The southern company had intervened, and claimed the property which the trust company had received from the belt company and from the other corporations. Thereupon the trust company brought three actions at law in a state court against the southern company, on the grounds that the belt company was indebted to it upon the promissory notes and upon an open account, and that the gulf company was also indebted to it, and that the southern company had assumed and agreed to pay to it all these debts. Upon these facts the southern company, upon a dependent bill in the equity suit, secured an injunction against the prosecution of the actions at law in the state court. Held:

(1) The prosecutions of the actions at law would not prevent the effectual decision of the issues and the administration of the rights and remedies involved in the equity suit.

(2) It would not withdraw or interfere with the legal custody of any specific property which the national court had acquired, or prevent in any degree its subsequent disposition of that property.

(3) The trust company had the legal right to prosecute its actions at law in the state court, and the issue of the injunction was an error.

Same — personal action for same cause.

2. The pendency in another jurisdiction of an action in *personam* for the same cause, which involves no claim to or lien upon any specific property in the possession or under the dominion of a national court of equity, and no issue of which it has acquired exclusive jurisdiction, presents no ground for a dependent bill or an injunction to stay the action at law.

Same — when issued.

3. A court may, by means of a dependent bill and by the use of injunctions and writs of assistance, prevent the prosecution in other courts by the parties to a suit before it of all subsequent actions at

law or suits in equity, (1) which will prevent its effectual determination of the issues, and its administration of the rights and remedies of which it has acquired exclusive jurisdiction in the litigation before it, or (2) which will withdraw or interfere with the dominion it has acquired over specific property to such an extent that its determination of the controversy about it, and the enforcement of its ultimate decree concerning it, may be in any degree prevented.

Action — splitting cause — injunction — laches.

4. Where a complainant presents a part of the existing and known facts which it claims entitle it to an injunction, and fails to secure it, and subsequently presents by another bill the other part of those facts, thereby splitting its cause of action, it exhibits a lack of diligence which is fatal to the second application.

Appeal — disposition of cause.

5. Where, on appeal from an order granting a temporary injunction, or appointing a receiver, it clearly appears that there is no equity in the bill, the appellate court may consider and determine that question and direct its dismissal in order to save the parties to the suit further expense resulting from the endeavor to secure impossible relief.

(April 2, 1909.)

A PPEAL by defendant from an order of the Circuit Court of the United States for the Western District of Missouri, enjoining it from prosecuting certain actions at law which it had instituted in the Circuit Court for Jackson County, Missouri. Reversed.

Statement by Sanborn, Circuit Judge:

This is an appeal from an order which enjoined the Guardian Trust Company, a corporation, from prosecuting three actions at law against the Kansas City Southern Railway Company, another corporation, which the trust company had commenced on March 15, 1905, March 28, 1905, and July 2, 1906, in the circuit court of the county of Jackson, in the state of Missouri, to recover personal judgments against the southern company for about \$545,000. The first and second actions were founded upon the claim of the trust company that the Kansas City Suburban Belt Railroad Company originally owed it about \$500,000, and that the southern company had assumed and agreed to pay that debt. The third action was based upon the claim of the trust company that the Kansas City, Pittsburg, & Gulf Railroad Company originally owed it several thousand dollars, and that the southern company had assumed and agreed to pay that debt.

Note. — As to injunction against action or proceeding in foreign court, see note to *O'Haire v. Burns*, 25 L.R.A.(N.S.) 267.
28 L.R.A.(N.S.)

The southern company had succeeded to the rights and had assumed the liabilities of a committee of reorganization which had purchased at foreclosure sales in March, 1900, and in December, 1901, the property of the gulf company and the property of the belt company, respectively, and it was in those years that the trust company alleged that its causes of action against the southern company accrued. The injunction in this case was issued upon a dependent bill filed on November 16, 1907, by the southern company, the belt company, and its receiver, in a creditors' suit instituted by the Cambria Steel Company, a judgment creditor of the belt company, on September 6, 1900, for the purpose of subjecting the property of the belt company to the payment of the judgment of the Cambria Company, and to the payment of claims of other creditors of the belt company, similarly situated. In that suit the Cambria Company made the belt company and the trust company, but neither the gulf company nor the southern company, parties defendant, alleged that the trust company held the promissory notes of the belt company, and that by the account books of the companies the belt company appeared to be heavily indebted to the former upon the notes and upon open accounts, and that the trust company held a large amount of property which had been delivered to it by the belt company to secure this indebtedness, but that in fact the belt company was not indebted to the trust company, but the latter owed the former, and the Cambria Company prayed for an accounting between the trust company and the belt company, for the payment of any balance owing by the trust company to the belt company, for the application of the property which the trust company had received from the belt company to the payment of the creditors of the latter, for an injunction, and for other relief. Thereupon the court issued a restraining order which forbade the trust company to assign, pledge, or dispose of any of the property mentioned in the bill. The trust company denied by its answer the equities of the bill, and prayed that it be dismissed. On November 20, 1901, the belt company, the trust company, and their receivers, stipulated in the Cambria Company's suit that the accounting between the trust company and the belt company should be expedited, and that a judgment for the amount found due should be rendered against the debtor in that suit. The receivers of the belt company then filed a cross bill in which they alleged that the promissory notes which evidence a part of the indebtedness of the belt company to the trust company, which the latter company avers in its actions at law

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was assumed by the southern company, were without consideration, and they prayed for an accounting, that these notes be delivered up and canceled, and that they recover of the trust company the amount that it should be found indebted to the belt company. The trust company answered this cross bill that the notes were made for a valuable and full consideration, that the belt company was indebted to it upon the notes and upon other accounts, that the trust company was entitled to all the property it had ever received from the belt company; and it prayed that its title to that property might be protected, and that it might have judgment against the belt company and its receivers for the amount due it.

On February 27, 1905, under a stipulation with the trust company and others, the southern company filed its intervening petition in the Cambria Company's case, and on May 1st its amended intervening petition, wherein it set forth certain property that had been received by the trust company at various times, alleged that by virtue of the foreclosures of the mortgages of the belt company, of the gulf company, and of other corporations, under which it had become the purchaser, it was entitled to some of this property, to the proceeds of another part of it, and to the value of still another part of it; and it prayed for a recovery thereof from the trust company. The trust company by an answer denied all the equities of this intervening petition, alleged that the belt company was indebted to it, that the southern company had assumed and agreed to pay that indebtedness, and prayed that the intervening petition of the southern company be dismissed. Meanwhile the three actions at law had been brought in the state court, and in August, 1905, the southern company filed a bill in equity and obtained a temporary injunction from the court below against the prosecution of the first two actions at law, and in May, 1906, the order granting that injunction was reversed by this court. *Guardian Trust Co. v. Kansas City Southern R. Co.* 76 C. C. A. 615, 146 Fed. 337.

The southern company answered in the actions at law, and in May, 1907, it made a motion to stay the proceedings therein upon the same grounds upon which the bill for this injunction rests. The state court denied the motion in June, 1907, and against the protest of the southern company upon a second motion of the trust company, and after a hearing on September 14, 1907, it set the actions at law for trial on December 2, 1907. On November 16, 1907, the bill for this injunction was filed by the south-

ern company and its assistants, the belt company and its receiver.

The transcript of the record in this case is voluminous,—it comprises 742 printed pages,—but no other facts are disclosed therein which can in any way modify the decision which those that have been recited compel.

Argued before Sanborn and Adams, Circuit Judges, and River, District Judge.

Messrs. John A. Sea and George H. English, Jr., with Mr. Edward P. Gates, for appellant:

The injunction was improvidently issued, because the actions in the state courts sought to be enjoined were mere actions *in personam*, and the effect of maintaining them would not be to disturb any property which is or could be in the custody of the court in the main case.

Guardian Trust Co. v. Kansas City Southern R. Co. 76 C. C. A. 615, 146 Fed. 337.

Complainants in the dependent bill are guilty of laches.

Bank of United States v. Schultz, 3 Ohio, 61; Nevada Nickel Syndicate v. National Nickel Co. 86 Fed. 489; Henry v. Travelers' Ins. Co. 45 Fed. 303; Omaha v. Redick, 11 C. C. A. 1, 27 U. S. App. 204, 63 Fed. 6.

The complainants in the dependent bill are bound by the former adjudication in respect to all the matters that were or could have been litigated in that proceeding.

21 Am. & Eng. Enc. Law, p. 227; Prentice v. Buxton, 3 B. Mon. 35; Hapgood v. Ellis, 11 Neb. 131, 7 N. W. 845; Re Clifford, 37 Wash. 460, 107 Am. St. Rep. 819, 79 Pac. 1001; Gallaher v. Moundville, 34 W. Va. 730, 26 Am. St. Rep. 942, 12 S. E. 859; Ingraham v. Dawson, 20 How. 486, 15 L. ed. 984.

Questions of expense do not afford ground for an interference of equity.

The Mamie (Parcher v. Cuddy) 110 U. S. 742, 28 L. ed. 313, 4 Sup. Ct. Rep. 194.

Messrs. Samuel W. Moore and F. H. Wood for appellees.

Sanborn, Circuit Judge, delivered the opinion of the court:

The cause of action in the suit brought by the Cambria Company, so far as the trust company, the belt company, and the southern company and their receivers are concerned, is the misappropriation by the trust company of property which it received from the belt company and other corporations, and the relief sought is the recovery from the trust company of that property, or of its proceeds, or of its value. The causes of action in the three cases in the state court are the debts of the southern company to

the trust company, and the only relief sought in those actions consists of personal judgments against the southern company. The suit in equity is not upon the same cause of action as any of the actions at law. The trust company has not in the equity suit prayed or in any way sought to obtain a judgment against the southern company on account of any of the causes of action pleaded in the actions at law in the state court.

Counsel for the southern company say that the indebtedness of the belt company to the trust company, and the cancelation of the notes which evidence a part of that alleged debt which the trust company claims was assumed by the southern company, are at issue and will be ultimately determined upon the accounting in the equity suit, and they argue that if those issues should be determined against the trust company in that suit, there would be no basis for the alleged assumption of a debt of the belt company by the southern company, or for any judgments against it. Be it so, but the suit in equity was brought and is pending in the United States circuit court for the western district of Missouri. The actions at law were subsequently commenced and are pending in another jurisdiction,—in the circuit court of the county of Jackson, of the state of Missouri. Even if the subsequent actions at law were between the same parties and involved the same cause of action, as they do not, these facts would furnish no ground for an injunction against their prosecution. The existence of an earlier suit in equity between the same parties, for the same cause, in one jurisdiction, will not sustain a plea in abatement or an injunction to stay the prosecution of a later action at law in another jurisdiction, where the prosecution of the later action does not prevent the determination of the issues and the administration of the rights and remedies involved in the former suit. Mutual L. Ins. Co. v. Brune (Mutual L. Ins. Co. v. Harris) 96 U. S. 588, 593, 24 L. ed. 737, 740; Franklin v. Conrad-Stanford Co. 70 C. C. A. 171, 175, 178, 137 Fed. 737, 741, 744; Ogden City v. Weaver, 47 C. C. A. 485, 489, 108 Fed. 564, 568.

In the first case there were two claimants of the moneys owing by the insurance company upon two policies of insurance issued to Brune. One of the claimants, Mrs. Barry, brought a suit in equity in the supreme court for the city and county of New York, against the insurance company, Brune, and his assignee, Whitridge, in which she pleaded her claim to the money, and prayed that the company might be enjoined from paying the amount due upon the policies to Brune or to Whitridge, and that it might be compelled to pay it to her. The in-

insurance company, Brune, and Whitridge answered the bill, and the parties made an agreement in the suit that the insurance company should pay the money into court, where the ownership of it should be adjudicated. Thereafter, and before the adjudication, Whitridge sued the insurance company at law upon the policies for the amount due in the United States circuit court for the district of Maryland. Thereupon the insurance company exhibited its bill in equity in that court, wherein it set forth the prior suit in New York, and prayed for an injunction against the prosecution of the subsequent action at law, but the court refused to issue the injunction and dismissed the bill, and the Supreme Court sustained its action. That court said: "Certain it is that the plea of a suit pending in equity in a foreign jurisdiction will not abate a suit at law in a domestic tribunal. This was shown in a very able decision made by the supreme court of Connecticut, in Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433, where the authorities are learnedly and logically reviewed. See also Colt v. Partridge, 7 Met. 570, and Blanchard v. Stone, 16 Vt. 234. If, then, a bill in equity pending in a foreign jurisdiction has no effect upon an action at law for the same cause in a domestic forum, even when pleaded in abatement; if, still more, it has no effect when pleaded to another bill in equity, as the authorities show, it is impossible to see how it can be a basis for an injunction against prosecuting a suit at law. It follows that the refusal of an injunction by the circuit court was not erroneous."

In the second case a suit in equity had been brought in a state court of Montana to foreclose a mortgage, and to procure a judgment against the maker of the mortgage note for the deficiency after the sale. The sale had been made and reported, and there was a docket entry that \$8,805.60 remained unpaid upon the mortgage note, but no decree or judgment had been entered for this amount against the maker of the note, who was a party defendant in the foreclosure suit. The successor in interest of the complainant in that suit then brought an action at law upon the note against its maker in the United States circuit court for the district of Utah for the \$8,805.60, and recovered. Judge Marshall said: "Lastly, it is contended that the foreclosure suit is still pending in the state court of Montana for the purpose of obtaining a deficiency judgment, and that such pending suit is ground for abating this action. This is an action at law *in personam*. It in no way involves any interference with the conduct of the suit in the state court of Montana, nor does it affect any property within the jurisdiction

of that court. Under these circumstances it is settled by the highest authority that the pendency of an action in a state court is no ground for abating an action subsequently brought in a Federal court upon the same cause of action. Mutual L. Ins. Co. v. Brune (Mutual L. Ins. Co. v. Harris) 96 U. S. 588, 24 L. ed. 737; Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; Ogden City v. Weaver, 47 C. C. A. 485, 108 Fed. 564, 567."

His decision applies to the case at bar, and it was affirmed by this court.

In Ogden City v. Weaver, 47 C. C. A. 485, 489, 108 Fed. 564, 568, the city had brought a suit in equity in the district court for the third judicial district of the state of Utah against the Bear River Irrigation & Ogden Waterworks Company, called the irrigation company, and against the Bear Lake & River Waterworks & Irrigation Company, called the waterworks company, and it had obtained an interlocutory decree that a certain contract between the city and Bothwell, under which the companies had been furnishing water to the city, was invalid, and that an accounting should be had between the companies and the city regarding their prior business transactions. In that condition of the equity suit, the receivers of the Irrigation Company, who had succeeded to the interests of that company, and were bound by all that had been done in the suit in the state court, commenced an action at law against the city upon the Bothwell contract for water furnished to the city thereunder by the Irrigation Company. Counsel for the city contended that the action at law must be stayed on account of the pendency of the suit in equity, but Judge Thayer, delivering the opinion of this court said: "This contention, however, is based upon a misconception of the character of the present proceeding, which is an action at law, *in personam*, to recover a sum of money due under a contract. It is not a case which affects the custody of any property over which the state court has first acquired jurisdiction. Neither is it a case which involves any interference with the orderly conduct of the litigation in the state court. It is simply one of those cases, such as frequently occur, where a state court and a Federal court, in the exercise of a jurisdiction which rightfully belongs to each, are called upon to determine the same question; and the fact that they may disagree and decide the question differently in no wise interferes with the right of either to proceed. It is well settled that the fact that a suit upon a cause of action is pending in a state court will not sustain a plea of *lis pendens* to a suit upon the same cause of action, subsequently filed in a Federal court."

It is equally true that the fact that a suit

upon a cause of action is pending in a Federal court will not sustain a plea of *lis pendens* to a suit upon the same cause of action subsequently filed in a state court.

These decisions of the Supreme Court and of this court answer many arguments of counsel in support of this injunction. They establish the propositions that the averments in the equity suit of no indebtedness of the Belt Company, and of the invalidity of the notes, together with the prayers for the accounting and for the cancelation of these notes, did not withdraw from the jurisdiction of the state court or prevent the trial in that court of the issue of debt or no debt in the subsequent actions at law therein, for that question was adjudged in the Cases of Brune and of Ogden City; that the fact that the remedy at law is not as complete, prompt and adequate as the remedy in equity, by an accounting or otherwise, is no ground for an injunction against the prosecution of the actions at law in another jurisdiction, for that question was adjudged in the Ogden City Case, and if that fact would sustain such an action, then no action at law for the same cause as a prior suit in equity could be maintained, for the remedy by the latter is always more complete, adequate, and effective than the remedy at law; that the stipulation between the belt company and the trust company, that an accounting between them should be had, and a judgment against the debtor should be rendered in the suit in equity, furnishes no reason for enjoining the prosecution of the subsequent actions at law, for that question was adjudicated in the Case of Brune, where there was a similar agreement between the parties to the action at law. By so much the more is the stipulation in this case ineffectual, because the southern company was not a party to it, nor to the Cambria Company's Case at the time the stipulation was made.

Counsel contend that the restraining order of September 6, 1900, forbade the actions at law. But the limit of the restraint upon the trust company by that order was "from in any manner, directly or indirectly, selling, transferring, assigning, pledging, or otherwise disposing or parting with the possession or control of, any of the property, assets, notes, stocks, bonds, claims, and demands mentioned and referred to in the bill of complaint;" and it in no manner prohibited the trust company from collecting, by suit or otherwise, any of the notes, accounts, or claims there mentioned. It did not require the trust company to permit the statute of limitations to run upon its causes of action against the southern company or others.

Counsel invoke the conceded rules that a court may, by means of a dependent bill and

by the use of injunctions or writs of assistance, prevent the prosecution by the parties to a suit before it of subsequent actions at law or suits in equity, (1) which will prevent its effectual determination of the issues and its administration of the rights and remedies of which it has acquired exclusive jurisdiction in the litigation before it (*Sharon v. Terry* [C. C.] 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 337; *Starr v. Chicago, R. I. & P. R. Co.* [C. C.] 110 Fed. 3; *French v. Hay* [*French v. Stewart*] 22 Wall. 250, 22 L. ed. 857; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; *Dietzsch v. Huidekoper* [*Kern v. Huidekoper*] 103 U. S. 494, 26 L. ed. 497), or (2) which will withdraw or interfere with the legal custody of specific property which it has acquired, so that its determination of the controversy about it and the enforcement of its decree concerning that property may be in any degree prevented (*Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 177 U. S. 51, 61, 44 L. ed. 667, 671, 20 Sup. Ct. Rep. 564; *Peck v. Jenness*, 7 How. 612, 12 L. ed. 841; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; *Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 185, 134 Fed. 1, 15; *Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 761, 66 C. C. A. 55, 58, 132 Fed. 945, 948; *Lang v. Choctaw, O. & G. R. Co.* 87 C. C. A. 307, 160 Fed. 355, 360; *Sullivan v. Algrem*, 87 C. C. A. 318, 160 Fed. 366, 370; *Gates v. Bucki*, 4 C. C. A. 116, 124, 12 U. S. App. 69, 53 Fed. 961, 969).

But the prosecutions of the actions at law in question in this case cannot in any way prevent the effective determination of the issues or the administration of the rights and remedies involved in the suit in equity in the national court, nor can it interfere with the legal custody of the specific property of which that court has jurisdiction. The liability of the southern company to pay the debts which the trust company alleges in the actions at law it has promised to pay is not in issue, and cannot be determined in the suit in equity, and the state court has no jurisdiction over and cannot interfere in those actions *in personam* with the specific property which is the subject of the litigation in the Federal court. This case falls far within the unquestioned rule that the pendency in a state or other court of an action *in personam* which involves no claim to or lien upon specific property in the possession or under the dominion of a national court of equity, and no issue of which that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to

stay it. *Stanton v. Embrey*, 93 U. S. 548, 554, 23 L. ed. 983, 984; *Standley v. Roberts*, 8 C. C. A. 305, 314, 19 U. S. App. 407, 59 Fed. 836, 844; *Barber Asphalt Paving Co. v. Morris*, *supra*; *Merritt v. American Steel-Barge Co.* 24 C. C. A. 530, 535, 49 U. S. App. 85, 79 Fed. 228, 233; *Green v. Underwood*, 30 C. C. A. 162, 164, 57 U. S. App. 535, 86 Fed. 427, 429; *Hughes v. Green*, 28 C. C. A. 537, 539, 84 Fed. 833, 835; *Hubinger v. Central Trust Co.* 36 C. C. A. 494, 496, 94 Fed. 788, 790; *Ogden City v. Weaver*, 47 C. C. A. 485, 492, 108 Fed. 564, 568; *Baltimore & O. R. Co. v. Wabash R. Co.* 57 C. C. A. 322, 324, 119 Fed. 678, 680; *Ball v. Tompkins* (C. C.) 41 Fed. 486, 490; *Guardian Trust Co. v. Kansas City Southern R. Co.* 76 C. C. A. 615, 618, 146 Fed. 337, 340.

There is another objection to this injunction. The issue of it was not a matter of right. It rested in the discretion of the court, not in its arbitrary whimsical will, but in its sound judicial discretion, informed and directed by the principles, rules, and practice of equity jurisprudence. The good faith and the reasonable diligence of the moving party and his probable irreparable injury if the injunction was not issued were indispensable conditions to the decision that it should issue. The actions at law which were enjoined were commenced in the state court in March, 1905, and in July 1906. In the month of August, 1905, the southern company filed its first bill to enjoin the prosecution of the first two actions, and obtained an order for a temporary injunction, which was reversed by this court in May, 1906. At the time it filed this first bill all the facts which it now claims entitle it to this second injunction existed and must have been known to it, but it failed to plead them. In May, 1907, the southern company made a motion in the state court to stay the progress of the actions at law upon the same grounds which it presented to the court below in the present bill, and the state court denied its motion. In September, 1907, that court set the actions at law pending in it for trial upon the motion of the trust company on December 2, 1907. On November 16, 1907, the present bill was filed, and for the first time the southern company prayed the court below to stay these actions for the reasons now urged, which had existed during all the time after March, 1905. The failure of that company to present these reasons in its former bill, the splitting of its cause of action for this injunction which that failure wrought, the unnecessary delay and expense thereby imposed upon the litigants in this suit, establish such a deleterious lack of diligence as appeals with compelling force to the discretion of a court of equity to deny such an injunction. And when to this inexcusable

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and expensive delay is added the fact that the trust company had the undoubted legal right to prosecute these actions at law, so that no legal injury could result to the southern company therefrom, the conclusion is irresistible, not only that the injunction was erroneously issued, but that there was no equity in the supplemental bill upon which it is founded.

Where, on an appeal from an order granting or continuing a temporary injunction, or from an order appointing a receiver, the equity of the bill is challenged, and the attack upon it appears to be well founded, the power is conferred, and the duty is imposed, upon the appellate court to consider it, and if it is of the opinion that the relief sought by the bill cannot be granted, to so decide, and thus to save the parties to the suit further expense resulting from the endeavor to secure impossible relief. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 524, 41 L. ed. 810, 812, 17 Sup. Ct. Rep. 407; *Highland Ave. & Belt R. Co. v. Columbian Equipment Co.* 168 U. S. 627, 630, 42 L. ed. 605, 606, 18 Sup. Ct. Rep. 240; *Cabaniss v. Reco Min. Co.* 54 C. C. A. 190, 192, 116 Fed. 318, 320; *Chicago Wooden Ware Co. v. Miller Ladder Co.* 66 C. C. A. 517, 521, 133 Fed. 541, 545; *Arkansas Southeastern R. Co. v. Union Sawmill Co.* 83 C. C. A. 224, 231, 154 Fed. 304, 311; *Mann v. Gaddie*, 88 C. C. A. 1, 158 Fed. 42, 48; *Shubert v. Woodward*, 92 C. C. A. 509, 167 Fed. 47.

The order for the issue of the injunction must be reversed, and the case must be remanded to the court below, with directions to dismiss the supplemental bill for want of equity; and it is so ordered.

And it is further ordered that the mandate in this case issue ten (10) days after the filing of this opinion.

COLORADO SUPREME COURT.

FRANK C. YOUNG, Appt.,
v.
VIRGINIA KIMBER.

(44 Colo. 448, 98 Pac. 1132.)

Money had and received — demand.

1. No demand is necessary before institution of a suit to recover money collected by defendant for plaintiff.

Note. — Demand as a condition of action to recover money collected by an agent.

This note does not include cases where it appeared that, instead of the money being collected by the agent, it was placed in his hands by the principal himself, for investment or other purposes. The cases dealing

Interest — allowance — statute.

2. Interest cannot be allowed for the retention of money vexatiously withheld, in the absence of a statutory provision for its allowance.

(November 16, 1908.)

APPEAL by defendant from a judgment of the District Court for the City and County of Denver in plaintiff's favor in an action brought to recover money alleged to have been collected by defendant for plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. Daniel Sayer and Charles R. Bell, for appellant:

Plaintiff was not entitled to interest.

Hoblit v. Bloomington, 71 Ill. App. 204;

with the question whether demand is necessary to recover money collected by a sheriff, constable, or other public officer, although closely related to those here included, have been expressly excluded from this note.

According to the weight of authority, and contrary to *YOUNG v. KIMBER*, demand is necessary before institution of a suit to recover money collected by an agent for his principal.

Cases which have so held or recognized this rule are *Sally v. Capps*, 1 Ala. 121; *Cummins v. McLain*, 2 Ark. 402 (money collected by attorney through another agent); *Sevier v. Holliday*, 2 Ark. 512 (attorney); *Palmer v. Ashley*, 3 Ark. 75 (attorney); *Taylor v. Spears*, 6 Ark. 381, 44 Am. Dec. 519; *Warner v. Bridges*, 6 Ark. 385; *Leake v. Sutherland*, 25 Ark. 219; *Armstrong v. Smith*, 3 Blackf. 251; *Judah v. Dyott*, 3 Blackf. 324, 25 Am. Dec. 112 (money collected by factor); *English v. Devarro*, 5 Blackf. 588; *Phillips v. Wills*, 2 Ind. 325; *Black v. Hersch*, 18 Ind. 342, 81 Am. Dec. 362 (money collected by attorney); *Pierse v. Thornton*, 44 Ind. 235 (attorney); *Heddens v. Younglove*, 46 Ind. 212; *Kyser v. Wells*, 60 Ind. 261; *Dodds v. Vannoy*, 61 Ind. 89; *State ex rel. Buskirk v. Sims*, 76 Ind. 328 (attorney); *Babb v. Babb*, 89 Ind. 281; *Claypool v. Gish*, 108 Ind. 424, 9 N. E. 382 (attorney); *Goben v. Phillips*, 12 Ind. App. 629, 40 N. E. 929; *Whinery v. Brown*, 36 Ind. App. 276, 75 N. E. 605 (attorney); *Alexander v. Jones*, 64 Iowa, 207, 19 N. W. 913; *Staples v. Staples*, 4 Me. 532 (obiter statement that, until after demand, attorney was not liable to his principal); *Cockrill v. Kirkpatrick*, 9 Mo. 697; *Beardslee v. Boyd*, 37 Mo. 180 (attorney); *Anderson v. Hulme*, 5 Mont. 295, 5 Pac. 865; *Burns v. Pillsbury*, 17 N. H. 66 (factors); *Taylor v. Bates*, 5 Cow. 376 (attorney); *Ex parte Ferguson*, 6 Cow. 596 (attachment against attorney); *Rathbun v. Ingalls*, 7 Wend. 320 (attorney); *Sears v. Patrick*, 23 Wend. 528; *Cooley v. Betts*, 24 Wend. 203 (factor); *Hays v. Stone*, 7 Hill, 128 (foreign factors); *Brink v. Dolsen*, 8 Barb. 337 (action to recover proceeds from factors); *Walrath v. Maynard*, 3 Barb. 584 (attorney); *Cottrell v. Finlayson*, 4 How. Pr. 242 (attachment against attorney); *Banner v. D'Auby*, 34 Misc. 525, 69 N. Y. Supp. 891 (attorney); *Satterlee v. Frazer*, 2 Sandf. 141 (attorney); *Grinnell v. Sherman*, 38 N. Y. S. R. 587, 14 N. Y. Supp. 544 (attorney); *Grover v. Clark*, Wright (Ohio) 350 (factor); *Krause v. Dorrance*, 10 Pa. 462, 51 Am. Dec. 496 (attorney); *Madden v. Watts*, 59 S. C. 81, 37 S. E. 209; *Hall v. Peck*, 10 Vt. 474 (factor).

Thompson v. Fullinwider, 5 Ill. App. 551; *Adams Exp. Co. v. Milton*, 74 Ky. 49; *Franklin County v. Layman*, 145 Ill. 138, 33 N. E. 1094; *Patrick v. Perryman*, 52 Ill. App. 514; *Supply Ditch Co. v. Elliott*, 10 Colo. 331, 3 Am. St. Rep. 586, 15 Pac. 691.

A demand was necessary before institution of suit.

Reina v. Cross, 6 Cal. 31; *Greenfield v. The Grunnell*, 6 Cal. 68; *Walrath v. Thompson*, 6 Hill. 540.

Mr. J. A. Bentley also for appellant.

Messrs. Thomas, Bryant, & Lee, and William P. Malburn, for appellee:

A tender having been made, interest follows as a matter of course.

Redington v. Chase, 34 Cal. 666; *Helena*

rell v. Finlayson, 4 How. Pr. 242 (attachment against attorney); *Banner v. D'Auby*, 34 Misc. 525, 69 N. Y. Supp. 891 (attorney); *Satterlee v. Frazer*, 2 Sandf. 141 (attorney); *Grinnell v. Sherman*, 38 N. Y. S. R. 587, 14 N. Y. Supp. 544 (attorney); *Grover v. Clark*, Wright (Ohio) 350 (factor); *Krause v. Dorrance*, 10 Pa. 462, 51 Am. Dec. 496 (attorney); *Madden v. Watts*, 59 S. C. 81, 37 S. E. 209; *Hall v. Peck*, 10 Vt. 474 (factor).

This rule has also been recognized in the following cases, although the main question at issue was whether the statute of limitations had run against the action to recover the money collected: *Kimbrow v. Waller*, 21 Ala. 376 (collection of money by attorney); *Taylor v. Spears*, 8 Ark. 429; *Denton v. Embury*, 10 Ark. 228 (attorney); *Jett v. Hempstead*, 25 Ark. 462; *Whitehead v. Wells*, 29 Ark. 99 (attorney); *Leigh v. Williams*, 64 Ark. 165, 41 S. W. 323 (attorney); *Voss v. Bachop*, 5 Kan. 59 (attorney); *Green v. Williams*, 21 Kan. 64 (attorney living in other state); *Roberts v. Armstrong*, 1 Bush, 263, 89 Am. Dec. 624 (attorney); *Cord v. Taylor*, 5 Ky. L. Rep. 852 (attorney); *Baird v. Walker*, 12 Barb. 298 (factors); *Walden v. Crafts*, 2 Abb. Pr. 301 (foreign factor); *Waring v. Richardson*, 33 N. C. (11 Ired. L.) 77; *Moore v. Hyman*, 34 N. C. (12 Ired. L.) 38; *Hyman v. Gray*, 49 N. C. (4 Jones, L.) 155; *Jones v. Woods*, 70 N. C. 447; *Bryant v. Peebles*, 92 N. C. 176 (attorney); *Lever v. Lever*, 1 Hill, Eq. 62; *Gardner v. Peyton*, 5 Cranch, C. C. 561, Fed. Cas. No. 5,234 (attorney); *Sneed v. Hanly*, Hempst. 659, Fed. Cas. No. 13,136 (attorney); *Topham v. Braddick*, 1 Taunt. 572 (factor).

It is to be observed by way of precaution, however, that this note does not purport to cover the general question as to when limitation commences to run against actions of this kind, and the above cases are cited simply for their bearing on the general question whether demand is a condition of the action. Whether, even upon the assumption that demand is a condition of the right to bring the action, limitation will commence to run after the lapse of reason-

v. Turner, 36 Ark. 580; Berthold v. Reyburn, 37 Mo. 587; Levan v. Sternfeld, 55 N. J. L. 41, 25 Atl. 854; Freeman v. Fleming, 5 Iowa, 460; Smith v. Anders, 21 Ala. 783; The Good Hope, 40 Fed. 608; Chapman v. Burt, 77 Ill. 337.

Bailey, J., delivered the opinion of the court:

The complaint in this action alleged that the plaintiff was the owner of certain bonds issued by the Gunnell Gold Mining & Milling Company, that upon the 1st day of January, 1900, there were interest coupons due thereon amounting to \$1,295; that the International Trust Company of Denver was in possession of the bonds and coupons for plaintiff, and delivered them to the defend-

ant for collection; and that upon the 8th of January, 1900, the defendant collected for the use and benefit of the plaintiff the sum of \$1,295 on account of these coupons. The seventh paragraph of the complaint is as follows: "That said defendant, having received said sum of \$1,295, for the use and benefit of this plaintiff, and for and on her account, then and there promised and agreed to pay the same to her upon demand; yet the plaintiff says that, though frequently so demanded, the said defendant has heretofore failed, neglected, and refused, and still fails, neglects, and wholly refuses, to pay the said sum of money or any part or portion thereof to this plaintiff." The defendant filed an answer, in which he admitted all of the allegations of the complaint except

able time in which to make the demand, and before actual demand is made, is not within the scope of this note.

In Burton v. Collin, 3 Mo. 315, it was said: "It is well settled that an agent who receives money or property for his principal, or a factor who sells goods or property, or receives goods or property which remain unsold, is not liable to an action until the money, goods, or property has been demanded, or an account of sales, where the goods or property has been sold."

In Ferris v. Paris, 10 Johns. 285, it was held that a factor or consignee apprising his principal of the sale of goods consigned to him may wait to receive directions as to the mode of remitting the proceeds, and he is not liable to an action until a default on his part.

In Cooley v. Betts, supra, where an action was brought for the recovery of the proceeds for goods sold, the court took occasion to say: "I am not disposed to deny that there may be a sound distinction between an action for not accounting, and an action for not paying over the proceeds of the goods. It is the duty of an agent to render an account of his transactions to his principal within a reasonable time; and when it appears that he has neglected to do so, an action for not accounting may, perhaps, be maintained without a demand. But here there was no evidence to show that the defendants had not rendered an account. And besides, the action is for not paying over the proceeds of the goods,—the special counts being laid out of the case,—and in such an action it is necessary to show a demand or instructions to remit."

In Roberts v. Armstrong, supra, it was said that an attorney's liability rests upon the principle of his agency for his client; and it would seem to be in opposition to the very nature of the trust imposed by his agency to hold him liable to an action for money collected by him until after a refusal on his part to pay it over.

It must be said, however, that a diversity of opinion does exist on this question, for a number of cases, in accordance with YOUNG v. KIMBER, have held that it is not

necessary before institution of a suit to recover money collected by an agent. This seems to have been recognized in Shepherd v. Crawford, 71 Ga. 458 (money collected by attorney); Looney v. Looney, 116 Mass. 283 (money collected on insurance policy); Merchants' Bank v. Rawls, 21 Ga. 289 (money collected by bank president).

In Tinkham v. Heyworth, 31 Ill. 519, there is an *obiter* statement to the effect that an attorney who collects money for his client must pay it over immediately, without demand.

So, in Coffin v. Coffin, 7 Me. 298, where the question was as to when limitations commenced to run against an action to recover from an attorney money collected, the court, after calling attention to the fact that the statement in regard to demand, made in Staples v. Staples, supra, was merely *obiter*, continued: "Any impressions received as to the necessity of a demand upon an attorney for money collected by him, before he can be considered as liable to an action, will be removed by the present opinion. Indeed, we are satisfied, on further examination of the subject, that we are not authorized to distinguish an attorney from other agents, and that the language used by the court, even if applied exclusively to that case, could not be sanctioned as correct."

And see Hawley v. Sage, 15 Conn. 52, *infra*, also set out in the YOUNG CASE.

In New York, although the earlier cases uniformly held that demand was necessary to recover money collected by an agent, the courts soon showed a tendency to depart from that rule; but in doing so, some of them, at least, attempted to distinguish the earlier cases, while others, although, as far as the facts are concerned, not necessarily opposed to those cases, at least used language broad enough to deny the rule altogether.

In Lillie v. Hoyt, 5 Hill, 395, 40 Am. Dec. 360, the court, after reviewing the earlier New York cases, and saying that the utmost that those cases established is that a foreign factor and an attorney at law, are not liable until request, held that, so far as a mere collecting agent is concerned, it

this seventh paragraph, which was denied. In a separate defense he pleads certain matters which are not material to this controversy, as we shall presently see, and this is also true of plaintiff's replication. When the matter came on for trial in the district court, the plaintiff read the pleadings to the jury, and stated that she was willing to rest her case upon the admissions contained in defendant's answer. Defendant likewise stated that he was willing to rest. The plaintiff then called defendant to the witness stand, and, after having asked him some preliminary questions, defendant's counsel objected to the testimony being taken, for the reason that both sides had rested, and any testimony which plaintiff would be entitled to introduce would be in rebuttal

of that which defendant had introduced. Defendant not having introduced any testimony, there was nothing to rebut. Plaintiff admitted the correctness of this contention and withdrew the witness. Plaintiff then moved that the jury be instructed to return a verdict for plaintiff, and defendant moved for a nonsuit. The court instructed the jury to return a verdict for plaintiff in the sum of \$1,695.08, upon which verdict judgment was rendered. All that portion of the verdict in excess of \$1,295 was for interest.

The important question presented in this record is as to whether or not it is necessary to make a demand upon a party who has received money for the use of another before an action may be maintained to recover the

is his duty to pay over within a reasonable time; and if he does not do so, the principal may maintain an action for money collected, without any previous demand.

In *Mills v. Mills*, 115 N. Y. 80, 21 N. E. 714, the question arising as to whether the statute of limitations had run, it was held that demand on the part of the plaintiff was not necessary to recover the surplus remaining in a brother's hands after he had fully reimbursed himself out of the proceeds of the sale of lands which had been absolutely deeded to him to cover debts owing him by the former. The court in this case said: "When money is received by one to and for the use of another, under such circumstances that it is his duty at once to pay it over, then an action for money had and received may be brought to recover it, without any demand."

To the same effect are *Wood v. Young*, 141 N. Y. 211, 36 N. E. 193 (collecting of insurance money by brother), and *Hickok v. Hickok*, 13 Barb. 632 (collecting money on note by person not an attorney or foreign factor).

In the last two cases the question of demand arose also in connection with the statute of limitations.

In *Re Cole*, 34 Hun, 320, also concerning the running of the statute of limitations, it was held that demand is not necessary on the part of a wife to recover from her husband's estate money which had been paid to him "for the use and benefit of his wife." The court said: "The test of the necessity for a demand is whether it was then and there the legal duty of the husband to pay this money to his wife. It was her money, and not his. He received it for her use and benefit, and not for his own. He kept the money that was her due. If he could lawfully withhold it from her, it must be by virtue of some understanding or contract with her, and none is shown. Such contract or understanding exists in the case of a deposit of money with a bank, or a special deposit, to be gratuitously kept and returned *in specie*."

So, in *Plummer v. Bankers' Surety Co.* 52 Misc. 97, 101 N. Y. Supp. 529, where an 28 L.R.A. (N.S.)

action was brought to hold the sureties of an auctioneer liable on his bond, it was held that it was not necessary to prove demand of the auctioneer for the money collected by him upon the sale of goods.

And see the cases cited in the *YOUNG CASE*.

Exceptions to general rule.

Although, as was above stated, the general rule is that demand is necessary before institution of a suit to recover money collected by an agent, from the very nature of the question there must exist many circumstances which will dispense with the necessity of demand.

Thus, in *Krause v. Dorrance*, 10 Pa. 462, 51 Am. Dec. 496, *supra*, the court took occasion to say that circumstances may exist which will dispense with the necessity of demand. As, when the attorney has been guilty of fraud or malpractice, or of culpable negligence in not giving notice of the receipt of the money in a reasonable time; or when he puts in a sham plea for delay; or when he exhibits a manifest desire to baffle the plaintiff, and withhold from him his just demand.

In *Clark v. Moody*, 17 Mass. 145, the law in regard to whether demand is necessary to recover from a factor the money collected as the proceeds of sales was laid down as follows: "Generally the consignor of goods accompanies his consignment with directions how to apply the proceeds; either to pay them over to a third person, or to remit in bills, or in merchandise, or in specie, or to hold them to answer his future orders; and in these cases there can be no difficulty. For the factor cannot be liable until he has actually or impliedly broken his orders. I say impliedly, for if the factor should become bankrupt or insolvent, with the goods of the principal, or their proceeds, in his hands, so that he is disabled from remitting them or otherwise appropriating them according to the instructions of the principal, there seems to be no reason why an action would not immediately lie against him, by analogy to the common-law principle, that

same. There is apparently a great diversity of opinion on this question among the courts of last resort. This diversity is more apparent than real, however; each case seemingly having been determined upon its own peculiar facts. Upon receiving the money, it was defendant's plain duty to have remitted it to the plaintiff. There was an implied contract upon the part of the defendant that upon the receipt of the money he would deliver it to plaintiff, and a party is usually bound to perform his contracts without being first requested so to do, unless there be an express stipulation to the contrary. We are inclined to believe that no demand was necessary before the institution of the suit. That belief is supported by the following authorities: In *Howard v. France*,

when a duty is to arise upon a demand, and the party liable has disabled himself from performing, the necessity of a demand ceases. And if this were not so, creditors here, who could not for a long time cause a demand to be made, would have no opportunity of securing themselves out of the effects of the factor in this country; while creditors of a different description, but not more meritorious, would meet with no impediment in securing their debts. The practice here has conformed to this principle; for many instances are known to have occurred, of actions brought and sustained against factors in foreign countries, although no demand had been previously made upon them to render an account. And it is probably upon this ground, if at all, that a principal may prove his claim against his factor, under a commission of bankruptcy in England, although no demand had been made upon him; so that the debt was contingent, according to the general liability of factors. . . . It is also the duty of factors to account to their principals in a reasonable time, without any demand, in cases where a demand would be impracticable or highly inconvenient; so that a factor abroad, who should receive goods to sell, without special directions as to the mode of remittance, would be held, according to the course of business, to give his principal information of his progress in the transaction; and if he should neglect unreasonably to forward his account to his employer, this negligence would be a breach of his contract, and subject him to an action. So, if he should render an untrue account, even without any intention of fraud, claiming greater credit than he was entitled to, so that the balance shown was not true, we conceive the principal would have a right of action, without a demand. For he would not be obliged to submit to such charges as the factor should choose to make, or to wait, perhaps at the risk of his debt, until his agent should voluntarily correct his account, and acknowledge a just balance. But if the factor should receive and sell the goods, without any special orders as to remittance, upon 28 L.R.A. (N.S.)

43 N. Y. 593, it was said by Mr. Judge Allen: "It is the duty of one who has received money to the use of another to pay it over; and no demand is necessary by the latter before action." "No demand is necessary before bringing an action for money received to plaintiff's use, where it was the duty of the defendant to have remitted it." *Stacy v. Graham*, 14 N. Y. 492. A, B, C, and D were proprietors of a fishery, and B, who was called agent, treasurer, and clerk, received the money for the sale of the fish, made the disbursements, and kept the accounts. The accounts were settled and a balance struck in favor of the proprietors, but B omitted to pay to D the balance that belonged to him. Held, that D might maintain an action in assumpsit against B, to

an understanding, express or implied, that he is to hold the proceeds to the order of his principal, and he does nothing in violation of those orders, or to disable himself from complying with them when they shall be received, and transmits a true account of sales, in a reasonable time, according to the course of business, and is ready to remit or answer drafts upon him, we think that no action will lie against him for the balance in his hands. For his contract is to sell and render an account, and he ought not to be held to remit at his own risk; and he cannot remit at the risk of his principal, unless in compliance with instructions."

It has accordingly been held that when an agent wrongfully converts the money collected to his own use, an action will lie for the recovery of the money without any demand therefor before suit brought. *Terrell v. Butterfield*, 92 Ind. 1.

So, in *Moore v. Garner*, 101 N. C. 374, 7 S. E. 732, demand was held not necessary to recover money collected by an agent, where he did not apply the money to the payment of certain judgments, as he was instructed to do.

In *Dever v. Branch*, 18 Tex. 615, it was held no demand was necessary to recover from an agent the money collected on a sale of cattle, where, contrary to the principal's instructions, the cattle had been driven to a certain city, and, in selling them, had been united with a drove belonging to a third person.

In *Brazier v. Fortune*, 10 Ala. 516, it was held that one whose agency consists of placing a claim in the hands of an attorney for collection, but who in fact collects the money himself, is not entitled to insist on demand previous to a suit against him for the money.

But the mere fact that the agent takes notes payable to himself, in discharge of the sum due to his principal, is not, by itself, such evidence of a conversion as will dispense with proof of a demand. *Kidd v. King*, 5 Ala. 84.

There are cases closely related to the above, but which, for the reason that they

recover the balance, without first making a special demand of payment. *Robinson v. Williams*, 8 Met. 454. S. H., the holder of a promissory note made by W. for \$500, indorsed it to J. H., who, at the same time, gave the following receipt: "When S. H. shall pay me his note of \$100, given by him this day to me, then I will deliver up to him a note of \$500, which he has indorsed over to me." W. paid his note to J. H., and subsequently both S. H. and J. H. died. It was held that, upon the payment of W.'s note, the law, without any act upon the part of J. H., applied so much of the account as was necessary in payment of the note of S. H.; that the residue might be recovered by the administrator of S. H. as money had and received to his use; that such action might

cannot be said to be actions for money collected, have not been included within this note.

Such a case is *Etter v. Bailey*, 8 Pa. 442, where it was held that the unauthorized sale of stoves which came into the agent's hands was a conversion which rendered him liable in trover without a demand.

So, when an agent, instead of selling shares on commission, as he was authorized to do, exchanged them for other property, he was guilty of conversion, and excused the principal from proof of demand before bringing suit. *Haas v. Damon*, 9 Iowa, 589.

A similar case is *Ainsworth v. Partillo*, 13 Ala. 460, where it was held that the act of an agent instructed to sell a house, in exchanging it for another, is a conversion, and he becomes liable to the owner for the value of the house, without a demand.

If the agent denies his liability to the principal, and thus shows that a demand would be fruitless, the principal is relieved from the duty of making it. *Hammett v. Brown*, 60 Ala. 498; *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836 (denial by attorney that he collected money as agent); *Bogle v. Gordon*, 39 Kan. 31, 17 Pac. 857 (denial by partner, after dissolution of partnership and money collected, that other party had right in any part of it, and concealing from him that money was collected); *Howard v. France*, 43 N. Y. 593; *Walradt v. Maynard*, 3 Barb. 584 (denial by attorney of liability to pay, and setting up claim exceeding amount collected); *Waddell v. Swann*, 91 N. C. 108; *King v. Foscue*, 91 N. C. 116; *Wiley v. Logan*, 95 N. C. 358; *Tillotson v. McCrillis*, 11 Vt. 477.

In *Taylor v. Armstead*, 3 Call (Va.) 200, relative to a demand and refusal necessary to maintain a suit for the recovery of money received by an attorney, the court said that defendant, by appearing and contesting the claim, rendered it unnecessary that further proof with regard thereto should be stated in the record.

In *Judith Inland Transp. Co. v. Williams*, 36 Mont. 25, 91 Pac. 1061, it was held that no formal demand was necessary where the agent claimed that he had fully paid the

be maintained without a special demand. *Hunt v. Nevers*, 15 Pick. 500, 26 Am. Dec. 616. In that case the court also said: "Upon the subject of interest, we can perceive nothing to take this case out of the ordinary rule that where money is payable on demand, and there is no contract or usage requiring it, and the defendant is not a wrongdoer in acquiring or detaining it, interest is to be computed from the service of the writ only." In *Hawley v. Sage*, 15 Conn. 52, it appears that Hawley, the plaintiff, had in his hands a draft of the bank of Charleston, South Carolina, on the Union Bank of New York, in his favor, for \$1,000, two thirds of which was his and the other belonged to the defendant. Defendant took this draft to collect, and, when collected,

principal all money collected, and, instead of being indebted to the principal, the principal was indebted to him.

A case holding to the same effect is *Bogle v. Gordon*, 39 Kan. 31, 17 Pac. 857, where the agent concealed the fact of collection, and claimed the money as his own.

In *Love v. Hoss*, 62 Ind. 255, it was held that a real estate broker who agrees with the owner of land to sell such land for a certain price, but who, in making the sale, sells for a larger price, which he conceals from his principal, is liable to the principal for the excess recovered by him, without previous demand.

To the same effect is *Heimbach v. Weinberg*, 18 Mich. 48 (concealment by agent from principal that he had collected more than a certain amount covered by a note); *Wooster v. Nevills*, 73 Cal. 58, 14 Pac. 390 (dividends collected on stock fraudulently retained by agent for their sale).

And where so long a time has elapsed since the collection of the money by an agent as will rebut the presumption that payment has been delayed by reason of the want of safe and convenient means of transmission, or because of some other good and sufficient cause, and that the collector still considers himself as entitled to no more than enough reasonably to compensate him for his services, and will pay it over on demand, then neither law nor reason requires that before the agent can be sued for his nonfeasance, he should be requested to do what his conduct sufficiently indicates his determination not to do. *Bedell v. Janney*, 9 Ill. 193.

To the same effect are *Chapman v. Burt*, 77 Ill. 337 (money collected by attorney); *Dodge v. Perkins*, 9 Pick. 368; *Eaton v. Welton*, 32 N. H. 352 (failure of factors in distant part of country to account for proceeds within a reasonable time).

In *Langley v. Sturtevant*, 7 Pick. 214, it was also held that if a foreign factor neglects for an unreasonable time to render an account, a demand on the part of the principal to pay over the proceeds is not necessary.

So, in *Drexel v. Raimond*, 23 Pa. 21, it

was to divide the avails, as above stated; and, though he did collect it, and did not deny that a reasonable time in which to pay the plaintiff his share had elapsed, yet he claimed that he was not bound to pay without a special request. The court said: "As a general rule, a party is bound to perform his contract without being first requested so to do; and, unless there be an express stipulation in the contract that a request or demand of performance shall be made, or it be requisite from the peculiar nature of the bargain, none is essential to complete the cause of action. And where there is a precedent debt or duty, no request is in general necessary." "Ordinarily a demand is necessary before bringing a suit against an attorney for money collected by him; but, where it has been collected a long time, and its retention is unexplained, or where the party collecting it has converted it to his own use, no previous demand is necessary." *Chapman v. Burt*, 77 Ill. 337.

was held that an agent who fails to give due notice to his principal that money collected is subject to the latter's disposal cannot protect himself against an action by alleging that no demand was made for the money before the suit was brought.

See, in connection with these cases, *Lillie v. Hoyt*, 5 Hill. 395, 40 Am. Dec. 360.

In *Nisbet v. Lawson*, 1 Ga. 275, it was said: "When an attorney receives the money of his client, it is his duty to remit it to him forthwith, or give him notice of its collection. But if he neglects to give this information, and has converted the money to his own use, or otherwise applied it illegally, I should be inclined to hold that he would subject himself to suit, without demand previously made. In *Taylor v. Bates*, 5 Cow. 376, *infra*, and other reported cases to be found in the books, it has been decided that an attorney was not liable for money collected, till demand made, or directions to remit. But in all such cases it will be found that no laches are shown on the part of the attorney; that he has manifested a willingness to pay, by giving notice to his principal of the receipt of the money, and only waited for orders to pay over or account."

Also there is no necessity of demand when the agent agrees in advance that, upon collection of the money, he will pay it over to the principal or his representative. *Mardis v. Shackelford*, 4 Ala. 493; *Kane v. Cook*, 8 Cal. 449 (money received in sale of goods by factor, who, at the time of shipment, received instruction to remit proceeds to the principal); *Stacy v. Graham*, 14 N. Y. 492 (agent agreeing to remit after retaining part in payment of his own debt); *Haebler v. Luttgen*, 2 App. Div. 390, 37 N. Y. Supp. 794, affirmed without opinion in 158 N. Y. 693, 53 N. E. 1125 (unconditional promise 28 L.R.A. (N.S.)

In *Field v. Brown*, 146 Ind. 293, 45 N. E. 464, it was said: "In assumpsit for money had and received, where the complaint alleges the receipt of money by defendant for the use and benefit of plaintiff, it need not allege a demand,"—citing cases decided in Indiana and Wisconsin, *Bates v. Cobb*, 5 Bosw. 29, *Adams v. Holley*, 12 How. Pr. 326, and other New York cases. "In an action for money had and received to the use of the plaintiff, it is not necessary to allege a request or demand for the payment of the money. Such an allegation is usual, but not essential to the sufficiency of the complaint." *Quimby v. Lyon*, 33 Cal. 394. In this case the case of *Reina v. Cross*, 6 Cal. 30, is distinguished; and the assertion therein made, that a party receiving money to the use of another is rightfully in possession until the same is demanded, is pronounced *dicta*.

The next question presented is as to whether or not the court erred in instructing the jury to find a verdict for the in-

of factor in foreign state to turn over all remittances as soon as received).

To the same effect is *Castleman v. Southern Mut. L. Ins. Co.* 14 Bush, 197, where the agent agreed to remit on or before the last day of each month the balance due, by draft or otherwise, as directed. The court said this implied an absolute undertaking to remit at that time by draft unless otherwise directed.

In *Hawley v. Sage*, 15 Conn. 52, where plaintiff put a draft into the hands of defendant, to receive the money thereon, and to "divide the avails" in a certain proposition, it was held that demand was not necessary on the part of the plaintiff to recover from the defendant his share of the money collected. The court, however, took occasion to say: "But again; as soon as the defendant had collected the draft, he had in his hands nearly \$700 of the plaintiff's money, which he had received to the plaintiff's use. It was then a debt due the plaintiff; and it was the defendant's duty to pay it. No special request was, therefore, necessary. But if there was anything to take the case out of the general rule, it was for the defendant to show it. When money is received by one man, which belongs to another, the law raises a promise on the part of the receiver that he will pay it, and that, to, without any previous requests. If, therefore, from the situation of the parties, or the relation in which they stood to each other, this implied promise could have been rebutted, the defendant should have shown it. But, as he has shown nothing but a desire to keep the plaintiff's money, his case must be governed by the general rule applicable to a precedent debt or duty."

In *Middleton v. Twombly*, 125 N. Y. 520, 26 N. E. 621, where the question arose whether the statute of limitations had run

interest as well as the principal. It is the rule that interest can only be recovered in this state in the cases enumerated in the statute. *Pettit v. Thalheimer*, 3 Colo. App. 355, 33 Pac. 277; *Greeley, S. L. & P. R. Co. v. Yount*, 7 Colo. App. 189, 42 Pac. 1023. Our statute for the payment of interest is as follows: "Creditors shall be allowed to receive interest when there is no agreement as to the rate thereof, at the rate of 8 per centum per annum, for all moneys after they become due, on any bond, bill, promissory note, or other instrument of writing, or on any judgment recovered before any court or magistrate authorized to enter up the same within this state, from the day of entering up said judgment until satisfaction thereof be made; also, on money due on mutual settlement of accounts, from the date of such settlement; on money due on account, from the date when the same became due; and on money received to the use of another, and detained without the owner's

knowledge." Mills's Anno. Stat. § 2252. The only clause in the foregoing section which allows interest for money had and received is one that provides for interest where the money is detained without the owner's knowledge. There is no allegation in the complaint that such was the fact in this case. The argument of counsel seems to be that interest should be allowed because the money was vexatiously withheld. At one time the law in this state authorized the allowance of interest in such cases, but that statute was repealed by the one now before us. We think the court erred in allowing interest, and the judgment will be reversed for that reason, and remanded, with instructions to render another judgment for plaintiff in the sum of \$1,295.

Reversed and remanded.

Steele, Ch. J., and Goddard, J., concur.

Petition for rehearing denied January 11, 1909.

against an action by a principal against his foreign factor for money which he, unknown to the principal, had collected on insurance policies, it was said: "It is claimed that the defendants' testator received these dividends as a foreign factor, and could not be made liable for them until after demand. This is, undoubtedly, the general rule; but when, from the usual course of business or special contract and instructions, a different practice has been pursued, it is the duty of the consignee to remit without waiting for demand. . . . In this case, the consignee had remitted the proceeds of the several consignments previously received by him, and it was supposed by the plaintiff that the transaction was closed; but, by an unexpected chance, the consignee recovered back some of the expenses which he had been obliged to pay out for the plaintiff, and these sums having been allowed by the plaintiff, it was the defendants' testator's manifest duty to rectify the mistake, which then appeared to have been made in his account, by remitting, as he had theretofore done, the sums thus received to the plaintiff. We do not think the circumstances of this case required a demand before suit brought, as the cause of action accrued upon the receipt of the money by the consignee, and his failure to remit." Although it will be noticed that the reasoning of the case, so far as the application of the statute of limitations is concerned, leads to a conclusion clearly unjust, the law, so far as the question of demand is concerned, may not be subjected to criticism. And it must be remembered that with the former question this note does not concern itself.

Of course, where an agent has fled the country, no demand is necessary. *Wilson* 28 L.R.A.(N.S.)

v. Monticello, 85 Ind. 10 (agent to sell municipal bonds).

In *Metz v. Abney*, 64 S. C. 254, 42 S. E. 103, it was held that an agreement whereby attorneys became trustees for the principal relaxed the severity of the rule as to demand before suit.

In *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826, it was held that since an agreement between attorneys and their client, whereby, in a suit for divorce prosecuted by them, they should retain in payment for their services one half of the alimony collected, is null and void, a demand on the part of the client to recover the money so retained is not necessary.

In *Trimble v. Pollock*, 77 Ind. 576, where it appeared that a person as agent had collected the rent on certain property, the court, after refusing to decide whether demand would have been necessary if suit had been brought against the agent himself, during his lifetime, held that demand was not necessary to recover the rents from his administrator.

(The question, however, as to the necessity of a demand upon the agent's estate in the event of his death, apart from the necessity of a demand upon the agent himself, when living, is not within the scope of this note.)

Of course, when there is a special agreement between the principal and agent that the latter need not pay until request or the money is demanded, the money is not payable until after demand has been actually made. *Boughton v. Flint*, 74 N. Y. 476 (husband holding proceeds of sale of land for wife).

In *Dana v. Barrett*, 3 J. J. Marsh. 6, it was held that demand was necessary when an agent received bank notes for a principal who was a nonresident.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JAMES E. STEWART et al.

v.

BARNET FINKELSTONE, Impleaded, etc.,
Appt.

(206 Mass. 28, 92 N. E. 37.)

Vendor and purchaser — restrictive covenant — right to enforce.

1. A mortgagee of real estate may maintain a suit to enjoin violation of a building restriction which has been imposed upon neighboring property for the benefit of that which is subject to his mortgage.

Parties — joinder — enforcement of restrictive covenant.

2. A mortgagor and mortgagee of property for the benefit of which a building restriction has been imposed upon neighboring property may join in a suit to enjoin violation of the covenant.

Appeal — facts — interference.

3. The law court will not interfere with a finding of fact by a single justice on conflicting testimony, where the inferences from other facts proved in the case are not inconsistent with the finding.

Injunction — violation of covenant — standing by.

4. That no steps were taken to prevent the erection of a building in violation of a restrictive covenant upon the use of the land until it was all up will not defeat an injunction against its maintenance, if the complaining parties did not know of the violation of the covenant until the building was completed.

Same — laches.

5. A delay of ten weeks in bringing suit to enjoin the maintenance of a building erected in violation of a restrictive covenant in the use of the land, after the building was erected, and knowledge was brought home to the complaining party, is not such laches as will bar relief, if no prejudice to the rights of the owner of the building through the delay is shown.

Same — interference with attorneys.

6. One cannot be prejudiced by delay in instituting a suit to protect his rights if it is due to the influence of one having a record interest in the property to be affected by the suit, in preventing the attorneys of complainant from proceeding with the litigation.

Note. — STEWART v. FINKELSTONE appears to have been the first case in which was raised the right of a mortgagee to enforce a building restriction imposed on neighboring property for the benefit of the property mortgaged. The decision, however, is in line with the general policy of the law to allow a mortgagee to maintain a suit to restrain any threatened injury of a permanent character which may endanger his security.

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Same — infringement by complainant — effect.

7. The restraint of substantial infraction of wholesome building covenants will not be denied because of possible slight infractions on the part of complainant, with respect to his own property, where his building has stood for more than forty years, and has been considered by all parties as a compliance with the restrictions.

Building covenant — changed conditions — right to ignore.

8. If changes from the building restrictions imposed upon lots in a subdivision, which affect only the buildings at corners of streets, are not of sufficient moment to interfere with the scheme as a whole, the owner of a particular lot cannot ignore the restrictions, under the rule of changed conditions.

Injunction — comparative loss — deliberate act.

9. One who deliberately violates building restrictions placed upon his lot for the benefit of a district in a city cannot avoid a mandatory injunction to compel the modification of his building so as to comply with the restrictions, on the theory that the loss caused by it will be disproportionate to the good accomplished.

(May 18, 1910.)

APPEAL by defendant Finkelstone from a decree of the Supreme Judicial Court for Suffolk County in plaintiffs' favor in a suit to enforce compliance with certain restrictive building covenants. Affirmed.

The facts are stated in the opinion.

Mr. Samuel C. Bennett, for appellant:

Since a mortgage, as between all except the mortgagor and mortgagee, is only a lien to secure the debt, the taking back of the mortgage upon sale did not give the mortgagee, who had no right to possession, a right to maintain the bill.

Ewer v. Hobbs, 5 Met. 1; Norcross v. Norcross, 105 Mass. 265.

There was laches on the part of the plaintiffs.

Hodgkins v. Farrington, 150 Mass. 24, 5 L.R.A. 209, 15 Am. St. Rep. 168, 22 N. E. 73.

The court will rarely interfere to pull down a building which has been erected without complaint.

Gaskin v. Balls, L. R. 13 Ch. Div. 324, 28 Week. Rep. 552; Rochdale Canal Co. v. King, 16 Beav. 634.

The plaintiffs cannot maintain the bill because they themselves are violating at the present time the very restrictions which they say the defendant is violating.

Sheard v. Webb, 2 Week. Rep. 343; Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936.

A mandatory injunction will not be issued when it appears that it will operate inequi-

tably and oppressively, nor when it appears that there has been unreasonable delay by the party seeking it in the enforcement of his rights, nor when the injury complained of is not serious or substantial, and may be readily compensated in damages, while to restore things as they were before the acts complained of would subject the other party to great inconvenience and loss.

Levi v. Worcester Consol. Street R. Co. 193 Mass. 116, 78 N. E. 853; Starkie v. Richmond, 155 Mass. 188, 29 N. E. 770; Cobb v. Massachusetts Chemical Co. 179 Mass. 423, 60 N. E. 790; Downey v. Hood, 203 Mass. 4, 89 N. E. 24; Jackson v. Stevenson, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691; Ware v. Regent's Canal Co. 3 DeG. & J. 212, 28 L. J. Ch. N. S. 153, 5 Jur. N. S. 25, 7 Week. Rep. 67.

Where there has been delay in the assertion of a legal right, and the damage sustained is slight, the court will not grant an injunction.

Wintle v. Bristol & S. W. Union R. Co. 6 L. T. N. S. 20, 10 Week. Rep. 210.

It is a sufficient reason for refusing an injunction that the granting of it would inflict serious damage upon the defendant without doing any practical good to the plaintiff.

Wood v. Sutcliffe, 2 Sim. N. S. 169; Ware v. Regent's Canal Co. 3 DeG. & J. 231; Senior v. Pawson, L. R. 3 Eq. 330; Wason v. Sanborn, 45 N. H. 169; Scanlan v. Howe, 24 N. J. Eq. 273.

The inference that owners have waived a strict compliance with the restrictions may be drawn from their failure to object.

Leathe v. Bullard, 8 Gray, 545; Schwoerer v. Boylston Market Asso. 99 Mass. 299.

Messrs. Samuel M. Child and Malachi L. Jennings, for appellees:

The plaintiffs cannot be barred by laches.

Codman v. Bradley, 201 Mass. 361, 87 N. E. 501; Linzee v. Mixer, 101 Mass. 512; Atty. Gen. v. Algonquin Club, 153 Mass. 447, 11 L.R.A. 500, 27 N. E. 2.

The plaintiffs have not waived their right to enforce the restrictions by their failure to prosecute other owners who have violated similar covenants.

Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936; Payson v. Burnham, 141 Mass. 547, 6 N. E. 708; Codman v. Bradley, supra.

That the use of the buildings on the street has changed in recent years does not affect the plaintiffs' right to have the restrictions enforced.

Evans v. Foss, 194 Mass. 513, 9 L.R.A. (N.S.) 1039, 80 N. E. 587, 11 A. & E. Ann. Cas. 171; Codman v. Bradley, supra. 28 L.R.A. (N.S.)

Rugg, J., delivered the opinion of the court:

This is a bill in equity brought to enforce compliance with certain restrictions as to buildings, imposed in 1859 in deeds of the several lots, comprising a considerable tract in the south end of Boston, as part of a general plan for their common benefit. The restrictions as to the character and extent of building were in perpetuity, and among other matters prohibited the erection of a building nearer than 10 feet to the street line and over the rear of the lot. No question is made that the defendant violated these two restrictions by the construction of a building commenced in March, 1906. There was evidence that the building was practically all up in the May following.

It is first contended that the bill cannot be maintained in this form by the present plaintiffs. The plaintiff Buttrick, in his capacity as trustee, was the owner of an estate within the protected area prior to July 28, 1906, when he conveyed it to the plaintiff Stewart, who was a *cestui que trust*, taking back a mortgage to himself as trustee. There was evidence to the effect that this transfer of title had been agreed upon a year before, but was delayed on account of the appointment of a guardian *ad litem*. A mortgagee of real estate, even though out of possession, has such an interest as enables him to maintain an action for any part of the mortgaged estate wrongfully severed and converted into personalty. To this extent he is owner of the fee. Searle v. Sawyer, 127 Mass. 491, 34 Am. Rep. 425. The reason for this is that the value of his security may be damaged. This reason extends to any act, whether done on the mortgaged premises or off, which may adversely affect the property described in his mortgage. He may maintain an action in the nature of waste, or may go into equity to prevent the commission of waste. Restrictions like these create a right in the nature of an easement in favor of, as well as impose a liability upon, the grantee of every lot, growing out of the common character of the deeds. The interest is in a contractual stipulation for the common benefit. Evans v. Foss, 194 Mass. 513, 9 L.R.A. (N.S.) 1039, 80 N. E. 587, 11 A. & E. Ann. Cas. 171. The nature of the right and obligation created by restrictions upon the use of real estate is such as to render their breach an injury to the fee of other land included within the scheme of improvement. A mortgagee is allowed to go into equity to prevent injuries threatened to the land covered by his mortgage, because any act in its nature capable of harming the value of his security may be such an injury as to entitle him to equitable relief and protection. Mortgagees

are commonly permitted to bring suits in equity to nullify the orders of public boards or test the constitutionality of statutes which in operation would impair their security. See, for example, *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 382-400, 38 L. ed. 1014-1024, 4 Inters. Com. Rep. 560, 4 Sup. Ct. Rep. 1047; *Reagan v. Mercantile Trust Co.* 154 U. S. 418, 38 L. ed. 1030, 4 Inters. Com. Rep. 577, 14 Sup. Ct. Rep. 1062, Id. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060. This principle includes the present case. There is no distinction in reason between sustaining a suit by a mortgagee to restrain waste threatened upon the mortgaged premises, and one to prevent acts on other estates in derogation of legal rights established for the benefit of the property covered by the mortgage. See *James v. Worcester*, 141 Mass. 361, 5 N. E. 826; *Everett v. Edwards*, 149 Mass. 588, 5 L.R.A. 110, 14 Am. St. Rep. 462, 22 N. E. 52; *Rockwood v. Robinson*, 159 Mass. 406-408, 34 N. E. 521; *Wilkinson v. Dunkley-Williams Co.* 139 Mich. 621, 103 N. W. 170. The act of the defendant in violating the restrictions was a continuing wrong, and not one ended with the completion of his building. No controversy arises between the two plaintiffs as mortgagor and mortgagee respectively. They both have an interest in the subject-matter of the restrictions, which, as to the defendant, constitutes a unity, and they may properly join in one suit against him.

The single justice found that the plaintiffs had not been guilty of laches. This finding was based upon the hearing of oral evidence, and will not be disturbed unless plainly wrong. His memorandum states that neither plaintiff was aware of the defendant's intention to violate the restrictions until his building was up. The finding is in accordance with the testimony of the plaintiffs, to which the single justice gave credence. It has been ingeniously argued that the circumstances of ownership of other property in the neighborhood, and visits there, supplemented by the direct testimony of two witnesses to the contrary, shows that this finding is unsupported, at least, as to the plaintiff Buttrick. But the testimony introduced by the defendant was not believed, and the inferences from other facts were not inconsistent with ignorance by the plaintiffs of what the defendant was doing. In all this there was no error. The building was up about the middle of May. The suit was brought in the following March. This deferment of suit is found to have been "largely due to the interference of the mortgagee" of the defendant's lot, who was originally joined as a respondent in this suit, and "who finally dissuaded the

counsel selected by them [the plaintiffs] acting for them." There is no hard and fast rule as to what constitutes laches. If there has been unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense, or enter into obligations, or otherwise change his position, or in any way by inaction lulls suspicion of his demands, to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right, especially if an injunction is asked. It would be contrary to equity and good conscience to enforce such rights when a defendant has been led to suppose by the word or silence, or conduct of the plaintiff that there was no objection to his operations. Diligence is an essential prerequisite to equitable relief of this nature. Quiescence will be a bar when good faith requires vigilance. But so long as there is no knowledge of the wrong committed, and no refusal to embrace opportunity to ascertain facts, there can be no laches. Upon the discovery of infringement of rights, such reasonable expedition is required in their prompt assertion as is consistent with due deliberation as to the proper means for relief. On the other hand, one who openly defies known rights, in the absence of anything to mislead him, or to indicate assent or abandonment of intent to oppose on the part of others, is not in a position to urge as a bar failure to take the most instant conceivable resort to the courts. After the right has been invaded under circumstances which would not defeat a plaintiff in seeking relief, and no substantial harm is shown to have accrued to the wrongdoer from delay, there is not the same imminent necessity for early enforcement of demands as exists before conditions have become fixed. Mere lapse of time, although an important, is not necessarily a decisive, consideration. Within the somewhat flexible limitations of these general rules, what may be laches in any case depends upon its peculiar facts. *Linzee v. Mixer*, 101 Mass. 512-526; *Cooke v. Barrett*, 155 Mass. 413, 29 N. E. 625; *Nudd v. Powers*, 136 Mass. 273; *Whitney v. Union R. Co.* 11 Gray, 359, 367, 71 Am. Dec. 715; *Haven v. Haven*, 181 Mass. 573-579, 64 N. E. 410; *Tucker v. Fisk*, 154 Mass. 574-579, 28 N. E. 1051; *Hill v. Boston*, 193 Mass. 569-574, 79 N. E. 825; *Parker v. American Woolen Co.* 195 Mass. 591-603, 10 L.R.A.(N.S.) 584, 81 N. E. 468; *Stewart v. Joyce*, 201 Mass. 301, 87 N. E. 613; *Daly v. Foss*, 199 Mass. 104, 85 N. E. 94. An

interval of perhaps ten weeks between the first knowledge by Buttrick and the consultation with an attorney, during which he communicated with Stewart, who was out of the state, when there is nothing to indicate that it operated to the prejudice of the defendant, cannot be accounted laches respecting so important an infraction of rights as the present case reveals. The subsequent delay in instituting the suit is excused because it arose solely from the influence of one having a record interest in the defendant's estate.

The defendant contends that the plaintiffs cannot prevail, because they are themselves violating the same restriction which they seek to enforce against the defendant. The original deed from the city of Boston, through which the defendant gained title, contained the clause that "a dwelling house has been erected and completed on said lot in conformity with the conditions and restrictions." The record shows that the single justice found that the constructions now upon the plaintiffs' lot were those originally placed there, and that they were substantially the same on the two lots. It follows that they were regarded on all sides more than fifty years ago as a substantial compliance with the restrictions. The photographs and chalks of the buildings in the neighborhood furnish some indication of like buildings upon similar lots. Whether these constitute in small particulars technical deviations from a strict compliance with the letter of the restrictions is of no consequence after the lapse of half a century of general concurrence in a practically uniform construction of their meaning by acts done. *Frost v. Jacobs*, 204 Mass. 1, 90 N. E. 357; *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691. Moreover, the minor respects in which it is claimed that the plaintiffs have violated the restrictions are of a character wholly different from the infractions committed by the defendant, and therefore are not to be regarded as a barrier to the enforcement of their rights. *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936.

The single justice, after taking a view of the neighborhood affected by the restrictions, determined that there had been no change whatever in the character of the buildings contemplated by the scheme contained in the restrictions, with the exception of those at the corners of streets, and this was not of sufficient moment to interfere with it as a whole. This finding, supported by oral evidence as well as a view, was clearly warranted. It leaves no room for the application of the rule of changed conditions, laid down in *Jackson v. Stevenson*, *supra*. In this respect the case is like

Evans v. Foss, 194 Mass. 513, 9 L.R.A. (N.S.) 1039, 80 N. E. 587, 11 A. & E. Ann. Cas. 171.

It is strongly urged that a mandatory injunction ought not to issue, for the reason that it would operate oppressively and inequitably, and impose on the defendant a loss disproportionate to the good it can accomplish, and that the plaintiffs ought to be relegated to financial compensation by way of damages. This remedy is a drastic one, and ought to be applied with caution, but in cases proper for its exercise, it ought not to be withheld merely for the reason that it will cause pecuniary loss. It has been found that the defendant, with full knowledge of the restrictions, "deliberately attempted" to override them, and thus deprive the district of the character given it by the restrictions. He took his chances as to the effect of his conduct with eyes open to the results which might ensue. It has been the practice of courts to issue mandatory injunctions upon similar facts. *Codman v. Bradley*, 201 Mass. 361, 369, 87 N. E. 501, and case cited; *Curtis Mfg. Co. v. Spencer Wire Co.* 203 Mass. 448, 89 N. E. 534; *Downey v. Hood*, 203 Mass. 4-12, 89 N. E. 24. Intrenchment behind considerable expenditures of money cannot shield premeditated efforts to evade or circumvent legal obligations from the salutary remedies of equity.

The costs allowed in the decree, including the expense of the surveyor's plans, were within the discretion of the court, which does not appear to have been wrongly exercised, *Rev. Laws*, chap. 203, § 14; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80-89.

KANSAS SUPREME COURT.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plff. in Err.,

v.

THOMAS GORMAN.

(79 Kan. 643, 100 Pac. 647.)

Future contract — agreement for — effect.

1. An agreement to make a contract in the future is not binding unless all the terms

Headnotes by BURCH, J.

Note. — Effect of shipping contract limiting carrier's common-law liability, signed under compulsion.

This note does not include cases involving contracts of carriage procured through fraud, nor those turning merely upon the fact that the shipper did not know the pro-

and conditions are agreed upon, and nothing is left to future negotiations.

Carrier — limiting liability — negotiations — jury.

2. Under the facts of this case, it cannot be said as a matter of law that a shipper of cattle bound himself, by preliminary negotiations relating to the shipment, to sign a special written contract limiting the carrier's common-law liability.

Contract — refusal to sign.

3. If preliminary negotiations relating to a shipment of cattle have not resulted in a valid agreement that it shall be made under a special written contract, the shipper may rightfully refuse to sign such a contract, although he knows the custom of the carrier to require written contracts in the course of a long experience as a shipper, has always signed written contracts, and,

visions of the contract, where such ignorance was not due to any wrongful act on the part of the carrier.

As to effect of limitation of liability in receipt prepared by shipper, see note to *Perrin v. United States Exp. Co.* post, 645.

As is said in *Missouri, K. & T. R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565, the great volume of case law holding that contracts of carriers limiting their liability, in order to be binding upon the shipper, must be just and reasonable, relates in the main to certain provisions or stipulations of such contracts which are considered illegal, although voluntarily entered into, and permits other portions of the contract, that are reasonable and just, to remain intact and binding upon the shipper; but in the foregoing case a different question is presented; viz., whether the contract, as a whole, is invalid, in that the shipper was not given an opportunity of shipping his freight under the conditions which the law insists that the carrier must afford him, but was in some way forced to accept the contract tendered by the carrier.

It is not a question whether the provisions of the contract were such as the law would not enforce because of reasons of public policy or otherwise, but rather, whether the conditions surrounding the execution of the contract were such as the courts would uphold, regardless of the nature of the provisions thereof.

The law charges the common carrier with the duty of carrying all goods of the kind he professes to carry, under the common-law liability which makes him a practical insurer thereof while in his custody; and he is liable to an action in case of a refusal so to accept such goods. Consequently, the proposition that a contract of carriage limiting the carrier's common-law liability will not be enforced if secured under compulsion needs but to be stated; the practical question is rather, what constitutes compulsion under this rule.

One of the most common forms of compulsion is where the carrier does not afford the shipper a fair option or opportunity to

following the negotiations, intended to sign a contract of the kind he had been using for the shipment in question.

Same — duress — validity.

4. A special written contract limiting a carrier's common-law liability, which has been extorted from a shipper who rightfully declined to sign it, by means of a refusal to transport cattle already in the carrier's possession, unless such a contract was signed, is voidable at the shipper's election.

Same — ratification.

5. A party may not voluntarily act upon a contract which he has been wrongfully constrained to sign, and voluntarily take the benefit of it, and then avoid it for duress. But conduct exhibited in apparent recognition of the contract, while the pressure of the hardship which overcomes the mind continues, will not amount to an af-

choose between a full-liability contract and a limited-liability contract.

It is not essential, in order to validate a contract limiting the carrier's liability, that the option or opportunity to ship the goods under the common-law liability be actually presented to the shipper. *Cau v. Texas & P. R. Co.* 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663; *Pacific Exp. Co. v. Wallace*, 60 Ark. 100, 29 S. W. 32; *Cleveland, C. C. & St. L. R. Co. v. Hollowell*, 172 Ind. 466, 88 N. E. 680; *Louisville & N. R. Co. v. Sowell*, 90 Tenn. 24, 15 S. W. 837; *Deming v. Merchants' Cotton-press & Storage Co.* 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89; *Nashville, C. & St. L. R. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955, 79 S. W. 1031.

It is sufficient that it would have been given if the shipper had demanded it. *Cleveland, C. C. & St. L. R. Co. v. Hollowell*, supra; *Duvenick v. Missouri P. R. Co.* 57 Mo. App. 550; *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 655, 14 S. W. 315; *Louisville & N. R. Co. v. Sowell* and *Deming v. Merchants' Cotton-press & Storage Co.* supra.

But a contract limiting the carrier's liability is invalid if its agent has no authority to receive the goods, and would not have received them except under such contract. *Little Rock & Ft. S. R. Co. v. Cravens*, 57 Ark. 112, 18 L.R.A. 527, 38 Am. St. Rep. 230, 20 S. W. 803; *St. Louis, I. M. & S. W. Co. v. Spann*, 57 Ark. 127, 20 S. W. 914; *Cleveland, C. C. & St. L. R. Co. v. Hollowell*, supra; *Ficklin v. Wabash R. Co.* 117 Mo. App. 221, 93 S. W. 847; *Parker v. Atlantic Coast Line R. Co.* 133 N. C. 335, 63 L.R.A. 827, 45 S. E. 658; *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 430, 7 L.R.A. 162, 12 S. W. 1018; *Illinois C. R. Co. v. Craig*, 102 Tenn. 298, 52 S. W. 164; *St. Louis Southwestern R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346.

If the local agent with whom the shipper deals denies him the opportunity to take advantage of a more favorable contract on a higher freight rate, or, what amounts to the same thing, informs him that there are

firmance; and, to constitute an affirmance, the conduct of the injured party must be such as to indicate an intention to condone the wrong, and a purpose to abide by its consequences.

Carrier — voidable contract — ratification — jury.

6. Under the facts of this case, it cannot be said as a matter of law that the acceptance and use of a return pass by a shipper of stock, after the stock had been transported and delivered, confirmed a voidable contract with the carrier, under which the shipment was made, and which provided for such pass.

(March 6, 1909.)

ERROR to the District Court for Bourbon County to review a judgment in plain-

no other terms or conditions upon which he can have his property transported, then there is in fact no opportunity afforded to contract for shipment on unrestricted terms, and the restriction is void. *St. Louis & S. F. R. Co. v. Wells*, 81 Ark. 409, 99 S. W. 534. To the same effect was the decision in *Southern Exp. Co. v. R. H. Meyer Co.* (Ark.) 125 S. W. 642.

A carrier cannot, by special contract, limit its common-law liability for losses not occasioned by negligence, where it does not afford the shipper an opportunity to contract for the service required without such restriction, even if he makes the special contract without objection or demand for a different one. *Little Rock & Ft. S. R. Co. v. Cravens*, 57 Ark. 112, 18 L.R.A. 527, 38 Am. St. Rep. 230, 20 S. W. 803.

A contract limiting the liability of a carrier must be fairly made, upon a sufficient consideration, after the shipper has been given an opportunity to choose between his common-law right and rate of transportation and the special-contract rate and limited liability. *Pittsburg, C. C. & St. L. R. Co. v. Mitchell* (Ind.) 91 N. E. 735.

If there be but one contract and one rate open and offered to the shipper, and no option or choice be given him, then a special provision limiting the carrier's liability is without consideration, and void. *Illinois C. R. Co. v. Lancashire Ins. Co.* 79 Miss. 114, 30 So. 43.

And in *Ficklin v. Wabash R. Co.* 117 Mo. App. 221, 93 S. W. 847, the court said that the contract in question must be condemned for two reasons: "First, because no rate is provided for shipment under a nonrelease contract, and therefore no option is available to the shipper; and second, the established rate is not, in any sense, a reduced rate, but is the regular and only rate, and consequently there is an entire failure of the expressed consideration."

Various other forms of compulsion are shown in the cases set out below.

A carrier cannot absolve itself from its duty to furnish safe cars by exacting a contract requiring the shipper to inspect and select his car, where the shipper is induced

tiff's favor in an action brought to recover damages caused by an alleged negligent delay in the shipment of certain live stock. Affirmed.

The facts are stated in the opinion.

Messrs. W. F. Evans and R. R. Vermilion, for plaintiff in error:

The written contract superseded all verbal arrangements, and was binding on the shipper.

Ft. Worth & D. C. R. Co. v. Wright, 24 Tex. Civ. App. 291, 58 S. W. 846; *Richmond, N. I. & B. R. Co. v. Richardson*, 23 Ky. L. Rep. 2234, 66 S. W. 1035; *Chicago, R. I. & T. R. Co. v. Halsell*, 36 Tex. Civ. App. 522, 81 S. W. 1243; *Texas Mexican R. Co. v. Gallagher* (Tex. Civ. App.) 70 S. W. 97; *Hoover v. St. Louis & S. F. R.*

to take the risk by safe, but false, appearances, while the carrier knows that the car selected is unsafe. *Lake Erie & W. R. Co. v. Holland*, 162 Ind. 406, 63 L.R.A. 948, 69 N. E. 138.

A carrier cannot coerce the shipper to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused. *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170.

So, if the shipper's only option is to sign a special contract for a rate less than the legal rate, or a contract for more than the legal rate, then the action of the company is contrary to law, and the shipper is not bound by the contract. *Paddock v. Missouri P. R. Co.* 155 Mo. 524, 56 S. W. 453.

And an agreement to carry for a price which the company was accustomed to charge is no consideration for the insertion of a clause diminishing the liability of the company in case of a loss by fire. *Louisville & N. R. Co. v. Gilbert*, supra.

If a carrier is liable to a shipper for failure to furnish cars, then it has no right to require a release of this liability before according to the shipper the privilege of shipping property upon terms the same as those given to other shippers, who assert no claim for damages. *St. Louis & S. F. R. Co. v. Pearce*, 82 Ark. 353, 118 Am. St. Rep. 75, 101 S. W. 760, 12 A. & E. Ann. Cas. 125.

A contract presented to a shipper after his cattle are loaded, with the alternative of signing it or unloading his cattle, was held void in *Kansas P. R. Co. v. Reynolds*, 17 Kan. 251, so far as it attempted to restrict the liability of the carrier, or to impose additional burdens upon the shipper, as conditions precedent to a recovery for damages resulting from the negligence of the railroad company.

So, where the shipper's horses were in the car, and the agent demanded "that he sign a special contract, or his horses would not go on that train," the special contract was held void in *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 149.

And a shipper is not bound by a contract presented to him after his stock was loaded, and which was signed by him only after he

Co. 113 Mo. App. 688, 88 S. W. 769; Helm v. Missouri P. R. Co. 98 Mo. App. 419, 72 S. W. 148; Texas & P. R. Co. v. Byers Bros. (Tex. Civ. App.) 73 S. W. 427; Shelton v. Merchants' Dispatch Transp. Co. 59 N. Y. 258.

Where a party, of his own free will and from choice, agrees to execute a written contract covering a certain transaction, and afterwards, in pursuance of that agreement, signs a written contract, just as he had agreed to sign, he cannot claim that the contract was signed under duress.

Yost v. Ramey, 103 Va. 117, 48 S. E. 862; Texas Mexican R. Co. v. Gallagher, *supra*.

The shipper ratified the contract by accepting its benefits.

State v. Otis, 60 Kan. 248, 56 Pac. 14, 9 Cyc. Law & Proc. p. 443; 10 Am. & Eng. Enc. Law, 2d ed. p. 337; Cobb v. Hatfield, 46 N. Y. 533; Gilleland v. Louisville & N. R. Co. 119 Ga. 789, 47 S. E. 336; Merrill v. Wilson, 66 Mich. 243, 33 N. W. 716; Sornborger v. Sanford, 34 Neb. 498, 52 N. W. 368; Bell v. Keepers, 39 Kan. 105, 17 Pac. 785; Provident Loan Trust Co. v. McIntosh, 68 Kan. 458, 75 Pac. 498, 1 A. & E. Ann. Cas. 906.

had been told that, unless he signed the agreement, the company would not ship the cattle. Atchison, T. & S. F. R. Co. v. Mason, 4 Kan. App. 391, 46 Pac. 31.

So, where the inference is fair that if the shipper had not signed the limited-liability contract, the carrier would have refused to ship his cattle, which were already loaded upon the cars, the contract is not binding. Missouri, K. & T. R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

Proof by the shipper that the cattle were received by the carrier under an oral contract to carry them at a certain rate, and be subject to all the common-law and statutory liabilities, was held in Texas & P. R. Co. v. Avery, 19 Tex. Civ. App. 235, 46 S. W. 897, to establish want of consideration for a written contract which demanded the same or a higher rate, and besides placed all risks of the shipment, and all the labor and burden of loading and unloading and caring for the cattle, upon the shipper, to be performed at his expense.

A stipulation in a contract to carry perishable freight, that it must be at the owner's risk, is void, where those are the only terms upon which the carrier would undertake the service. Parker v. Atlantic Coast Line R. Co. 133 N. C. 335, 63 L.R.A. 827, 45 S. E. 658.

In Adams Exp. Co. v. Nock, 2 Duv. (Ky.) 562, 87 Am. Dec. 510, it is said, *obiter*, that, in a case of importunate necessity for immediate transportation, a refusal to carry without a special contract cannot be sanctioned.

A custom of railroads not to receive for 28 L.R.A.(N.S.)

Messrs. A. M. Keene and E. C. Gates, for defendant in error:

The shipper was given no choice of contracts, and is not bound by one limiting liability, and which was obtained by coercion.

Kansas P. R. Co. v. Reynolds, 17 Kan. 251; Atchison, T. & S. F. R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148; Little Rock & Ft. S. R. Co. v. Cravens, 57 Ark. 112, 18 L.R.A. 527, 38 Am. St. Rep. 230, 20 S. W. 803; Lake Erie & W. R. Co. v. Holland, 162 Ind. 406, 63 L.R.A. 948, 69 N. E. 138; Atchison, T. & S. F. R. Co. v. Mason, 4 Kan. App. 391, 46 Pac. 31.

Burch, J., delivered the opinion of the court:

The defendant is a common carrier, operating a line of railroad running northward through Godfrey, Ft. Scott, and Fulton to Kansas City, Missouri. The plaintiff is a stockman who resides at Fulton, north of Ft. Scott, and who keeps cattle at Godfrey, south of Ft. Scott. The defendant has no office or agent at Godfrey. Desiring to ship several car loads of cattle from Godfrey to Kansas City, the plaintiff made a verbal arrangement to do so with the defendant's agent at Fulton. The arrange-

transportation any live stock except under certain conditions modifying their common-law liability would be contrary to law and public policy. Missouri P. R. Co. v. Fagan, 72 Tex. 127, 2 L.R.A. 75, 13 Am. St. Rep. 776, 9 S. W. 749.

The mere fact that the plaintiff did not ask time to read the contract before signing it would not necessarily make the contract binding, if it was procured under duress or without consideration. Gulf, C. & S. F. R. Co. v. Batte (Tex. Civ. App.) 107 S. W. 632.

Where the shipper is refused any other contract than one limiting the carrier's liability, and is compelled to sign it, in order to ship his cattle, the contract is not properly evidence in the case, and no defense can be based upon it. Chicago, R. I. & P. R. Co. v. Cotton, 87 Ark. 339, 112 S. W. 742.

So, in Evansville & T. H. R. Co. v. McKinney, 34 Ind. App. 402, 73 N. E. 148, it was held that an action by a shipper for loss or injury to goods during transportation is one in tort, where the evidence shows that, as a condition precedent to such carriage, the shipper was compelled to sign a contract limiting the carrier's liability.

And in Cleveland, C. C. & St. L. R. Co. v. Hollowell, 172 Ind. 466, 88 N. E. 680, the court said: "The owner may rightfully demand that such property shall be received and carried under the carrier's common-law liability, and a contract limiting such liability, to which he is obliged to assent, in order to secure transportation, cannot be considered as having been freely and fairly entered into."

ment was that cars would be placed at Godfrey, which the plaintiff would load in time to be taken by a certain train, the plaintiff would go with the cattle to Ft. Scott, the defendant would have a shipping contract prepared and ready for signature when the train arrived there, and the plaintiff and his cattle would go through to Kansas City on the train taking them from Godfrey. The plaintiff had been a regular shipper of cattle for years, knew it was the custom to require shippers to sign written contracts, and had always signed written contracts, but he had never scrutinized, and was not familiar with, their provisions. He did not discuss rates or terms with the agent at Fulton, or the conditions of the contract which would be in waiting for him. He did not know what the terms would be, but he expected, when he reached Ft. Scott, to be presented with, and intended to sign, just such a written contract as he had been in the habit of shipping under. The cattle were loaded and transported to Ft. Scott, as contemplated. At Ft. Scott the defendant had no contract in readiness for signature, no agent at the station, and, after diligent effort, the plaintiff could find nobody with authority to bill his cattle. The

train conductor could not take the cattle without proper papers, and the cars containing them were cut out of the train, over the plaintiff's objection and protest, were placed on a side track, and the train proceeded to Kansas City without them. The day was hot and sultry, and for several hours the cattle were switched and bumped about the yards, frequently with much violence, or were left standing between lines of other cars, so that they suffered greatly from heat, with the result that they were seriously injured. The plaintiff followed them about, getting up those which were knocked down, and otherwise doing what he could to protect them. The plaintiff finally found an agent who made out a contract, and presented it for signature. The plaintiff was not apprised of its terms, was offered no choice of rates, and was given no option as to conditions of liability on the part of the defendant. He might have read the instrument, but did not. He recognized it as a railroad live-stock contract like the kind he had been using, but he was not familiar with what it contained. He told the agent the condition the cattle were then in, and refused to sign. The agent refused to allow the cattle to be shipped un-

In *Kirby v. Western U. Teleg. Co.* 4 S. D. 105, 439, 30 L.R.A. 612, 46 Am. St. Rep. 765, 55 N. W. 759, the same doctrine was held applicable to a telegraph company, and it was held that a modification of the common carrier's liability depended upon the agreement of the parties, and the carrier could not legally exact such an agreement as a condition precedent to receiving or carrying the offered freight or message.

In *Baltimore & O. S. W. R. Co. v. Fox*, 113 Ill. App. 180, it was held that the burden of showing the assent of a shipper to a limitation of the carrier's common-law liability is upon the carrier. And to the same effect was the decision in *Elgin, J. & E. R. Co. v. Bates Mach. Co.* 98 Ill. App. 311, affirmed in 200 Ill. 636, 93 Am. St. Rep. 218, 66 N. E. 326.

The lack of an independent consideration for an exemption of a carrier from liability for damages caused by fire, expressed in the bill of lading, cannot successfully be urged to avoid such provision, although the carrier may have had but one rate, where the consideration expressed was sufficient to support the entire contract made. *Cau v. Texas & P. R. Co.* 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663. And to the same effect was the decision in *Arthur v. Texas & P. R. Co.* 204 U. S. 505, 51 L. ed. 590, 27 Sup. Ct. Rep. 338.

Of course, if the goods presented or offered for transportation are of such a character that the carrier is not obliged, as a common carrier, to transport the same, he may insist upon carrying them only under such terms as he may wish to impose; as, for

instance, the paraphernalia of a circus, including wild animals (as in *Wilson v. Atlantic Coast Line Co.* 66 C. C. A. 486, 133 Fed. 1022, affirming 129 Fed. 774; *Chicago, M. & St. P. R. Co. v. Wallace*, 30 L.R.A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506); or the cars of a sleeping car company (as in *Russell v. Pittsburgh, C. C. & St. L. R. Co.* 157 Ind. 305, 55 L.R.A. 253, 87 Am. St. Rep. 214, 61 N. E. 678).

So, carriers making a through contract for the shipment of merchandise, whether through an initial line agreeing to ship beyond its own road, or through a transportation company having no line of its own, but simply authorized to ship over connecting lines, may insert therein a fire-exemption clause, although no offer is made to assume the risk for additional compensation, since there is no common-law liability to make the through shipment. *Deming v. Merchants' Cotton press and Storage Co.* 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89.

Although this note is intended to be confined to cases of the shipment of goods or cattle, attention is called to the fact that in some cases it has been held that before a carrier can limit its liability as a carrier of passengers, the intending passenger must have had the opportunity of an option between a limited-liability contract and a full-liability contract. *Louisville & N. R. Co. v. Turner*, 100 Tenn. 222, 43 L.R.A. 142, 47 S. W. 223; *Robert v. Chicago & A. R. Co.* (Mo. App.) 127 S. W. 925. Doubtless other cases of the same character might be found.

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less the plaintiff signed the paper tendered. Having no alternative, the plaintiff affixed his signature, so that he could get his cattle to market. A few hours afterward the cattle were placed in a train which took them to Kansas City. When placed on the market, one animal could not be sold, and five others were weighed back after sale because of broken ribs and bruises. The contract which the plaintiff signed required him to attend and unload his cattle at his own risk and expense. It contained provisions with which he did not comply, which were conditions precedent to the recovery of damages for the injuries sustained. It also provided for his transportation. He went to Kansas City on the train with the cattle, and at Kansas City surrendered the contract to the defendant, and received a pass to his home, which he used. The plaintiff sued the defendant for damages, counting upon the common-law liability which attached to the delivery of the cattle to the defendant under the verbal arrangement with the agent at Fulton. The defendant answered, setting up the written contract, and pleading noncompliance with its conditions. The plaintiff replied that the writing was signed under duress. The case was submitted on testimony showing the foregoing, among other facts. The court instructed the jury respecting the common-law liability of the defendant in the absence of special contract, and respecting its limited liability under the written contract, and submitted to the jury the question whether the written contract was signed with such freedom from constraint that it governed the rights of the parties. The defendant excepted, but made no request for other instructions. The jury found for the plaintiff, and the defendant prosecutes error.

The defendant argues that when the written contract was signed, it superseded all oral negotiations, and fixed the rights of the parties. It is said that when the plaintiff signed the contract, he did only what he intended to do from the beginning, and what he agreed to do at the beginning, and hence that the coercion of the agent at Ft. Scott can be given no legal effect. It is not necessary to cite authorities upon the proposition that if the plaintiff freely and voluntarily signed the contract,—assuming it to be one which the law will permit,—it measures the rights of the parties. The oral arrangement would be at an end, and the plaintiff would be in no position to avoid the force of the limitations placed upon the carrier's liability by the writing. It may be assumed that, if the plaintiff legally bound himself at Fulton to execute the precise contract which was pre-

sented to him at Ft. Scott, the claimed coercion was without legal influence. But, if the plaintiff rested under no legal obligation to sign that contract, he could abandon his original intention and refuse to do so; and if the original intention to sign was rightfully abandoned, any subsequent assent to the terms of the contract would have to be obtained without coercion or it would not bind. In calling upon this court to declare that the plaintiff irrevocably bound himself to sign the very instrument he did sign, the defendant raises a question of fact which he should have asked to have submitted to the jury under proper instructions. There is no evidence that the defendant had a standard form of contract which it invariably used, and which therefore was in the plaintiff's mind. The contract upon which the defendant relies has the following heading: "St. Louis & San Francisco Railroad Company. Read this contract carefully, as numerous changes have been made." How long this form had been in use does not appear, and it cannot be said the plaintiff had any of its provisions in mind. True, the plaintiff recognized the contract as a railroad livestock contract like the ones he had been using, and such as he expected to sign; but, taking all of his evidence into consideration, a jury would have the right to find that his identification extended no further than to the genus. A man may recognize a trust deed or coupon bond as such, and know nothing of its contents, and he may agree to execute such a bond and to secure it by such a deed without agreeing upon any single condition to be inserted in either. All the plaintiff said must be weighed to ascertain its true purport. Statement qualifies statement, and reconciliation is a jury function.

Except that the plaintiff identified this contract as like those he had previously used, which to the jury might have meant nothing, there is no evidence of usual stipulations or customary conditions with which the plaintiff should have been familiar from his previous experience, and which should have been in mind; and, except as indicated, there is no evidence that this contract was of a regular, usual, or customary kind. The court is not inclined to declare as a matter of law that a shipper who delivers stock to a carrier for transportation, with the understanding that a written contract will be signed, intends or binds himself to submit to every condition the carrier may see fit to impose. Under these circumstances, the jury would have been justified in finding that the plaintiff simply agreed to agree upon a contract when he reached Ft. Scott: and it is elementary law that, unless an

agreement to make a future contract be definite and certain upon all the subjects to be embraced, it is nugatory. "A contract between two persons, upon a valid consideration, that they will, at some specified time in the future, at the election of one of them, enter into a particular contract, specifying its terms, is undoubtedly binding, and, upon a breach thereof, the party having the election or option may recover as damages what such particular contract to be entered into would have been worth to him, if made. But an agreement that they will in the future make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. There would be no way by which the court could determine what sort of a contract the negotiations would result in, no rule by which the court could ascertain whether any, or, if so, what, damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations. . . . Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon." *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906. Such being the law and the state of the case, it cannot be said that the plaintiff rested under a legal duty to sign the writing in controversy. He was free to refuse to commit himself to any specific agreement. He did refuse, and the Fulton arrangement was then at an end so far as the execution of a shipping contract was concerned. The law required the defendant to accept the plaintiff's stock for transportation without obliging him to agree to sign a special contract, and without coercing him into signing a special contract. A special contract limiting the carrier's common-law liability must be freely and fairly made, or the shipper may repudiate it; and a refusal to transport stock unless the shipper signs a special contract destroys freedom of consent. "Such a contract, however, must be freely and fairly made with the railroad company,—not exacted as a condition precedent of shipment. Railroad companies cannot arbitrarily fix any valuation on the property of the shipper, or arbitrarily demand or exact the execution of a contract limiting the common-law liability. *Kansas P. R. Co. v. Nichols*, 9 Kan. 236, 12 Am. 28 L.R.A.(N.S.)

Rep. 494. If a railroad company has two rates for the transportation of goods or stock,—one if the goods or stock are carried under the common-law liability, and the other if carried under a limited or special contract,—the shipper must have real freedom of choice. He cannot be denied the right to have his goods carried by the carrier under its common-law liability; but if he desires, and if the statute permits and public policy does not forbid, he may enter into a special contract with the carrier, limiting the common-law liability. . . . But a common carrier cannot exact of a shipper his signature to a special contract limiting the common-law liability as a condition precedent of shipping or transporting stock, because, in such a case, the carrier resorts to unfair means. A contract thus exacted is not freely and fairly entered into." *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148. This being true, the contract pleaded in the answer was voidable at the plaintiff's election.

The defendant claims that the plaintiff affirmed the contract by surrendering it at Kansas City and procuring free transportation to his home. It is undisputed law that a party may not voluntarily act upon a contract which he has been constrained to sign, and voluntarily take the benefit of it, and then avoid it for duress. The rules applicable to the rescission of contracts on the ground of fraud apply. But things done in apparent recognition of the contract while the pressure of the hardship which overcomes the mind continues will not amount to an affirmance. The influence of the duress must be removed before conduct becomes voluntary, and after that, acts charged as constituting a confirmation must be such as to indicate an intention to condone the wrong, and a purpose to abide the consequences. Numerous decisions illustrate these principles.

In the case of *Montgomery v. Pickering*, 116 Mass. 227, a vendee fraudulently obtained a bond for a deed and a sum of condemnation money for a part of the property. With full knowledge of the fraud and of her rights, the vendor executed a deed pursuant to the bond. Afterwards she brought suit to set aside the conveyance. The opinion reads: "The deed in question does not expressly confirm the validity of the previous contract. It was not founded on any new consideration, or given in settlement of a disputed claim. It was required by the terms of the original contract, and there is nothing to show an intention to forgive the fraud. To have effect as a confirmation, such deed must appear to have been given with that inten-

tion by one who was not under the influence of the previous transaction. When relied on as a defense in a case where fraud is clearly established, it is said that it must stand upon the clearest evidence, because the act is so inconsistent with justice, and so likely to be connected with the fraud. *Morse v. Royal*, 12 Ves. Jr. 355, 373. The deed must be so disconnected with the previous dealings as to leave the grantor the complete power of determining, as upon an original act, whether he will do it or not (*Crowe v. Ballard*, 1 Ves. Jr. 215); or, as it is said in the more recent case of *Moxon v. Payne*, L. R. 8 Ch. 881, the parties must be at arms' length and stand on equal terms." (P. 230.) In the case of *Rau v. Von Zedlitz*, 132 Mass. 164, the syllabus reads: "If a woman on the eve of her marriage is induced by threats of the imprisonment of her intended husband, and by undue influence and fear that her marriage will otherwise be prevented, to sign an agreement to pay the debts of her intended husband, the agreement cannot be enforced in equity; and a part payment by her, after signing the agreement, on legal proceedings being threatened, and in ignorance of her rights, is not in equity a ratification of the agreement. If a woman, induced by undue influence, signs an agreement to pay a debt of her intended husband, the fact that the creditor forbore to sue the original debt and to arrest the debtor, and that the woman thereby obtained a husband and a title, will not prevent the woman from setting up the defense of undue influence when the creditor seeks to enforce the contract in equity." In the opinion it was said: "But, to constitute a confirmation, the acts must have been done with that intention by one who was not under the influence of the previous transaction (*Montgomery v. Pickering*, supra, and cases cited), and with a knowledge of its invalidity." (P. 168.) In the case of *Leflore County v. Allen*, 80 Miss. 298, 31 So. 815, the syllabus reads: "The fact that a wife lived two years after making a deed, void because made under threats of the prosecution of her husband, and expressed satisfaction at the acceptance of the deed and the prevention of disgrace, is not a sufficient ratification to validate the deed, the husband being still alive and subject to prosecution." In the case of *Bell v. Anderson*, 74 Wis. 638, 43 N. W. 666, a defrauded vendee of a piano made an offer to return the instrument, which was not accepted, and then brought an action for the price paid. After the offer to return, she used the piano on occasions until the time of trial. In the opinion it was said: "The plaintiff testified that she had used the

piano a little, as she had occasion, down to the time of trial. It is claimed that such use thereof is inconsistent with a rescission of the contract of purchase, and hence that her offer to return the instrument is nugatory. Such use may or may not be inconsistent with a rescission of the contract. Were we deciding the question of fact, inasmuch as the defendant, by refusing to take the piano from plaintiff's home, compelled her and her family to remain involuntary bailees of it, and, inasmuch as it is not suggested that it was injured by such use, we should hold the use not inconsistent with the rescission of the contract. But the most that can be successfully claimed by the defendant is that it was for the jury, under proper instructions, to say whether the use was such an assertion of ownership by the plaintiff as would render nugatory the offer to return the instrument." (P. 640.) In the case of *Tarkington v. Purvis*, 128 Ind. 182, 9 L.R.A. 607, 25 Am. St. Rep. 429, 25 N. E. 879, a fraudulent vendee sold some of the property after a right to rescind had been established by a tender and offer to place the vendor *in statu quo*. In the opinion it was said: "The doctrine is fully established that a contract induced by fraud is only voidable; and if one who has been defrauded, after discovering the deceit, acquiesces in the sale, either by express words or by an unequivocal act, such as treating the property as his own, with an intent to condone the fraud, he will be deemed to have elected to affirm the contract, and he cannot afterwards rescind. One who, uninfluenced by the fraud, deals with the property as his own after having fully discovered that fraud has been practised upon him in the contract or transaction by or through which he acquired the property, thereby waives his right to rescind. . . . Equivocal acts, however, which do not clearly evince a purpose, with complete knowledge of the fraud, to retain the property as his own, will not defeat the right of the person defrauded to rescind. The act must be unequivocal, and must show an election to retain the property after discovering the deceit before the right to rescind is gone." (P. 185.)

The return of the plaintiff to his home was an incident to the shipment of the cattle, and was bound up with it as the concluding feature of an entire transaction. The contract which he was forced to accept in order to get his cattle out of Ft. Scott compelled him to go with them, or they would have been without care and attention on the road, and without supervision at the unloading. These were responsibilities which he was obliged to assume in order

to get the cattle moved. After they were marketed, the return home was not a separate and independent matter of personal advantage, but was a final step of the transaction, necessitated by what had gone before. It would be idle to contend that the plaintiff indisputably intended to condone the fraud and affirm the contract because he was relieved from payment of freight in advance, secured a night ride to Kansas City in the caboose of a freight train at the defendant's expense, and had a lower freight charge deducted from the proceeds of sale,—assuming the defendant carried at a lower rate under special contract. All these things were immediate products of the vitiated agreement forced upon him by the conduct of the defendant's agent, and it cannot be said as a matter of law that he willingly acceded to them. The turning in of the contract, and the acceptance and use of the pass, bear the same relation to the original coercion. They were integral parts of the defendant's scheme which the plaintiff was driven to accept to save his cattle. A jury might be able to say that, as soon as the plaintiff was ready to go home, he commenced to deal with the defendant at arms' length, free from the constraint under which he had been acting, made up his mind to stand by the contract, and determined to get what he could out of it; but the law will not arbitrarily impose such an interpretation upon his conduct. The defendant might have had this question of fact, as well as the one first discussed above, submitted to the jury, but it made no request for instructions to that end.

The instruction given stated the law, and the judgment of the District Court is affirmed.

All the Justices concur.

Petition for rehearing denied.

NEW JERSEY COURT OF ERRORS AND APPEALS.

VALERIAN LOUIS PERRIN et al.

v.

UNITED STATES EXPRESS COMPANY,
Plff. in Err.

(— N. J. —, 74 Atl. 462.)

Evidence — presumption — writing — contents — knowledge.

1. In the absence of evidence or circumstances tending to show the contrary, a person who personally, or by his duly authorized agent, prepares a writing, will be

deemed to know the contents of such writing.

Carrier — receipt prepared by shipper — binding effect.

2. Where a shipper tenders to a common carrier a form of receipt for goods to be carried, which contains a limitation of the carrier's liability, and the carrier assents to its terms, the shipper is bound thereby, notwithstanding the receipt may be in a blank form, furnished by the carrier.

(November 15, 1909.)

ERROR to the Supreme Court to review a judgment in plaintiffs' favor in an action brought to recover damages for the loss of certain goods while in defendant's possession for transportation. Reversed.

Statement by Voorhees, J.:

This suit was brought to recover damages for the loss of a case containing gloves, delivered by the plaintiffs at their factory in the city of Plainfield, in this state, to the defendant for shipment by express to their store in the city of New York.

On April 6, 1906, the driver of the express company, in making his rounds, called at the factory of the plaintiffs, and there received a case containing some 80 or more dozen pairs of gloves, which had been nailed up and addressed, and was ready for de-

Note. — Effect of limitation of liability in receipt prepared by shipper.

As to effect of shipping contract signed under compulsion, see note to St. Louis & S. F. R. Co. v. Gorman, ante, 637.

The authorities are apparently unanimous in holding with *PERRIN v. UNITED STATES EXP. CO.* that if the shipper himself prepares the bill of lading or receipt which contains limitations upon the carrier's liability, he will be bound thereby, and be estopped from claiming that he was unaware of its contents. *Central R. Co. v. City Mills Co.* 128 Ga. 841, 58 S. E. 197 (contract limiting liability to own line); *Durgin v. American Exp. Co.* 66 N. H. 277, 9 L.R.A. 453, 20 Atl. 328 (contract fixing agreed valuation); *Greenwald v. Barrett*, 199 N. Y. 170, 92 N. E. 218 (contract fixing agreed valuation); *Bernstein v. Weir*, 40 Misc. 635, 83 N. Y. Supp. 48 (contract fixing agreed valuation); *Wilson v. Platt*, 84 N. Y. Supp. 143 (contract fixing agreed valuation); *Cincinnati, H. & D. R. Co. v. Berdan & Co.* 22 Ohio C. C. 326 (stipulation releasing carrier for loss by fire not due to its negligence).

So, in *Greenwald v. Barrett*, supra, the court said: "There was a book of blank receipts in their custody, and they made the entries in the blanks themselves, and completely prepared the receipts for signature by the express company's driver when he called for and took the goods. The contract of agreed valuation being one which the parties could lawfully make, the proof

livery to him. The servant of the plaintiffs, who acted principally in the capacity of janitor, packed the goods in question, nailed it up, and marked the address upon it, and took the box downstairs to the place where the express company received it. This witness testified: That plaintiffs had a book of forms of receipts that were bound together; that it was customary, as soon as a case was ready for shipment, for him to write the address and date on the receipt and the articles consigned, and place the book usually on top of the case, and leave it there for the driver; that on this particular occasion, as it was a large case, the driver needed assistance, and therefore he remained until the driver called and filled out the receipt; and that, in addition to his duties as janitor, he was the person who actually made the shipments from the factory to the express company. The receipt was contained in a book of receipts, some of which had been used, leaving the remainder in blank for future use. The driver, having taken the case to the company's bill clerk at the railroad station,

where it was weighed and the express charge ascertained, the next morning collected the charge from the plaintiffs. Each page of this book was in itself a receipt, with spaces below for the entries connected with each shipment; that is, for the date, description of the articles, its value, the name of the consignee, destination, and the charges and signature of the company's agent or driver. The book was put in evidence by the defendant. The first entry in it was made more than a year previous to the shipment in question. It was kept in the office of the plaintiffs and was always there, except when it was left with a package intended for shipment, so that the driver could sign it when he received it. These receipts were usually filled out before the driver came, by the shipping clerk of the plaintiff or bookkeeper, or by another who helped the bookkeeper. In the record of the many shipments shown by the book, in no case was the value of the articles shipped before this suit was brought given. In nearly every instance on the used pages of the book at the top line, under the word "value,"

here required a finding that it had been made."

And in *Durgin v. American Exp. Co.* supra, it was held that a shipper of goods who fills out one of the blank receipts contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto upon delivering to him a package for transportation, will be presumed to know the contents of the receipt, and if he receives such receipt without objection, his assent to its conditions will, in the absence of fraud, be conclusively presumed.

And in *Central R. Co. v. City Mills Co.* supra, a charge was held erroneous which might have led the jury to believe that, if the plaintiff's agent did not understand a contract which he had previously prepared in blank and then filled out, and thus prepared for the other party to sign, the plaintiff would not be bound by it.

So, too, in *Cincinnati, H. & D. R. Co. v. Berdan & Co.* supra, the shipper, in accordance with the well-established custom, prepared a receipt containing a statement that the freight should be transported subject to the conditions on the railroad company's bill of lading. One of these conditions was that the company should not be liable for loss by fire not due to its negligence, and it was held that the consignee was bound by the stipulation made by the shipper.

Where the shipper made out a bill of lading limiting the carrier's liability, it was held in *Mouton v. Louisville & N. R. Co.* 128 Ala. 537, 29 So. 602, that it was binding upon the consignee, although the shipper did not sign it nor notify the carrier that he accepted it. A judgment for the defendant was reversed, however, upon the ground, apparently, that the defendant had failed to

prove that the loss was not due to its negligence.

And in *Wallace v. Matthews*, 39 Ga. 617, 99 Am. Dec. 473, it was held that when the shipper made out such a written contract as was satisfactory to him, which limited the carrier's liability, and carried it to the latter's agent, who signed it, the shipper was bound by it. In this case the carrier's road was much dilapidated from the effects of the Civil War, and it had but little rolling stock, and refused to receive any goods for transportation except under limited-liability contracts.

In *Texas Midland R. Co. v. H. L. Edwards & Co.* (Tex. Civ. App.) 121 S. W. 570, the bill of lading, releasing the carrier from liability for losses due to fire, had been prepared by the shipper, but had not been signed when the goods, which had been delivered to the carrier, were destroyed by fire. The carrier claimed that he was released from liability by the stipulations, but the court held that the liability of the railroad did not arise on the bill of lading, but upon a delivery of the goods to the railroad for transportation.

Attention is called to the fact that in each of the foregoing cases the limitation of the carrier's liability was a valid limitation, and would have been enforceable had it been prepared by the carrier, and the contract otherwise fairly entered into; and it can hardly be claimed that a carrier might, by procuring the shipper to prepare a bill of lading, limit his liability by stipulations which would be void if prepared by the carrier. And in the quotation from the *Greenwald Case*, cited above, it is to be noted that the court expressly says that the contract in question was one which the parties could lawfully make.

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was written the words, "value asked and not given," or the words, "not given," and on the several lines below under these words were "ditto marks," indicating as to each successive shipment that the value had not been given.

The receipt in question provided that, in case of any loss or damage, no demand should be made upon the company "beyond the sum of fifty dollars, at which sum said property is hereby valued, unless the just and true value thereof is stated herein." The words "fifty dollars" are italicized. At the end of this provision, also italicized, is contained: "The party accepting this receipt hereby agrees to the conditions herein contained." In a heavier and large type at the end of the receipt it is stated: "The liability of this company is limited to \$50, unless a greater value is stated in this receipt." The defendant, prior to the bringing of this suit, tendered to the plaintiffs \$51.33, being the amount of express charges, \$1.05, and \$50, the amount of its limited liability under the contract, and 28 cents interest, and in its plea set up this tender in defense of the action. The fact and the amount of the tender are undisputed. It appeared that the rate charged the plaintiffs for the shipments was less than would have been charged if the true value had been given. The defendant acknowledged its limited liability under the contract for the amount tendered, and requested that the trial court direct a verdict against it for that amount, which was refused. The trial judge submitted the case to the jury, who found a verdict for the plaintiffs for \$1,068.09. The defendant has assigned error on this ruling.

Messrs. Edward A. Day and William T. Day, for plaintiff in error:

The express receipt in evidence constituted a special contract by which the liability of the plaintiff in error for the loss of the goods delivered to it by the plaintiffs was limited to \$50.

Atkinson v. New York Transfer Co. 76 N. J. L. 608, 71 Atl. 278; Hill v. Adams Exp. Co. (N. J. L.) 71 Atl. 683.

The plaintiffs, by receiving and accepting the receipt, are presumed to have read it and assented to its conditions, and are bound by it.

Cau v. Texas & P. R. Co. 194 U. S. 431, 48 L. ed. 1056, 24 Sup. Ct. Rep. 663; 6 Cyc. Law & Proc. p. 417; 5 Am. & Eng. Enc. Law, 2d ed. p. 293; 1 Am. & Eng. Enc. Law, 2d ed. Supp. p. 822, note 4; Moore, Carr. p. 294; De Wolff v. Adams Exp. Co. 106 Md. 472, 67 Atl. 1099; Steers v. Liverpool, N. Y. & P. S. S. Co. 57 N. Y. 1, 15 Am. Rep. 453; Grace v. Adams, 100 Mass. 505, 97 28 L.R.A. (N.S.)

Am. Dec. 117, 1 Am. Rep. 131; Quimby v. Boston & M. R. Co. 150 Mass. 365, 5 L.R.A. 846, 23 N. E. 205; Graves v. Adams Exp. Co. 176 Mass. 280, 57 N. E. 462; Zimmer v. New York C. & H. R. R. Co. 137 N. Y. 460, 33 N. E. 642; Mills v. Weir, 82 App. Div. 396, 81 N. Y. Supp. 801; Ullman v. Chicago & N. W. R. Co. 112 Wis. 150, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41.

Mr. Samuel Koestler for defendants in error.

Voorhees, J., delivered the opinion of the court:

The stress of attack upon the judgment brought here by this writ of error is against the refusal of the trial court to direct the jury to render a verdict against the defendant for \$51.33, the amount tendered to the plaintiff, representing the express charges paid by the plaintiff and \$50, the amount to which the defendant's liability was limited by the terms of the written express receipt. The plaintiffs resist this attack by saying that the receipt is not a contract, that it did not become such by its mere reception by them without their assent, citing Hayes v. Adams Exp. Co. 73 N. J. L. 105, 62 Atl. 284, affirmed in 74 N. J. L. 537, 65 Atl. 1044, and further, that the burden lies upon the defendant to prove such assent. In Russell v. Erie R. Co. 70 N. J. L. 808, 67 L.R.A. 433, 59 Atl. 150, 1 A. & E. Ann. Cas. 672, we held that a carrier might lawfully contract specially to limit its common-law liability for any loss except such as might arise by its negligence or misfeasance, and in Atkinson v. New York Transfer Co. 76 N. J. L. 608, 71 Atl. 278, we also held, in the language of the learned chief justice delivering the opinion of this court: "The carrier is entitled to be compensated for his services in proportion to the value of the article consigned and the consequent risk assumed by him. The shipper is entitled to take the benefit of a lower rate, if he desires to do so, by placing a value upon his goods for the purpose of their shipment, below their actual worth. Such a stipulation stands as if the carrier had asked the value of the goods shipped, and had been told by the consignor that it was the sum named in the contract. . . . It exacts from the carrier the measure of care due to the value agreed on, and is, we think, a proper and lawful mode of securing a due proportion between the amount for which the carrier can be held responsible and the charges received by it as a consideration for the safe transportation of the goods shipped." This case did not go to the length that the courts of many of our sister states have gone in hold-

ing that the shipper receiving a bill of lading is conclusively presumed to have read it and acquiesced in its terms, in the absence of fraud, imposition, and mistake. See 6 Cyc. Law & Proc. p. 417, where the cases are collected. The case under review does not call for a decision on that point. The Atkinson Case, *supra*, however, did declare that if a shipper has knowledge that the express charges are based upon a value placed on the goods by him which is less than their real value, and is specified in the receipt, coupled with a clause limiting the carrier's liability to the specified amount, he may not, having accepted such receipt in silence, afterwards repudiate that he assented to the valuation, and recover the full amount of his loss.

The case in hand, however, is one where the plaintiffs must be held to have drawn the contract, and by their own language to have limited the liability of the carrier, to which it has assented. The plaintiffs had knowledge of the entire contents of the receipt, for they had, by their agents in charge of shipping the goods, prepared it and tendered it to the defendant, contrary to the general course of such transactions, where customarily the receipt is filled out by the carrier and tendered to the shipper. Although it was written upon blanks furnished by the carrier, yet these blanks had been in the possession of the shippers, and had been uniformly used and filled out by them in their usual course of shipping goods for more than a year previous to the transaction in question, and were tendered by them to the defendant, and so had been adopted by the plaintiffs as embodying their own contract.

In the absence of evidence or circumstances tending to show the contrary, a person who personally or by his duly authorized agent prepares a writing will be deemed to know the contents of such writing; and so here, the contents of the receipt prepared and furnished by the plaintiffs by their agent accustomed to prepare such receipts, and tendered by the plaintiffs to the defendant for signature, will be presumed to have been known by the plaintiffs. They have not attempted to rebut this presumption. Here, then, we have essentially a case of the shipper limiting the liability of the carrier,—not the usual one, where the carrier has sought to do so. The plaintiffs themselves incorporated in it a provision that the goods covered by it would be valued at \$50 unless the true value was stated therein, that the liability of the company was limited to \$50 unless a greater value was stated in the receipt, and that the party accepting the receipt agreed to the conditions therein; and having thereafter

er, at the time of making the shipment, received the receipt from the carrier, and retained it without objection, with such knowledge, the plaintiffs must be held to be bound by its terms, as a contract put forward by themselves. The court should therefore have directed a verdict for the plaintiff for the amount of the sum tendered.

The judgment of the Supreme Court is reversed, and a venire de novo awarded.

KANSAS SUPREME COURT.

WICHITA ICE & COLD STORAGE COMPANY, Appt.,

v.

L. H. SHEPPARD.

(82 Kan. 509, 108 Pac. 819.)

Appeal — verdict — natural law — effect.

1. Where there is some evidence tending to support a verdict, to justify an appellate court in overturning it on the ground that it is contradicted by the settled and unquestioned laws of nature, or by some established principle of mathematics, mechanics, physics, or the like, the undisputed physical facts must demonstrate beyond any reasonable doubt that the evidence is false, and that the verdict is without support in fact or law.

Trial — verdict — evidence — sufficiency.

2. The evidence in this case examined, and held, that the physical facts are not shown to be such as to authorize the court to say that the story told by the plaintiff's witnesses is false or untrue.

(May 7, 1910.)

Headnotes by PORTER, J.

Note. — The right of a court to set aside a verdict supported by the testimony of eyewitnesses with respect to matters of fact is treated in notes in 7 L.R.A.(N.S.) 357, and 15 L.R.A.(N.S.) 701. The suggestion in those notes of the possibility of the existence of facts not disclosed in the record, or perhaps not even brought out on the trial, which, if shown, might have served to reconcile the testimony of the eyewitnesses with the scientific principles applicable to the situation, as the court apprehends them, although, upon the facts actually disclosed by the record, that testimony and the verdict resting thereon seem opposed to those principles, is in a measure justified by the position of the court in WICHITA ICE & COLD STORAGE CO. v. SHEPPARD.

From the nature of the question, individual cases are of but limited value as precedents, since there is little probability that substantially similar situations will be presented in two cases.

In Smith v. Chicago, R. I. & P. R. Co. 82

A PPEAL by defendant from a judgment of the District Court for Sedgwick County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. Stanley, Vermillion, & Evans for appellant.

Mr. C. T. Ferguson for appellee.

Porter, J., delivered the opinion of the court:

The plaintiff sued to recover damages for injuries caused by his falling into an open tank of hot water while in defendant's employ. The jury awarded him damages in the sum of \$2,000. The defendant appeals.

The defense was contributory negligence. The plaintiff had been in the employ of the defendant five and one half days. He had only been at work in and about the room where the accident occurred a half day. The room was undergoing repairs, and the floor was being taken up, and the plaintiff was engaged in carrying out the lumber. The defendant sought to show that the room was so light that the plaintiff should have seen the tank before he stepped into it. The evidence shows that there were two skylights in the roof over the room, each 6 feet long and 3 feet wide; that there were several doors and windows, including two windows in the north, about 18 or 20 feet away, and an opening in the north wall 7 feet by 4 feet, distant about 12 feet from the tank. In addition, the floor between the opening and the tank had been taken up. The plaintiff testified that at the time of the accident he was looking on the floor for a pinch bar, and was feeling along with one hand, trying to find it; that it was so dark where he was that he did not see the tank, and walked into it. He also testified that a pile of lumber on the floor obstructed to some extent the light from a door back of him, and that the skylights

were obscured by dirt and smoke. He was corroborated by a witness who was present, and testified that it was dark near the tank, and that there was a weak vapor of steam escaping from it at the time. There was also testimony that another tank, called the brine tank, had been raised about 4 feet from the floor, on account of the repairs which were being made, and that this tended to shut off a part, at least, of the light from the windows and openings.

There is only one proposition argued in the brief, which is that the testimony of the plaintiff's witnesses is not to be credited or given any weight whatever because of the physical facts; that, the size of the room and the number of doors and openings from which light was admitted being conceded, it is physically impossible that the testimony of the plaintiff's witnesses can be true. It is said in the defendant's brief that, "before this verdict can be sustained, this court must feel satisfied that, notwithstanding all the windows and openings, it was so dark about the vat that the plaintiff could not see his danger." We do not so understand the law or the functions and authority of the court. We may have grave doubts whether it was so dark about the vat as to prevent the plaintiff from seeing his danger. The jury have said that it was. The question for us to determine is whether there is legal evidence in the record to support this finding. The defendant urges that, in order to sustain the verdict, the court would be required to ignore the evidence of its own senses and its own experience in like matters. The question is squarely presented, therefore, whether the physical facts in this case are such that we can say there is no legal evidence to support the verdict. A similar contention was raised in the "wool case" (*Sun Ins. Office v. Western Woolen-Mill Co.* 72 Kan. 41, 82 Pac. 513), where the court declined to disturb the verdict of a jury far more at variance with the undisputed facts and

Kan. 136, 107 Pac. 635, referred to in the foregoing opinion, the conclusion on this point was merely that while the derailment and overturning of an engine, and the fact that twenty freight cars were piled in confusion on the right of way, tended strongly to discredit the engineer's testimony, which was apparently to the effect that the train was running at the rate of 15 miles an hour, yet it could not say, as a matter of law, that it was physically impossible for this condition to have been brought about with the train running at that rate of speed.

The case of *Sun Ins. Office v. Western Woolen-Mill Co.* 72 Kan. 41, 82 Pac. 513, also referred to in the foregoing opinion, differs from the cases considered in the notes referred to and also from *WICHITA ICE & 28 L.R.A.(N.S.)*

COAL STORAGE CO. v. SHEPPARD, in that the verdict in that case appears to have rested on expert testimony tending to show that spontaneous combustion can occur in unwashed wool by the application of water. The court was of the opinion that books of scientific character being at variance on the point, it could not be said that one view or the other must be taken by the courts. There is an obvious distinction between such a case and one where the verdict rests, not upon the opinions of witnesses as to matters of science, but on the testimony of eye-witnesses as to what they actually saw, or upon the opinions of witnesses as to matters of nonscientific character, as, for example, the speed of a train.

well-known laws of nature than is the verdict here. It was urged again, but unsuccessfully, upon another state of facts and circumstances in the recent case of *Smith v. Chicago, R. I. & P. R. Co.* 82 Kan. 136, 107 Pac. 635.

Appellate courts do not hesitate to reverse a judgment where a principle of law judicially known to the court requires it, notwithstanding the trial court may not have taken judicial notice thereof. It is equally clear that appellate courts will take judicial notice of the unquestioned laws of nature, of the laws of mathematics, and of physics; and, where the trial court has refused to recognize them, and has approved a verdict supported by some evidence, but so far at variance with the undisputed physical facts as to demonstrate that the evidence is false and the verdict unjust, it becomes the duty of the appellate court to reverse the judgment. Speaking of the duty of an appellate court in this respect, Mr. Elliott, in his work on Evidence (§ 39) says: "Even though it may not be authorized to weigh evidence and pass upon the facts, it may, and should, so use its judicial knowledge as to bring about justice. Thus, there are often undisputed physical facts clearly shown in evidence, and, by applying to them a well-known law of nature, of mathematics, or the like, it is demonstrated beyond controversy that the verdict or finding is based upon what is untrue and cannot be true. In such cases it is very generally held that the appellate court should take judicial notice of the law of nature or mathematics or quality of matter, or whatever it may be that rules the case, and apply it as the trial court should have done." This principle was recognized by the court in *Young v. Chicago, R. I. & P. R. Co.* 57 Kan. 144, 45 Pac. 583, where the plaintiff, who was injured at a railroad crossing, testified that, when within a distance of 100 feet from the crossing, she looked and listened for the train, and then stopped again, and looked and listened, but did not see the train until she was struck. It was held that her testimony was self-contradictory, because, if she had looked she must have seen the train, for it was in plain view. Again, upon the same principle, in *Atchison, T. & S. F. R. Co. v. Holland*, 60 Kan. 209, 56 Pac. 6, a judgment for the plaintiff was reversed, with directions to enter judgment for the defendant. That was a crossing case, and the plaintiff testified that she looked and listened, but did not see the train. The jury made a finding that she was not negligent. The finding was held to be "little less than absurd." (p. 212), because her evidence was in plain contradic-

tion of the physical facts. The same doctrine has frequently been recognized and followed by other courts. *Lake Erie & W. R. Co. v. Stick*, 143 Ind. 449, 41 N. E. 365; *Cleveland, C. C. & St. L. R. Co. v. Berry*, 152 Ind. 607, 46 L.R.A. 33, 53 N. E. 415; *Bornscheuer v. Consolidated Traction Co.* 198 Pa. 332, 47 Atl. 872; *Payne v. Chicago & A. R. Co.* 136 Mo. 562, 38 S. W. 308; *Hudson v. Rome, W. & O. R. Co.* 145 N. Y. 408, 40 N. E. 8; *Medcalf v. St. Paul City R. Co.* 82 Minn. 18, 84 N. W. 633; *Hunter v. New York, O. & W. R. Co.* 116 N. Y. 615, 6 L.R.A. 246, 23 N. E. 9. In the case last cited, the plaintiff, who was a brakeman, was injured by striking his head against an arch of a tunnel. The car upon which he was riding was identified, and its height above the rails and the height of the arch in the tunnel established by the plaintiff's evidence, so that it was undisputed that the space between the top of the car and the arch of the tunnel was 4 feet and 7 inches. He testified that at the time he received the injury, he was sitting down on the top of the box car. There was a cut or gash on his forehead, and it was undisputed that, in order to have received the blow at that point, his head must have been at least 4 feet 8 inches above the top of the car. The trial judge submitted to the jury the question of the possibility of the accident happening in this way, saying: "If the plaintiff was sitting down, it is for you to say whether his head would reach to that height." p. 621. In the opinion it is said: "Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved, and the apparent justice of the case. The rule that permits a court to do so is of practical value in the law of appeal, where the evidence is clearly insufficient to support the judgment. In such case, judicial notice may be taken of facts which are a part of the general knowledge of the country, and which are generally known and have been duly authenticated in repositories of facts open to all, and especially so of facts of official, scientific, or historical character." p. 621. There was no evidence showing the height of the plaintiff, but the court took judicial notice that the average height of man is less than 6 feet, that the average length of the body from the lower end of the spine to the top of the head is less than 36 inches, and came to the conclusion that a man whose forehead would be 4 feet 7 inches above the seat upon which he was sitting must be at least 9 feet high; and since history affords no instance of man attaining such height, the court took judicial notice of the fact that a man could not strike his head under

those circumstances, and reversed the judgment.

In the case at bar, the undisputed physical conditions surrounding the plaintiff at the time he received his injuries furnished a strong argument against the credibility of his testimony, but this is as far as the record authorizes us to go. Where there is some evidence tending to support a verdict, to justify an appellate court in overturning it on the ground that it is contradicted by the settled and unquestioned laws of nature, or by some established principle of mathematics, mechanics, physics, or the like, the undisputed physical facts must demonstrate beyond any reasonable doubt that the evidence is false, and that the verdict is without support in fact or law. To justify such a conclusion in this case would require information on a number of matters of more or less importance, concerning which the record is silent. For instance, we have information as to the number of windows, doors, and openings, and their size, but the dimensions of the room are not stated, although the abstract contains a blue print, from which, if it be drawn to a scale, we may assume that the building was 32 feet square. There are no directions marked on the plat, but, assuming that the top of the map is north, the ice room, which is 16 feet square, is in the northeast corner of the building. The room in which the accident occurred is 16 feet east and west by 32 feet north and south, with an "L" extension on the south and east, 16 feet square. There are no windows in the south, one window and one door on the west, and two doors on the east side of the "L" extension. In that part of the room where the dip tank appears to be located, the openings are in the north, and consist of two windows and an opening in the wall, 7 feet by 4 feet. The plat shows four tanks in addition to the one in which the plaintiff was injured, or two tanks extending across the room. It is impossible to tell which. Nor is it possible to tell from the plat either the location or dimensions of the brine tank, which was raised up about 4 feet, and which the plaintiff claimed obstructed the light. It is stated in the brief that this tank is east of the ice room, with a passage between them; but if we are correct in our assumption as to the directions on the map, it would be a physical impossibility for it to be located east of the ice room. Again, we know from the record that the accident occurred just after the noon hour, January 17th, but whether it was a bright, clear day, or a dark, gloomy one, we are not advised. In answer to special questions, the jury found that the doors, windows, skylights, and other openings in the room where the hot water vat was located

did not admit sufficient light to enable the plaintiff to see it. The vat itself appears to have been in the main room immediately north of the angle formed by the southwest corner of the ice room. The vat was level with the floor. It was 3 feet long and 20 inches wide, and there was a slight mist or vapor of steam rising from it. It is reasonable to suppose that the brine tank, which was raised up about 4 feet, cast some shadow on the floor, just as a table, desk, or any solid article of furniture will do in an ordinary room. With no information as to the size or dimensions of this tank, or its location with respect to any particular door or window, we are unable to say that the story told by the plaintiff's witnesses is either improbable or untrue.

The judgment is therefore affirmed.

All the Justices concur.

OKLAHOMA SUPREME COURT.

ST. PAUL FIRE & MARINE INSURANCE
COMPANY, Plff. in Err.,

v.

F. A. MITTENDORF et al.

(— Okla. —, 104 Pac. 354.)

Pleading — condition precedent — waiver.

1. In an action on an insurance policy, the plaintiff must allege and prove a compliance with the conditions precedent in the policy, or a waiver thereof.

Insurance — proof of loss — sufficiency.

2. In an action on an insurance policy, a substantial compliance with the requirement of proof of loss is sufficient.

Same — oath of insured.

3. Where, in an action on an insurance policy requiring "the insured shall, within sixty days after the loss, make proof thereof under oath," the evidence disclosed that, in due time, the insured made such proof, but

Headnotes by TURNER, J.

Note. — Furnishing proofs of loss not under oath as substantial compliance with policy requiring proofs under oath.

The conclusion reached in the above case, that, under a policy of insurance requiring the insured to furnish sworn proofs of loss, the furnishing of unverified statements of loss is not a sufficient compliance with the policy, was also reached in *Spooner v. Vermont Mut. F. Ins. Co.* 53 Vt. 156; *McFaul v. Montreal Inland Ins. Co.* 2 U. C. Q. B. 59; and in *Shaw v. St. Lawrence County Mut. Ins. Co.* 11 U. C. Q. B. 73. Whether this requirement has been waived presents another question.

J. A. C.

the same was not sworn to by the insured, held, that it was error for the court to charge the same to be a sufficient compliance with the requirement of the policy.

Pleading — petition — amendment by implication.

4. Where, in an action on an insurance policy, the petition alleged certain specific acts as a waiver of proof of loss, and in proof thereof uncontradicted evidence was introduced, without objection, sufficient to prove a waiver thereof upon other grounds, held, that the petition will be considered amended so as to conform to the facts proved, and a waiver so proven fairly in issue.

Appeal — harmless error — insurance — proof of loss — waiver.

5. While, in an action on an insurance policy, it was error for the court to charge the jury that certain proof of loss introduced in evidence was a sufficient compliance with the requirements of the policy, the same is harmless error, where it appears from unconflicting evidence that proof of loss had been waived.

(September 14, 1909.)

ERROR to the District Court for Kiowa County to review a judgment in plaintiffs' favor in an action brought to recover the amount alleged to be due on a policy insuring certain crops against loss or damage by hail. Affirmed.

The facts are stated in the opinion.

Messrs. J. D. Houston and C. H. Brooks, for plaintiff in error:

Proof of loss, except in exceptional cases, must be made by the insured.

Clement Fire Ins. as a valid Contract, p. 206, Rule 16; 2 Wood, Fire Ins. 931, § 438; Ayres v. Hartford F. Ins. Co. 17 Iowa, 176, 85 Am. Dec. 553; 13 Am. & Eng. Enc. Law, 2d ed. p. 332; Citizens' Ins. Co. v. Shrader (Tex. Civ. App.) 33 S. W. 584; McGraw v. Germania F. Ins. Co. 54 Mich. 145, 19 N. W. 927; Evans v. Crawford County Farmers' Mut. F. Ins. Co. 130 Wis. 189, 9 L.R.A. (N.S.) 485, 118 Am. St. Rep. 1009, 109 N. W. 952; American Cereal Co. v. Western Assur. Co. 148 Fed. 77.

The furnishing of proof of loss by the insured is a condition precedent to maintaining an action on a policy, unless the giving of proof of loss is waived.

German Ins. Co. v. Fairbank, 32 Neb. 750, 29 Am. St. Rep. 459, 49 N. W. 711; German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698; Western Home Ins. Co. v. Thorp, 48 Kan. 239, 28 Pac. 991; Burlington Ins. Co. v. Ross, 48 Kan. 228, 29 Pac. 469; American Cent. Ins. Co. v. Hathaway, 43 Kan. 399, 23 Pac. 428; 13 Am. & Eng. Enc. Law, 2d ed. p. 327.

Mr. L. M. Keys, for defendants in error: 28 L.R.A. (N.S.)

A proof of loss not made by the insured may, by the consent of the insurer, be by the insured adopted and treated as his own, and both parties will be bound thereby.

Kerr, Ins. p. 515; Wilson v. Northwestern Mut. Acci. Asso. 53 Minn. 470, 55 N. W. 626; Loeb v. American Cent. Ins. Co. 99 Mo. 50, 12 S. W. 374.

The retention of the proofs of loss by the insurer waived any and all objections thereto.

Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308; Stanchcombe v. New York L. Ins. Co. 46 Or. 316, 80 Pac. 213; Western Travelers' Acci. Asso. v. Holbrook, 65 Neb. 469, 91 N. W. 276, 94 N. W. 816; Petit v. German Ins. Co. 98 Fed. 800; Taber v. Royal Ins. Co. 124 Ala. 681, 26 So. 252; Hartford F. Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; North British & M. Ins. Co. v. Crutchfield, 108 Ind. 518, 9 N. E. 458; Young v. Hartford F. Ins. Co. 45 Iowa, 377, 24 Am. Rep. 784; Miller v. Hartford F. Ins. Co. 70 Iowa, 704, 29 N. W. 411; McIlrath v. Farmers' Mut. Hail Ins. Asso. 114 Iowa, 244, 86 N. W. 310; Eliot Five Cents Sav. Bank v. Commercial Union Assur. Co. 142 Mass. 142, 7 N. E. 550; First Nat. Bank v. American Cent. Ins. Co. 58 Minn. 492, 60 N. W. 345; Swan v. Liverpool, L. & G. Ins. Co. 52 Miss. 704; McCullough v. Phoenix Ins. Co. 113 Mo. 606, 21 S. W. 207; Home F. Ins. Co. v. Ham-mang Bros. 44 Neb. 566, 62 N. W. 883; Taylor v. Roger Williams Ins. Co. 51 N. H. 50; Hibernia Mut. F. Ins. Co. v. Meyer, 39 N. J. L. 482; Jones v. Howard Ins. Co. 117 N. Y. 103, 22 N. E. 578; Phoenix Mut. F. Ins. Co. v. Bowersox, 6 Ohio C. C. 1; Commercial Union Assur. Co. v. Hocking, 115 Pa. 407, 2 Am. St. Rep. 562, 8 Atl. 589; Gould v. Dwelling-House Ins. Co. 134 Pa. 570, 19 Am. St. Rep. 717, 19 Atl. 793; London & L. F. Ins. Co. v. Schwulst (Tex. Civ. App.) 46 S. W. 89; Morotock Ins. Co. v. Cheek, 93 Va. 8, 57 Am. St. Rep. 782, 24 S. E. 464; Rheims v. Standard F. Ins. Co. 39 W. Va. 672, 20 S. E. 670; Vergeront v. German Ins. Co. 86 Wis. 425, 56 N. W. 1096; Manhattan L. Ins. Co. v. Francisco, 17 Wall. 672, 21 L. ed. 698.

Where the facts shown plainly establish a waiver of all defects in the proof on the part of the insurer, and especially where there is no conflict or dispute in the evidence showing the waiver, it is properly a question of law for the court to determine.

Germania F. Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; Indian River State Bank v. Hartford F. Ins. Co. 46 Fla. 283, 35 So. 228; Winnesheik Ins. Co. v. Schueller, 60 Ill. 465; Caledonian Ins. Co. v. Traub, 80 Md. 214, 30 Atl. 904; Noonan v. Hartford F. Ins. Co. 21 Mo. 81; Medley v. German Alliance Ins. Co. 55 W. Va. 342, 47

S. E. 101, 2 A. & E. Ann. Cas. 99; Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co. 11 Colo. App. 264, 53 Pac. 242; Dwelling House Ins. Co. v. Dowdall, 159 Ill. 179, 42 N. E. 606; Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1, 66 Am. Dec. 308; Pretzfelder v. Merchants' Ins. Co. 123 N. C. 164, 44 L.R.A. 424, 31 S. E. 470.

Turner, J., delivered the opinion of the court:

This is a suit brought by defendants in error, plaintiffs below, in the district court of Kiowa county, to recover for total loss on an insurance policy issued by plaintiff in error, defendant below, insuring them against loss or damage by hail, between May 16, and September 15, 1905, at noon, a certain 25 acres of wheat, 15 acres of oats, and 10 acres of smeltz, growing in said county. The petition substantially states, among other things, that plaintiffs had performed all conditions precedent in said policy, and had in due time furnished defendant proof of loss, but not upon blanks furnished by defendant, for the reason that the blanks furnished by defendant were each time first filled out by defendant, showing only a partial loss of \$100, based upon information furnished by defendant's adjuster, sent to adjust the loss soon after it occurred, and which plaintiffs refused to sign, and for that reason, and that said adjuster had offered \$100 in settlement, and had left without asking further information, defendant had waived formal proof of loss under said policy. For answer defendant filed a general denial, and, among other things, alleged that the policy provided: "The insured shall, within sixty days after the loss, make proof of loss under oath, stating the date and number of his policy, a description of the land upon which the grain was damaged by hail, the date of the loss or damage, the percentage of damage done to grain on each piece of land. A failure by the assured to give the notice or make proof of loss within the time herein specified shall cause a forfeiture of any claim under this policy." And plaintiffs, if loss had been by them sustained, had failed to make proof thereof, as thus required, which said failure worked a forfeiture of said claim. After reply in which plaintiff denied each and every allegation contained in the answer, "so far as the same controverts the allegations stated in the petition," there was trial to a jury, which resulted in a verdict and judgment in favor of plaintiffs for \$391.50, and defendant brings the case here.

The only error assigned is that the court erred in giving the following instruction: "You are further instructed, gentlemen of the jury, that if you find from the evidence 28 L.R.A.(N.S.)

that, within sixty days from the date of the loss complained of, the plaintiffs made out and forwarded to the defendant the proof of loss contained in exhibit D, that has been offered in evidence before you, such proof of loss is a sufficient compliance with the requirements of the policy of insurance, which provides that proof of loss shall be made by the plaintiffs to the defendant within sixty days from the date of such loss."

Said exhibit D, produced by defendant on the trial, is as follows:

Mt. View, Oklahoma, June 19, 1905.

Van Arsdale & Osborne,
Wichita, Oklahoma.

Dear Sir:—

I went this day to the justice of the peace, I. W. Gray, and had him select two other appraisers, which was Mr. C. H. Fisher and Mr. W. H. Garden. We did not make selection of the appraisers. Inclosed you will find a statement from the three men above mentioned. Settle this claim on policy No. H. 29,908, within five days, or we will have to sue on this. Your adjuster, Mr. Payne, acknowledged that we had been damaged, and according to your letter of June 15th could not get me in the fields for settlement. Will say that I was ready to go into the fields at any time, but he was afraid he would miss the train. I would not have done this, but could get no encouragement for settlement, and so I will now have to collect the full amount according to the appraisers. I will also send you notice that was made in fields, showing you how they divided and struck a balance. Please return the same. Yours truly,

H. R. Davis, T. Z. T.
T. A. Mittendorf.

Territory of Oklahoma, County of Oklahoma.

This is to certify that we, the undersigned, have this day of June 19, 1905, made a personal inspection of the crops of wheat, oats, and smeltz on the ——— quarter of section ——— in township 8th, No. of range 15 W. I. M. in Kiowa county, Oklahoma, and find to the best of our knowledge the loss to be as follows, viz: Wheat, 01 per cent loss, oats, 56 per cent loss; smeltz, 80 per cent loss. In witness whereof we hereunto set our hands this 19th day of June, 1905.

I. W. Gray.
C. H. Fisher.
W. H. Gordon.

Subscribed to and sworn before me this 19th day of June, 1905.

T. E. Givens, Notary Public. [Seal.]
Commission expires August 12, 1907.

In support of this contention it is urged that, as said proof of loss was not made by the "insured" "under oath," it is fatally defective. To so instruct was error. To our minds it is clear that "under oath" meant the oaths of the insured, and not the oaths of others, for the reason, among others, that the policy further provides: "That any . . . false swearing by the assured relative . . . to the amount or cause of any loss or damage to any insured property shall be a full satisfaction and discharge of this company from all liability by virtue of this policy, and shall be a complete bar to all remedies thereon." And that proof of loss under oath of the insured constituted a condition precedent to their right of recovery on the policy, upon a performance of which the insurer had a right to insist. And this, too, we believe, although said provision in the policy should be liberally construed in favor of the insured, as to which, in *Porter v. Traders' Ins. Co.* 164 N. Y. 504, 52 L.R.A. 424, 58 N. E. 641, the court says: "Finally, it should be noted that the condition alleged to have been violated in this case applied only after the capital fact of a loss. The object of the provision was to prescribe the manner in which an accrued loss was to be adjusted and ascertained. The liability of the defendant having become fixed by the happening of the event upon which the contract was to mature, conditions which prescribe methods and formalities for ascertaining the extent of it, or for adjusting it, are not to be subjected to any narrow or technical construction, but construed liberally in favor of the insured. *Solomon v. Continental F. Ins. Co.* 160 N. Y. 505, 46 L.R.A. 682, 73 Am. St. Rep. 707, 55 N. E. 279; *McNally v. Phoenix Ins. Co.* 137 N. Y. 389, 33 N. E. 475; *Paltrovitch v. Phoenix Ins. Co.* 143 N. Y. 73, 25 L.R.A. 198, 37 N. E. 639; *Sergeant v. Liverpool & L. & G. Ins. Co.* 155 N. Y. 349, 49 N. E. 935; *Matthews v. American Cent. Ins. Co.* 154 N. Y. 449, 39 L.R.A. 433, 61 Am. St. Rep. 627, 48 N. E. 751."

Nor in so holding are we unmindful of the rule that, as to proof of loss, all that can be required of the insured is a reasonable and substantial compliance with the conditions of the policy. In *Northwestern Ins. Co. v. Atkins*, 3 Bush, 328, 96 Am. Dec. 239, the court said: "The stipulation referred to, providing for the production of preliminary evidence of loss as a condition precedent to the payment of such loss by the insurer, is not unusual in insurance policies; and it may be regarded as authoritatively settled that a substantial compliance with such a condition must be made by the claimant before a right of action will accrue to him for losses, unless the right to insist on

such preliminary condition be waived. *Angell, Fire Ins.* §§ 223-248; *Phillips, Ins.* p. 497; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 509, 9 L. ed. 512; *Smith v. Haverhill Mut. F. Ins. Co.* 1 Allen, 297, 79 Am. Dec. 733." 11 Am. & Eng. Enc. Law, p. 336; *Home Ins. Co. v. Cohen*, 20 Gratt. 312; *Rochester Loan & Bkg. Co. v. Liberty Ins. Co.* 44 Neb. 537, 48 Am. St. Rep. 745, 62 N. W. 877; *Boyle v. Hamburg-Bremen F. Ins. Co.* 169 Pa. 349, 32 Atl. 553; *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366; *Swofford Bros. Dry Goods Co. v. American Cent. Ins. Co.* 76 Mo. App. 27; *Bartlett v. Union Mut. F. Ins. Co.* 46 Me. 500; *Norton v. Rensselaer & S. Ins. Co.* 7 Cow. 645; *Erwin v. Springfield F. & M. Ins. Co.* 24 Mo. App. 145. The proof contained in exhibit D did not substantially comply with said requirement of the policy, in that it was not made under oath of the insured, and for that reason was fatally defective.

Spooner v. Vermont Mut. Ins. Co. 53 Vt. 156, was a suit on a fire insurance policy covering a dwelling house, barn, and produce, etc. It was issued to Spaulding and Chloe D. Spooner, his wife, the latter of whom was the sole owner of the property. The plaintiffs alleged partial loss, and notice thereof duly given to the company. Defendant pleaded, among other things, that plaintiff did not make out and deliver a detailed statement thereof, as required by the by-laws and act of incorporation of defendant. Said by-laws required that all persons insured by the company, and sustaining loss or damage by fire, "are forthwith to give notice thereof to the company, and within thirty days after said loss to deliver in a particular account in detail of such loss or damage, signed with their own hands, and verified by their oath or affirmation; . . . they shall also declare on oath whether . . . they were the owners of the property at the time of the loss. If there be any fraud or false swearing, the claimant shall forfeit all claim by virtue of this policy." Plaintiffs introduced evidence tending to prove that within thirty days after the loss they prepared a detailed statement of the same, and deposited it in the postoffice, duly directed to the defendant company; that said statement was sworn to by Spaulding Spooner, but not by Chloe D. Spooner, the wife, and was signed by both husband and wife. The defendant requested the court to charge, in effect, that the notice was not such a compliance with the by-laws as would entitle plaintiff to recover, which the court declined to do, but charged "that said detailed statement was a compliance with said by-laws," to which defendant excepted. There was verdict for plaintiff. On appeal, the court held that there was no waiver of

proof of loss in the cases, and in passing said: "The by-law requires a statement of the loss—that is, of the property destroyed or damaged—to be signed by the owner, and verified by the oath of the owner, with the additional oath that the party making such statement was, at the time of the loss, the owner of said property. It turns out that, of the property lost, Chloe, the wife, was the sole owner. The statement was not sworn to by her. It does not appear that any oath was made by either as to the ownership of the property. . . . The court told the jury explicitly that that statement was a substantial compliance with the by-law. This we think erroneous. The failure of the owner of the property to make oath to the statement rendered the statement defective in a material respect. It may be true that such defect might be waived by the company, but there was no evidence in the case tending to show that the company did waive it,"—and reversed and remanded the cause.

McManus v. Western Assur. Co. 22 Misc. 269, 48 N. Y. Supp. 820, was a suit to recover on a fire insurance policy. The plaintiff, among other things, alleged that she duly served proofs of loss on the defendant, and that she had complied with all the other conditions of said policy on her part. The answer was a general denial. The policy, among other things, provided that in case of loss the insured, within sixty days after the fire, "shall render a statement to this company, signed and sworn to by the insured," stating, among the other things, "the interest of the insured in the property." Proof of loss was duly furnished. It was signed by the insured, and under her signature was the following certificate of oath, not signed by her, and without venue:

"Personally appeared Mrs. Ann McManus, signer of the foregoing statement, who made solemn oath of the truth of the same.

"Witness my hand and official seal this 8th day of April, 1896.

"Michael A. Burdett,

"(134) Notary Public, N. Y. Co."

In reply thereto the insurer notified the insured "that the papers offered as proof of loss are defective," and "to serve new papers in proper form;" and urged as objections thereto, among other things, that "the statement prefixed to the schedule is not properly verified." "There seems to be no venue and no affidavits signed by the insured, but merely a certificate of the notary that the insured 'made oath to the truth of the same.'" The defects thus pointed out were never corrected by the insured, who claimed the same to be sufficient. Both parties stood on their rights on this point, and plaintiff brought suit on the policy, urging,
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among other things, a waiver of proof of loss as to the oath. There was judgment for plaintiff, and defendant appealed. The supreme court, in affirming the judgment of the trial court, said: "The requirement of the policy that the proofs of loss shall be 'signed and sworn to' by the insured means, by general understanding and practice in matters requiring such verification, that the oath, or a certificate thereof, shall be in writing. This present certificate does not state that the affiant made oath before the notary. This defect seems to be fatal to its sufficiency. *Proffatt, Notaries*, § 68; *Smart v. Howe*, 3 Mich. 590. But the company did not include it among its grounds of objections, and thus excluded and waived it. The only objections specified on the head of the oath were that there was 'no venue and no affidavit signed by the insured.' There being no requirement in the policy that the insured shall sign the affidavit, the latter is untenable. *Proffatt, Notaries*, § 67; *Millius v. Shaffer*, 3 Denio, 60. But the former was good; absence of a venue making an affidavit a nullity. *Thompson v. Burhans*, 61 N. Y. 52; *Proffatt, Notaries*, § 66. The affidavit of the notary, subsequently made and served upon the company, did not supply the lack of a validly certified oath by the insured. It was her oath in writing, or a valid certificate thereof, which the company was entitled to. The proofs of loss were thus fatally defective, and the plaintiff may not prevail unless such defect were waived by the company. It now seems to me as matter of law that it was." But since forfeitures are not favored, we hold that the giving of this instruction is not reversible error, for the reason that, as the condition insisted on was one inserted in the policy for the benefit of the insurer, the same was one which the insurer might, and in this instance did, waive. 16 Am. & Eng. Enc. Law, 2d ed. p. 934, says: "Since the conditions of a policy, a breach of which by the assured will give rise to a forfeiture, are inserted for the benefit of the insurance company, they may be waived either pending the negotiation for the insurance, or after such negotiation has been completed, and during the currency of the policy, and this either before or after the forfeiture is incurred; and, since forfeitures are not favored in the law, the courts are always prompt to seize hold of any circumstances that indicate an election to waive." There is no conflict in the evidence.

On this point the record disclosed that the loss sued for accrued May 26, 1905; that soon thereafter plaintiffs notified defendant thereof, who, in a short time, sent its adjuster to the scene; that he, with one of the insured, examined the injury sustained to

the crops, and on a blank furnished by the company prepared proof thereof, showing a loss of 40 per cent to the wheat, 30 per cent to the oats, and 30 per cent to the smeltz,—a damage in all of \$100,—and presented the same to said insured to sign, but who refused, and then and there claimed a total loss; that after plaintiffs and said adjuster were unable to agree as to the extent of the loss, the former asked for appraisers to appraise the same, which said adjuster declined to appoint on behalf of the company; that plaintiffs afterwards demanded of defendant in writing an appraisal of said loss; that defendant refused to appoint or select appraisers for that purpose; that soon thereafter plaintiffs furnished to defendant proof of loss, as set forth in exhibit D, whereupon, on June 15, 1906, defendant wrote, inclosing proof of loss on one of its blanks, filled out as theretofore presented to plaintiffs by said adjuster, with the request that they sign and return the same, promising when received that a draft for \$100 would issue in payment thereof, which was not done; and that since furnishing said proof of loss, plaintiffs have received no objections thereto, and no communication of any kind from defendant concerning their claim. Receiving and retaining said proof of loss, now in the answer for the first time complained of, without objecting to any defects therein, was a waiver of any objections thereto, and that, too, as a matter of law, under the undisputed evidence herein. 4 Cooley's Briefs on the Law of Insurance, 3544, and cases cited. But it is in effect contended that no question of waiver is before us, for the reason that the court did not charge thereon, and confined plaintiffs to proof of loss as required by the terms of the policy as a condition precedent to his right of recovery. The point is not well taken.

Examination of the record discloses that a waiver of said condition was pleaded by plaintiffs; that while they did not specifically predicate such waiver upon the fact that defendant received and retained the proofs furnished without objection, yet, as such evidence was introduced by them without objection, in proof of waiver, we hold that their petition was, in effect, amended so as to conform to said facts proved (Capitol Ins. Co. v. Bank of Pleasanton, 48 Kan. 397, 29 Pac. 578; Missouri Valley R. Co. v. Caldwell, 8 Kan. 244; Mitchell v. Milhoan, 11 Kan. 617, and thereby put a waiver, based upon that ground, fairly in issue. Had defendant objected to the introduction of said evidence for the reason that no waiver based upon that ground had been pleaded, plaintiffs would doubtless have amended so as to set it up. As it did not do so, but permitted

the evidence to be introduced without objection, thereby treating waiver upon that ground as a proper issue, it is now too late to complain. Wilson v. Northwestern Mut. Acci. Asso. 53 Minn. 470, 55 N. W. 626, was a suit by plaintiff's administrator on an accident policy. After the death of the insured, and before the appointment of the said administrator, proof of the claim was made by one Jones on a blank form of claim received from defendant association. After sending same to defendant, no further proof was demanded, and prior to the bringing of the suit several attempts were made by defendant to settle the claim. Defendant pleaded in defense insufficiency of the proof of loss. On appeal, the supreme court held that defendant could not be allowed to defeat a recovery on the ground that it was incumbent on plaintiff himself to file the proof, or that he could not, with its implied consent, adopt the act of Jones, saying: "It is analogous to the reception and retention of defective proof of a claim. In such cases good faith would require that the association give notice indicating the defect; and the failure to object to defective proofs, or a refusal to pay on other grounds, is regarded as an acceptance of the defective proofs, and a waiver of defects. American L. Ins. Co. v. Mahone, 56 Miss. 180; Miller v. Eagle Life & Health Ins. Co. 2 E. D. Smith, 268; Continental L. Ins. Co. v. Rogers, 119 Ill. 474, 59 Am. Rep. 810, 10 N. E. 242." And the court added: "But appellant calls attention to the fact that in the complaint plaintiff alleged the making and filing of proper proof of the claim by him, which was put in issue by the answer, and that no waiver of full performance of the condition precedent to recovery was pleaded in the reply. Not having pleaded a waiver, plaintiff was limited to proof of performance as alleged in the complaint, is the position of appellant's counsel, who cites Guerin v. St. Paul F. & M. Ins. Co. 44 Minn. 20, 46 N. W. 138, and Mosness v. German-American Ins. Co. 50 Minn. 341, 52 N. W. 932, in support of the position. We need not consider the condition of the pleadings on this subject, because no objection was made on that ground to the reception of the testimony relative to the filing of proof of the claim by Jones, plaintiff's subsequent reliance upon and adoption thereof, with the implied consent of defendant's officers, the statement of the secretary that this proof was satisfactory, so far as he knew, and other statements and acts which estopped defendant association from asserting that satisfactory proof of the claim had not been made. Nor was the point made when defendant moved for a verdict in its favor at the close of the evidence. All questions of ratification,

adoption, and waiver of proof, other than that furnished by Jones, were evidently regarded as proper issues under the pleadings, and it is now too late for counsel to insist that they were not. He is concluded by his course upon the trial," —and affirmed the judgment of the trial court. It follows that, as there was no conflict in the evidence, the question of waiver was one of law, for the court (*Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.* 11 Colo. App. 264, 53 Pac. 242; *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. 606; *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1, 66 Am. Dec. 308; *Pretzfelder v. Merchants' Ins. Co.* 123 N. C. 164, 44 L.R.A. 424 (31 S. E. 470); that, upon the undisputed facts, plaintiffs were entitled to have the law declared to be that defendant, by retaining, without objection, the proof of loss furnished by them, waived all objections thereto, including the objections that the same was not sworn to by the insured, and a verdict directed for plaintiffs. Under this view of the case, the error complained of was harmless. *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.* supra.

The judgment of the lower court is affirmed.

All the Justices concur.

ARKANSAS SUPREME COURT.

A. A. McDONALD, Guardian of Ella Hare,
Appt.,
v.

TILL SHAW et al.

(92 Ark. 15, 121 S. W. 935.)

Will — devise of beneficiary's property — election.

1. The intent to devise property of a beneficiary in a will must appear upon its face to compel him to elect between asserting his title to such property and claiming the benefit of the provision in the will.

Same — parol evidence — enlarging devise.

2. Where one devises a portion of his estate and there is property upon which the will can operate, evidence is not admissible for the purpose of enlarging the devise so as to include property belonging to another.

Party — will — election.

3. No election can be compelled between a devise and property covered by the will which is alleged to belong to the devisee, in a suit to which the person to whom the devise was made is not a party.

On Rehearing.

Equity — jurisdiction — retaining suit.

4. A chancery court having assumed jurisdiction

of a suit involving the right to compel a beneficiary under a will to elect between the provision in his favor and a claim to property covered by the will which he alleges belonged to him may retain the case to settle the amount of mesne profits to which he is entitled and the amount to be allowed those who had been in possession for betterments.

Action — settlement of estate — extraneous claims.

5. In a suit to recover possession of real estate in which a cross complaint is filed to compel the claimant to elect between claiming it and accepting a benefit under a will which is alleged to have covered it, claims cannot be presented by persons who claim to have purchased property from testator's administrator, to subrogation against that estate for the amount of the purchase price paid, or by persons who claim compensation for support furnished to the beneficiary.

(July 12, 1909.)

Note. — May beneficiary be put to his election by extrinsic evidence of testator's intention.

In *Blake v. Bunbury* (1792) 1 Ves. Jr. 514, Lord Eyre said: "This putting a devisee to his election, however reasonable and just it may be, was certainly a strong operation of a court of equity; and I agree, the intention of the testator to dispose of that which is not his ought to appear upon the will, with such explanation, however, of the prima facie appearance, as the law admits; . . . and no man ought, under pretense of this rule, to be spelt or conjectured out of his property. But as, on one hand, we are not to do it by conjecture, so, on the other, we are not to refuse our assent to that moral certainty and demonstration which, in such cases as the present, the general object of both instruments, the nature of the subject, the scope and purpose of the will, the observations upon the particular clauses, and the force of the expressions, construed according to their natural import, may produce." The two instruments referred to were a settlement and a will which were considered together in determining the intention of the testator.

The case of *Darlington v. Pulteney*, (1795) 2 Ves. Jr. 544, 7 Eng. Rul. Cas. 45, has been frequently referred to as one in which steward's accounts and a settlement of the state of the property were admitted in evidence to show the testator's intention to include in the will property of which he thought he was the owner, but of which a beneficiary in the will was the owner. Lord Loughborough, who decided the foregoing case, said in *Rutter v. Maclean* (1799) 4 Ves. Jr. 531 that in the *Pulteney Case* he had persuaded himself that where a man disposed of his estate it was not a fair inference that he intended to dispose of what was not his estate, and that the fact that he had a large estate of his own was suf-

A PPEAL by plaintiff from a judgment of the Sebastian Chancery Court in defendants' favor in consolidated actions brought to recover possession of certain real estate to which plaintiff alleged title as heir at law of John Hare, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Winchester & Martin, for appellant:

In order to create a condition requiring an election it must clearly appear that the testator undertook to dispose of some property belonging to the person called upon to elect.

2 Jarman, Wills, 15-17; Story, Eq. Jur. §§ 1075, 1086; Fitzhugh v. Hubbard, 41 Ark. 69; Blake v. Bunbury, 1 Ves. Jr. 523;

sufficient to satisfy the provision in the will. But he pointed out that the decision was directly to the contrary, that is, to the effect that since the testator thought property of the beneficiary belonged to him, he must have intended to include it, and there should be an election.

In *Hinchcliffe v. Hinchcliffe* (1796) 3 Ves. Jr. 521 where accounts in the testator's handwriting were admitted to show the surrounding circumstances, and were expressly limited to the question of election and stated to be inadmissible to explain the will, the decision actually turned upon the rule there announced, that provisions for children by the will of the parent are presumed to be in satisfaction of a prior provision by settlement, unless clearly not so intended.

In *Druce v. Denison* (1801) 6 Ves. Jr. 385, Lord Eldon, doubting their correctness, nevertheless bowed to what he considered the controlling authority of the *Pulteney* and *Hinchcliffe* Cases, and admitted a statement of property written by the testator to show that he intended to dispose of property not strictly, but in some sense, his, for the purpose of compelling an election.

Without discussing the propriety of such a course, the court in *Dillon v. Parker* (1833) 1 Clark & F. 303, admitted evidence of an agreement between the testator and his son, for the purpose of showing the former's intention to impose an obligation to elect, but it was held that no such intention was established.

In a *dictum* in *Pickersgill v. Rodger* (1876) L. R. 5 Ch. Div. 163, it was said that the presumption that a testator intends to dispose only of property which belongs to him was a presumption only, rebuttable even by parol evidence.

The foregoing cases can scarcely be called authoritative. About the only one of them not in the nature of a *dictum* is *Darlington v. Pulteney*, which loses much of its force through the subsequent remarks by the judge who decided it, and through the statements made in *Druce v. Denison*.

It may fairly be said that the English 28 L.R.A.(N.S.)

Doe ex dem. Oxenden v. Chichester, 4 Dow, P. C. 89; *Clementson v. Gandy*, 1 Keen, 309; *Havens v. Sackett*, 15 N. Y. 365; *Adsit v. Adsit*, 2 Johns. Ch. 448, 7 Am. Dec. 539; *Miller v. Springer*, 70 Pa. 269; *Dummer v. Pitcher*, 2 Myl. & K. 262, s. c. 5 Sim. 35; *Pickersgill v. Rodger*, L. R. 5 Ch. Div. 163.

A general devise of the testator's real estate shows an intention to give what strictly and properly belonged to him, and nothing more, even if the testator had no real estate of his own upon which the devise could operate.

1 Jarman, Wills, pp. 391, 393; 2 Jarman. Wills, pp. 17, 18; 2 Story, Eq. Jur. § 1087.

Parol evidence was not admissible to enlarge the devise.

cases deny that extrinsic evidence may be admitted to show that the testator intended to bequeath property not belonging to him, and thus raise a case of election, and it is declared that such intention must appear by the will alone. *Clementson v. Gandy* (1836) 1 Keen, 309; *Gibson v. Gibson* (1852) 1 Drew. 42.

In *Dixon v. Samson* (1837) 2 Younge & C. Exch. 566, where testatrix gave a legacy upon condition that the legatee forego all claims upon her estate, parol evidence that the only claim that the legatee ever had upon such estate was for a legacy under the will of another, was held inadmissible for the purpose of compelling an election with respect to such claim.

In *Stratton v. Best* (1791) 1 Ves. Jr. 285, the court said, in holding evidence dehors the will inadmissible for the purpose of compelling an election, that to hold it admissible would be to introduce a very desperate rule of property into the court. These words were quoted with approval in *Dummer v. Pitcher* (1833) 2 Myl. & K. 262.

It was held in an early case that parol evidence was inadmissible to show that a testator's provision for his wife was intended to be in lieu of dower, for the purpose of compelling an election by her. *Tinney v. Tinney* (1743) 3 Atk. 8. (The same result has been reached by the Canadian court. *Fairweather v. Archibald*, 15 Grant. Ch. [U. C.] 255.)

And subsequent cases have declared that such intention must appear from the will, either expressly or by necessary implication. *French v. Davies* (1795) 2 Ves. Jr. 580; *Birmingham v. Kirwan* (1805): 2 Sch. & Lef. 452; *Warbuton v. Warbuton* (1854) 2 Smale & G. 163.

And it seems to be settled in this country that extrinsic evidence is admissible to show the condition of the subject-matter and the surrounding circumstances, so as to place the court in the position of the testator, but his purpose to put the beneficiary to his election must appear from the will itself. *Fitzhugh v. Hubbard*, 41 Ark. 64; *Waters v. Howard*, 1 Md. Ch. 112; *Sher-*

Wilkins v. Allen, 18 How. 385, 15 L. ed. 396; Den ex dem. Weatherhead v. Baskerville, 11 How. 357, 13 L. ed. 728; Miller v. Travers, 8 Bing. 248; Timberlake v. Parish, 5 Dana, 351; 4 Wigmore, Ev. § 2471; Jackson ex dem. Van Vechten v. Sill, 11 Johns. 201, 6 Am. Dec. 371; Hand v. Hoffman, 8 N. J. L. 76; Clark v. Clark, 2 Lea, 723; Horton v. Thompson, 3 Tenn. Ch. 575; Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23; Sherman v. Lewis, 44 Minn. 107, 46 N. W. 318; Webb v. Byng, 1 Kay & J. 580; Whitfield v. Langdale, 45 L. J. Ch. N. S. 177; Wootton v. Redd, 12 Gratt. 196; Burke v. Lee, 76 Va. 386; Webber v. Stanley, 16 C. B. N. S. 698; Lomax v. Lomax, 218 Ill. 629, 6 L.R.A.(N.S.) 960, 75 N. E. 1076; Chappell v. Missionary Soc. 3 Ind. App.

man v. Lewis, 44 Minn. 107, 46 N. W. 318; Casey v. McGowan, 50 Misc. 426, 100 N. Y. Supp. 538.

The intention to raise an election must be manifest from the will itself. Jones v. Jones, 8 Gill, 198; McLaughlin v. Barnum, 31 Md. 425; Havens v. Sackett, 15 N. Y. 365; Huston v. Cone, 24 Ohio St. 11; Pennsylvania Ins. Co. v. Stokes, 2 Brewst. (Pa.) 597; Re Hayden, 1 Connoly, 454, 5 N. Y. Supp. 845; Pennsylvania Co. v. Stokes, 61 Pa. 136.

It must be disclosed by such instrument that the testator assumed to dispose of property belonging to the beneficiary. Cameron v. Parish, 155 Ind. 329, 57 N. E. 547.

So, for the purpose of forcing the election, extrinsic evidence is inadmissible to establish the intention of the testator to dispose of property belonging to the beneficiary. Young v. McKinnie, 5 Fla. 543; Gray v. Williams, 130 N. C. 53, 40 S. E. 843; Charch v. Charch, 57 Ohio St. 561, 49 N. E. 408; McLean v. Miller, 17 Ohio Dec. Reprint, 637.

And the American cases, like those of England, hold parol evidence inadmissible to show that a testamentary provision for the wife was intended to be in lieu of dower. Cowdrey v. Cowdrey, 72 N. J. Eq. 951, 12 L.R.A.(N.S.) 1176, 67 Atl. 111; Hall v. Hall, 8 Rich. L. 407, 64 Am. Dec. 758. An early Virginia statute authorized the admission of parol evidence to show that a provision in favor of the wife was intended to be in lieu of dower. Ambler v. Norton, 4 Hen. & M. 23. And the same seems to have been true in West Virginia. Tracey v. Shumate, 22 W. Va. 474; Atkinson v. Sutton, 23 W. Va. 197.

And the cases are numerous in which it has been declared that, in the absence of statute, the widow cannot be put to her election unless it appears from the will that testator so intended, either expressly or by necessary implication. It should be noted that it does not appear in these cases that extrinsic evidence was sought to be introduced, and it may not necessarily follow that the courts would hold extrinsic evidence inadmissible. In preparing this list 28 L.R.A.(N.S.)

356, 50 Am. St. Rep. 276, 29 N. E. 924; Barnes v. Simms, 40 N. C. (5 Ired. Eq.) 392, 49 Am. Dec. 435; Herbert v. Reid, 16 Ves. Jr. 486; 1 Roper, Legacies, chap. 4, § 4.

Mr. Ira D. Oglesby also for appellant.

Messrs. Read & McDonough, Brizolara & Fitzhugh, Youmans & Youmans, and Joseph M. Hill, for appellees:

If the testator give what is not his property, but which he supposes to be his, and gives to the person whose property it is, an interest by his will, that person will not be permitted to defeat the disposition when it is in his power, and yet take under the will; and the same rule applies though the testator knew he had no right to dispose of the lands, and yet knowingly he takes it upon himself to dispose of them.

of cases, however, care has been exercised to exclude those which state merely that it is presumed that the testator, by making a general provision for his widow, did not intend to affect her right to dower; that is, only those cases are included in which the *dicta* (they appear clearly to be *dicta*) are to the effect that no case for election arises except where the will itself discloses that it was intended to impose an election. It may be that the fact that this judicial statement has been so frequently made accounts for the small number of decisions on the admissibility of extrinsic evidence, upon the theory that it is regarded as establishing the determination of the courts to hold such evidence inadmissible. Following are the cases holding that, in the absence of statute, the intention to bar dower must appear by the will itself: Green v. Green, 7 Port. (Ala.) 19; Hilliard v. Binford, 10 Ala. 977 (rule changed by statute); Stokes v. Pillow, 64 Ark. 1, 40 S. W. 580 (homestead); Thompson v. Betts, 74 Conn. 576, 92 Am. St. Rep. 235, 51 Atl. 504; Tooke v. Hardeman, 7 Ga. 20; Reynolds v. Norvell, 129 Ga. 512, 59 S. E. 299; Kelly v. Stinson, 8 Blackf. 387 (rule changed by statute); Shipman v. Keys, 127 Ind. 356, 26 N. E. 896 (statutory change held to have no application to widow's statutory allowance of \$500); Richards v. Hollis, 8 Ind. App. 353, 35 N. E. 572 (same as preceding case); Corriell v. Ham, 2 Iowa, 552; Clark v. Griffith, 4 Iowa, 405; Metteer v. Wiley, 34 Iowa, 214; Snyder v. Miller, 67 Iowa, 261, 25 N. W. 240; Daugherty v. Daugherty, 69 Iowa, 677, 29 N. W. 778; Re Blaney, 73 Iowa, 113, 34 N. W. 768; Howard v. Watson, 76 Iowa, 229, 41 N. W. 45; Parker v. Hayden, 84 Iowa, 493, 51 N. W. 248; Richards v. Richards, 90 Iowa, 606, 58 N. W. 926; Bare v. Bare, 91 Iowa, 143, 59 N. W. 20; Hunter v. Hunter, 95 Iowa, 728, 58 Am. St. Rep. 455, 64 N. W. 656; Baldwin v. Hill, 97 Iowa, 586, 66 N. W. 889; Re Franke, 97 Iowa, 704, 66 N. W. 918; Watson v. Watson, 98 Iowa, 132, 67 N. W. 83; Sutherland v. Sutherland, 102 Iowa, 535, 63 Am. St. Rep. 477, 71 N. W. 424; Re Proctor, 103

Gore v. Stevens, 1 Dana, 204, 25 Am. Dec. 141; *McElvain v. Porter*, 9 Ky. L. Rep. 899, 7 S. W. 309, 8 S. W. 705; *Weeks v. Weeks*, 77 N. C. 421; *Tripp v. Nobles*, 136 N. C. 99, 67 L.R.A. 449, 48 S. E. 676; *Story, Eq. Jur.* §§ 1075, 1096; *Melchor v. Burger*, 21 N. C. (1 Dev. & B. Eq.) 634; *Noyes v. Mordaunt*, 2 Vern. 581; *Caulfield v. Sullivan*, 85 N. Y. 153; *Brown v. Knapp*, 79 N. Y. 136; *Underhill, Wills*, § 726; *Adams, Eq.* 93; *McQueen v. McQueen*, 55 N. C. (2 Jones, Eq.) 16, 62 Am. Dec. 205; 1 Pom. Eq. Jur. p. 431.

It is always admissible to prove by parol the circumstances by which the testator was surrounded, the condition and character of all property disposed of in the will, its ownership, and the relation of the parties.

4 *Wigmore, Ev.* §§ 2458, 2462, 2463, 2467, 2470; *Underhill, Wills*, § 734; *Hunt v. White*, 24 Tex. 652; *Wigram, Wills*, 3d ed. 53; *Postlethwaite's Appeal*, 68 Pa. 479; *Blake v. Hawkins*, 98 U. S. 315, 25 L. ed. 139; *Pickersgill v. Rodger*, L. R. 5 Ch. Div. 163; *Fitzhugh v. Hubbard*, 41 Ark. 64.

The doctrine of election is applicable.

Bispham, Eq. § 295; *Story, Eq. Jur.* §§ 1076 et seq.; *Noys v. Mordaunt*, 1 White & T. Lead. Cas. in Eq. 510; 2 Redf. Wills, 745; *Van Steenwyck v. Washburn*, 59 Wis. 483, 48 Am. Rep. 532, 17 N. W. 289; *State ex rel. Percy v. Hunt*, 88 Minn. 404, 93 N.

W. 314; *Washburn v. Van Steenwyck*, 32 Minn. 336, 20 N. W. 324.

McCulloch, Ch. J., delivered the opinion of the court:

Ella Hare, who is, and has been since she was an infant of tender years, an imbecile, instituted separate actions by her guardian against certain defendants to recover possession of real estate in the city of Ft. Smith, title to which is asserted for her by inheritance from her father, John Hare, who is shown to have owned it at the time of his death. The defendants filed separate answers and cross complaints, praying that the actions be transferred to the chancery court. They each alleged, in substance, that they held the property in controversy, and claimed title thereto, by purchase and conveyance, one from the devisee under the last will of Mary A. Hare, mother of Ella Hare, and the others from the administrator of the estate of said Mary Hare; that said Mary Hare by will devised property of her own to Ella Hare, and also devised property of Ella Hare to others, and that said Ella Hare should therefore be put to an election whether she would take her own property and repudiate her mother's will, or conform to said will and permit the defendants to keep the property conveyed to them. The prayers of the cross complaints

Iowa, 232, 72 N. W. 516; *Bentley v. Bentley*, 112 Iowa, 625, 84 N. W. 676; *Percifield v. Aumick*, 116 Iowa, 383, 89 N. W. 1101; *Kiefer v. Gillett*, 120 Iowa, 107, 94 N. W. 270; *Warner v. Hamill*, 134 Iowa, 279, 111 N. W. 930; *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251 (homestead); *Fulton v. Fulton*, 30 Miss. 586 (rule subsequently changed by statute); *Hall v. Smith*, 103 Mo. 289, 15 S. W. 621 (rule changed by statute only as to land of which husband should die seised); *Schorr v. Etling*, 124 Mo. 42, 27 S. W. 395 (homestead); *Ball v. Ball*, 165 Mo. 312, 65 S. W. 552 (homestead); *Brown v. Brown*, 55 N. H. 106; *Norris v. Clark*, 10 N. J. Eq. 51 (rule changed by statute); *Church v. Bull*, 2 Denio, 430, 43 Am. Dec. 754; *Fuller v. Yates*, 8 Paige, 325; *Sanford v. Jackson*, 10 Paige, 266; *Havens v. Havens*, 1 Sandf. Ch. 324; *Sheldon v. Bliss*, 8 N. Y. 31; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Konvalinka v. Schlegel*, 104 N. Y. 125, 58 Am. Rep. 404, 9 N. E. 868; *Horstmann v. Flege*, 172 N. Y. 381, 12 N. Y. Anno. Cas. 163, 65 N. E. 202; *Leonard v. Steele*, 4 Barb. 20; *Lasher v. Lasher*, 13 Barb. 106; *Gray v. Gray*, 5 App. Div. 132, 39 N. Y. Supp. 57; *Miller v. Miller*, 22 Misc. 582, 49 N. Y. Supp. 407 (holding, further, that husband's request in will that wife release dower did not put her to election); *Gloss v. Eldert*, 30 App. Div. 338, 51 N. Y. Supp. 881; *Re Grotrian*, 30 Misc. 23, 62 N. Y. 28 L.R.A.(N.S.)

Supp. 996; *Glaser v. Glaser*, 67 App. Div. 132, 74 N. Y. Supp. 395; *Lauby v. Gill*, 42 Misc. 334, 86 N. Y. Supp. 718; *Casey v. McGowan*, 50 Misc. 426, 100 N. Y. Supp. 538; *Bond v. McNiff*, 6 Jones & S. 83; *Evans v. Webb*, 1 Yeates, 424, 1 Am. Dec. 308; *Sample v. Sample*, 2 Yeates, 433; *Pickett v. Peay*, 3 Brev. 545, 6 Am. Dec. 594; *Gordon v. Stevens*, 2 Hill, Eq. 46, 27 Am. Dec. 445; *Cunningham v. Shannon*, 4 Rich. Eq. 135; *Sumerel v. Sumerel*, 34 S. C. 85, 12 S. E. 932; *Garrett v. Vaughn*, 59 S. C. 516, 38 S. E. 166; *Otts v. Otts*, 80 S. C. 16, 61 S. E. 109; *Re Hatch*, 62 Vt. 300, 22 Am. St. Rep. 109, 18 Atl. 814.

The statutory change referred to in the foregoing list of cases is uniformly a reversal of the common-law rule. The statutes generally provide that a general provision shall be taken to be in lieu of dower, unless the contrary intention appears. Where such a statute is in force, of course the question considered herein cannot arise. It has been found that statutes of this kind have been in force in Alabama, Florida, Indiana, Kentucky, Massachusetts, Mississippi, Missouri (change made only as to lands of which husband should die seised), New Jersey, North Carolina, Ohio, Tennessee, and Wisconsin. In Virginia and West Virginia, as has been seen, a legislative enactment has authorized the admission of extrinsic evidence in such cases.

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were that the court should make such election for Ella Hare on account of her incapacity to elect for herself. The cases were transferred to the chancery court and consolidated, and on final hearing the court made an election for Ella Hare that she should conform to the will of her mother, thus permitting the defendants to keep the property devised to their grantor. The guardian of Ella Hare appealed to this court.

The facts of the case are practically undisputed. John Hare and his wife, Mary A., came to Ft. Smith in 1852. They were members of the Roman Catholic Church, belonging to the parish of the church of the Immaculate Conception, one of the two Catholic churches of Ft. Smith. They had one child, Ella, who was in infancy rendered an imbecile by a stroke of paralysis. She is now about thirty-five years of age, and is unable to walk without assistance, or to care for herself, and has but a small degree of intelligence. She is in the care of the Catholic sisters in a convent at Ft. Smith. When she was a small child, her father died,—in 1883,—leaving an estate consisting of \$2,028.05 personal property and a large amount of real estate, which was then valued at \$26,000, including the property now in controversy. He left a will, devising all his property to his wife, Mary A. Hare, the will being in due form in all other respects, but omitting to mention the name of his child, or to make any provision for her. Mrs. Hare then owned no real estate. Among other tracts of land owned by John Hare was one of 470 acres in sections 1 and 2, township 7 N., range 31 W., worth about \$6 or \$7 per acre. It is admitted that the title to this property was in John Hare; but after his death the record shows that for some reason or other his wife, Mary Hare, accepted a quitclaim deed from one Carnall, describing and conveying the property. It is not shown that Carnall had any title to convey. The will of John Hare was probated, and Mrs. Hare administered on his estate and closed the same up with an order of the probate court vesting all the above estate of John Hare in her. She exercised acts of ownership over the same after her husband's death. She built houses on some of it and sold some of it.

The evidence tends to show that Mrs. Hare was never advised that the last will of her husband was ineffectual to devise his property to her, on account of omitting the name of their child. After her husband's death Mrs. Hare accumulated personal property, which, at the time of her death, was valued at \$1,347.87, and real estate valued at \$9,800, exclusive of im-

provements which she had placed on the property owned by her husband. She died in 1893, leaving a will in due form, which, in addition to making certain minor bequests, contains the following clauses:

"After all my just debts and funeral expenses are paid, I give and bequeath to the boy, Paul, whom I have raised, 80 acres of land described as follows, said 80 to be taken out of my lands I own in township 7 north, range 31 west, the 80 to be in one body, Paul to have choice and also the sum of one hundred dollars. . . .

"I give, devise, and bequeath to the convent of the Sisters of Mercy, at Fort Smith, known as Saint Ann's Convent, one half of all of my estate, real and personal, after deducting the legacies and bequests mentioned in this my last will and testament, for the support and maintenance of my daughter, Ella Hare, during her life, and after the death of my said daughter, Ella Hare, I give, devise, and bequeath to the said sisters of Mercy the said half of my estate, real and personal, for the purpose to educate poor Catholic children.

"I give, devise, and bequeath to the pastor of the parish of the church of the Immaculate Conception of Fort Smith, in the state of Arkansas, half of all my estate, real and personal, to be used by the said pastor for the said purposes of helping to establish a school in said parish for the education of Catholic boys and for helping to educate young men of the parish for the priesthood."

This will was construed, and its provisions sustained, in *McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952. "The boy Paul" referred to in the will was Paul Herring, who was an orphan reared by Mrs. Hare. After the death of Mrs. Hare the Catholic sisters took charge of Ella, and have given her all the care that loving solicitude could suggest. There is no doubt that they are attempting to carry out the provisions of Mrs. Hare's will, in spirit as well as in letter.

Under the statutes of this state (Kirby's Dig. § 8020) the will of John Hare was void as to the child, Ella, whose name was omitted therefrom. As to the child, he is deemed to have died intestate, and the title to his property passed to her as the sole heir. There is no disagreement between learned counsel in this case as to the general principles requiring election in cases of this kind. A concise statement of such principles may be found quoted from Bispham's *Principles of Equity*, § 295, in the opinion of this court, delivered by Mr. Justice Smith in the case of *Fitzhugh v. Hubbard*, 41 Ark. 64, as follows: "An election in equity is a choice which a party is com-

pelled to make between the acceptance of a benefit under an instrument and the retention of some property, already his own, which is attempted to be disposed of in favor of a third party, by virtue of the same instrument. The doctrine rests upon the principle that a person claiming under an instrument shall not interfere, by title paramount, to prevent another part of the same instrument from having effect according to its construction. He cannot accept and reject the same instrument." The Virginia court of appeals, in *Gregory v. Gates*, 30 Gratt. 83, states the same doctrine in somewhat different language, as follows: "The doctrine of election may be thus stated: That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights." It is further conceded to be settled that "it is not material, in determining whether a party is put to an election, that the testator, in disposing of that person's property, was in error as to its ownership, or that the testator in fact knew that he had no title to it. In either case, if the party whose property is given away decides to take against the will, he must relinquish his legacy under the will." 2 Underhill, Wills, § 736.

The real controversy arises concerning the application of the rules of evidence,—whether parol evidence is admissible to show that Mary A. Hare by her will attempted to dispose of property which belonged to Ella Hare as sole heir of her father, John Hare. The defendants claim the right to show, by evidence *dehors* the will of Mary Hare, that she intended by the words in her will, "all of my estate, real and personal," to describe the property of Ella Hare; and to do so they adduced parol evidence tending to show that Mrs. Hare claimed to own the property, believed herself to be the owner, and exercised acts of ownership over it. On the other hand, learned counsel for the plaintiff insist on adherence to what they assert to be the settled rule of evidence, that "the intent of the

testator to dispose of that which is not his ought to appear on the face of the will itself," and that when it appears that the testator was seised and possessed of property which in fact answered the descriptive words, "all of my estate," parol evidence should not be admitted for the purpose of showing, in order to require an election on the part of the devisee, that the testatrix believed she owned other property which in fact belonged to such devisee, and intended to devise it by her will. In other words, they insist that where the testator in the will uses merely the general descriptive terms "all of my property," it may be shown what property she owned, but that the inquiry must there stop. We think that the authorities fully sustain this contention.

This court in *Fitzhugh v. Hubbard*, *supra*, which is clearly in line with all the authorities on the subject, said: "You may show the condition of the subject-matter and the surrounding circumstances, so as to place the court in the position of the testator. But his purpose to put the devisee to his election must appear from the will itself."

In *Blake v. Bunbury*, 1 Ves. Jr. 523, which was a case of election under a will, it was said that "the intent of the testator to dispose of that which is not his ought to appear upon the will, with such explanation, however, of the *prima facie* appearance as the law admits," meaning, of course, the rule permitting evidence identifying the property called for by the descriptive terms used. In *Clementson v. Gandy*, 1 Keen, 309, the substance of the opinion by Lord Langdale Master of the Rolls, appears in the syllabus as follows: "Where the intention to dispose was clearly expressed on the face of the will, and parol evidence was tendered for the purpose of showing that the testatrix had mistaken the amount of the property which she was capable of bequeathing, supposing certain property in which she had only a life interest to be her own, and that a legatee under the will, who also took an interest in such supposed absolute property under a settlement made by the testatrix, ought, in order to enlarge the residuary bequest, to be put to his election, such evidence was held to be inadmissible." Lord Eldon in *Doe ex dem. Oxendem v. Chichester*, 4 Dow. P. C. 76, which is cited with approval in 1 Jarman on Wills, 6th ed. p. 469, said: "It must appear on the face of the will that the testator proposes that there should be an election, and as to what subjects." In *Weber v. Stanley*, 16 C. B. N. S. 698, the court of common pleas announced the general rule that under a general devise of "my manor house," and "all of my manor farms, lands," etc., in a certain county where there was property which

fitted every particular of the description, and on which every word of the devise could have full effect, the meaning of the words could not be enlarged by extrinsic proof. The English cases are discussed at length in Jarman on Wills, at the page indicated above, and the prevailing rule shown there as contended for by counsel for plaintiff. An interesting discussion of the subject may also be found in the notes of Hare & Wallace to the case of *Noys v. Mordaunt*, beginning on page 510 of *White & Tudor's Leading Cases in Equity* (vol. 1). They state the prevailing rule, and cite numerous English cases to sustain it, as follows: "In order to raise a case of election there must appear in the will or instrument itself a clear intention, on the part of the author of it, to dispose of that which is not his own." The only English case declaring a different doctrine is *Darlington v. Pulteney*, 2 Ves. Jr. 544, which has been expressly disapproved by many of the greatest judges of that country.

The American cases are equally harmonious, and of the same purport. In *Havens v. Sackett*, 15 N. Y. 305, Chief Justice Denio gives the following statement of the law (quoting from the syllabus): "In order however, to raise a case for election under a will, a clear and decisive intention of the testator must be manifested by the will itself, to dispose unconditionally of that which did not belong to him. If his expressions will admit of being restricted to some interest in property belonging to, or disposable by, the testator, they will not be held to apply to that over which he had no disposing power." In *Miller v. Springer*, 70 Pa. 269, Judge Sharswood, speaking for the court, said: "A general devise of the testator's real estate has always been held to show an intention to give what strictly belongs to him, and nothing more, even if the testator had no real estate of his own upon which the devise could otherwise operate. 1 Jarman, Wills, 393. Nor can evidence *dehors* the will be admitted to show that the testator considered the land in question to belong to him, and intended it to pass under the will." Judge Mitchell, delivering the opinion of the supreme court of Minnesota, in *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318, laid down the law on the subject as follows: "The rule is that a general bequest and devise of the testator's property will be construed as intended to extend only to such property as he could dispose of by will; also that, even where specific property is disposed of by will, in which the testator had only a partial interest, the courts will, if possible under any reasonable rule of construction, construe the language of the will as intended to apply only to the interest

which the testator was able to dispose of, the presumption being that he did not intend it to apply to that over which he had no disposing power; also that, in order to raise a case for an election, the intention as manifested by the will itself must be clear and decisive. It must be clear, beyond reasonable doubt, that the testator has intentionally assumed to dispose of the property of the beneficiary, who is required on that account to give up his own gift [citing cases]. And while parol evidence is admissible, to the same extent as in other cases, in aid of the construction of written instruments,—that is, to show the condition of the subject-matter and the surrounding circumstances, so far as to place the court in the position of the testator,—yet the intent of the testator to dispose of that which was not his must appear from the words of the will itself, and cannot be proved by evidence *dehors* the instrument." The Virginia court of appeals in *Wootton v. Redd*, 12 Gratt. 196 (quoting the syllabus), said: "Though it may be possible the testator intended to give more, yet if there be a subject found to satisfy the description in the will, the court can neither enlarge nor extend it." The same court, in the case of *Gregory v. Gates*, 30 Gratt. 83, said: "In order to raise a case of election, there must appear in the will itself a clear intention on the part of the testator to dispose of that which is not his own." And again that court, in *Penn v. Guggenheimer*, 76 Va. 839, held that "generally, when the testator has an undivided interest in certain property, and he employs general words in disposing of it, as 'all my lands,' or 'all my estate,' no case of election arises from it; for it does not plainly appear that he meant to dispose of anything but what was strictly his own." Judge Story clearly announced the same doctrine as follows: "A case of election cannot ordinarily arise where property is devised in general terms, as a devise of 'all my real estate in A.,' which estate is subject to the claims of a devisee or legatee; for it is not apparent that he meant to dispose of any property but what was strictly his own, subject to that charge." 2 Story, Eq. Jur. 1087. Prof. Pomeroy also reached the same conclusion. 1 Pom. Eq. Jur. 473, 474.

The diligence of learned counsel has not brought to light a single case directly holding the contrary view. We assume that there are none. They rely mainly upon certain general observations of Mr. Wigmore in his work on Evidence, expressing views as to the general growth of the law of evidence on this subject. But that learned author does not undertake to show that the

rule announced by the various authorities hereinbefore cited is erroneous. Counsel also rely to some extent on the decision of this court in *Fitzhugh v. Hubbard*, 41 Ark. 64; but the doctrine announced in that case by no means reaches to the point raised in this. There the testator in general terms released the debt of a certain party to him, and it appeared that the only debt which the party had ever owed him was a note which he had previously assigned to the testator's wife, who was also a beneficiary under the will. It was held competent in that case to show these facts in order to give some effect to the language of the will; otherwise the entire bequest would have been void. In the present case the devise was for the benefit of Ella Hare, and was in the language "one half of all my estate," and the testator owned property which fitted the language. We find it nowhere announced that evidence is inadmissible to show the circumstances with which the testator was surrounded, in order to explain the language which he used, or to identify property which he intended to devise. But the description of the property cannot be entirely supplied by evidence *dehors* the will, where there is nothing in the language of the will itself to point out what property is meant; nor, where the language does point out the property, and some is found which answers the description, can the description be enlarged by parol testimony. We are therefore of the opinion that the parol testimony was inadmissible for the purpose of showing that Mrs. Hare intended to convey the property which Ella Hare held by inheritance from her father, and that no case was made out for an election.

It is further insisted by counsel for plaintiff that the devise of 80 acres of land to Paul Herring was a specific devise of property owned by Ella Hare, and that that called for an election. We do not deem it necessary, for the purposes of this case, to determine whether the devise to Paul Herring was sufficiently specific to indicate an intention, on the part of the testator, to devise property which belonged to Ella Hare, and which called for an election. If it be conceded that such was the case, the defendants are in no position to demand an election, because the position of Ella Hare, the claimant by inheritance from her father, is inconsistent with the rights of Paul Herring. Paul Herring is not a party to this suit, and no controversy has arisen with him. It is the duty of the court to make an election for an infant or other incompetent person only when it becomes necessary. 2 Underhill, Wills, 737. Now, if hereafter the guardian of Ella Hare should, under orders of the court, seek to recover from Paul

Herring the property devised to him, then a case for election may arise as to that individual. These defendants can never inject themselves into that controversy and claim the right to require an election, because Paul Herring may have the right to demand it. If, in a controversy with Paul Herring, the necessity for an election should arise, the court could either elect for Ella Hare to conform to her mother's will so far as to leave Paul Herring undisturbed in his rights thereunder, or could elect for her to take from him the property so devised, and render compensation to him out of the property devised to Ella Hare under her mother's will. In no event can the other devisee under the will of Mrs. Hare, or the grantees of such devisee or the purchaser from Mrs. Hare's administrator, be interested in that controversy. If Mary Hare had attempted by her last will to devise to them property which was owned by Ella Hare, then they would be in position to require of Ella Hare an election whether she would abide by the will or repudiate it, but such is not the case. Since we hold that none of the property claimed by them was described in the will, what interest have they in any election made by her or for Ella Hare, or in requiring her to make an election at all? If an election should be made by or for Ella Hare, that would not involve the property in controversy which is owned by her, and is not affected by the will of her mother; for if the court in a proper proceeding should elect for her to abide by the will of her mother, she would only have to relinquish her claim to that portion of her property which is given to others under the will. That portion of her property which is not covered by the terms of the will, regardless of the source of her title, would not be affected by an election, for her claim to it is not inconsistent with the terms of the will; and she can conform to every provision of the will without relinquishing any of the property in controversy, because the testatrix did not by the terms of the will purport to devise it. The basis of the doctrine of election is that a person cannot assume two inconsistent positions,—he cannot accept and reject under the same instrument. *Fitzhugh v. Hubbard*, supra. It follows, therefore, that in case of an election a person can be required to give up that which is his own only to the extent that it is necessary to relieve his position of inconsistency.

The chancellor erred in declaring an election. The decree is reversed, and the cause remanded, with directions to remand the case to the Circuit Court for further proceedings not inconsistent with this opinion

A petition for rehearing having been filed, the following response was handed down on October 25, 1909.

Learned counsel for appellees have again argued the questions pressed upon us on the original consideration of the case, but after careful re-examination of those questions, we are convinced that we reached the correct conclusion, and the decision is adhered to. In addition to this, they ask that, instead of giving directions to remand the case to the circuit court, the chancery court be directed to retain the case for further proceedings. Appellees in their answer claim reimbursement for improvements, made on the property in controversy, and for taxes paid thereon. After the case was transferred to the chancery court, the several parties entered into the following stipulation, viz.: "It was further stipulated and agreed by the respective parties in open court that, if the court should find against the said defendants and cross plaintiffs on the issues made by their answers and cross complaints, the said respective causes should then be referred to a master to take testimony as to the mesne profits due plaintiffs, if any, from said defendants, respectively, and as to the amounts due defendants, respectively, for improvements made and taxes paid, if any, by them, or either or any of them, upon the property in controversy in said several cases." Now, aside from this stipulation, we are of the opinion that the chancery court having properly assumed jurisdiction for the purpose of considering the defense interposed by appellees, it should retain it for the purpose of completely adjudicating the rights of the parties, concerning the subject-matter of the controversy. It is proper, therefore, that the controversy as to the amount of mesne profits, if any, to be recovered by appellant, and the amount of reimbursement, if any, to be recovered by appellees, should be determined in the chancery court. We do not mean to decide, however, at this time, whether or not appellees are entitled to any reimbursement, for that question has not been presented, and was not decided below. We merely leave that matter open for further consideration in the court below.

Other matters are set up in the cross complaints of some of the appellees, viz.: the claim by some of them who purchased from the administrator of the estate of Mary A. Hare, to subrogation against the property of that estate for the amount of purchase price paid, and also the claim of the Sisters of Mercy against Ella Hare for an accounting of the amounts paid out for her benefit. But these matters we do not think are germane to this controversy, and find no proper place in this litigation. If

causes of action exist, they should be made the subject of separate suits.

The judgment of this court is therefore modified so as to change the directions; and the decree of the chancery court is reversed, with directions to enter a decree in accordance with this opinion, and for further proceedings not inconsistent herewith. It is so ordered.

KENTUCKY COURT OF APPEALS.

CHARLEY TIBBS, Appt.,

v.

COMMONWEALTH OF KENTUCKY.

(— Ky. —, 128 S. W. 871.)

Evidence — dying declarations — statements as to death.

1. That at the time of making a declaration declarant stated that he did not expect to live does not render the declaration admissible in evidence as a dying declaration, if all his other conversations and acts tend to show that he did not expect to die.

Homicide — slight wound — improper treatment — liability for death.

2. Inflicting upon another a wound not calculated to endanger or destroy life, but which, because of improper treatment, does have that effect, does not render one guilty of murder.

Same — effect of somnambulism.

3. That one accused of murder is a somnambulist, and while in this state is without self-control, and commits acts of which he has no recollection, and that his offense was committed while he was in that state, constitutes no defense other than that embraced in a plea of insanity.

(June 1, 1910.)

Note. — Criminal responsibility of one who inflicts a wound on another, resulting in the latter's death, as affected by negligence or lack of skill in treatment or care of the wound.

This question is considered in a note appended to Noble v. State, 22 L.R.A. (N.S.) 841, attention being called to a few later decisions.

In State v. Morahan (Del.) 77 Atl. 488, a nisi prius case, the jury was instructed that if it be proved that an assault upon a person was lawful, and his death resulted from maltreatment or misconduct solely, and not from the wound, the one inflicting it should be acquitted of the charge of manslaughter.

And in McMillan v. State (Tex. Crim. Rep.) 126 S. W. 875, where it was claimed that death was due not to a wound inflicted by the defendant, but to improper medical treatment, it was held that the court should have instructed the jury to the effect that if the death of the deceased was brought about by improper treatment or gross neg-

APPEAL by defendant from a judgment of the Circuit Court for Bell County, convicting him of murder. Reversed.

The facts are stated in the opinion.

Messrs. H. B. Jones and J. B. Burnett for appellant.

Messrs. James Breathitt, Attorney General, and Thomas B. McGregor, for the Commonwealth:

Statements by witnesses of statements made by the deceased which were in effect dying declarations were properly admitted in evidence.

Kelly v. Com. (Ky.) 119 S. W. 810.

Deceased died from the effect of the wound inflicted by appellant, which was fatal, and which was murder.

1 Bishop, Crim. Law, 7th ed. § 639; Roberson, Ky. Crim. Law, §§ 148, 149; Bush v. Com. 78 Ky. 271; Coffman v. Com. 10 Bush, 500, 1 Am. Crim. Rep. 293.

Clay C., delivered the opinion of the court:

Charley Tibbs was indicted and tried for murder. The jury found him guilty, and fixed his punishment at confinement in the penitentiary for life. From the judgment of conviction, he prosecutes this appeal.

The facts in brief are as follows: Appellant was a blacksmith in the employ of the Ralston Coal Company, a corporation engaged in business near the Tennessee line. He started from that company's place of business for Tazwell, Tennessee. In going there it was necessary for him to pass through the city of Middlesborough and remain over night. Early in the evening preceding the morning when the deceased, Charlie Haynes, was wounded, appellant met deceased. Some time later they were joined by Ernest Withrow. These parties first visited one saloon, then another. They drank a quantity of beer and whisky. About 9 o'clock they proceeded to a house of ill fame kept by Julia Elliott. There they met a man by the name of T. C. Anderson. The occupants of the Elliott house were Julia Elliott and her daughters, Clody Sounders,

and Fannie Bates. After remaining at this house a while, appellant and his companions went uptown. They again visited several saloons. About midnight they returned to Julia Elliott's. While in the house, Anderson let the deceased have \$2. The deceased shook the money in his hands for the purpose of teasing one of the inmates. Appellant said to deceased, "Charlie, let me have that money. I will spend it with them." This the deceased declined to do, and at the same time handed the \$2 back to Anderson. According to two of the witnesses present, the appellant said, addressing the deceased, "God damn you, I will settle with you before daylight," or "God damn you, I will get even with you before to-morrow." Other witnesses present claim no such remark was made by appellant. Very soon appellant and his companions were ordered to leave the Elliott house. This they did. As they were leaving, one or two of the witnesses claim that appellant drew his pistol and made the statement that he was going to shoot back into the house through the window. This is denied by other witnesses. After going out of the house, appellant lay on the ground and went to sleep. The deceased, with Anderson and Withrow, went to the next house, some 50 or 60 feet away, kept by Nellie Carroll. There they remained for quite a while. Upon leaving the Carroll house, they went to appellant for the purpose of waking him. Anderson says their object was to take appellant to the train, which left early that morning. Other witnesses claim that it was for the purpose of taking appellant into the Carroll house to be cared for. When the deceased attempted to wake appellant, and they started in the direction of the Carroll house, appellant, according to Anderson's testimony, arose from the ground and struck deceased with his fist, but immediately apologized for so doing, at the same time shaking hands with the deceased. After some further conversation and after they had walked a few steps in the direction of the Carroll house,

lect of physicians, defendant would not be guilty of homicide.

In connection with this case, attention is called to the fact that in Texas this subject is controlled by a statute which is referred to in the note to Noble v. State, 22 L.R.A. (N.S.) 847.

But it was held in State v. Pell, 140 Iowa, 655, 119 N. W. 154, that the defendant in a homicide case could not show lack of proper attention to the deceased after his injury, and before death, in order to prove that death might have resulted from some other cause than the injury inflicted by the former, as the well-settled rule is that where death follows an injury without other inde-

pendent intervening cause calculated to produce death had he not been injured by the wrongful act of the accused, proof of lack of proper treatment, which might have saved or prolonged his life, cannot be shown.

And it was held in Dumas v. State, 159 Ala. 42, 133 Am. St. Rep. 17, 49 So. 224, that where the evidence clearly disclosed that death was the result of a wound inflicted by the defendant, and that blood poisoning developed, the defendant could not justify by proving that the wound was trifling, and that the decedent was so diseased as to become readily infected with blood poisoning.

W. J. L

the deceased said: "It is all over, now; but you have hurt me, and hurt me bad." Appellant replied that he would hurt him still worse. At the same time he drew his knife from his pocket, and struck deceased over the eye. He struck at the deceased a second time, but missed him. Anderson, who testifies to the foregoing facts, claims that he then struck appellant with his fist and kicked him three or four times on the face and jaw, finally knocking him down and away from deceased. Appellant then arose, and Anderson chased him about 125 yards. Upon returning to the deceased, Anderson found a stranger near him. He asked deceased if that was the man who struck him. The deceased replied that it was not; that Charley Tibbs was the man who cut him. The next morning appellant was found out behind a blacksmith shop by one Andrew Jackson. The latter persuaded appellant to go into the shop and lie down on a buggy cushion. Appellant remained there until Monday morning. This witness claims that, when he aroused appellant, the latter said: "O Lordy, Andy, I expect I done something last night that will get me in trouble." The testimony for appellant is to the effect that he had absolutely no recollection of any difficulty with the deceased. He remembered taking several drinks, and that he left the Elliott house. Following that he remembered nothing until awakened by Jackson.

Shortly after the deceased was cut, which occurred about 4 o'clock on Sunday morning, he went into the house kept by Nellie Carroll. There the wound was washed and tied up with an old rag. Dr. Evans, who passed the Carroll house about 7 o'clock, was called in. He examined the wound, and did not consider it fatal. Deceased remained at the Carroll house all day and until the next morning. He then went to the station, about a half mile distant, unattended. From there he took the train to Tazwell, Tennessee. During all this time there was no one with him. After reaching his home at Tazwell, a local physician was called in, and the wound again dressed. A member of the faculty of Tennessee Medical College, of Knoxville, was sent for, and he came and operated upon deceased. According to his testimony, the skull was fractured. The deceased gradually grew worse, and died a few days later from blood poison. According to one of the physicians, who testified for appellant, the skull was not fractured.

In view of the fact that we have concluded that the judgment must be reversed for other reasons, we deem it unnecessary to determine whether or not the court erred in refusing to grant appellant a con-

tinuance. The other two errors relied upon are the admission of the dying declarations of the deceased, and the failure of the court to permit appellant to introduce evidence to the effect that the wound was not of itself dangerous,—that is, calculated to endanger or destroy life,—and that the deceased died from the effect of improper treatment. Nellie Carroll stated that deceased, after making the statement that he did not think he would get well, but expected to die, detailed the circumstances of the tragedy, and claimed that appellant was the man who cut him. Another witness corroborates this statement of Nellie Carroll. It appears, however, that the deceased kept his clothes on and wandered about the Carroll house, and also went over to the adjoining premises owned by Julia Elliott. There he said, in the presence of two witnesses: "Look what that damned son of a bitch has done. It will only be a black eye for a few days." After this conversation, he walked about for some time, and was up and down during the day, with his clothes on. The next morning he went, unassisted, to the station in Middlesborough for the purpose of taking the train to his home. After landing at old Tazwell, Tennessee, he himself called a doctor. Were the declarations of the deceased, made under these circumstances, admissible as dying declarations? It is well settled that, in prosecutions for homicide, the declarations of the deceased, voluntarily made, while sane, when *in articulo mortis*, and under the solemn conviction of approaching dissolution, concerning the facts and circumstances constituting the *res gestæ* of his destruction, are always admissible in evidence, provided the deceased would be a competent witness if living. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive of falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful being considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. 21 Cyc. Law & Proc. pp. 974-976; Walston v. Com. 16 B. Mon. 15; Kelly v. Com. (Ky.) 119 S. W. 810. Considered in the light of these principles, we conclude that the alleged dying declarations of the deceased were not made with a sense of impending dissolution. We do not attach so much importance to the fact that it was several days before he actually died, but to the fact that, aside from his statement that he did not expect to live, all his other con-

versations and acts go to show the contrary. The very fact that he was dressed and visited first one house and then another, that he used the expression attributed to him in the Elliott house, that he arose the next morning, and without assistance went to the train, knowing that he would have to travel several miles on the train, and then ride in a hack for a mile and a half without anyone to look after him, precludes the idea that his alleged dying declarations were made with a solemn conviction of approaching death. That being the case, we are of opinion that the court erred in permitting such declarations to go to the jury.

We also conclude that the court erred in refusing to permit appellant to show, if he could, that the wound was not calculated to endanger or destroy life, and that deceased died solely from improper treatment. The rule in this state is contained in the following language from the case of *Bush v. Com.* 78 Ky. 268: "As said in *Com. v. Hackett*, 2 Allen, 141, the rule of the common law would seem to be that if the wound was a dangerous wound,—that is, calculated to endanger or destroy life,—and death ensued therefrom, it is sufficient proof of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskilful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. The principle on which this rule is founded is that everyone is held to contemplate and to be responsible for the natural consequences of his own acts. But, if the wound is not dangerous in itself, and death results from improper treatment, or from disease subsequently contracted, not superinduced by or resulting from the wound, the accused is not guilty. 1 Hale, P. C. 428; *Parsons v. State*, 21 Ala. 301. When the disease is a consequence of the wound, although the proximate cause of the death, the person inflicting the wound is guilty, because the death can be traced as a result naturally flowing from the wound, and coming in the natural order of things; but when there is a supervening cause, not naturally intervening by reason of the wound, and not produced by any necessity created by the wound, the death is by the visitation of Providence, and not from the act of the party inflicting the wound. In the case under consideration, the fever was not the natural consequence of the wound, nor was it produced by any necessity created by the infliction of the wound. It did not ren-

der it necessary to have the wound treated by a physician just recovering from the scarlet fever, even if it be conceded that medical treatment was necessary at all. If the death was not connected with the wound in the regular chain of causes and consequences, there ought not to be any responsibility. If a new and wholly independent instrumentality interposed and produced death, it cannot be said that the wound was the natural or proximate cause of the death. *Livingston v. Com.* 14 Gratt. 601." Upon the next trial of the case, the court will permit appellant to introduce evidence, if he can do so, tending to show that the wound was not calculated to endanger or destroy life, and that the death of the deceased was caused solely by improper treatment. If appellant succeeds in introducing such evidence, the court will, in addition to the instructions given on the former trial, instruct the jury that, if they believe from the evidence, beyond a reasonable doubt, that the defendant, not in his necessary, or to him apparently necessary, self-defense, cut and wounded the deceased, but further believe from the evidence that the wound inflicted by defendant, if he did inflict it, was not calculated to endanger or destroy the life of the deceased, and that the death of the deceased resulted solely from the improper treatment of the wound, then they should find the defendant guilty of wilful and malicious cutting and wounding, if they believe that the cutting and wounding was wilfully and maliciously done, with the intent to kill the deceased, as provided by § 1166 of the Kentucky statutes (*Russell's Stat.* § 3184); but, if they believe that the cutting and wounding was inflicted in sudden heat and passion, without previous malice, they should find the defendant guilty of cutting and stabbing in sudden affray, as provided by § 1242, Ky. Stat. (*Russell's Stat.* § 3185).

The court will designate the above instruction No. 3. In lieu of instruction No. 3, as given, it will further instruct the jury that manslaughter is a lesser offense than murder, malicious wounding is a lesser offense than manslaughter, and cutting in sudden affray is a lesser offense than malicious wounding; and if the jury believe beyond a reasonable doubt that he is guilty as defined in No. 1, No. 2, or No. 3, but have a reasonable doubt as to the degree of the offense, they will find him guilty of the lesser offense as to which they have no reasonable doubt.

Complaint is made of the fact that the court submitted to the jury the question of appellant's insanity. Some evidence was admitted on the trial, tending to show that appellant was a somnambulist, and while

in this state was without self-control, and committed acts of which he had no recollection. We fail to see how these facts would constitute any defense other than that embraced in a plea of insanity. Certainly the appellant cannot complain that he was given the benefit of such defense.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

MISSOURI SUPREME COURT.

KANSAS CITY, Respt.,
v.

ST. LOUIS & SAN FRANCISCO RAIL-
ROAD COMPANY et al., Appts.

(— Mo. —, 130 S. W. 273.)

Special assessment — part of entire improvement.

Benefits to accrue from an improvement consisting as a whole of the cutting down of the grade of a street, the construction of a viaduct, and the acquisition of private prop-

Note. — *May an assessment of benefits rest upon prospective action in completing improvement.*

The theory upon which special assessments for public improvements are based and justified is that the property against which they are assessed derives some special benefit from the improvement. It follows, therefore, that the property can be assessed only to the extent that it is benefited by the improvement. The benefits must be substantial, certain, and capable of being realized within a reasonable time. Benefits arising from improvements which depend upon contingencies and future action of public authorities cannot be considered in estimating the assessment, though they may form part of a general plan for public improvement. The cases generally hold in accord with *KANSAS CITY v. ST. LOUIS & S. F. R. Co.* that only such benefits can be considered as arise from improvements which have been expressly authorized and provided for.

Thus, it is improper to assess property along a proposed street which is to be extended to a river, for benefits it may derive from the street with a bridge over the river, where the ordinance for the extension of the street made no provision for a bridge, and ordered none to be built. *Hutt v. Chicago*, 132 Ill. 352, 23 N. E. 1010. The court said that all the natural and probable results to flow from the improvement ordered may properly be considered, but that the future action of the city in ordering additional improvements cannot be regarded as a natural or probable consequence to flow from the improvement which is ordered. But see *Dickson v. Racine*, 65 Wis. 306, 27 N. W. 58, which is set out in the opinion of *KANSAS CITY v. ST. LOUIS & S. F. R. Co.*

And so there is no sufficient basis in em-
28 L.R.A. (N.S.)

erty to widen a street, cannot be assessed to pay for the cutting down of the street and the acquisition of the property, where that would be of no benefit to the public without the viaduct, and no definite plan as to it has been adopted, but it is merely talked about as desirable, without any present means on the part of the municipality to build it.

(Woodson, J., dissents in part.)

(June 21, 1910.)

APPEAL by defendants from a judgment of the Circuit Court for Jackson County in plaintiff's favor in an action brought to assess the damages and benefits incident to the proposed changing of the grade of a certain street. Reversed.

The facts are stated in the opinion.

Messrs. Dana, Cowherd, & Ingraham, Johnson & Lucas, and Samuel W. Sawyer, for appellants:

Speculation as to the assessment of benefits, and speculation as to assessment of damages, are both condemned by law.

inent domain proceedings for the introduction of evidence of benefits to accrue to the part of the land not taken, where the ordinance providing for the opening of the street across a low, wet, and marshy tract of land fails to state the nature and character of the improvement further than the mere opening of the street, and establishes no grade nor adopts any plan for further improvement, and there is nothing to bind the city to do more than to open the street. *Washington Ice Co. v. Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378.

Nor was there a sufficient basis for an instruction based upon the estimate of benefits to be derived from the street by giving the landowner access to all parts of his land. *Ibid.* And see *Swenton v. Supervisors*, 95 Minn. 161, 103 N. W. 895.

These cases have been referred to with approval and followed in *Waukegan v. Burnett*, 234 Ill. 460, 84 N. E. 1061, where it was held that the city was without power specially to assess property to pay for land condemned for the purpose of laying sewers across private property, where it had not provided by ordinance for the construction of sewers over the land sought to be condemned. The court said that where the property cannot be benefited by the proposed improvement except subsequent work be done, for which no provision is made, such property cannot be specially assessed.

And so, property cannot be specially assessed for benefits arising from the opening of a street, where the ordinance provides only for the condemnation of the strip of land required, and makes no provision for the removal of the buildings which occupy such strip, nor for putting the surface of the land in condition to be used for a street. *Chicago v. Kemp*, 240 Ill. 56, 88 N. E. 284.

A special assessment for improving a

Hutt v. Chicago, 132 Ill. 352, 23 N. E. 1010; Washington Ice Co. v. Chicago, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378; Hook v. Chicago & A. R. Co. 133 Mo. 322, 34 S. W. 549; Isom v. Mississippi C. R. Co. 36 Miss. 312; Atchison, T. & S. F. R. Co. v. Blackshire, 10 Kan. 488; Boston & M. R. Co. v. Middlesex County, 1 Allen, 331; Brown v. Providence, W. & B. R. Co. 5 Gray, 35; Weckler v. Chicago, 61 Ill. 149; Mantorville R. & Transfer Co. v. Slingerland, 101 Minn. 488, 11 L.R.A.(N.S.) 277, 118 Am. St. Rep. 647, 112 N. W. 1033; McKusick v. Stillwater, 44 Minn. 372, 46 N. W. 769; Munkwitz v. Chicago, M. & St. P. R. Co. 64 Wis. 403, 25 N. W. 438; Pittsburgh, V. & C. R. Co. v. Rose, 74 Pa. 369; Pinkham v. Chelmsford, 109 Mass. 225; Chicago v. Lonergan, 196 Ill. 522, 63 N. E. 1018.

Messrs. M. A. Lowe and Sebree, Conrad, & Wendorff also for appellants.

Mr. John T. Harding, with Messrs. H. M. Beardsley, John G. Park, and John G. Schalch, for respondent:

The court properly permitted testimony concerning the condemnation proceedings and the viaduct to be built by the city.

Kansas City v. Hyde, 196 Mo. 498, 7

L. R. A.(N.S.) 639, 113 Am. St. Rep. 766, 96 S. W. 201; Chamberlain v. Cleveland, 34 Ohio St. 567; Dickson v. Racine, 65 Wis. 306, 27 N. W. 58; Orth v. Milwaukee, 92 Wis. 230, 65 N. W. 1029; Lingle v. West Chicago Park, 222 Ill. 393, 78 N. E. 794.

Valliant, J., delivered the opinion of the court:

This is a proceeding instituted by Kansas City to assess the damages and benefits incident to the changing of the grade of Twelfth street, from Broadway west to a point 270 feet west of Summit street. The proceeding arose out of the following state of facts, as we gather them from the statement of the case in the brief for the respondent:

In the western part of the city, south of the Missouri, lies a considerable tract which is called the "West Bottoms." In the Bottoms are the tracks of many railroads, freight houses, and a union station, besides many business houses of various kinds. The general lay of the land is north and south. Twelfth street runs east and west, crossing the Bottoms at or about right angles. It is one of the principal thoroughfares of the city. On the east side of the

street by paving and extending the construction of certain culverts in the street cannot be confirmed, where no provision has been made by ordinance for the extension of the culverts, it appearing that the only action taken was a resolution by the town council to have the town engineer prepare plans for their extension. Lindblad v. Normal, 224 Ill. 362, 79 N. E. 675.

So it was error to refuse to instruct that the only special benefits to the property the jury may consider are those that will inure to the property assessed from the making of the improvement provided for in the ordinance, and that it is not proper for them to assume that any other improvements will be put into the street before the building of the pavement provided for by the ordinance, where the witnesses for the city who testified to the amount the property would be benefited by the proposed improvement testified on cross-examination that their estimates of the benefits were based upon the assumption that the city would make other improvements in the street in question before the paving provided for was done,—such as putting in water stubs, house drains, and sewers,—and where the court refused on motion to strike out their testimony for that reason. Holdom v. Chicago, 169 Ill. 109, 48 N. E. 164. See also Albertson v. Philadelphia, 185 Pa. 223, 39 Atl. 887.

Land which can be drained into a trunk sewer only after connecting laterals are built cannot be assessed for the cost of the trunk sewer until the laterals which will furnish connection have been determined upon, and the plan providing for such later-

als has been adopted. State, Kellogg, Prosecutor, v. Elizabeth, 40 N. J. L. 274.

And no assessment based upon the prospect of a future connection of a sewer can be valid unless some provision is made which will eventually effect such connection. Title Guarantee & T. Co. v. Chicago, 162 Ill. 505, 44 N. E. 832; Re Park Ave. Sewers, 169 Pa. 433, 32 Atl. 574; Edwards v. Chicago, 140 Ill. 440, 30 N. E. 350.

In Chamberlain v. Cleveland, 34 Ohio St. 551, it appeared that the opening of a new street rendered it practicable to open another desirable and needed street for which the city had previously appropriated land, but which could not have been opened before, and which, if opened, would render the property adjacent to the new street more accessible and available for use, and it was held that the extent to which the opening of the new street contributed to creating the new condition of things, including the prospective opening of the contemplated street, was a proper subject for consideration in estimating the benefits conferred by the opening of the new street. The court said: "It was not the special benefit that might be conferred by the opening of the contemplated street that could be considered, but the fact that the opening of the new street rendered it practicable to open the contemplated street; and if this, in itself, specially benefited the adjacent property, which was a question of fact, and not of law, then, to the extent of such benefit, the boards should have been controlled by it in estimating the special benefits conferred by the opening of the new street."

A. L. R.

Bottoms a steep bluff rises. Coming from the east on Twelfth street, the traffic ends when it comes to the bluff, except traffic by street railway, which is carried on a viaduct from that point across or over the Bottoms. The viaduct was constructed by the street railway company, and is not available or suitable for any other than street railway travel. Twelfth street, from Broadway to the point mentioned, 270 feet west of Summit street, crosses four streets, —Washington, Pennsylvania, Jefferson, and Summit. From the brow of the bluff going east the grade of Twelfth street rises, varying from 6 to 9 per cent, until Washington street is reached; then it falls to Broadway. The change in the grade of Twelfth street, required by the city ordinance, will cause a cut from 16 to 18 feet deep at Washington street, and the depth thence to the objective point will vary according to the natural grade, to bring the street on a level with Broadway. When the street is cut down to that grade, there will still be an abrupt bluff about 8 feet high. On the other side of the Bottoms, from Santa Fé street to Liberty street, a distance of three blocks, Twelfth street is only 30 feet wide, having three shallow blocks abutting it on the north. These blocks are only 30 feet deep. They separate Twelfth street from Eleventh street, which latter street is 70 feet wide. These three shallow blocks, condemned and out of the way, would, by uniting Eleventh and Twelfth streets, make a street 130 feet wide. This topographical condition has created an impediment in the way of travel to and from and across the Bottoms, which the city officials have for a long time desired to remove, and to accomplish that purpose they have (we are still drawing from the statement in respondent's brief) decided on this plan, viz.: The grade of Twelfth street is to be altered as above indicated, the three shallow blocks lying between Santa Fé and Liberty streets and Eleventh and Twelfth streets are to be condemned and taken out of the way, and a viaduct is to be constructed at the city's expense—perhaps two viaducts, one to carry the heavy, the other the lighter, traffic—across the Bottoms, from the brow of the bluff on the east to Liberty street on the west, on the grade of Twelfth street, as it will be established in this proceeding.

At the trial it was shown in evidence by the city that an ordinance had been duly passed to condemn the three blocks above mentioned, and proceedings were then pending to assess the damages and benefits incident to the condemning of the same, and that suit was pending in the same division of the circuit court as that in which this suit was being tried; and the record in 28 L.R.A.(N.S.)

this case shows that this judgment was held in the breast of the court until the other case was prosecuted to judgment, the court holding that one should not go into judgment for the city until the other also so resulted. Judgment was rendered in favor of the city in both cases, appeals taken in both, and both are now before this court and submitted together. It appears from the record in both these cases that the benefit district in one is the same as in the other. But, in so far as the general plan involved the construction of the viaduct, the only evidence offered to prove it was the oral evidence of witnesses, who stated that the plan had been thoroughly discussed by the city officials, and they had decided that it should be done. There had been no plans of the viaduct drawn, no details as to its width or capacity, no specifications of material, and no determination as to when it should be built. The gap to be filled by the viaduct is over 3,000 feet in width. The evidence showed, and it was practically admitted, that unless this gap was spanned by a viaduct, neither the grading of Twelfth street, as proposed, nor the condemning of the three blocks on the west side, would reflect the least benefit on the property included in the benefit district, nor anything but damage to the property abutting Twelfth street. The evidence in behalf of the city as to the proposed viaduct was to the effect that the reason no ordinance was adopted providing for the construction of the viaduct was that it would be contrary to the city charter to pass such an ordinance until the money was in the city treasury to pay for the structure, and there was no money then available for that purpose. In the oral argument before this court it was said that a proposition to issue bonds for this purpose had been submitted to a vote of the people, and by such vote authorized; but, some question as to the validity of the vote having arisen, the issuance of the bonds was delayed, and would await the judicial settlement of that question.

The main question is: Is the city entitled to judgment in either case until there is some assurance, beyond what was shown by the oral testimony, that this viaduct, without which neither the grading of Twelfth street, as proposed in this, nor the condemning of the three blocks in the other, suit, would reflect any possible benefit on the property in the benefit district, or be of any use to the public would be constructed? So far as the grading of Twelfth street is concerned, it would result in leaving the abutting property on both sides, from Washington to Summit street, fronting on a deep cut, thus depriving the owners of the use

they formerly had of that street, and leaving them dependent on such future action as the city government might see fit to take to give the necessary relief; and so far as the condemnation suit is concerned, it would take the private property without any benefit to the public of the character proposed. The learned trial judge fully appreciated the difficulty of the question, and, in colloquy between court and counsel, on objection to the introduction of evidence, stated that it devolved on the city to prove its general scheme before it could be entitled to a judgment in either case; and for that reason the court, over the objection of counsel for defendants, allowed the city to introduce in evidence in this case the ordinance on which the condemnation suit was founded, and the proceedings in that case, and also oral testimony as to the design or purpose of the officials to build the viaduct. In overruling the objection to the evidence of the ordinance and proceedings in the other suit, the court said: "I cannot see any way to try this case, except for the court to retain control of it and of the other case, but withhold a judgment in both cases until both are ready for judgment, and then let the court determine at that time whether the judgments, taken together, are reasonable or not, and protect the property owner in that way by a final judgment, having both in view, and having the question of the reasonableness of both verdicts in view at the same time." Again the court said: "I don't see how any witness can come on the stand here and give an intelligent opinion as to the benefit or damage to this property, unless he has the entire plan in his mind." And the counsel for the city said: "I don't understand the city will insist on pressing the case, and insist on the grade being made, unless the whole scheme goes through." And when counsel for defendants, cross-examining a witness on the question of benefits, asked what benefit it would be to the property in the district if the gap was left from the brow of the bluff to a point over or across the Bottoms, the court said: "I don't think you need take up time on that, Mr. Ingraham, because I have said that if this case shows that that condition is going to be there, and the information does not come to the court in some proper way that this plan is going to be carried out, I am going to dismiss this case as unreasonable."

Thus we see that the learned trial judge had a just appreciation of the merits of the case and a correct idea of the law, but on the point of obtaining information "in some proper way that this plan is going to be carried out," he admitted incompetent testimony in respect of the design to con-

struct the viaduct, and in admitting that evidence he was probably misled by some of the language used in the opinion in the case of *Kansas City v. Hyde*, 196 Mo. 498, 7 L.R.A.(N.S.) 639, 113 Am. St. Rep. 766, 96 S. W. 201. In that case it appeared that the extension of the street as proposed in the ordinance would, if there was nothing more in the design, create a cul-de-sac, which would result in no public use or benefit, and that was one of the objections urged against the condemnation; but to meet that objection it was shown in evidence that there was another ordinance, under which there was a proceeding pending in the same court, to extend another street, to meet the proposed extension, and obviate that physical defect. It was held that the city had a right to introduce the ordinance and the court proceedings in the other case, to show the design of the ordinance and proceedings in that case, as each depended on the other, and the purpose of either could be seen only when both were considered together. The court in that case: "If the opening or extending of a particular proposed street is but a part of a general scheme, the court should know what the scheme is, in order to appreciate the value of the particular street in question. That scheme may be shown by contemporaneous ordinances, if it has been put into that record form, or it may be shown by the best evidence of which the fact is susceptible, if it has not been made a matter of record." The court would have said all that it was necessary to say in the deciding of that case if it had omitted the last clause of the last sentence. The court had before it a case in which the proof offered was an ordinance contemporaneous with the ordinance on which that proceeding was founded, and it would have been quite sufficient if he had said that that contemporaneous ordinance was competent evidence. As to what might be competent evidence in some other case, where there might be no ordinance, was not in question in that case. The purpose of the last clause in the sentence was to prevent what preceded it from being interpreted into a decision that nothing but an ordinance or court record could be received in any case that might arise. It is impossible to lay down a hard and fast rule that will justly apply to the many varying conditions that may surround a case that might possibly arise; but it is safe to say that, in a case where an ordinance is required, an ordinance ought to be shown.

The evidence introduced by the city in the case at bar to show the purpose to build the viaduct was incompetent. It did not tend to prove that the city had taken any official action in the matter, or that there

was any reasonable certainty of the accomplishment of the design. On the contrary, it was shown that the city was in no condition to take action, that it had no money available for that purpose, and was for that reason forbidden by its charter to pass an ordinance undertaking the work. Not even the character of the viaduct, which was talked of and desired, was decided, and whether there would be one or two was left for future determination. The whole scheme was vague. There was no reasonable certainty about it. What the city was unable to do, what it was in fact forbidden in the then condition of its treasury to do, it had no right to assume would be done, and make the assumed fact the basis of its exercise of the high prerogative of eminent domain, to the deprivation of the citizen of his property rights. Decisions by the courts of other states are not always persuasive in a case like this, because the difference in the statute laws of the various states necessitates differences in judicial decisions. We have examined the cases cited by the learned counsel for the city; but, as we construe them, they do not sustain respondent's contention. In the Ohio case it was held that, in assessing the benefits for the street opening, the fact of another proposed street might be taken into account. *Chamberlain v. Cleveland*, 34 Ohio St. 551. But in that case it seems that land had already been appropriated for the other street, although the city had not taken possession of it. In *Dickson v. Racine*, 65 Wis. 306, 27 N. W. 58, which was a street opening case, the court held that it was not error to admit testimony tending to show that the property assessed for the benefit would be benefited by the building of a bridge, the building of which would be rendered practicable by the opening of the street. The court said: "The reason for opening the street was to make an approach to a bridge, the construction of which was contemplated by the city in the near future." It does not appear in the opinion of the court what action the city had taken in reference to the bridge, and there was no question raised as to its being constructed in the near future. The only objection was that it was not an accomplished fact. In *Orth v. Milwaukee*, 92 Wis. 230, 65 N. W. 1029, it was not suggested that the city had not taken all necessary steps towards the construction of the viaduct. It was treated as an assumed fact, and in fact the viaduct was completed before the trial in the circuit court, though it had not been completed when the suit was begun. In neither of those suits was there any question raised as to the city's right to condemn for the purpose shown; but there was only a question as to the

amount of damages or benefits. We have been referred to no case where a condemnation suit has been sustained which was based on a contemplated public improvement that had progressed no farther than to have been talked about with approval.

We hold that, without a viaduct spanning West Bottoms from the bluff on the east to Liberty street on the west, neither the proposed grading of Twelfth street nor the condemnation of the three blocks between Santa Fé and Liberty streets and Twelfth and Eleventh streets could result in anything but damage or deprivation of private property without any public benefit; and that there is no legal showing that such viaduct will be constructed in the near future or a reasonable time. Therefore there is no foundation in law for the proceeding relating to the grading of Twelfth street or that relating to the condemnation of the three blocks mentioned.

There are other assignments of error; but, as what is above said is decisive of the case, there is no use discussing the other questions.

The judgment is reversed, and the cause is remanded to the Circuit Court, with directions to dismiss the suit.

Fox, Ch. J., and Gantt, Lamm, and Graves, JJ., concur.

Woodson, J., concurs in all except what is said concerning the case of *Kansas City v. Hyde*, 196 Mo. 498, 7 L.R.A.(N.S.) 639, 113 Am. St. Rep. 766, 90 S. W. 201, as to which he dissents.

Burgess, J., not sitting.

Petition for rehearing denied July 20, 1910.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA
v.

J. E. CLIFTON, Appt.

(152 N. C. 800, 67 S. E. 751.)

Animal — wilful killing — Liability of officer.

A constable killing, in obedience to a valid municipal ordinance, a dog running at large without a muzzle, is not subject to punishment under a statute providing a penalty for wilfully killing dogs.

(April 6, 1910.)

Note. — Right to kill dogs.

This question has already been covered

A PPEAL by defendant from a judgment of the Superior Court for Robeson County, convicting him of wilfully killing a dog. Reversed.

The facts are stated in the opinion.

Messrs. McLean & McLean for appellant.

Messrs. T. W. Bickett, Attorney General, George L. Jones, and McIntyre, Lawrence, & Proctor, for the State:

The ordinance providing that any animal found running at large could be killed by any person is void, and conferred no protection upon the defendant.

Morse v. Nixon, 51 N. C. (6 Jones, L.) 295.

Brown, J., delivered the opinion of the court:

The defendant offered no evidence, but rested his case upon the proof offered by the state. The evidence tended to prove that the dog was running at large off his owner's premises, within the town of Lumber Bridge, in Robeson county, unmuzzled, and was killed by defendant by the administration of poison. There is also evidence that the defendant was the town constable, charged with enforcement of the municipal ordinances which prohibited the running at large within the town of dogs without muzzles. The ordinance provided, further, that any dog found running at large after April 24, 1909, without a muzzle, might be killed by any resident of the town; and the dog in question was killed by the defendant, the constable of the town, after that date. The ordinance also imposed a fine upon the owner of the dog.

The defendant, in apt time, by proper prayers for instruction, requested the court to charge the jury that if there was such an ordinance in force, and he killed the dog in obedience to it, he was not guilty. We

think the defendant was clearly entitled to this instruction.

It is needless to consider whether a private citizen could justify under the ordinance, or whether the ordinance is too broad in providing such a general method of enforcement, for the defendant was a police officer whose duty it was to execute the lawful and valid ordinances of the town. The town of Lumber Bridge is invested with the police powers of the state conferred by the general law upon all the cities and incorporated towns of the state. Such powers are usually exercised to further and protect the comfort and safety of citizens generally. The keeping of animals of all kinds is classified as one of "the main subjects of police regulation." *Horr & B. Mun. Pol. Ord.* § 212. A very general police regulation found in the ordinances of municipalities in this country is one "to require dogs to be muzzled, and to authorize the police officers to kill those to be found at large and unmuzzled." *Horr & B. Mun. Pol. Ord.* subd. 3, § 213, and cases cited in note to page 200. In addition, the following cases are authority for the text: *Faribault v. Wilson*, 34 Minn. 255, 25 N. W. 449, 6 Am. Crim. Rep. 544; *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; *Morey v. Brown*, 42 N. H. 373; *Mitchell v. Williams*, 27 Ind. 62.

The word "wilful," as used within the meaning of the statute, implies something more than a mere voluntary purpose. When used in criminal statutes, the word "wilful" means not only designedly, but also with a "bad purpose." 8 Words & Phrases, p. 7,469, citing *Potter v. United States*, 155 U. S. 438, 39 L. ed. 214, 15 Sup. Ct. Rep. 144; *Com. v. Kneeland*, 20 Pick. 206, and other cases. A police officer who, in good faith, kills a dog under color of the authority of a municipal ordinance, can-

by a note to *State v. Churchill*, 19 L.R.A. (N.S.) 835, to which the following is supplemental.

In *McDermott v. Taft* (Vt.) 75 Atl. 276, it was said that while dogs are recognized by the law as a species of property, they belong to that class of property the keeping of which may be stringently regulated by the legislature in the exercise of its police power, even to the extent of providing for their destruction, in given circumstances, without judicial proceedings, and in a most summary way.

Evidence that the presence of dogs among defendant's sheep at the time of the killing would have frightened the sheep, and caused the ewes, which were heavy with lambs at that time of the year, to lose their lambs, and that defendant knew this from experience, is admissible in a prosecution for 28 L.R.A. (N.S.)

malicious mischief in shooting a dog, for the purpose of rebutting the charge of malice, wilfulness, and wantonness. *Caldwell v. State*, 55 Tex. Crim. Rep. 164, 131 Am. St. Rep. 809, 115 S. W. 597.

A statute requiring dogs to be licensed and collared, and providing that "any person may, and every police officer and constable shall, kill or cause to be killed," dogs not so licensed and collared, "when- ever and wherever found," affords a complete defense to a person killing a hound from which the owner had removed its collar, as was his custom when hunting; and such person is not precluded from justifying under the statute by the fact that his motive in shooting the dogs was to save the life of a wild deer which dogs were attacking. *McDermott v. Taft*, supra. E. S. O.

not be said to do so wilfully, within the meaning of the statute upon which this indictment is founded.

We thing the rulings of the judge deprived defendant of the benefit of a valid defense.

New trial.

OHIO SUPREME COURT.

ELMER G. FILMORE, Plff. in Err.,
v.
METROPOLITAN LIFE INSURANCE
COMPANY.

(82 Ohio St. 208, 92 N. E. 26.)

Life insurance — recovery by beneficiary who caused death.

1. The beneficiary in a life insurance policy cannot recover thereon, where the death of the assured is caused by the intentional and felonious act of such beneficiary.

Same — pleading — murder as intentional killing.

2. In an action to recover upon a policy of life insurance, brought by the person named therein as the beneficiary, an answer by the insurance company, alleging that the plaintiff murdered the assured, states a defense; such an averment, in legal effect, being tantamount to the allegation that the killing charged was intentional and felonious.

(May 3, 1910.)

ERROR to the Circuit Court for Clark County to review a judgment affirming a judgment of the Court of Common Pleas in defendant's favor in an action brought to recover the amount alleged to be due on a certain life insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. James Johnson, Jr., and C. S. Ollinger, for plaintiff in error.

Messrs. Martin & Martin, for defendant in error:

If the assignee or beneficiary feloniously causes the death of the assured, there can be no recovery in favor of such wrongdoer under the policy, regardless of whether

there is any violation of the stipulations in the policy itself.

25 Cyc. Law & Proc. p. 895; Schmidt v. Northern Life Asso. 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; Prather v. Michigan Mut. L. Ins. Co. Fed. Cas. No. 11,368.

An "unlawful" killing presumes intent.

United States v. Harper, 33 Fed. 471; Spies v. People, 122 Ill. 174, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; Lawrence v. State, 68 Ga. 289; State v. Heaton, 77 N. C. 505; Norris v. State, 87 Ala. 88, 6 So. 371.

From the fact of killing, the presumption of law is that it was malicious and murder.

Com. v. York, 9 Met. 93, 43 Am. Dec. 373; Green v. State, 28 Miss. 698; Head v. State, 44 Miss. 753; Murphy v. People, 37 Ill. 457; State v. Bertrand, 3 Or. 61; Jenkins v. State, 82 Ala. 25, 2 So. 150; People v. Bush, 71 Cal. 606, 12 Pac. 781.

Crew, J., delivered the opinion of the court:

The plaintiff in error, Elmer G. Filmore, as the beneficiary under a policy of life insurance issued to Emma Filmore, his wife, by defendant in error, the Metropolitan Life Insurance Company, brought suit against said company in the court of common pleas of Clark county, Ohio, to recover the sum of \$239, with interest thereon from September 3, 1906, which sum he alleged in his petition was due him as such beneficiary under the policy of insurance so issued by said company. For answer to plaintiff's petition, the insurance company pleaded two defenses, the first of which was a general denial, and the second was in the words and figures following, to wit: "For a second cause of defense to the petition, this defendant says that on the 3d day of September, 1906, the said plaintiff murdered his said wife, Emma Filmore, in the city of Springfield, county of Clark, state of Ohio; that on the 25th day of October, 1906, he was indicted by the grand jury of said county for manslaughter on account of the killing of his said wife, and on the 31st day of December, 1906, he was convicted of

of the policy, was denied in Anderson v. Life Ins. Co. 152 N. C. 1. 67 S. E. 53; and the proceeds of the policy having been paid to the administrator, with the understanding that he should hold the same to abide the determination of the action, the court, without undertaking to decide what the rights of the party would have been in the absence of such an agreement, held that the funds were properly awarded to the representative of the insured.

Note. — The right of the beneficiary in a policy of life insurance, who kills the insured, to recover on the policy, is treated in a note to McAlister v. Fair, 3 L.R.A. (N.S.) 726, on the general question of homicide as affecting devolution of property. Since that note, the right of the administrator of a beneficiary who caused or procured the death of the insured under circumstances amounting to a felony, and then committed suicide, to recover the proceeds 28 L.R.A. (N.S.)

said crime, and on February 25, 1907, he was sentenced by the court of common pleas to six years' hard labor in the Ohio Penitentiary, at Columbus, Ohio, where the said plaintiff is now confined. Defendant says that, plaintiff having caused the death of the said assured, as herein set forth, he is estopped from asserting any claim as beneficiary under said policy. Defendant, having fully answered, prays to be hence dismissed, with its costs." To this defense a demurrer was interposed by the plaintiff, Elmer G. Filmore, on the ground that the facts therein stated were insufficient in law to constitute a defense. This demurrer was overruled by the court of common pleas, and the plaintiff not desiring to plead further, judgment was entered dismissing his petition. This judgment of dismissal was subsequently affirmed by the circuit court, and the plaintiff in error now asks that this judgment of affirmance be reversed by this court.

The sole question here presented is as to the legal sufficiency, against a general demurrer, of this second defense as pleaded in defendant's answer. It is conceded by counsel for plaintiff in error to be the well settled and established rule of law that a beneficiary under a policy of life insurance is without right to recover thereon, where the death of the insured has been intentionally caused by the act of such beneficiary; but it is contended in the present case that the second defense of defendant's answer is lacking in an essential allegation, and is fatally defective, because it contains no direct or sufficient averment that the killing of the assured by Elmer G. Filmore, the beneficiary under said policy, was an intentional killing. That such objection is purely technical, and in the present case wholly without merit, is apparent, we think, from a consideration of the character and legal effect of the matter pleaded and the allegations made in said second defense. One of the express averments found in this second defense is that the plaintiff, Elmer G. Filmore, murdered his wife, Emma Filmore, who was the assured in the policy of insurance upon which he was seeking to recover; and while it is true that neither the circumstances of the killing nor the constituent elements of the crime thus charged are pleaded with the particularity that would be necessary in an indictment charging the same crime, it is equally true that in an answer in a civil action such particularity of statement is not required; but it is sufficient if, in such pleading, the matter constituting the defense be stated "in ordinary and concise language." Rev. Stat. § 5066. Murder, being specifically defined by statute in Ohio, is a term or word of

technical significance and determinate legal meaning. Hence the averment in an answer in a civil suit that the plaintiff therein murdered his wife is not the averment of a mere conclusion, but is the allegation of a determinate and issuable fact, which, if denied, could not be supported by proof merely of an unintentional or involuntary killing; for while in this state, under our Criminal Code, there are two degrees in the crime of murder, first and second, the purpose or intent to kill is made by statute an essential element of each, except only in the case of death caused from maliciously placing an obstruction upon a railroad track, etc. Rev. Stat. § 6809. Wherefore it follows that the allegation in the second defense of defendant's answer in this case, that the plaintiff, Elmer G. Filmore, murdered his wife, is tantamount to an allegation that he intentionally killed her; and the term "murder," employed therein by the pleader to designate and define the plaintiff's act, itself necessarily imports that such killing was unlawful and felonious. And as said by Mr. Justice Field in *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 600, 29 L. ed. 1000, 6 Sup. Ct. Rep. 877: "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired."

In the case of *Schreiner v. High Court*, C. O. F. 35 Ill. App. 576, cited and relied upon by counsel for plaintiff in error as supporting their contention in the present case, the court also clearly recognizes the principle, applicable to all contracts of insurance, that the insured or beneficiary cannot, under such contract, receive indemnity for a loss that he himself has intentionally brought about; the second paragraph of the syllabus in that case being as follows: "There can be no recovery in an action founded upon intentional wrong. The beneficiary in an insurance policy cannot recover, where the death of assured has been intentionally caused by his act."

For the reasons hereinbefore stated, we are of opinion that in the case at bar the allegation of defendant's second defense, that the plaintiff murdered his wife, should be construed as pleading an intentional killing, and, therefore, as sufficient against a general demurrer. The view we have taken as to the legal effect of this averment renders unnecessary a consideration of the other averments of said second defense.

Judgment affirmed.

Spear, Davis, Shauck, and Price, JJ., concur.

KANSAS SUPREME COURT.

EVA WINEGARNER

v.

EDISON LIGHT & POWER COMPANY,
Appt.

(— Kan. —, 109 Pac. 778.)

Electricity — wires in highway — duty to house movers.

It is the duty of an electric light and power company having wires charged with a high voltage of electricity, suspended upon poles across a street in a city, upon which street the moving of a building of greater height than the wires is reasonably to be anticipated, to insulate the wires at such crossing, or to take such other precautions as are necessary to protect any person who is liable to be upon such building and to be brought in contact with such wires.

(July 9, 1910.)

APPEAL by defendant from a judgment of the District Court for Sedgwick County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's husband, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Stanley, Vermillion, & Evans and Harkless & Histed for appellant.

Messrs. John W. Adams, George W. Adams, and J. D. Houston, for appellee:

One who employs electricity in a street is required to exercise the highest degree of care to protect persons using the streets from the danger of being injured by the electric current, and is liable for any damages occasioned by his failure to do so.

Metropolitan Street R. Co. v. Gilbert, 70 Kan. 261, 78 Pac. 807, 3 A. & E. Ann. Cas. 256; Rowe v. Taylorville Electric Co. 213 Ill. 307, 72 N. E. 711; Beaming v. South Bend Electric Co. (Ind. App.) 90 N. E. 786; Winkelman v. Kansas City Electric Light Co. 110 Mo. App. 184, 85 S. W. 99; Prince

Headnote by SMITH, J.

Note. — As to liability for injury or death of traveler coming in contact with electric wire in highway, see note in 22 L.R.A.(N.S.) 1169.

As to duty of one to ascertain if there is danger before passing under a wire strung over a highway, see note in 22 L.R.A.(N.S.) 1189.

As to applicability of rule *res ipsa loquitur* to accidents on highway due to disordered electrical appliances, see note in 22 L.R.A.(N.S.) 1178.

As to right to interfere with wires of public service corporation in moving house along street, see note in 14 L.R.A.(N.S.) 448.

28 L.R.A.(N.S.)

v. Lowell Electric Light Corp. 201 Mass. 276, 87 N. E. 558; Thomas v. Wheeling Electrical Co. 54 W. Va. 395, 46 S. E. 217; Von Trebra v. Laclede Gaslight Co. 209 Mo. 648, 108 S. W. 559; Knowlton v. Des Moines Edison Light Co. 117 Iowa, 451, 90 N. W. 818; Rucker v. Sherman Oil & Cotton Co. 29 Tex. Civ. App. 418, 68 S. W. 818; Greenville v. Pitts (Tex. Civ. App.) 102 S. W. 451; Colusa-Parrot Min. & Smelting Co. v. Monahan, 89 C. C. A. 256, 162 Fed. 276; Ennis v. Gray, 87 Hun, 355, 34 N. Y. Supp. 379; Hodgins v. Bay City, 155 Mich. 687, 132 Am. St. Rep. 546, 121 N. W. 274; Brubaker v. Kansas City Electric Light Co. 130 Mo. 439, 110 S. W. 12; Haines v. Raleigh Gas Co. 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 10 S. E. 344; Perham v. Portland General Electric Co. 33 Or. 451, 40 L.R.A. 799, 72 Am. St. Rep. 730, 53 Pac. 14; Giraudi v. Electric Improv. Co. 107 Cal. 120, 28 L.R.A. 596, 48 Am. St. Rep. 114, 40 Pac. 108; Clements v. Louisiana Electric Light Co. 44 La. Ann. 692, 16 L.R.A. 43, 32 Am. St. Rep. 348, 11 So. 51.

Deceased was not guilty of contributory negligence.

Thomas v. Wheeling Electrical Co. *supra*; Geismann v. Missouri-Edison Electric Co. 173 Mo. 654, 73 S. W. 654; Perham v. Portland General Electric Co. *supra*; Griffin v. United Electric Light Co. 164 Mass. 492, 32 L.R.A. 400, 49 Am. St. Rep. 477, 41 N. E. 675; Giraudi v. Electric Improv. Co. *supra*; Miner v. Franklin County Teleph. Co. (Vt.) 26 L.R.A.(N.S.) 1195, 75 Atl. 653; Fitzgerald v. Edison Electric Illuminating Co. 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 161.

Smith, J., delivered the opinion of the court:

This action was brought by the plaintiff to recover damages for the death of her husband, caused by the electric wires of the defendant. The deceased was employed by a house mover. His principal business was driving a team to convey things needed in the business; but when not so engaged, it was his duty to assist in any way in the business, and he was accustomed to handling electric wires strung on the streets when it became necessary in moving buildings under them. In accordance with the requirements of the ordinances of the city of Wichita, the house mover, before moving the building on the streets, procured a permit therefor from the city clerk. The house mover had given notice to defendant of his intention to move the building upon which the accident occurred, on the day before he started to move it, and the employees of the defendant company had arranged to remove the wires near the building at the place from which it was to be removed. This was

to be done on the morning of the removal, and the defendant's workmen remained in the neighborhood subject to call, if they were further needed. The building was moved 350 or 400 feet, to the intersection of Murdock and St. Francis streets, where the wires of the defendant company crossed the street, suspended about 18 or 20 feet from the ground. The comb of the roof of the building was higher than the wires. The wires were raised by the house mover, or some employee, and the building was passed thereunder the greater part of its length, when it was stopped. The mover did not call upon the company's men to handle the wires, but testified that he intended to attend to them himself. He was detained, however, in talking to a man who sought to engage his services, and the deceased, being then unoccupied, went up a ladder, evidently to attend to the wires. In ascending the sloping roof, he slipped, and either fell across or grabbed the wires, and was immediately killed by the shock. The wires were charged to a voltage of 2,300. The contact of a person simultaneously with two wires so charged caused a "short circuit" of the current through the body, and is extremely dangerous to life, if not certainly fatal. It appears that only two witnesses were called who saw the deceased at the time the accident occurred, and each testified that the deceased slipped, or became overbalanced, on the side of the sloping roof, and one says that he in falling seemed to grab for something, for anything he could reach, and came in contact with the wires, and he saw the flash of electricity. The other testified to about the same circumstances, except she says he appeared to fall upon the wires, and she saw the flash. Others testified that they saw the wounds upon the body, that he was burned upon the right side through his clothing, and to or almost to his intestines. His death appears to have been instantaneous. When he was found he was lying across the wires, or his arm thrown over them. One witness says that a wire burned in two. In the trial to a jury, the plaintiff recovered a judgment and verdict for \$5,000.

The defendant makes three assignments of error: (1) That the court erred in not sustaining defendant's demurrer to the plaintiff's evidence; (2) that the court erred in not instructing the jury to return a verdict for the defendant at the close of the evidence; and (3) that the court erred in instructing the jury that the defendant owed the deceased a positive duty to have its wires in a condition safe for interference therewith by the deceased. After setting forth the respective claims of the parties in their pleadings, and defining the meaning of negligence and contributory negligence, 28 L.R.A.(N.S.)

the court instructed the jury as to negligence as follows:

"You are further instructed that in maintaining its electric wires and carrying on its business in and along the streets of the city of Wichita, Kansas, it was the duty of the defendant to exercise to care proportionate to the risk of its business, to the end that damage might not result therefrom to others.

"You are further instructed that the degree of care required varies according to the circumstances of the particular case; and if the use of electricity by the defendant in the prosecution of its business at the times in question is shown by the evidence to be a highly dangerous agency to life, unless exercised with great care, then, to such extent, a high degree of care in its supervision, management and use was required of the defendant at places where people had a right to go and had been in the habit of going, and would likely continue to go for work or business.

"You are further instructed that if under all the facts and circumstances in this case you find that the defendant knew, or had sufficient and reasonable grounds to anticipate, that persons might, while in the exercise of ordinary care for their own safety, come in contact with and be injured by any defective and dangerous wires it might operate and maintain at said place, and if you further find that the said Walter Winegarner without carelessness on his part, and while rightfully and lawfully engaged in moving or assisting to move a house under said wires at said place, came in contact with said wires, and was, without his fault, then and there injured and killed by electricity escaping from said wires at the point of said contact, through the dangerous condition and defective insulation of said wires and the carelessness of the defendant as set out in the petition, and that said wires were at said time and place charged with a powerful current of electricity, and that they were not properly insulated, and were unsafe and dangerous to the lives of persons who might come in contact with them, and that the defendant and its agents and employees knowingly maintained and operated said wires in said condition at said time and place, in the manner and under the circumstances charged in the petition; and if you further find that the defendant was negligent in so maintaining and operating said wires at said time and place in said condition as charged, and that said negligence was the direct, proximate, and natural cause of said injury and death resulting to said Walter Winegarner as charged,—then the defendant would be liable to the plaintiff for the damages so caused plaintiff by said

death, unless you should further find that the act or acts of the said Walter Winegarner himself contributed to his own injury and death; but if the said deceased was guilty of contributory negligence in the premises, and thereby contributed to his own injury and death, then the plaintiff cannot recover herein.

"You are further instructed that if a negligent act or omission of a party is such that a person of ordinary intelligence and prudence should have foreseen that an accident and injury were liable to be produced thereby, then such negligent act or omission may be said to be the proximate cause of such accident and resulting injury.

"Negligent acts cannot be the proximate cause of an injury to one, unless, under all the circumstances, ordinary prudence would have admonished the person sought to be charged with the negligence that his acts or omissions would result in injury to someone; and in order to warrant your finding that any of the alleged acts or omissions of the defendant constituted the proximate cause of the injury and resulting death to the said Walter Winegarner, it must appear from the preponderance of the evidence that such injury and death were the natural and probable consequence of such negligence or omission, and that it ought to have been foreseen by defendant in the light of all the attending circumstances."

The court also instructed the jury that if the injury occurred through the contributory negligence of the deceased, the plaintiff could not recover.

The defendant urges his assignments of error for the following reasons: "(a) The deceased was but a bare licensee; the defendant owed him no duty to have its wires in a condition safe for him to handle. (b) Deceased was guilty of contributory negligence as a matter of law. (c) Even though it be conceded that defendant owed deceased some duty other than that owed to a bare licensee, it discharged its full duty, as shown by plaintiff's evidence."

It is true that the house mover by ordinance of the city was required to get a permit from the city clerk before removing the building on the streets. On the other hand, by the statutes of the state, and by ordinance of the city, the defendant company was required to have the grant of a franchise and permission to set poles, etc., before engaging in the business of conducting electricity, and its business was subject to regulation by the city, so that the company was also, in this sense, a licensee. The use of the streets, either for moving buildings, or for sustaining the poles and wires of electric light and power companies, cannot be said to be the ordinary use of the

streets. As to the city, the house mover and the company were alike licensees, except that the house mover had to have a license for each particular moving, while the license to the company was for a certain time. It can hardly be said that the deceased was a licensee as to the defendant, or *vice versa*.

There is evidence that the company had notice of the moving of this building. Whether it had notice of its passing the particular point where the accident occurred, or not, is not shown, but there is evidence tending to show that the moving of buildings was of so frequent occurrence that the defendant must have taken notice of such use of the streets.

It is contended on the part of the plaintiff that it was the duty of the company to have its wires crossing streets so insulated as not to be dangerous to persons who are liable to come in contact therewith, and that the wires should be so insulated at street crossings where persons engaged in moving buildings are liable to come in contact with the wires.

There was evidence that the wires which caused the death of deceased carried a current of 2,300 voltage; also, that no insulation is efficient to save the life of a person who comes in contact with a wire carrying such a current. On the other hand, there is evidence that a proper insulation would prevent injury to a person coming in contact with a wire having such voltage. The plaintiff insists that it was impossible for the deceased, even if he voluntarily came in contact with the wires, to know anything of the strength of the voltage; and, on the other hand, it is insisted that the deceased should have known of the danger of coming in contact with the wires, and that he was guilty of contributory negligence in so doing. It is a matter of common knowledge that wires carrying only a light voltage, like, for instance, a telephone wire, are not liable to produce any injury by contact, and that wires carrying a high voltage, as shown in this case, are extremely dangerous in case of contact.

The court submitted to the determination of the jury, as a question of fact, whether under all the evidence in the case the defendant was guilty of negligence, and whether the deceased was guilty of contributory negligence, and by its instructions told them that if, under all the facts of the case, persons were liable to come in contact with these wires, at the high voltage shown by the evidence, the defendant was under obligation to have the wires insulated so that injury would not result therefrom. If, on the other hand, the deceased knew of their dangerous character, and, so knowing, purposely came in contact with the wires, he

was guilty of contributory negligence. We think the instructions of the court to the jury were in accordance with the principles laid down in numerous cases cited with approval in *Metropolitan Street R. Co. v. Gilbert*, 70 Kan. 261, 78 Pac. 807, 3 A. & E. Ann. Cas. 256. In the latter case, the following citation was made with approval from *Fitzgerald v. Edison Electric Illuminating Co.* 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 161: "Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect is not apparent to ordinary observation, and the public therefore, while presumed to know that danger may be present, are not bound to know its degree in any particular case. The company, however, which uses such a dangerous agent, is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires, and liable to come, accidentally or otherwise, in contact with them."

If, from all the circumstances, the defendant had reason to apprehend that the building would be moved under the wires where the accident occurred, it was its duty, knowing its wires to be highly charged with electricity, to have such wires at the street crossing insulated, or to take such other precautions as might be necessary to protect anyone who might be liable to be upon such building from contact or injury from such wires.

The case was submitted to the jury under proper instructions, and we think that the jury were amply justified by the evidence in finding that the defendant was guilty of negligence which caused the death of the deceased, and that the deceased was not guilty of contributory negligence.

The judgment is therefore affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

CITY OF MURRAY, Appt.,

v.

C. N. CRAWFORD.

(— Ky. —, 127 S. W. 494.)

Statute of frauds — sale of realty — action by nonsigning vendor.

Under a statute providing that no action shall be brought to charge any person upon any contract for the sale of real estate unless the promise be in writing and signed by the person to be charged, a vendor who has not signed a contract cannot maintain an action to charge the vendee there-
28 L.R.A.(N.S.)

on, although the latter has expressed his assent in writing sufficiently to satisfy the statute.

(April 27, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Calloway County in plaintiff's favor in an action brought to recover damages for breach of an alleged contract to purchase certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. Coleman & Linn and Rainey T. Wells, for appellant.

Messrs. Speight & Dean, for appellee.

If a contract made by a municipal corporation is not in violation of its charter nor of any statute, and the corporation, by its promise, has induced a party relying on the promise, and in execution of the contract, to expend money and perform his part thereof, the corporation is liable on the contract.

Hitchcock v. Galveston, 96 U. S. 341, 24 L. ed. 659.

The contract cannot be avoided because within the statute of frauds.

Lamkin v. Baldwin & L. Mfg. Co. 72 Conn.

Note. — Who must sign note or memorandum of executory contract for the sale of real property or chattels within the statute of frauds.

1. Not necessary that both parties sign, 681.
- II. View that "party to be charged" is the party sought to be charged in the suit, 689.
- III. View that "party to be charged" is the vendor or owner, as such, 691.
- IV. Statutes not employing the phrase, "party to be charged," 692.
- V. Who may enforce contract.
 - a. Vendor who did not sign against vendee who did.
 1. Contracts as to real property, 694.
 2. Contracts for sale of goods, 695.
 - b. Vendee who did not sign against vendor who did.
 1. Contracts as to real property, 696.
 2. Contracts for sale of goods, 698.
 - c. Vendor who did sign against vendee who did not.
 1. Contracts as to real property, 699.
 2. Contracts for sale of goods, 701.
 - d. Vendee who did sign against vendor who did not, 701.

Scope.

Assuming a given state of facts as to the party who signed the contract, or note or memorandum thereof, and as to the party

57, 44 L.R.A. 790, 43 Atl. 593, 1042; Covington v. Ludlow, 1 Met. (Ky.) 298.

Hobson, J., delivered the opinion of the court:

Pursuant to an ordinance regularly passed, an election was held on November 6, 1906, in the city of Murray, by which the sense of the qualified voters was taken as to whether the council should issue and sell bonds of the city to the amount of \$19,500 for the purpose of purchasing, installing, and maintaining a system of electric lights and waterworks in the city. The requisite majority voted in favor of the proposition. C. N. Crawford and J. J. Moore owned an electric light plant in the city, which they were operating in connec-

tion with their flour mill; that is, the same engine ran both, the electric light plant being in a brick building adjoining the mill house. On May 6, 1906, before the bonds had been issued or sold, the council appointed a committee of three "to make investigation into the possibility of buying the Murray electric light plant," and to report at the next meeting. On May 10th the committee was continued, with further instructions to buy the plant at a price not exceeding \$8,000. The committee had several conferences with Crawford, the result of which was a verbal agreement between the committee and Crawford, after consultation with his partner, by which the committee agreed to buy the electric light plant property for \$8,000, and Crawford and Moore were to move their

who seeks to enforce the same, the question whether the action or suit will lie would seem to be readily susceptible of answer by deduction from judicial constructions of the phrase, "party to be charged," employed in the 4th section of the original English statute of frauds and perjuries (stat. 29 Car. II.), or "parties to be charged," employed in the 17th section of that statute, if these phrases have been preserved in the particular jurisdiction in which the question arises; or directly from the terms of the statutes in those jurisdictions in which the statute expressly requires the contract, or note or memorandum thereof, to be signed by the "party assigning, granting, or surrendering" the estate or interest in the land; by the "lessor or grantor;" or by the person by whom the sale or lease is to be made.

Since, however, the same state of facts in respect of the party who signed and the party who seeks to enforce the contract may be presented in a jurisdiction in which the statutory phrase, "party to be charged," or "parties to be charged," is construed to mean the party or parties sought to be charged in the particular action or suit, irrespective of whether they are the vendors or vendees, or in a jurisdiction where the view prevails that these phrases relate to the vendor or owner of the property, as such, irrespective of whether the contract is sought to be enforced by or against him, or in a jurisdiction in which the statute in terms requires the contract, or note or memorandum thereof, to be signed by the vendor or owner or person granting the interest, there is some apparent conflict—which, for the most part, disappears when these differences are attended to—as to the right to maintain the action or suit upon a given state of facts in these respects. That is, if actual results alone be regarded, there is an apparent conflict among the cases from different jurisdictions as to the right of a vendor who has not signed to enforce the contract against the vendee who has signed, or as to the right of the vendor who has signed to enforce the contract against the vendee who has not. For these reasons, it is thought that it may be of service to present the sub-

ject from two points of view; considering first the general question of statutory construction, and, in that connection, the objection of lack of mutuality frequently urged against the enforcement of the contract at the instance of the party who did not sign, against the party who did; and then collating the cases with a view of showing the state of authorities as to the right to maintain the action or suit under each variation in respect of the form of remedy, and of the party who signs and the party who seeks to enforce the contract, and under the varying provisions and judicial interpretations of the statutes.

It is assumed for the purposes of this note that the particular contract in question was within the statute of frauds, and that there had been no part performance or other acts to take it out of the statute; and it is further assumed that the writing relied upon to satisfy the statute was in all respects, other than the mere matter of signing, sufficient to satisfy the statute.

The note does not cover the point whether the grantee in a deed poll or the lessee in a lease of real property is bound by the covenants therein.

The note is also limited in the main to cases in which the action or suit was planted upon an executory contract with relation to real or personal property, and does not purport to cover the question whether the statute of frauds is available as a defense to an action on a note or other money obligation given for the purchase price of real or personal property.

For convenience, the signing of the note or memorandum is treated as equivalent to the signing of the contract itself; and the signing by an agent as a signing by the principal.

I. Not necessary that both parties sign.

Neither the purpose of the original English statute of frauds and perjuries, as declared in its preamble, nor the language in which the provisions of the 4th and 17th sections are framed, is of itself suggestive of any intention to require the contract to

mill off the lot. The committee all say that they told Crawford that they had no money to buy with unless they sold the bonds, and that the arrangement was dependent upon the sale of the bonds. Crawford insists that it was a positive agreement and without condition. No writings of any kind were drawn or signed.

The committee, on June 7th, made this report to the council:

To the City Council of Murray, Ky.:

We, your committee on purchase of light plant, beg to make the following report: We purchased the machinery, and all wire and poles, including buildings and grounds, well, and right to use railroad track, and franchise to operate, for the price of \$8,000, to have possession on demand.

Respy,

E. A. Hughes,

J. B. Hay, Committee

After spreading the report of the committee on its record, the council entered the

following minute: "Which report was received, adopted, and trade ratified by all members present, being a quorum, and the committee discharged." It will be observed that the report closes with the words "to have possession on demand." The committee and the members of the council say that these words were put there because they had not sold the bonds and did not know whether they could sell them, and the city would not need the property unless it could sell the bonds. After this, Crawford and Moore moved their mill off the lot at an expense of something like \$1,600, and lost the use of the mill during the time. The city was unable to sell the bonds, and refused to take the property. Thereupon Crawford and Moore brought this suit against the city to recover damages for the breach of the contract.

In the circuit court there was evidence on behalf of the city that Crawford and Moore applied to the city authorities to know whether they must move their mill, and the city authorities told them they could not

be signed by both parties, i. e., by both vendor and vendee. That, at least, is true of the 4th section, which, it will be observed, employs the term "party," not "parties." And, as subsequently shown, the courts have very generally repudiated any distinction based on this variation in the language of the two provisions.

The doubt as to whether either party could enforce the contract unless signed by both was engendered neither by the purpose of the statute nor by the language in which the provisions were framed, but by the consideration that if the party who did not sign the contract, and was therefore not bound, was permitted to enforce the contract against the party who did sign, the fundamental principle that requires mutuality of obligation and remedy would be violated.

Cases reported very shortly after the adoption of the statute reflect the doubt arising from this source, though, in the earliest cases, the objection of lack of mutuality was not regarded as sufficient to prevent the enforcement of the contract, even in a court of equity, at the instance of the party who did not sign, against the party who did.

The report of *Hatton v. Gray*, 2 Ch. Cas. 164 (decided in 1684, which was but eight years after the adoption of the statute), is very brief. It is merely stated that Hatton sold houses to Gray, that a note was made of the agreement, signed by Gray, but not by Hatton. That statement is followed by what appears to be an argument of counsel for Gray that "the note binds not him who signed it not, for the statute of frauds and perjuries, etc.; and, therefore, in equity cannot bind the other party, for both must be bound, or neither of them in equity." The report concludes, "but decreed contrary."

And in 1736, Lord Hardwicke, in *Backhouse v. Mohun*, 3 Swanst. 434, note (a suit 28 L.R.A.(N.S.)

by the purchaser, against the vendor, for the specific performance of an agreement to convey real property), said: "Many cases have occurred where agreements for lands, appearing in writing under the hand of the party who was to be bound by it (which are the words of the statute of frauds), notwithstanding there was no writing of the other part, have been carried into execution; and I have known the objection often taken of its not appearing, on the side of the purchaser, and as often overruled. But it may be taken as an ingredient to add weight to other objections." Specific performance was granted in this instance, at the instance of the purchaser, who had not signed.

In 1802, however, Lord Redesdale, in a *dictum* in *Lawrenson v. Butler*, 1 Sch. & Lef. 13, expressed his opinion that a court of equity, at least, ought not to enforce a contract in relation to real property at the instance of the party who did not sign, against the party who did. He said in this connection: "In the case of *Hatton v. Gray*, *supra*, it was considered as sufficient that the agreement should be signed by the party against whom the performance was sought, because such are the words of the statute of frauds. Now such, certainly, is the import, that no agreement shall be enforced but when it is signed by the party to be charged; but the statute does not say that every agreement so signed shall be enforced; the statute is in the negative. To give it this construction would, as I have heard it urged, make the statute really a statute of frauds, for it would enable any person who had procured another to sign an agreement to make it depend on his own will and pleasure whether it should be an agreement or not." Again, as to the necessity of mutuality as a condition of specific performance, Lord Redesdale remarked: "I confess I

tell until they found a purchaser for the bonds, and that Crawford and Moore went on and moved the mill on their own judgment. There was no direction from the council for them to move the mill, and the functions of the committee were ended when they were discharged, so that the rights of the parties must depend on whether there was an enforceable contract by the council to buy the mill when the council adopted and ratified, on June 14th, the trade made by the committee. In the circuit court there was a verdict and judgment in favor of Crawford and Moore in the sum of \$2,500. The city appeals.

The contract, as shown by the record, was one for the purchase of the lot, buildings, and electric light plant for the lump sum of \$8,000. The whole arrangement between Crawford and the committee was verbal. Crawford and Moore signed no writings of any kind until they signed the deed which they tendered with their petition in this case. They were the vendors of the property. The title was in them. The city

was the proposed purchaser. The question we have is: Was the contract taken out of the statute of frauds by the written report signed by the committee and the adoption and ratification of that report by the council? The statute of frauds, among other things, provides: "No action shall be brought to charge any person . . . upon any contract for the sale of real estate, . . . unless the promise, contract, . . . or some memorandum or note thereof be in writing and signed by the party to be charged therewith, or by his authorized agent; but the consideration need not be expressed in the writing. . . ." Ky. Stat. § 470 (Russell's Stat. § 1775).

The question we have before us is: Who is "the party to be charged therewith," under this statute? May the vendor, who has signed no writing, sue the vendee upon tendering a deed, and recover damages for a breach of the contract, where the vendee has made a memorandum in writing of the contract? It is clear here that, if Crawford and Moore had refused to make the deed

have no conception that a court of equity ought to decree a specific performance in a case where nothing has been done in pursuance of the agreement, except where both parties had by the agreement a right to compel a specific performance according to the advantage which it might be supposed that they were to derive from it; because otherwise it would follow that the court would decree a specific performance where the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him, he would be liable to the performance, and yet, if advantageous to him, he could not compel a performance. This is not equity, as it seems to me."

As was said by Chancellor Kent in *Clason v. Bailey*, 14 Johns. 485: "The intrinsic force of this argument, the boldness with which it was applied, and the commanding weight of the very respectable character who used it, caused the courts for a time to pause . . . but the courts have, on further consideration, resumed their former track."

In *Huddleston v. Briscoe*, 11 Ves. Jr. 583, Lord Eldon, in passing, called attention to the doubt expressed by Lord Redesdale, whether the court could grant specific performance of a contract signed by one party only, but was not called upon to express an individual opinion, as the contract in that case was signed by both parties.

In *Flight v. Bolland*, 4 Russ. Ch. 298, the court, while denying the right of an infant to maintain a suit for specific performance of a contract, on the ground of lack of mutuality, said that it was settled, although seriously questioned by Lord Redesdale, that plaintiff may obtain a decree for specific performance of a contract signed by defendant, although not signed by plaintiff.

And Lord Redesdale's *dictum* was also re-

puted by other early English and Irish cases. *Ormond v. Anderson*, 2 Ball & B. 263; *Thornton v. Kempster*, 5 Taunt. 786; *Allen v. Bennett*, 3 Taunt. 169; *Seton v. Slade*, 7 Ves. Jr. 275; *Field v. Boland*, 1 Drury & Walsh, 37.

The entire repudiation in England of Lord Redesdale's *dictum*, and the return to the earlier view, is also shown by the later English cases cited throughout the note, all of which either assume or expressly hold that it is not indispensable that the contract be signed by both parties.

A number of eminent jurists in this country have expressed their personal concurrence in the argument and position of Lord Redesdale on this point.

Chancellor Kent, while constrained by the weight of authority to declare a contrary rule, expressed his own individual concurrence in Lord Redesdale's position, remarking in *Clason v. Bailey*, supra: "I have thought, and have often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party ought not to be at liberty to enforce at his pleasure an agreement which the other was not entitled to claim."

So, Chief Justice Gibson, in *Wilson v. Clarke*, 1 Watts & S. 554, took occasion to express his approval of Lord Redesdale's *dictum* and of the individual opinion expressed by Chancellor Kent in *Clason v. Bailey*, supra, though the entire dissimilarity of the Pennsylvania statute rendered an expression on this point unnecessary.

The weight ordinarily attached to the opinions of Kent and Gibson has been insufficient to induce the courts of this country to accept Lord Redesdale's *dictum*. On the contrary, while individual judges still oc-

upon the city's tendering to them \$8,000, they could have relied upon the statute, and said: "We have made no written contract for the sale of this land." If the contract is within the statute, then damages cannot be recovered for its breach; for to allow damages for the breach of a contract is only in another form to enforce it. It is true the courts will not allow a party to a contract to refuse to carry it out because it is within the statute of frauds, and retain the benefits which he has received under it. But the city here has received no benefits, and if the contract alleged is within the statute of frauds and unenforceable, no action, by the terms of the statute, "shall be brought to charge" the city thereon. So the question is: Is the contract void under the

statute, because not in writing and signed by Moore and Crawford?

In *M'Dowel v. Delap*, 2 A. K. Marsh. 33, the plaintiff brought a suit to recover the price of an interest in land which he averred he had sold the defendant, and proved by parol testimony the agreement on his part, but produced no written evidence to that effect. Holding that there could be no recovery, the court said: "Now, it is obvious that, according to the provisions of the statute against frauds and perjuries, a verbal agreement on the part of the plaintiff to transfer his interest in the salt well to the defendant was not obligatory. Such an agreement was, consequently, not a sufficient or valid consideration for the promise on the part of the defendant. . . . In

casually concede the force of the argument based on lack of mutuality, the rule that under a statute requiring the contract, or note or memorandum thereof, to be signed by the "party to be charged" or the "parties to be charged," is not indispensable, either for the purposes of a suit in equity or an action at law, that both parties should sign, is sustained by the overwhelming weight of authority in this country as well as in England. As subsequently shown, however, the objection of lack of mutuality has, in individual cases, in connection with other objections, prevailed to the extent of inducing courts of equity to exercise their discretion by refusing the particular relief of specific performance. And in Kentucky and Tennessee, as subsequently shown, this objection has been persuasive in inducing the courts to construe the phrase, "party to be charged," to mean the vendor or owner of the property, as such, irrespective of whether the contract is sought to be enforced by or against him.

The subject was thoroughly discussed by the New York court of appeals in *Justice v. Lang*, 42 N. Y. 494, 1 Am. Rep. 576, and the conclusion there reached, in harmony with the almost unbroken current of authority since that time that neither the phrase, "party to be charged," employed in the 4th section of the original statute (which had in fact been superseded in New York by a new statutory form), nor the phrase, "parties to be charged," employed in the 17th section of the original statute (which was still preserved by the New York statute in relation to the sale of goods, wares, and merchandise), requires the contract to be signed by both parties; that the objection of lack of mutuality, arising in that view of the statute, is not sufficient to prevent the enforcement of the contract by the party who did not sign, against the party who did. That was an action at law by the purchaser, to recover damages from the defendants for the nonperformance of their promise, contained in a memorandum or instrument in writing signed by them, but not by the plaintiff, to deliver certain chattels. But the argument

by which the court met and disposed of the objection of lack of mutuality is generally accepted and adopted by courts of equity as well as courts of law, and regarded as applicable to contracts in relation to real property, as well as those in relation to chattels. The argument, which follows that employed by the English cases, is, in effect, this: The statute of frauds does not define nor prescribe what shall be necessary to constitute a contract. Upon the other hand, it presupposes the existence of an agreement having all the requisites at common law to constitute a complete and mutually binding contract, supported by a mutual consideration; and the fact that, because of the intervention of the statute of frauds, the party who does not sign or subscribe may not be liable thereon in an action by the other party, does not destroy or annul the consideration, since the inability of the party who did sign, to enforce the contract against the party who did not sign, results simply from his failure to take the precautionary means required by law to charge the other party.

Some courts add that the contract becomes mutual in fact as well as theory as soon as the party who did not sign brings his action to enforce the contract.

The point is well expressed by the court in *Fenly v. Stewart*, 5 Sandf. 101, as follows: "This construction has proceeded not on the ground that contracts need not be mutual, but that the statute in certain enumerated cases has taken away the power of enforcing contracts which would otherwise be mutually binding unless the parties against whom they are sought to be enforced have subscribed some note or memorandum thereof in writing. If a mutual contract is made, and one of the parties to it gives the other a memorandum, in pursuance of the statute, but neglects to take from that other a corresponding memorandum, he has but himself to blame if he is unable to compel its performance, while he is bound to the other party. The difficulty is not that the contract, as originally entered into, is not mutual, but that one of the parties has not the evidence which the statute has made indispensable to its enforcement."

order to support the count, it was certainly necessary to produce in evidence some memorandum in writing of the agreement, signed by the plaintiff or someone duly authorized by him." In *Thomas v. Harrodsburg*, 3 A. K. Marsh. 298, 13 Am. Dec. 165, the trustees of Harrodsburg brought a suit on a bond given for the price of certain lots of ground purchased of them. The defendant pleaded that the trustees had not signed or made any written contract of sale. In the replication they pleaded that a record of a sale of the lots was made in the books of the trustees. Disposing of the case on these facts, the court said: "The only matter of avoidance alleged in the replication is that of the lots having been sold at public auction, and an entry and record thereof

made in the books of the trustees; but that matter, certainly, does not take the sale out of the statute against frauds and perjuries. The statute contains no exception of sales at auction, and the entry in the books of the trustees, unless signed by the trustees, or some person authorized by them, is not a compliance with the requisitions of the statute; and the replication contains no averment of the entry having been so signed. From both replication and plea, therefore, the sale must be admitted to be within the statute; and, as the bond is alleged to have been given for the price of the purchase made at that sale, the plea, under the statute authorizing the consideration of sealed writings to be gone into and impeached, contains a good and valid de-

The case of *Justice v. Lang* came before the court of appeals on a second appeal, following a new trial (52 N. Y. 323); and on that occasion Allen, J., who wrote for the court, while disclaiming any intention to modify the decision on the first appeal, that the signing of the contract by the defendant was sufficient to satisfy the statute of frauds, intimated that he was inclined to question the correctness of that decision on principle. The decision on this appeal, however, reversing the judgment for the plaintiff, was not upon the ground that the plaintiff did not sign the contract, but that the question whether he assented to the contract at all as a contract binding on him should have been submitted to the jury. The intimation in this opinion, especially in view of subsequent cases in New York, cannot be regarded as impairing the weight of the decision on the first appeal on this point.

Nor may similar intimations in *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch. 187, *Davis v. Shields*, 26 Wend. 341, *Dykers v. Townsend*, 24 N. Y. 57, and *Brabin v. Hyde*, 32 N. Y. 519, be regarded as any longer throwing doubt upon the point.

With the exception of a few cases, presently referred to, practically all the cases hereafter cited in this note expressly hold, or tacitly assume, that it is not necessary that the contract, or note or memorandum, be signed by both parties. This has also been recognized in the following cases, which do not purport to be exhaustive, decided under the statute requiring a contract not to be performed within one year to be signed by the party to be charged: *Smith v. Neale*, 2 C. B. N. S. 67; *Reuss v. Picksley*, 4 Hurlst. & C. 588; *Gaunt v. Hill*, 1 Starkie, N. P. 10; *Raphael v. Hartman*, 87 Ill. App. 634; *First Presby. Church v. Swanson*, 100 Ill. App. 39; *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394; *Himrod Furnace Co. v. Cleveland & M. R. Co.* 22 Ohio St. 451; *Kearby v. Hopkins*, 14 Tex. Civ. App. 166, 36 S. W. 506.

In *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139, however, the court took the contrary view, and, while 28 L.R.A.(N.S.)

recognizing the conflict of authority on the point, held that under a statute requiring a contract not to be performed within a year to be signed by the "party to be charged," both parties must sign.

And to the same effect are *Co-Operative Teleph. Co. v. Kadus*, 140 Mich. 367, 112 Am. St. Rep. 414, 103 N. W. 814, and *Adams v. Harrington Hotel Co.* 154 Mich. 198, 19 L.R.A.(N.S.) 919, 117 N. W. 551, and upon the authority of the *Wilkinson Case* it was held in *McIlroy v. Richards*, 148 Mich. 694, 112 N. W. 489, that a contract signed by defendant, not to be performed within a year, whereby he agreed to purchase certain stock in a corporation, could not be enforced against him, as the plaintiff had not signed.

The case of *Corbitt v. Salem Gaslight Co.* 6 Or. 405, 25 Am. Rep. 541, has sometimes been referred to as though it held that to satisfy the requirement of the statute that the contract be signed by the "parties to be charged," both parties must sign. It is doubtful, however, whether the case was not decided upon the ground that there was no sufficient allegation of acceptance, written or otherwise, by the plaintiff.

In *Halsell v. Renfrow*, 202 U. S. 287, 50 L. ed. 1032, 26 Sup. Ct. Rep. 610, 6 A. & E. Ann. Cas. 189, the United States Supreme Court said that the Oklahoma statute providing that no contract relating to real estate, other than for a lease for not over one year, "shall be valid unless reduced to writing and subscribed by the parties thereto," if taken literally and naturally, goes further than its English prototype. "It is not satisfied by a memorandum made with a different intent, but requires an instrument drawn for the purpose of embodying the contract, and in the case of an agreement to buy and sell, the subscription of both the buyer and seller, not merely that of 'the party to be charged therewith.'" The court, however, was evidently not expressing its own independent opinion as to the proper construction of the statute, but merely the view taken by the Oklahoma courts, citing in that connection the case of *McCormick v. Bonfils*, 9 Okla. 618, 60 Pac. 296. The opinion in that case

fense to the action of the trustees. No action at law or bill in equity can be maintained by either Bush or the representatives of Thomas on the sale; and it is a settled rule of the common law that a promise on which no action can be sustained forms no sufficient consideration for any other promise." It will be observed that in this case the purchaser had executed a bond for the price of the lots, and yet the bond was held unenforceable because the vendor had signed no written memorial of the sale.

The question came up again in *Murray v. Pate*, 6 Dana, 335. In that case Pate made a verbal agreement to sell Tunstall a piece of land for \$500, and Tunstall placed a \$500 bank note in Murray's hands, to be delivered to Pate upon his executing

a deed, provided a certain person should determine that the title was good. The person referred to pronounced the title good. The deed was made by Pate and tendered to Tunstall, but he refused to accept it, and notified Murray not to pay over the money. Thereupon Pate sued. Holding that there could be no recovery, the court said: "The contract by which this note, or its nominal or actual value, was payable, being for the sale of land and by parol, did not give a right of action to either party until a deed was not only made, but accepted (*M'Dowel v. Delap*, supra; *Lewis v. Grimes*, 7 J. J. Marsh. 336), and was not legally obligatory on either party, until a deed conveying the land, or some other writing evidencing the sale, and binding the vendor, was actually

does contain an intimation that the contract must be signed by both parties, but there was no discussion of the point, and the court expressly refrained from deciding it.

The decision of the Oklahoma supreme court in *Halsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118, 2 A. & E. Ann. Cas. 286, which was affirmed by the United States Supreme Court in the *Halsell* Case, did not rest upon the ground that the contract was not signed by both parties, but upon the ground that a sufficient contract to satisfy the statute in other respects was not shown.

Spence v. Apley, 4 Neb. (Unof.) 358, 94 N. W. 109, an action by real estate broker to recover commissions, was decided under a statute which expressly requires the contract to be signed by the owner and the broker.

Repudiation of distinction between "party to be charged" and "parties to be charged."

It has been suggested in a few cases that the use of the singular "party" in the 4th section, and the plural "parties" in the 17th section, of the original statutes and the other statutory provisions modeled thereon, makes a distinction, bearing on the necessity that the contract, or note or memorandum thereof, be signed by both parties.

Thus, in *Champion v. Plummer* (1805) 5 Esp. 240, Sir James Mansfield said that he was of the opinion that the sale was void; that the statute meant to make the obligation reciprocal and to bind equally both contracting parties; that the words of the act were not "party" to be charged, but the word "parties," in the plural number, meaning that each should be liable on his default. He further stated, apparently as an independent ground for the decision, that the note did not specify the buyer, and therefore might apply to the plaintiff or to anyone else. In a report of the case in 1 Bos. & P. N. R. 252, more emphasis is placed on the latter point. It is, however, stated in that report that it was objected on the part of the defendant that the note or memorandum was not sufficient, because not signed by the purchaser, and that his Lordship, being of that opinion, nonsuited the plaintiff. The 28 L.R.A. (N.S.)

accuracy of these reports of the case is doubtful, in view of the remarks of the same judge in the subsequent case of *Allen v. Bennett* (1810) 3 Taunt. 169 (an action of assumpsit for nondelivery of goods as required by a contract signed by defendant, but not by plaintiff). He there said: "It was then objected that one party who has not signed is not bound, but the fact was the same in the cases of *Egerton v. Mathews*, 6 East, 307, and *Champion v. Plummer*, and the objection was never taken in either of these cases, but the whole of this case supposes that the plaintiff had agreed; suppose he has not contracted by writing, he has by parol, and he is bound in honor; and it has never yet been decided that an obligation in honor would not be a good consideration. All these cases, *Egerton v. Mathews*, *Saunderson v. Jackson*, 2 Bos. & P. 238, and *Champion v. Plummer*, suppose a signature by the seller to be sufficient; and everyone knows it is the daily practice of the court of chancery to establish contracts signed by one person only, and yet a court of equity can no more dispense with the statute of frauds than a court of law can. There is no reason, therefore, to set aside the verdict, and the rule must be discharged."

Chancellor Kent, in *Clason v. Bailey*, 14 Johns. 485, expressly repudiated the distinction based on the use of the singular "party" in the 4th section, and the plural "parties" in the 17th section, remarking: "But I do not find from the cases that this variation has produced any difference in the decisions. The construction as to the patent under consideration has been uniformly the same in both cases." And his views on this point were adopted by the court in *Justice v. Lang*, 42 N. Y. 494, 1 Am. Rep. 576.

This attempted distinction was also expressly repudiated in *Cunningham v. Williams*, 43 Mo. App. 629. And as will subsequently appear, the courts have uniformly repudiated or ignored the distinction, and have applied the same rule whether the case arose under a statute modeled on the 4th section of the original statute, which employed the singular "party," or the 17th section, which employed the plural "parties."

accepted by the purchaser, or his authorized agent. The parol agreement to sell and convey the land, being unobligatory on the vendor, formed no consideration for the promise to pay the price or to accept the deed. To say that the purchaser is bound to accept the deed, which will bind him to pay the money, would be to hold him bound by the contract at the will of the vendor, who is not bound, and would enable the vendor to maintain an action against the vendee for the nonacceptance of the deed and for the nonpayment of the money, while the vendee could not, by paying or tendering the money, have an action against the vendor."

The same question was again before the court in *Curnutt v. Roberts*, 11 B. Mon. 42.

Necessity of actual assent by party who does not sign.

Since the rule, now established beyond question, that it is not necessary for both parties to sign, presupposes a transaction between the parties, which, but for the statute, would have every requisite of a complete mutually binding and mutually enforceable contract at common law, it in no wise dispenses with the necessity of establishing an actual assent by the party who did not sign to the terms proffered by the other party, and his acceptance, as a contract, of the paper or instrument signed by the other party. In other words, the rule merely dispenses with the necessity of showing such assent and acceptance by writing signed by the party, and permits those facts to be proven by the same means that would have been available in the absence of a statute. The question as to what is necessary to establish a parol assent and acceptance, by the party who did not sign, of the written proposition or contract signed by the other party, and thus convert it into a contract, is not within the scope of this note. The necessity, however, of proving in some way such assent and acceptance by the party who does not sign, is doubtless assumed in all the cases cited in this note. It is especially emphasized in the following cases, among many others that might be mentioned: *Ullsperger v. Meyer*, 217 Ill. 262, 2 L.R.A. (N.S.) 221, 75 N. E. 482, 3 A. & E. Ann. Cas. 1032; *Forthman v. Deters*, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97; *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500.

And *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118, emphasizes the point that while it is not necessary that the acceptance of the contract by the party seeking to enforce it be in writing, it is necessary that he shall have accepted it in some other manner without varying its terms.

And *Thornton v. Kempster*, 5 Taunt. 786; *Levin v. Dietz*, 194 N. Y. 376, 20 L.R.A. (N.S.) 251, 87 N. E. 454, reversing 119 App. Div. 875, 104 N. Y. Supp. 1131; *Montauk Assn. v. Daly*, 62 App. Div. 101, 28 L.R.A. (N.S.)

There the court, again refusing a recovery, said: "A verbal contract for the sale of land is not legally obligatory upon either party until some writing evidencing the sale, and sufficient to take the contract out of the operation of the statute of frauds, is executed by the vendor, and accepted by the purchaser. . . . The verbal agreement to sell and convey land, not being binding on the vendor, formed no consideration for the promise to pay the money or to accept the deed. The promise, therefore, to pay the money, being without consideration, was legally invalid, and could not be enforced."

These cases were approved in *Usher v. Flood*, 83 Ky. 552; *Fite v. Orr*, 8 Ky. L. Rep. 349, 1 S. W. 582. In the subsequent

70 N. Y. Supp. 861, affirmed in 171 N. Y. 659, 63 N. E. 1119; and *Wright v. Mischo*, 20 Jones & S. 241, recovery was denied, not because the plaintiff, seeking to enforce the contract, had not signed, but because it did not appear that the written instrument or paper signed by the defendant, and relied upon as the contract, had been accepted by the plaintiff as a contract in any manner sufficient to conclude a binding contract, even apart from the statute of frauds.

And see *Justice v. Lang*, 52 N. Y. 323, *infra* V, b. 2.

In *Lanz v. McLaughlin*, 14 Minn. 72, Gil. 55, the court held that an oral acceptance of a written proposal to sell did not satisfy the statute of frauds. The court said that a contract which could be perfected only by an acceptance of the proposal or offer would not be a contract in writing, unless the acceptance also was in writing. The distinction here suggested seems to be between a case where the paper signed by one party, and orally accepted by the other, purported to be merely an offer, and one where it purported on its face to be a binding agreement, though not originally signed by the party against whom it is sought to be enforced. (See *Wemple v. Knopf*, 15 Minn. 444, Gil. 355, 2 Am. Rep. 147.)

Discretion as to specific performance.

Although, as above stated, the objection of lack of mutuality of remedy is no more an absolute bar to a suit in equity for the specific enforcement of a contract at the instance of a party who did not sign, against the party who did, than to an action at law between the same parties, it has more or less effect, according to the circumstances, upon the exercise of the discretion of a court of equity in granting this particular form of relief. Thus Lord Manners, in *Ormond v. Anderson*, 2 Ball & B. 263, remarked that in a case where the court finds the party who is not bound has endeavored to obtain some undue advantage, or has been playing fast and loose, the courts will not assist him. As a matter of fact, however, the

case of *Moore v. Chenault*, 16 Ky. L. Rep. 531, 29 S. W. 140, where the court had before it again the construction of the statute, it said: "The vendor is the party vested with title. It is he who can assume a liability which will compel him to convey the title to the property to the vendee. It is he alone who can sign such writing as will divest him of title. The law intended him to be protected in his right to his property until he voluntarily disposed of it by a writing. It did not intend that he should be placed in the power of perjurers to take it from him by proving a parol sale. It is the vendor 'to be charged' with the contract of sale."

It has been held in a number of cases that the contract need not be signed by the purchaser; that a receipt showing the contract and signed by the vendor is sufficient. *Gully v. Grubbs*, 1 J. J. Marsh. 388; *King v. Hanna*, 9 B. Mon. 371; *Tyler v. Onzts*, 93 Ky. 331, 20 S. W. 256, and cases cited. The necessary effect of these opinions is that, under the statute, the purchaser is not "the party to be charged;" and manifestly a writing executed by one who is not "the party to be charged" cannot satisfy the statute. The purpose of the statute is to protect the holders of title to realty from

alleged verbal agreements for its sale. The English act was given this meaning (*Browne*, Stat. Fr. §§ 267, 269); and while some of the words contained in it are omitted from ours, the meaning on this point is the same. To hold that "the party to be charged" is the party against whom the suit is brought would be to allow the vendor, in cases like this, to maintain an action, though none could be maintained by the vendee against him. This, as shown by the cases cited, cannot be done. The justice of the rule thus declared by the court is well illustrated in this case; for it is manifest that, if the contract between the committee and Crawford had been drawn up and put in writing, there would have been no such misunderstanding between the parties as is shown by the record before us. The statute against frauds and perjuries was designed to prevent the use of oral evidence in controversies of this kind. We therefore conclude that the contract sued on being within the statute, no action can be maintained upon it.

Judgment reversed and cause remanded, with directions to the Circuit Court to sustain the defendant's demurrer to the petition.

specific performance was denied in this case because of the omission of an essential part of the agreement.

So, in *Backhouse v. Mohun*, 3 Swanst. 434, note, Lord Hardwicke, while granting specific performance at the instance of a purchaser who had not signed, against the vendor, who had, admitted that the objection of lack of mutuality might be taken as an ingredient to add weight to other objections.

And in *Stengel v. Sargeant*, 74 N. J. Eq. 20, 68 Atl. 1106, the court, while recognizing that in general the party who did not sign may enforce the contract against the party who did sign, said that courts of equity exercise their discretion as to specific performance of such contracts with great caution, and view somewhat narrowly the conduct of the party claiming the benefit of his unilateral right to make the contract absolute; that the unilateral contract becomes binding on the party who has not signed only by the filing of the bill, and up to that time he is free from any legal or equitable obligation, and it would not ordinarily be equitable to enforce against a principal a unilateral contract made in that form by his agent, without the principal's knowledge or express authority. The court in this case denied the relief of specific performance at the instance of the vendee, who did not sign, against the vendor, whose agent did sign.

So, in *Love v. Welch*, 97 N. C. 200, 2 S. E. 242, the court, while recognizing that generally a suit for specific performance will lie by the vendee who did not sign, against the vendor who did, held that that

form of relief, not being an absolute right, the court will take into consideration the fact that the plaintiff was not bound, in connection with his long delay before asking relief, and may, in view of the circumstances, decline to grant the relief.

The question as to the right of the party not bound, because he did not sign the contract, to enforce specific performance against the party who did, was considered in the note to *Western Timber Co. v. Kalama River Lumber Co.* 6 L.R.A. (N.S.) 397. That note, however, proceeded upon the assumption that there was no question but that the statute of frauds was satisfied, and that the point was merely whether, in view of the circumstance that the complainant was not bound prior to the filing of his bill, he ought to be allowed the equitable remedy of specific performance. Treated from that point of view, the note fails to bring out the full weight of authority in support of the right to specific performance under such circumstances, which is furnished by the cases that did not treat the lack of mutuality as a distinct objection to the remedy of specific performance, apart from the proper construction of the statute of frauds, but considered it simply in its bearing on the question of construction, and having decided, in spite of that objection, that the signing by the defendant sufficiently satisfied the statute, granted the relief of specific performance as a matter of course, without distinguishing particularly between legal and equitable remedies. For the purpose of showing the bearing of these cases on the question as to the right to the particular remedy of spe-

CALIFORNIA SUPREME COURT.

CARRIE HARPER, Appt.,

v.

H. H. GOLDSCHMIDT, Respt.

(156 Cal. 245, 104 Pac. 451.)

Specific performance — statute of frauds — part performance.

1. Under a statute making invalid contracts within the statute of frauds unless a memorandum thereof be in writing, and subscribed by the party to be charged, an action for specific performance cannot be maintained against a vendee who did not sign the agreement, although he paid a small portion of the purchase money, and accepted a receipt therefor.

Contract — mutuality — offer to perform.

2. A contract for the sale of land is not void for lack of mutuality from the fact that it is not enforceable against the vendee, because he did not sign the memorandum, as required by the statute of frauds, at least, where the statute provides that a party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed or offers to perform it.

specific performance, they are discriminated in the subsequent subdivisions from the cases in which the action was at law, although, as already stated, in most of them the form of the remedy was not regarded as important.

II. View that "party to be charged" is the party sought to be charged in the suit.

As shown in the last division, the cases are practically unanimous that under a statute requiring the contract, or note or memorandum, to be signed by the "party to be charged," or the "parties to be charged," it is not essential that both parties shall sign. The great majority of these cases have apparently assumed that the only alternative was to hold that the "party to be charged" was the party against whom the contract was sought to be enforced in the particular action or suit; and in this view of the statute have met the objection of lack of mutuality in the way indicated in that division. Comparatively few of them have considered the possibility of avoiding the force of that argument by construing the phrase, "party to be charged," to mean the vendor or owner of the property, as such, and thus defeating the very promise of the argument.

As illustrated by the comments in HARPER v. GOLDSCHMIDT, on the case of Scott v. Glenn, 98 Cal. 168, 32 Pac. 983, the occasional intimation in opinions that it is the vendor, as such, who must sign, are not to be too hastily taken as authority for that 28 L.R.A.(N.S.)

Pleading — complaint — statute of frauds — demurrer.

3. A complaint showing on its face that the agreement sued upon is within the statute of frauds, and fails to comply with its requirements, is demurrable.

(August 31, 1909.)

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in defendant's favor in an action brought to compel specific performance of a contract to purchase certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. T. E. Gibbon and G. W. Crouch, for appellant:

A contract in the form of a receipt, signed only by the vendor, or his duly authorized agent for him, can be specifically enforced against the vendee, who has not signed.

1 Wharton, Contr. § 2; Easton v. Montgomery, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280; Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249; Cavanaugh v. Casselman, 88 Cal. 543, 26 Pac. 515; Joseph v. Holt, 37 Cal. 254; Rutenberg v. Main, 47 Cal. 213; Scott v. Glenn, 98 Cal. 170, 32 Pac. 983; Hubbard v. Marshall, 50 Wis. 322, 6 N. W.

view, as opposed to the view that it is the party against whom the contract is sought to be enforced, whether vendor or vendee, who must have signed, since it is often practically unnecessary to choose between these two doctrines in order to dispose of the case on the facts. This is true where as in the cases cited in V. b, supra, the action or suit is by the vendee, who did not sign, against the vendor, who did. In the great majority of these cases, however, it is clear that the contract was held enforceable not because the party who had signed the contract was the vendor, but because he was the party against whom the contract was sought to be enforced in the particular action or suit in question. This is made apparent in many of the cases of this class by the fact that the court assumed that the contract could not have been enforced at the instance of the defendant in the suit, against the plaintiff, for the reason that the latter had not signed the contract, and dealt with the objection of lack of mutuality on that assumption, disposing of it in the manner indicated in I., supra. This sometimes serves to dissipate the apparent ambiguity arising from conflicting statements on the point in the same opinion. Thus, for example, the opinion in Ullsperger v. Meyer, 217 Ill. 262, 2 L.R.A.(N.S.) 221, 75 N. E. 482, 3 A. & E. Ann. Cas. 1032, declares at one point that it is sufficient if the vendor sign, but immediately quotes a text writer to the effect that it is sufficient if the instrument be signed by the party defendant, whether he be vendee or vendor. Since the suit was

497; *Gardels v. Kloke*, 36 Neb. 493, 54 N. W. 834; *Mull v. Smith*, 132 Mich. 620, 94 N. W. 183; *Moore v. Chenault*, 16 Ky. L. Rep. 531, 29 S. W. 140; *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 23, 24 Pac. 695; *Boehly v. Mansing*, 52 Misc. 382, 102 N. Y. Supp. 171; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617.

Messrs. B. F. Mull and E. B. Coll, for respondent:

The agreement is defective under the statute of frauds, in that it is not signed by the party to be charged.

Dupuy v. Macleod (Cal.) 33 Pac. 1115; *Mizell v. Burnett*, 49 N. C. (4 Jones, L.) 249, 69 Am. Dec. 746; *Wilson v. Miller*, 42 Ill. App. 332; *Moore v. Powell*, 6 Tex. Civ. App. 43, 25 S. W. 472; *Guthrie v. Anderson*, 47 Kan. 383, 28 Pac. 164; *Willard*, Eq. Jur. p. 267.

The memorandum is not sufficient under

against the vendor, who had signed, the result would be the same in either view; but the fact that the court assumed that the contract could not have been enforced by the defendant against the plaintiff, and on that assumption met and overruled the objection of lack of mutuality, shows that the signing by defendant was sufficient to sustain the action, not because he was the vendor, but because he was the party against whom the contract was sought to be enforced.

Practically all the cases cited in V. b, 1 and 2, *infra*, may therefore be regarded as supporting the doctrine that the "party to be charged," or the "parties to be charged," is the party or parties against whom the contract is sought to be enforced, irrespective of whether he is vendor or vendee.

Even stronger authority, however, for that position, is furnished by the cases cited in V. a, 1 and 2, *infra*, holding that a vendor or owner of the property, who did not sign the contract, or any note or memorandum thereof, may enforce the same against the vendee, who did sign, and, upon the other hand, by cases cited in V. c, 1 and 2, *infra*, which deny the right of the vendor, who did sign the contract, to enforce the same against the vendee, who did not sign, since it is apparent that this view is necessary in order to justify the results reached in either of those classes of cases, and the results in those cases are therefore necessarily inconsistent with the view that the "party to be charged" is the vendor, as such irrespective of whether the contract was sought to be enforced by or against him.

The Kentucky and Tennessee cases cited in V. c, 1, upholding the right of the vendor in such circumstances to maintain the suit, are opposed to the view sustained by the weight of authority, that the "party to be charged" is the party sought to be charged in the action whether vendor or vendee. But the other cases cited in that 28 L.R.A. (N.S.)

the statute of frauds, for the reason that the name of the vendor does not appear.

Clampet v. Bells, 39 Minn. 272, 39 N. W. 495; *Grafton v. Cummings*, 99 U. S. 106, 25 L. ed. 368; *Breckinridge v. Crocker*, 78 Cal. 535, 21 Pac. 179; *Meux v. Hogue*, 91 Cal. 447, 27 Pac. 744; *McGovern v. Hern*, 153 Mass. 308, 10 L.R.A. 815, 25 Am. St. Rep. 632, 26 N. E. 861; *Ross v. Allen*, 45 Kan. 231, 10 L.R.A. 839, 25 Pac. 570.

Henshaw, J., delivered the opinion of the court:

This action was brought by plaintiff for the specific performance of a contract for the sale of realty, which contract, as pleaded in the complaint, was evidenced by the following written memorandum or receipt:

Los Angeles, Cal., Jan. 11, 1907.

Received of H. H. Goldschmidt \$100, part

subdivision, upholding the vendor's right to maintain the suit in such circumstances, are not opposed to that view, since they were decided under statutes not employing the phrase, "party to be charged."

Ordinarily it is the plaintiff who is seeking to enforce the contract against the defendant, so that usually the use of the term "defendant" as a substitute for the phrase, "party against whom the contract is sought to be enforced," or similar phrases employed in this note, would answer all practical purposes of the case; but occasionally the defendant seeks by cross bill or counterclaim to enforce the contract against the plaintiff, and in that event it is, of course, the plaintiff who, in this view of the statute, must have signed. Hence, the use in this note of the descriptive phrases, rather than the term "defendant," to indicate the party who must have signed.

While most of the courts have acted upon the prevailing rule that the "party to be charged" is the party against whom the contract is sought to be enforced in the particular action or suit have tacitly assumed that that is the rule, after holding that it is not necessary for both parties to sign, some of them have given their reasons for adopting that view in opposition to the contrary view, that the party to be charged is the vendor or owner of the property as such.

Thus, in *Heflin v. Milton*, 69 Ala. 354, the court said: "The words, spirit, and policy of the statute cannot be met and satisfied, unless there is written evidence of the contract subscribed by the party to be charged, the defendant in the action, whether he is the vendor or vendee."

And in *Simms v. Killian*, 34 N. C. (12 Ired. L.) 253, *Ruffin*, Ch. J., said that the danger was as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it, as that, by a similar means, a feigned contract of sale should be established against the own-

payment on lot numbered 3, block —, Harper's Magnolia Place. Terms: Total price, \$5,250; balance to be paid as follows: \$1,400 cash on delivery of contract, less \$250 discount as com. on sale, \$1,250 in six months from date, \$1,250 twelve months from date, \$1,250 eighteen months from date, and interest at 7 per cent semiannually. This receipt is issued subject to the conditions in the regular form of contract and deed given for lots in the here-in-mentioned tract.

Geo. C. Peckham & Company,
By Geo. C. Peckham.

Plaintiff averred the tender to defendant of the contract mentioned in the receipt, and the due performance of all of the terms and conditions upon her imposed by the contract, with defendant's refusal to accept the contract and to pay the moneys due there-

er of the land. And that statement is quoted with approval in *Hall v. Misenheimer*, 137 N. C. 183, 107 Am. St. Rep. 474, 49 S. E. 104.

III. View that "party to be charged" is the vendor or owner, as such.

The view taken in *MURRAY v. CRAWFORD* clearly opposed to the great weight of authority, that the "party to be charged" is the vendor or owner of the property, irrespective of whether the contract is sought to be enforced by or against him, is quite consistently supported by the earlier decisions in Kentucky. (See *Moore v. Che-nault*, 16 Ky. L. Rep. 531, 29 S. W. 140; *Lloyd v. O'Rear*, 22 Ky. L. Rep. 1000, 59 S. W. 483, with the exception of *King v. Cheatham*, 31 Ky. L. Rep. 1176, 104 S. W. 751, where the court said that the "party to be bound" is the party sued, or him against whom it is sought to enforce the contract. In that case, however, the vendee, who had signed, was seeking to enforce the contract against the vendor, who had not; and it was clear that in either view the action would not lie under such circumstances. The decision, therefore, cannot be regarded as opposed to the position taken in the other Kentucky cases.)

The view that it is the vendor, as such, who must sign, is also sustained by the Tennessee cases. Thus, in *Frazer v. Ford*, 2 Head, 464, the court, in answering the argument that, as the action was against the vendee, and he signed the contract, that was a compliance with the statute, since the vendee was the party attempted to be charged, said: "This is not the meaning of the act. It means the persons who sell the land shall sign the writing,—the vendor, and not the vendee. The filing of the bill by all the vendors, with an express ratification of the contract therein, and tender of title, does not remedy the defect of failure to sign the writing by the vendor, as is contended by counsel. The principle would

under. A general demurrer to this complaint was interposed and sustained. From the judgment which followed plaintiff appeals.

The principal question presented upon the appeal is whether, under the circumstances here indicated, a vendee who has not signed the contract of sale, and who has done no more than pay \$100 upon the purchase price, accepting a receipt therefor, can be compelled specifically to perform. Appellant answers this question by saying that under our statute of frauds and the sections of the Code relating to specific performance, and the decisions of this court, construing the statute and the Code, specific performance should be decreed. Respondent makes answer that under our statute of frauds and the sections of the Code dealing with specific performance, and the decisions of this court, expounding the statute and the Code,

make the contract binding on one party, and not on the other,—on the purchaser, and not the seller. Whereas, to make it obligatory, it must be mutual."

To the same effect is *Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. Rep. 800, 4 S. W. 835.

The declaration by the court in *Scott v. Glenn*, supra, that the vendor is the party to be charged, taken by itself, would tend to support this view, but that statement is explained away in *HARPER v. GOLDSCHMIDT*, which squarely holds in accordance with the weight of authority, that the party to be charged is not necessarily the vendor or owner of the property, but the party against whom the contract is sought to be enforced whether vendor or vendee.

The Mississippi cases are somewhat ambiguous on this point. In *Curtis v. Blair*, 26 Mass. 309, 59 Am. Dec. 257, holding that specific performance would lie at the instance of the vendee, who did not sign, against the vendor, who did sign, the court said that while the letters in question, when written, were but propositions to sell, they contained a description of the land and the terms, and the moment the proposition was accepted and the terms complied with by the other party, the transaction became mutual as to all rights and liabilities thereunder. If by the last statement the court meant that the transaction became mutual in the sense that it could be enforced by the party who did sign, against the party who did not, it would seem to be true only upon the assumption that the statute requires the contract to be signed by the vendor, as such, rather than by the party sought to be charged.

In *Johnson v. Brook*, 31 Miss. 17, 66 Am. Dec. 547, the court, while holding that a deed executed by the vendor, but not delivered to the vendee, could not be regarded as a sufficient note or memorandum to satisfy the statute of frauds, seems to have placed the decision on the ground of lack of delivery; and there is no suggestion that the fact that the vendee did not sign would

no action will lie, and the defendant is not bound. That such a contrariety of opinion should exist upon a proposition which should be well settled, not only excites surprise, but demands an exposition of it resolving all uncertainty.

Upon the statute of frauds, appellant points out that § 1091 of the Civil Code reads as follows: "An estate in real property, other than an estate at will, or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto duly authorized;" that § 1971 of the Code of Civil Procedure prescribes that "no estate or interest in real property, other than for leases for a term not exceeding

one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." From the language of these sections he argues that when in § 1973 of the Code of Civil Procedure, and in §§ 1624 and 1741 of the Civil Code, it is declared that contracts within the statute of frauds are invalid unless they, or some note or memorandum of them, "be in writing and subscribed by the party to be charged, or by his agent," the "party to be charged" is the vendor, and

in itself have been fatal, although it would seem that objection in itself would be fatal except upon the assumption that it is the vendor, and not the party against whom the contract is sought to be enforced, who must sign.

In *Peevey v. Haughton*, 72 Miss. 918, 43 Am. St. Rep. 592, 17 So. 378, 18 So. 357, however, holding that specific performance would lie at the instance of the vendee, who did not sign, against vendor, who did, it seems to have been assumed that the vendee was not bound by the contract until he filed his bill to enforce the same.

In *Bailey v. Leishman*, 32 Utah, 123, 89 Pac. 78, 13 A. & E. Ann. Cas. 1116, holding that the purchaser of goods, who did not sign, could maintain an action for breach of contract against the seller, who did sign, the court said that it has often been held that the phrase, "party to be charged," applies to the vendor in case of sale; and that the purchaser's acceptance of the offer made it a contract mutually binding. Probably, however, the court did not mean to adopt the view that it is the vendor, as such, rather than the person against whom the contract is sought to be enforced, who must sign. At least, the facts did not call for a choice between the two views.

IV. Statutes not employing the phrase, "party to be charged."

Most of the states originally adopted the 4th section of the original statute of frauds and perjuries, which required a contract for the sale of real property, or some note or memorandum, to be signed by the "party to be charged." The 4th section, however, was never adopted in Pennsylvania. That state, however, did adopt the 3d section, which, in effect, provided that no lease, estate, or interest in lands should be assigned, granted, or surrendered unless by deed or note in writing, "signed by the party so assigning, granting, or surrendering the same." And this provision was held applicable to equitable as well as legal interests. (*Wilson v. Clarke*, 1 Watts & S. 554.)

It would seem that under the terms of 28 L.R.A. (N.S.)

this statute there would be no room for the contention that the contract must be signed by both parties, and it has been expressly held that signing by both is not necessary. *Lowry v. Mehaffy*, 10 Watts, 387; *Simpson v. Breckenridge*, 32 Pa. 287; *Cadwalader v. App.* 81 Pa. 194; *Everhart v. Dolph*, 133 Pa. 628, 19 Atl. 431; *Witman v. Reading*, 191 Pa. 140, 43 Atl. 140; and *Brodhead v. Reinbold*, 200 Pa. 618, 86 Am. St. Rep. 735, 50 Atl. 229.

The 4th section of the original statute was originally adopted in New York, but by the Revision of 1830 a new provision was substituted to the effect that a contract for the leasing for a longer period than one year, or for the sale of any real property, or an interest therein, is void unless the contract, or some note or memorandum thereof, be in writing, subscribed by the "lessor or grantor," or by his lawfully authorized agent.

And in a number of other states provisions which in terms require the contract for the sale or leasing of real property to be signed by the person by whom the sale or lease is to be made have been substituted for the original provision.

Under these forms of the statute, as well as under the Pennsylvania form, it seems clear that signing by both parties is not necessary, and as shown by cases cited in subsequent divisions in this note, it is so held when the question directly arises. Indeed, under these forms of the statute there would seem to be no basis or premise whatever for the argument, based on lack of mutuality, so frequently, though unsuccessfully, urged under statutes requiring signing by the "party to be charged," against the right of the party who did not sign to enforce the contract against the party who did sign. Curiously enough, however, in cases arising under these changed forms of the statute, where the vendee who did not sign sought to enforce the contract against the vendor or owner who did sign, the courts have frequently invoked the reasoning employed in the cases arising under the old forms of statute (i. e., those employing the phrases "party to be charged" or "par-

not the vendee. And it is said that such is the construction put upon the statute in this state by the cases of *Joseph v. Holt*, 37 Cal. 254, *Rutenberg v. Main*, 47 Cal. 213, and *Scott v. Glenn*, 98 Cal. 170, 32 Pac. 983; while elsewhere this construction receives support, as in Wisconsin (*Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497); in Nebraska (*Gardels v. Klope*, 36 Neb. 493, 54 N. W. 834); in Michigan (*Mull v. Smith*, 132 Mich. 620, 94 N. W. 183); in Montana (*Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695); and in New York (*Boehly v. Mansing*, 52 Misc. 382, 102 N. Y. Supp. 171).

Upon the proposition that specific performance is a road open to the vendor under the circumstances here presented, it is said

ties to be charged") to meet the objection of lack of mutuality; thus apparently implying that the contract could not have been enforced in a suit by the vendor who did sign, against the vendee who did not. (See *Gartrell v. Stafford*, 12 Neb. 545, 41 Am. Rep. 767, 11 N. W. 732; *Robinson v. Cheney*, 17 Neb. 673, 24 N. W. 378; *Gardels v. Klope*, 36 Neb. 493, 54 N. W. 834; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Pettibone v. Moore*, 75 Hun, 461, 27 N. Y. Supp. 455; *Cheney v. Cook*, 7 Wis. 413; *Lowber v. Connit*, 36 Wis. 176.)

Although on its face *M'Crea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103, having been decided after the change of the statute by the Revision of 1831, would seem to be subject to the same comment, the contract in that case was made prior to the change of statute, and the court probably assumed that it would be governed by the statute in force at the time it was made.

In *Parrish v. Koons*, 1 Pars. Sel. Eq. Cas. 79, the court, on the authority of Chief Justice Gibson's *dictum* in *Wilson v. Clarke*, 1 Watts & S. 554, *supra*, actually held that specific performance would not lie at the instance of the vendee, who did not sign, against the vendor, who did, although, as above shown, the provision of the Pennsylvania statute is not that the contract should be signed by the "party to be charged," but that it must be signed by the party granting the interest in the land.

Although, as already stated, the *dictum* of the chief justice on this point is clearly opposed to the overwhelming weight of authority even in those jurisdictions in which the requirement of the statute is that the contract must be signed by the "party to be charged" or "parties to be charged," there is under that form of the statute a basis or premise for the objection of lack of mutuality, since it is conceded that the party who did sign could not have enforced the contract against the party who did not. There would seem, however, to be no basis or premise whatever for the objection under the Pennsylvania statute, since, if the contract, as required by that statute, be signed by the party transferring the interest, there

that the vendee who has not signed may prosecute such an action against the vendor who has signed. This being admitted, reference is made to § 3386 of the Civil Code, which declares that "neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance;" and to such authorities as Wharton on Contracts, where (vol. 1, § 2) it is said: "The parties to a contract, therefore, must both be bound;" and the language of our adjudications, such as that in *Doe v. Culverwell*, 35 Cal. 295, where

would seem to be no reason why it should not be enforced by, as well as against, him; and in that view the objection of want of mutuality altogether disappears. As a matter of fact, in the *Wilson Case* the contract was not signed by either party; and it is doubtful whether the chief justice intended his animadversions on the doctrine that the party who does not sign may enforce specific performance against the party who does sign, to apply to cases arising under the Pennsylvania statute. That he did not so intend is apparently indicated by the fact that, after remarking that Chancellor Kent was reluctantly obliged to concede that the doctrine was established by weight of authority, Chief Justice Gibson added: "But we are able to escape it by the fact that this section (4th section of the original statute of frauds) has been omitted in the statute of Pennsylvania."

As shown in subsequent divisions in this note, the latter Pennsylvania cases have frequently recognized that it is not necessary for both parties to sign the contract, and in one or two instances have expressly held that specific performance would lie at the instance of the vendee who did not sign, against the vendor who did sign.

Some of the cases decided under these changed forms of statutes have expressly stated, what but for the confusion created by the cases just referred to would scarcely seem to require express statement, that the signing by the vendor or owner is sufficient to render the contract enforceable by either party against the other.

Thus, in *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695 (a suit by the vendee, who did not sign, against the vendor, who did, for specific performance), the court, in reply to the argument that the contract could not have been enforced against plaintiff if he had been the party sought to be charged, as he had not signed, and therefore it could not be urged against the defendant, said that the statute does not require the writing to be signed by the party to be charged, but only by the party by whom the sale is made.

So, in *Boehly v. Mansing*, 52 Misc. 382,

the well-established principle is enunciated that, "to be obligatory on either party, a contract must be mutual and reciprocal in its obligations." Upon these principles, it is argued that, as the contract is admitted to be enforceable against the vendor, and as it could not be so enforceable without mutuality of obligation, it must be equally enforceable against the vendee.

The English statute of frauds and perjuries of Charles II., to which the similar statutes of all our states owe their origin, used the phrase, "party to be charged," in precisely the same manner and to the same effect as it is now used in our sections of the Code. A glance at the English cases will establish that the "party to be charged" did not mean the vendor, nor yet the ven-

dee, but it meant the person charged in court with the performance of the obligation,—the party defendant. 1 Sugden, Vendors, chap. 4, § 3, ¶ 2; Thornton v. Kempster, 5 Taunt. 786; Allen v. Bennet, 3 Taunt. 169; Seton v. Slade, 7 Ves. Jr. 265. It was not the vendor alone whom the statute of frauds and perjuries sought to protect, but the vendee equally. For, as is well said by Ruffin, Ch. J., speaking for the supreme court of North Carolina: "The danger seems as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it, as that by some means a feigned contract of sale should be established against the owner of the land. Hence the act in terms avoids entirely every contract of which the sale of land is the sub-

102 N. Y. Supp. 171, the court said that if the owner of the land signs the contract, or note or memorandum, so as to satisfy the statute of frauds, and the purchaser unreservedly agrees to take the property and pay the purchase price, although his acceptance is expressed by word of mouth, the contract is mutually obligatory, and can be enforced by either party.

And in Mull v. Smith, 132 Mich. 618, 94 N. W. 183, the court expressly declares that under the statute requiring the contract to be signed by the vendor, if he does sign it, it is valid against both. And it will be observed by referring to V. c, infra, that when the situation has been presented, the courts, under statutes in this form, have held the contract enforceable at the instance of the vendor who did sign, against the vendee who did not.

These decisions directly on the point clearly outweigh any inference against the right of the vendor who has signed the contract under a statute requiring the contract to be signed by the vendor or person by whom the sale is to be made, to enforce the same against the vendee who has not signed, that might otherwise be drawn from the apparent assumption by the cases above cited, in meeting the objection of lack of mutuality, that the vendor could not have enforced the contract against the vendee, for the reason that the latter did not sign. That assumption is not only contrary to the clear implication of the statute, but also to the decisions in the cases in which the point was presented for decision.

V. Who may enforce contract.

a. Vendor who did not sign against vendee who did.

1. Contracts as to real property.

It logically follows from the rule, established by the great weight of authority that the "party to be charged" is the party sought to be charged with the contract in the particular action or suit in question, whether he be the vendor or vendee, that

the vendor or owner who does not sign may nevertheless enforce the same against the vendee who does sign; and so it has been specifically held or recognized, under a statute in form requiring the contract or note or memorandum to be signed by the "party to be charged," that the vendor or owner who has not signed may enforce specific performance against the vendee or other party who has signed. Hodges v. Kowing, 58 Conn. 12, 7 L.R.A. 87, 18 Atl. 979; Old Colony R. Corp. v. Evans, 6 Gray, 25, 66 Am. Dec. 394; Dresel v. Jordan, 104 Mass. 407; Ivory v. Murphy, 36 Mo. 534; Marquize v. Caldwell, 48 Miss. 23 (overruling intimations to contrary in Lee v. Dozier, 40 Miss. 481) Hunter v. Seton, 7 Ves. Jr. 265; Butcher v. Nash, 61 L. T. N. S. 72.

So, under a statute in that form, it has been held or declared that an action at law may be maintained by the vendor or owner who did not sign a contract relating to real property, against the vendee or other party who did sign. Oliver v. Alabama Gold L. Ins. Co. 82 Ala. 417, 2 So. 445 (action for rent); Byers v. Aiken, 5 Ark. 419 (action for purchase price); Drennen v. Boyer, 5 Ark. 497; Browning v. Walbrun, 45 Mo. 477 (action for breach of agreement to accept premises and pay rent); Booklovers' Library v. Bogigian, 193 Mass. 444, 79 N. E. 769 (action to recover damages for breach of contract to take a lease of premises); Crutchfield v. Donathon, 49 Tex. 691, 30 Am. Rep. 112 (obiter); Anderson v. Tinsley (Tex. Civ. App.) 28 S. W. 121 (action for damages for breach of contract to purchase land); Laythoarp v. Bryant, 2 Bing. N. C. 735 (action for damages for refusal to pay for leasehold premises).

In Vyers v. Aiken and Drennen v. Boyer, supra, the actions were on bonds given for the purchase price, and the decisions perhaps rest on the ground that the defendant in such an action cannot avail himself of the statute of frauds, rather than on the ground that the statute is satisfied if the party against whom the contract is sought to be enforced has signed.

In Oliver v. Alabama Gold L. Ins. Co. supra, the action was upon a promissory note

ject, in respect of a party—that is, either party—who does not charge himself by his signature to it, after it has been reduced to writing.” *Simms v. Killian*, 34 N. C. (12 Ired. L.) 252.

In 1830 the state of New York changed the language of the English statute, and enacted the following: “A contract for the leasing for a longer period than one year, or for the sale of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration in writing, be subscribed by the lessor or grantor, or by his lawfully authorized agent.” In 1850 the state of California passed an act concerning fraudulent conveyances and contracts (Stat. 1850, chap. 114, p. 267, § 8),

for rent, given by defendant, but the court seems to treat the question the same as if the action had been to enforce a contract in relation to real property, and the decision is referred to the doctrine that only the party sought to be charged need sign.

As pointed out in IV., *supra*, some of the states, while preserving the language of the 17th section of the original statute without substantial modification, have entirely changed the 4th section in relation to contracts in regard to real property, and have substituted in place of the requirement that a contract, or note or memorandum thereof, shall be signed by the “party to be charged,” an express requirement that the contract shall be signed by the owner of the property, or by the party by whom the sale is to be made. This change was made in New York by the Revision of 1831, and the example of New York in that respect has been followed in some other states. Under this form of statute it has been expressly held that the vendor or owner of the property who has not signed cannot maintain an action thereon against the vendee or other party who has signed. *Maynard v. Brown*, 41 Mich. 298, 2 N. W. 30; *McWhorter v. McMahan*, 10 Paige, 386; *Champlin v. Parish*, 11 Paige, 405; *Miller v. Pelletier*, 4 Edw. Ch. 102; *DeBeerski v. Paige*, 47 Barb. 172, affirmed in 36 N. Y. 537; *Laughran v. Smith*, 75 N. Y. 205.

The same result clearly follows under a statute which in terms requires the contract, or note or memorandum thereof, to be signed by the “party to be charged,” if, as in Kentucky and Tennessee, that phrase is by judicial construction deemed to mean the vendor or owner of the property, as such, irrespective of whether the contract is sought to be enforced by or against him. There seems to be no case in Kentucky in which this precise situation has been presented; but in *Frazer v. Ford*, 2 Head, 464, the view that the “party to be charged” is the vendor or owner of the property, as such, irrespective of whether the contract is sought to be enforced by or against him, was specifically applied by denying the right of the vendors, some of whom had not signed the contract, 23 L.R.A. (N.S.)

which declared: “Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made.” This was an express and admitted adaptation of the New York statute. In turn, a similar statute was adopted by the states of Wisconsin, Nebraska, Michigan, and Montana,—all of the states upon whose decisions appellant leans to support his contention. It must be apparent that the language of the courts in construing a statute which requires only that the contract shall be signed by the vendor can have no weight,

to maintain a suit for specific performance of a contract for the sale of real property, against the vendee, who had signed.

2. Contracts for sale of goods.

Under the rule that the phrase, “party to be charged,” or “parties to be charged,” means the party or parties sought to be charged in the suit, it has been specifically held or declared that a contract for the sale of chattels within the statute of frauds may be enforced by the seller who did not sign against the purchaser who did sign. In *Re Neff*, ante, 349, 84 C. C. A. 561, 157 Fed. 57; *Schaefer v. Whitman* (Iowa) 124 N. W. 763 (*obiter*); *Barstow v. Gray*, 3 Me. 409; *J. I. Case Threshing Mach. Co. v. Smith*, 16 Or. 381, 18 Pac. 641 (*obiter*); *Wemple v. Knopf*, 15 Minn. 440, Gil. 355, 2 Am. Rep. 147; *Kessler v. Smith*, 42 Minn. 494, 44 N. W. 794; *Cunningham v. Williams*, 43 Mo. App. 629; *Clason v. Bailey*, 14 Johns. 485 (*obiter*); *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Penniman v. Hartshorn*, 13 Mass. 87; *Egerton v. Mathews*, 6 East, 307. See *Dykers v. Townsend*, 24 N. Y. 57, *supra*.

In *McIlroy v. Richards*, 148 Mich. 604, 112 N. W. 489, however, a contract signed by defendant only, and not to be performed within one year, whereby he agreed to purchase certain shares of stock, was held bad under the statute of frauds, and insufficient to sustain an action, because not signed by the plaintiff. The court relied on *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139. This case is clearly opposed to the weight of authority.

Some of the cases sustaining the right of the seller under these circumstances may have been decided under a form of statute employing the phrase, “party to be charged,” rather than the phrase, “parties to be charged,” as employed in the 17th section of the original statute of frauds and perjuries in relation to goods, wares, and merchandise. But, as shown in I., *supra*, the courts are practically agreed that no distinction can be based on the difference of the language in this respect.

either by way of reasoning or authority, in a case where a statute requires that the contract must be signed by the party to be charged. Such is the situation touching the last two of the cases from this state, relied upon by appellant. *Joseph v. Holt*, supra, was decided under the law expressed in the Statutes of 1850. Its language is: "To take a contract for the sale of land out of the statute of frauds, a mere note or memorandum in writing, subscribed by the vendor or his agent, containing the names of the parties and a summary statement of the terms of the sale, . . . is all that is required." This language is strictly true with reference to the statute as it then stood. So, in *Rutenberg v. Main*, supra, the same remark is applicable to the court's

language when it states: "The statute only requires that the memorandum of sale of real property shall be signed by the vendor or his agent. Act concerning fraudulent conveyances, §§ 8, 9."

As an essential of every contract there must be an agreement and meeting of minds. Thus, the agreement must precede the signature to the contract, however speedily thereafter such signature may follow. Before the statute of frauds, an oral agreement could be proved against either party. The statute of frauds in no way interfered, or attempted to interfere, with the antecedent oral agreement, but, in effect, declared a rule of evidence that such agreement could not be proved unless the essentials of it had been reduced to writ-

These cases doubtless assume that the contract was not mutual in the sense that an action could have been maintained thereon by the purchaser who did sign, against the seller who did not.

But in *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535, the court said that where the sellers of goods accepted a written contract signed by the purchaser as a contract, they become bound by its terms and conditions as completely as if they had in form signed the paper. The action in this case, however, was by the sellers, who did not sign the contract, against the purchasers, who did, to recover the purchase price, and the statement of the court was made in considering the question whether the action was one founded upon a written contract within the statute of limitations.

b. Vendee who did not sign against vendor who did.

1. Contracts as to real property.

Since, as stated in I., supra, it is now established beyond question that a statute providing that a contract, or note or memorandum thereof, must be signed by the "party to be charged" or "parties to be charged," does not require signing by both parties, it is clear that a vendee, or other party, who contracts with the owner of land, in relation thereto, may, if the latter has signed, maintain a suit for specific performance, although he himself did not sign. *Moses v. McClain*, 82 Ala. 370, 2 So. 741; *Ross v. Parks*, 93 Ala. 153, 11 L.R.A. 148, 30 Am. St. Rep. 47, 8 So. 368; *Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42, 80 S. W. 574; *Farwell v. Lowther*, 18 Ill. 252; *Esmay v. Gorton*, 18 Ill. 483; *Perkins v. Hadsell*, 50 Ill. 216; *Estes v. Furlong*, 59 Ill. 298; *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118; *Fortham v. Deters*, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97; *Ullsperger v. Meyer*, 217 Ill. 262, 2 L.R.A. (N.S.) 221, 75 N. E. 482, 3 A. & E. Ann. Cas. 1032; *Barickman v. Kuykendall*, 6 Blackf. 21 (impliedly); *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880; *Breen v. Mayne*, 141

Iowa, 399, 118 N. W. 441; *Becker v. Mason*, 30 Kan. 697, 2 Pac. 850 (*obiter*); *Ross v. Allen*, 45 Kan. 231, 10 L.R.A. 835, 25 Pac. 570; *Newton v. Lyon*, 62 Kan. 306, 62 Pac. 1000; *Engler v. Garrett*, 100 Md. 387, 59 Atl. 648; *Slater v. Smith*, 117 Mass. 96; *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415; *Peevey v. Haughton*, 72 Miss. 918, 48 Am. St. Rep. 592, 17 So. 378, 18 So. 357; *Mastin v. Grimes*, 88 Mo. 478; *Houghwort v. Boisaubin*, 18 N. J. Eq. 315; *Richards v. Green*, 23 N. J. Eq. 536; *Stengel v. Sargeant*, 74 N. J. Eq. 70, 68 Atl. 1106; *Charlton v. Columbia Real Estate Co.* 67 N. J. Eq. 629, 69 L.R.A. 394, 110 Am. St. Rep. 495, 60 Atl. 192, 3 A. & E. Ann. Cas. 402; *Durham Consol. Land & Improv. Co. v. Guthrie*, 116 N. C. 381, 21 S. E. 952 (by implication); *Dennis Simmons Lumber Co. v. Corey*, 140 N. C. 462, 6 L.R.A. (N.S.) 468, 53 S. E. 300; *Davis v. Martin*, 146 N. C. 281, 59 S. E. 700; *Thayer v. Luce*, 22 Ohio St. 62; *Flegel v. Dowling*, 54 Or. 40, 102 Pac. 178; *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500; *Church of Advent v. Farrow*, 7 Rich. Eq. 378; *Sams v. Fripp*, 10 Rich. Eq. 447; *Peay v. Seigler*, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885 (impliedly); *McPherson v. Fargo*, 10 S. D. 611, 66 Am. St. Rep. 723, 74 N. W. 1057; *Morris v. Gaines*, 82 Tex. 255, 17 S. W. 538; *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227 (impliedly); *Western Timber Co. v. Kalama River Lumber Co.* 42 Wash. 620, 6 L.R.A. (N.S.) 397, 114 Am. St. Rep. 137, 85 Pac. 338, 7 A. & E. Ann. Cas. 667; *Monongah Coal & Coke Co. v. Fleming*, 42 W. Va. 538, 26 S. E. 201; *Fowle v. Freeman*, 9 Ves. Jr. 351; *Martin v. Mitchell*, 2 Jac. & W. 413; *Dowell v. Dew*, 1 Younge & C. Ch. Cas. 345; *Backhouse v. Mohun*, 3 Swanst. 434, note; *Field v. Boland*, 1 Drury & Walsh, 37. (But see I., supra, as to specific performance viewed as a matter of discretion.)

In *Shirley v. Shirley*, 7 Blackf. 452, it was held that the vendee, who did not sign, could maintain a suit against the vendor, who did, to enforce a vendee's lien.

And in *Trulock v. Parse*, 83 Ark. 149, 11 L.R.A. (N.S.) 924, 103 S. W. 166, where de-

ing, and signed by the party to be charged. By the English statute, the party to be charged was either of the parties against whom enforcement of the contract was sought; but by the statute of California, until the reversion to the English statute, which took place in 1873-74, and by the statutes of New York, Wisconsin, and the other states whose law in this regard is like the early law of California, the statute of frauds was satisfied if the vendor of the property alone signed the contract. There was no such requirement as to the vendee, and, consequently, against him, proof of its acceptance could rest in parol. Hence the repeated declarations from the courts of those states,—like the declarations above quoted from the early decisions of this

state,—to the effect that the statute is satisfied if the memorandum be signed by the vendor. The statute was satisfied because all that it required was that the vendor alone should sign; hence the inapplicability of the decisions of those states to our existing law. *Guthrie v. Anderson*, 47 Kan. 383, 28 Pac. 164. But in all of the states like California to-day, where the statute requires the signature of the party to be charged, when effort is made to charge the vendee, it is uniformly held that the signature of the vendor plaintiff is not sufficient, but that the signature of the defendant vendee is absolutely essential, saving in the exceptional class of cases where the conduct of the vendee has amounted to such a performance, or part performance, of the con-

feudant in a suit to enjoin interference with complainant's wall relied on an agreement signed by the latter only, it was held that defendant's signature was unnecessary, since the agreement obligated him to do nothing, but merely gave him a right to use the wall.

In *Bogle v. Jarvis*, 58 Kan. 76, 48 Pac. 558, holding that an offer to sell, signed by the vendor, and accepted orally by the purchaser, was available to the latter as a defense to ejectment brought by the vendor, there had been part performance by part payment of the purchase price, and taking possession.

In a few of these cases, if they stood alone, it might be difficult to determine whether the courts were of the opinion that the "party to be charged" is the party sought to be charged in the suit, irrespective of whether he is the vendor or vendee, or whether that phrase means the vendor or owner, as such, irrespective of whether the contract is sought to be enforced by or against him. Thus, for example, in *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661, the court said that the "party to be charged" or the vendor must sign. And there is the same doubt in some of the other earlier Illinois cases. The result in these cases, of course, does not remove the doubt, since the party against whom the contract was sought to be enforced was the vendor or owner, so that the result would be the same in either view. In the later Illinois cases, however, it is made clear that the reason the suit can be maintained under these circumstances is not that the vendor or owner, as such, has signed, but that the party against whom the contract is sought to be enforced has signed. And this is true of practically all of the jurisdictions represented by the cases just cited.

The fact that in the situation now considered (i. e., where the vendee who did not sign seeks to enforce the contract against the vendor who did sign) it is immaterial which view of the phrase, "party to be charged," is taken, so long as it is conceded that that phrase does not require both parties to sign, is illustrated by a Kentucky case (*Lloyd v. O'Rear*, 22 Ky. L. Rep. 1000, 28 L.R.A.(N.S.)

59 S. W. 483) and a Tennessee case (*Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. Rep. 800, 4 S. W. 835), holding that the vendee who did not sign may enforce specific performance against the vendor who did, although, as already shown (*supra*, III.), in those two jurisdictions the view prevails, contrary to the great weight of authority elsewhere, that the "party to be charged" is the vendor or owner of the property, as such, and not necessarily the party against whom the contract is sought to be enforced. See also *Curtis v. Blair*, 26 Miss. 309, 59 Am. Dec. 257, *supra*, III.

In *Acree v. Rozzell*, 32 Ky. L. Rep. 1342, 108 S. W. 846, holding that a contract in relation to real property, signed by the owner's agent, satisfied the statute of frauds, the nature of the action does not clearly appear but it does appear that the contract was successfully asserted by the vendee, who apparently did not sign it, against a subsequent grantee of the vendor. *Curtis v. Blair*, 26 Miss. 309, 59 Am. Dec. 257, *supra*, III.

The intimation of Chancellor Kent in *Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484, that lack of mutuality would prevent the specific performance at the instance of the vendee, where the contract was signed only by the vendor, has been overruled by the later cases in New York, although, as already shown, Chancellor Kent, while deferring to the weight of authority, still persisted in the doubt intimated in this case.

It is clear, of course, that under a statute requiring a contract, or note or memorandum thereof, to be signed by the "party to be charged," a vendee or other party who did not sign may maintain an action at law against the vendor or owner, upon a contract in regard to real property, signed by the latter. To that effect are *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515 (action for damages for breach of contract); *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280 (action to recover money paid on purchase price); *Black v. Crowther*, 74 Mo. App. 480 (action for damages for breach of contract); *Mizell v. Burnett*, 49 N. C. (4 Jones, L.) 249, 69

tract, as to relieve the contract from the necessity of his signature.

Nor is there any weight to the objection of lack of mutuality which follows this interpretation of the law. Such objection was early made by Lord Chancellor Redesdale in *Lawrenson v. Butler*, 1 Sch. & Lef. 13. It was considered a valid objection by Chancellor Kent in *Clason v. Bailey*, 14 Johns. 484, but, as pointed out in *Vassault v. Edwards*, 43 Cal. 458, the courts refused to hold it tenable. Says Parsons (Parsons, Contr. §§ 9, 10): The difficulty, therefore, cannot be that the contract is not mutual, but that one of the parties has not obtained the evidence which the statute requires him to produce to bind the other. In *Chitty on Contracts*, 8th Am. ed. 4, note, it is said

that the reason why a party may sue on a contract, although it may be void against him for want of his signature, under the statute of frauds, is that the signature is prescribed as "necessary evidence of a contract," and not as an essential or constituent part of the engagement itself. In equitable theory, the requirement of mutuality of remedy is satisfied when the nonsigning plaintiff enters suit, since, by the very bringing of his action, he binds himself to abide by the decree of the court in chancery, and so empowers that court to decree specific performance against him. The commencement of his action is his offer to perform, and the precise situation is met and covered by the provisions of § 3388 of the Civil Code, which declares that "a party

Am. Dec. 744 (assumpsit); *Cosack v. Descoudres*, 1 M'Cord, L. 425, 10 Am. Dec. 681 (action for damages for breach of contract); *Wharton v. Tolbert*, 84 S. C. 197, 65 S. E. 1056 (action for damages for breach of contract); *Bailey v. Leishman*, 32 Utah, 123, 89 Pac. 78, 13 A. & E. Ann. Cas. 1116 (see supra, III., as to this case).

In *Wharton v. Tolbert*, supra, the court expressly repudiated the contention made by counsel, that it is only in actions for specific performance that the party who did not sign may enforce the contract against the party who did sign.

So, of course, under a statute which in terms requires the contract to be subscribed by the party by whom the sale is to be made, the contract may be enforced or asserted at the instance of the vendee or party who did not sign, against the vendor or owner of the property, who did sign. *Vassault v. Edwards*, 43 Cal. 458 (the California statute was subsequently changed so as to require the contract to be signed by the party to be charged, as under the 4th section of the original English statute); *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360; *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; *M'Crea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Gartrell v. Stafford*, 12 Neb. 545, 41 Am. Rep. 767, 11 N. W. 732; *Robinson v. Cheney*, 17 Neb. 673, 24 N. W. 378; *Pettibone v. Moore*, 75 Hun, 461, 27 N. Y. Supp. 455; *Quinto v. Alexander*, 123 App. Div. 1, 107 N. Y. Supp. 422; *Boehly v. Mansing*, 52 Misc. 382, 102 N. Y. Supp. 171; *Caren v. Liebovitz*, 113 App. Div. 674, 99 N. Y. Supp. 952 (impliedly); *Cheney v. Cook*, 7 Wis. 413; *Docter v. Hellberg*, 65 Wis. 415, 27 N. W. 176.

In *Wardell v. Williams*, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796, recovery was denied in an action at law by the vendee, who did not sign, against the vendor, who did, to recover damages for breach of a contract, because, by the terms of the contract, the vendee was to give back a mortgage on the property. The court likened the case to an agreement for the exchange of lands.

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In *Parish v. Koons*, 1 Pars. Sel. Eq. Cas. 79, it was held that specific performance would not lie at the instance of the vendee, who did not sign, against the vendor, who did. The objections to this decision are stated in IV., supra. The right of the vendee, who did not sign, to enforce specific performance against the vendor, who did, was assumed in *Re Eargood*, 1 Pearson (Pa.) 399 (though specific performance was denied for other reasons), and was expressly held in *M'Farson's Appeal*, 11 Pa. 503. And in *Smith's Appeal*, 69 Pa. 475, the right of the vendee who does not sign to specific performance against the vendor who does is clearly recognized. The last case was a suit by the purchasers to enjoin the vendors from cutting timber on the land; but the court said that the question whether the plaintiffs had such a right or title in the land as would sustain the action by them depended on the question whether the contract, which was signed by the vendors only, could have been specifically enforced against the latter; and that question was answered in the affirmative.

So, under the Pennsylvania statute, it has been held that a contract signed by the vendor alone may be set up by the vendee as a defense in an action of ejectment by one claiming under the vendor. *Shoofstall v. Adams*, 2 Grant, Cas. 209; *Brodhead v. Reinbold*, 200 Pa. 618, 86 Am. St. Rep. 735, 50 Atl. 229.

And so, in *Witman v. Reading*, 191 Pa. 134, 43 Atl. 140, it was held that an indorsement, signed by the lessor, upon a lease, of an extension of the lease, though not signed by the lessee, and though the execution of a more formal writing was contemplated, was sufficient to establish the lessee's interest in the land, as against a third person, even assuming that the latter would have the same right as the lessor to plead the statute of limitations.

2. Contracts for sale of goods.

Whether the statute of frauds in relation to the sale of goods, wares, and merchandise employs the phrase of § 17 of the original

who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed or offers to perform it, on his part, and the case is otherwise proper for enforcing specific performance." *Bird v. Potter*, 146 Cal. 286, 79 Pac. 970. The decision of this court in *Scott v. Glenn*, 98 Cal. 168, 32 Pac. 983, must be construed by the light of this principle of mutuality of remedy, where the party not signing seeks the aid of the court. In *Scott v. Glenn*, the action was by the non-signing vendee to recover the portion of the purchase price paid by him on the vendor's failure to perform. The vendor, by cross complaint, alleged due tender of the deed, and demand and refusal of the pay-

ment of the balance due, and asked judgment that plaintiff be compelled to accept the deed, and pay the balance of the purchase price. It was there insisted that the contract was void against the vendee plaintiff because not signed by him. The court said that the vendor was the party to be charged, as he was in the original action, and that his signature to the contract, taken in connection with the delivery thereof to the vendee, and a partial payment thereunder, bound both parties. This was sufficiently accurate, perhaps, for the circumstances of the case, but in fact, while by the original action, the vendor, who had signed, was the party to be charged, by the cross complaint, the vendee, who had not signed, was the party to be charged; and

statute, "parties to be charged," or the phrase, "party to be charged," it is clear that a purchaser who has not signed may enforce the contract against the seller, who has signed, although the contract remains wholly executory, and there has been no delivery or part payment to take it out of the operation of the statute. *Linton v. Williams*, 25 Ga. 391; *Smith v. Smith*, 8 Blackf. 208; *Nebfaska Bridge Supply & Lumber Co. v. Conway*, 127 Iowa, 237, 103 N. W. 122; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Sanborn v. Flagler*, 9 Allen, 474; *Morrison v. Browne*, 191 Mass. 65, 77 N. E. 527; *Morin v. Martz*, 13 Minn. 191, Gil. 180; *Bowers v. Whitney*, 88 Minn. 168, 92 N. W. 540; *Russell v. Nicoll*, 3 Wend. 112, 20 Am. Dec. 670; *Davis v. Shields*, 26 Wend. 341; *Justice v. Lang*, 42 N. Y. 494, 1 Am. Rep. 576; *Bristol v. Mente*, 79 App. Div. 67, 80 N. Y. Supp. 52 (affirmed in 178 N. Y. 599, 70 N. E. 1096); *Napier v. French*, 8 Jones & S. 122; *West v. Newton*, 1 Duer, 277; *Weidmann v. Champion*, 12 Daly, 522; *Fenly v. Stewart*, 5 Sandf. 101; *Brooklyn Oil Refinery Co. v. Brown*, 38 How. Pr. 444; *Douglass v. Spears*, 2 Nott & M'C. 207, 10 Am. Dec. 598; *Hodson v. Carter*, 3 Pinney (Wis.) 212.

Of course, this would be true even if the courts were of the opinion that the phrase, "party to be charged," or "parties to be charged," means the seller or sellers, irrespective of whether the contract is sought to be enforced by or against them. (See *Bailey v. Leishman*, 32 Utah, 123, 89 Pac. 78, 13 A. & E. Ann. Cas. 1116, supra, III.)

The New York superior court, in *Justice v. Lang*, 2 Robt. 333, denied recovery in such an action, upon the ground that the contract, note or memorandum, must be signed by both parties; and before that case had been reversed by the court of appeals (42 N. Y. 493, 1 Am. Rep. 576) the decision of the superior court had been followed by other cases in that court (*Marcus v. Barnard*, 4 Robt. 219; *Johnson v. Mulry*, 4 Robt. 401; *Dilworth v. Bostwick*, 1 Sweeney, 581). These cases were, of course, overruled by the decision of the court of appeals in *Justice v. Lang*, 42 N. Y. 494, 1 28 L.R.A.(N.S.)

Am. Rep. 576. The latter case again came before the court of appeals (52 N. Y. 323) upon a new appeal, and Allen, J., who wrote the opinion on the new appeal, while disclaiming any intention on the part of the court to modify the decision on the first appeal, that the signing of the contract by the defendant was sufficient to satisfy the statute of frauds, took occasion to say that he was inclined to question the correctness of the decision on principle. The decision, however, reversing a judgment for plaintiff, was not upon the ground that the plaintiff had not signed the contract, but that the question whether he had assented to the contract at all as a contract binding on him should, under the facts of the case, have been submitted to the jury, the paper signed by the defendant being unilateral in form as well as execution.

In *Roget v. Merritt*, 2 Caines, 117, where such an action was maintained, there are intimations in the opinion that the result was referable to the doctrine that the "party to be charged" on such a contract was the seller, and that he had signed. This view, if it was entertained, is contrary to the rule established by many later New York cases.

See also *Corbitt v. Salem Gaslight Co.* 6 Or. 405, 25 Am. Rep. 541, supra, I., and *Lanz v. McLaughlin*, 14 Minn. 72, Gil. 55, supra, I., *Necessity of actual assent by party who does not sign.*

c. Vendor who did sign against vendee who did not.

1. Contracts as to real property.

Under the prevailing view, that the "party to be charged" or the "parties to be charged" is the party or parties against whom the contract is sought to be enforced in the particular action or suit, and not the vendor or owner of the property, as such, it is clear that the fact that the vendor or owner signed the contract, or a note or memorandum thereof, is not sufficient, in the absence of part performance, to enable him to maintain either a suit in equity

since the vendee had sought the aid of the court for a recovery growing out of this contract, he made the remedy mutual, and bound himself by his action to abide the judgment of equity upon the whole matter.

But where, as in this case, the contract is wholly executory, and the evidence of it amounts to nothing more than a receipt, signed by the vendor, and the alleged part performance is nothing more than the payment of a small amount of money by the nonsigning vendee, and the acceptance of a receipt therefor, no case can be found which holds such to be sufficient part performance to relieve from the statute of frauds. In precise point upon this matter is *Guthrie v. Anderson*, *supra*. The statute of Kansas, in which state the case arose, is

or an action at law upon the contract against the other party who did not sign the same.

Thus, under a statute requiring the contract to be signed by the "party to be charged," it has been held or clearly recognized that, in the absence of part performance, a vendor who has signed cannot maintain a suit to enforce specific performance by the vendee of a contract for the purchase of real property. *HARPER v. GOLDSCHMIDT*; *Kingsbury v. Cornelison*, 122 Ill. App. 495; *Hall v. Misenheimer*, 137 N. C. 183, 107 Am. St. Rep. 474, 49 S. E. 104; *Moore v. Powell*, 6 Tex. Civ. App. 43, 25 S. W. 472; *Capeheart v. Hale*, 6 W. Va. 547; *Steenrod v. Wheeling, P. & B. R. Co.* 27 W. Va. 1.

So, under a statute in this form, a suit cannot be maintained to enforce the vendor's lien where the vendee did not sign the contract, or any note or memorandum thereof. *Heflin v. Milton*, 69 Ala. 354.

Upon its face, *Gardels v. Klocke*, 36 Neb. 493, 54 N. W. 834, would seem to be authority for the position that the vendor who did sign could maintain a suit against the vendee who did not, to foreclose the contract, as it is stated in effect that the Nebraska statute embodies the provision of the original statute, requiring the contract to be signed by the "party to be charged." This, however, was a mistake, as the requirement of the Nebraska statute was that the contract must be signed by the party by whom the sale is to be made. Under that form of statute, the decision that the vendor could maintain the suit was right (see cases subsequently cited in this subdivision); but if, as the court apparently assumed, the statute had been in the form of the 4th section of the original English statute, the decision would have been against the clear weight of authority, and would have been clearly wrong, unless the court had adopted the Kentucky and Tennessee view of the phrase, "party to be charged."

Under a statute requiring the contract,

identical with our own. The necessity of the signature of the party to be charged was pointed out, together with the inapplicability of the decisions of states such as New York and Wisconsin, whose laws differ from our own. It was shown that the statute is satisfied, and the nonsigning defendant is held, where the contract has been executed upon the part of the vendor, or lessor, by the giving of a deed or lease, which has been accepted by the vendee or lessee. *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Wilkinson v. Scott*, 17 Mam. 249; *Wood, Fr.* §§ 222, 223. In such a case, the contract has been wholly executed by the one party, and the acceptance of the deed or lease is consistently held to be a sufficient part performance to charge the

or note or memorandum thereof, to be signed by the "party to be charged," it has been held or clearly recognized that a vendor who did sign cannot maintain an action at law to recover the purchase price against the vendee who did not sign. *Montgomery v. Waldeck*, 2 Alaska, 581; *Smith v. Jones*, 66 Ga. 338, 42 Am. Rep. 72; *Wilson v. Miller*, 42 Ill. App. 332 (reversed in 146 Ill. 523, 37 Am. St. Rep. 186, 34 N. E. 1111 on another ground); *Guthrie v. Anderson*, 49 Kan. 416, 30 Pac. 459; *O'Donnell v. Brehen*, 36 N. J. L. 257; *Rice v. Carter*, 33 N. C. (11 Ired. L.) 298; *Simms v. Killian*, 34 N. C. (12 Ired. L.) 253; *Love v. Atkinson*, 131 N. C. 544, 42 S. E. 966; *Miller v. Carolina Monazite Co.* 152 N. C. 608, 68 S. E. 1.

It is apparent, however, that if, as in Kentucky, the courts take the view that the phrase, "party to be charged," in relation to a contract concerning real property, means the vendor or owner, the statute is satisfied if the contract is signed by the vendor, although not signed by the vendee; and where this view of the statute prevails, the vendor who has signed may maintain an action or suit on the contract against the vendee who has not signed. This is expressly held in *MURRAY v. CRAWFORD*; *Moore v. Chenault*, 16 Ky. L. Rep. 531, 29 S. W. 140 (action for purchase price).

In *Garth v. Davis*, 120 Ky. 106, 117 Am. St. Rep. 571, 85 S. W. 692, the case was disposed of on the ground that the auctioneer's memorandum bound both parties,—a point not within the scope of this note.

And so, under a statute which in terms provides that the contract shall be signed by the owner or party by whom the sale is to be made, the vendor who has signed may maintain an action or suit against the vendee who has not signed. *Ehrmantraut v. Robinson*, 52 Minn. 333, 54 N. W. 188; *Bleecker v. Franklin*, 2 E. D. Smith, 93 (impliedly); *Reilly v. Steinhart*, 126 App. Div. 909, 110 N. Y. Supp. 1142 (action for purchase price); *Wright v. Mischo*, 20 Jones & S. 241 (relief denied because not

other party. So, also, in case of executory contracts, where the nonsigning vendee enters into possession, or exercises dominion in other ways over the land, it is held that this amounts to such a part performance as will bind the nonsigning vendee. But where the act of the vendee is no more than the payment of a small amount of the purchase price, and the acceptance of a receipt for that amount, leaving all of the rest of the contract executory, both upon his part and upon the part of the vendor, no case has been pointed out which holds such acts to amount to a part performance which will bind the vendee. His refusal "to complete the contract after paying part of the purchase money would be no fraud upon the seller, but his own loss." Fry, Spec.

shown that vendee had accepted instrument as a contract, verbal or otherwise); *Earl v. Campbell*, 14 How. Pr. 330 (specific performance); *Rutenberg v. Main*, 47 Cal. 213 (implied); *Lowber v. Connit*, 36 Wis. 176 (specific performance); *Vilas v. Dickinson*, 13 Wis. 489 (implied); and see *Gardels v. Klope*, 36 Neb. 493, 54 N. W. 834, *supra*.

So, under the Pennsylvania statute which requires the writing to be signed by the party granting the interest in real property, it has been held that signing by the vendor alone is sufficient to sustain an action at law by him against the vendee, to recover the purchase money. *Lowry v. Mehaffy*, 10 Watts, 387; *Tripp v. Bishop*, 56 Pa. 424; *Johnston v. Cowan*, 59 Pa. 275.

2. Contracts for sale of goods.

Under a statute requiring the contract, or note or memorandum thereof, for the sale of goods, to be signed by the "party to be charged" or the "parties to be charged," it has been held or clearly recognized that an action cannot be maintained upon the contract, in the absence of part payment or delivery to take the case out of the statute, by the seller of the goods, who did sign, against the purchaser, who did not. *Dupuy v. Macleod* (Cal.) 33 Pac. 1115 (taken out of the statute by part delivery); *Groover v. Warfield*, 50 Ga. 644; *Newby v. Rogers*, 40 Ind. 9; *Boardman v. Spooner*, 13 Allen, 353, 90 Am. Dec. 106; *Becker v. Calmenson*, 102 Minn. 406, 113 N. W. 1014; *Bailey v. Ogden*, 3 Johns, 399, 3 Am. Dec. 509; *Rayner v. Linthorne*, 2 Car. & P. 124.

Cases like *Cook v. Anderson*, 20 Ind. 15, in which the action was taken out of the statute of frauds by part payment or delivery, are, of course, not opposed to the decisions in the above cases.

In *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576, where the action was by the purchasers, who did not sign, against the sellers, who did sign, and therefore, so far as the decision is concerned, belongs to 28 L.R.A.(N.S.)

Perf. §. 567. It is held, therefore, that in this case there was no such part performance as the law contemplates.

The questions here presented arose properly, and were properly decided, upon demurrer. "Whenever it appears from the face of the declaration, bill, or complaint, that the agreement sued upon is within the statute of frauds, and fails to comply with the requirements thereof, the appropriate mode of taking advantage of the defect is by demurrer." 9 Enc. Pl. & Pr. p. 704, and cases.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: **Melvin, J.; Lorigan, J.**

V. b. 2, Lott, J., who spoke for the court, and reached the conclusion, after a long discussion and an elaborate consideration of the cases, that the "parties to be charged" as used in the 17th section of the original statute, and the state statutes modeled thereon, are the party or parties sought to be charged in the suit, and that the statute does not require both parties to sign, remarked, before entering upon the discussion of the objection of want of mutuality which arises in that view of the statute: "It is true that the party who does not sign or subscribe it may not be liable thereon in an action, as to which I deem it unnecessary to express an opinion." It is not clear why the learned justice should have entertained any doubt upon the point. His conclusion that the "parties to be charged" are the parties sought to be charged in the action seems by logical necessity to involve the result that the contract cannot be enforced against the party who did not sign, by the party who did sign.

d. Vendee who did sign against vendor who did not.

It is clear that a vendee who did sign may not, in the absence of part performance taking the case out of the statute of frauds, enforce the contract against the vendor, who did not sign, and this is true whether the court adheres to the doctrine, sustained by the weight of authority, that the "party to be charged" is the party sought to be charged in the action or suit, or whether that view has been abrogated in the particular jurisdiction by statutory provisions requiring the contract to be signed by the owner, or, as in Kentucky and Tennessee, by judicial construction of the phrase, "party to be charged," to mean the vendor or owner. It has been expressly so held in *King v. Cheatham*, 31 Ky. L. Rep. 1176, 104 S. W. 751; *Taylor v. R. D. Scott & Co.* 149 Mich. 525, 113 N. W. 32; *Haydock v. Stow*, 40 N. Y. 363.

G. H. P.

IOWA SUPREME COURT.

SARAH I. SLATER

v.

EDMUND H. ROCHE.

(— Iowa, —, 126 N. W. 925.)

Action — service by publication — when commenced.

1. In case process is served by publication, the action is not commenced, for the purpose of determining whether or not it is within the time allowed by the statute of limitations, until the publication is completed.

Same — attachment — effect.

2. An action to subject property of a nonresident to payment of a judgment against him is, for the purpose of determining whether or not it is within the time allowed by the statute of limitations, commenced when the property is attached.

Evidence — judicial notice — proceedings in case.

3. To warrant a judgment in a proceeding commenced by attachment, the attachment and return need not be offered in evidence, since the court may take judicial notice of them.

Note. — When action based on service by publication deemed to be commenced, for purpose of statute of limitations.

Little authority has been disclosed upon the question here considered. No case has been found which holds an action to be commenced for this purpose before the filing of the petition and affidavit required in cases of service by publication.

Thus, in *Bisbee v. Evans*, 17 Fed. 474, an action to foreclose a vendor's lien was held barred by limitations although the complainants' bill was filed before the expiration of the period of limitations, but was not sworn to, or the necessary affidavit for the issuance of a warning order against the nonresident defendant made, until after the expiration of the period of limitations.

And in *Bates v. Smith*, 80 Tex. 242, 16 S. W. 47, where the plaintiff filed his petition in a suit on a note within the period of limitations, but instructed the clerk not to issue citation until later, on account of negotiations for a settlement, and no citation issued until after the lapse of the period of limitations, the action was held barred. It does not appear clearly, however, whether the citation referred to in this case was by publication.

In *Hoffman v. Brungs*, 83 Ky. 400, it was held that an action to foreclose a mortgage, claimed to be constructively fraudulent, was commenced within the six months allowed, where a warning order was entered as to a nonresident within that period.

The question of when an action is deemed commenced is regulated by statute in some states.

28 L.R.A.(N.S.)

Limitation of actions — attached property — appearance of owner.

4. The appearance of a nonresident defendant in an action after the limitation period has run will not deprive plaintiff of the right to a judgment against property which he attached within the limitation period, although defendant is no longer subject to a personal judgment.

Same — appearance after bar — effect.

5. The appearance of a nonresident defendant in an action commenced by attachment, after the limitation period has elapsed, does not authorize a personal judgment against him, where process was not served upon him within the limitation period.

(June 16, 1910.)

CROSS-APPEALS from a judgment of the District Court for Polk County in plaintiff's favor in an action brought to recover the amount alleged to be due upon a certain foreign judgment, and to reach certain assets by attachment; defendant appealing from so much of the judgment as subjected the attached property to the payment of the foreign judgment, and plaintiff

Thus, the statute in Indiana provides that a civil action shall be commenced as to those against whom publication is made "from the time of the first publication;" and where the first publication is not made until the expiration of the period of limitations, the action is barred. *Wood v. Bissell*, 108 Ind. 229, 9 N. E. 425.

So, in Nebraska, the statute provides that an action where service is by publication "shall be deemed commenced at the date of the first publication;" and where the affidavit for service by publication against a nonresident purchaser of property is not filed before the expiration of the two years allowed to foreclose a mechanics' lien, the action is barred. *Pickens v. Polk*, 42 Neb. 267, 60 N. W. 566.

The Code in Oregon provides that an attempt to commence an action shall be deemed equivalent to its commencement when the complaint is filed and summons delivered, with the intention that it shall be actually served; "but such an attempt shall be followed by the first publication of the summons, or service thereof, within sixty days;" and where the first publication is not attempted until after the expiration of the period of limitations, the action is barred. *Dutro v. Ladd*, 50 Or. 120, 91 Pac. 459.

The statute in Ohio provides that "where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication must be regularly made." *Robinson v. Orr*, 16 Ohio St. 284. This case does not involve the question of service by publication, but that of service by summons.

J. T. W.

appealing from so much as denied a personal judgment for the balance of the amount of the foreign judgment. Affirmed on both appeals.

Statement by Deemer, Ch. J.:

Action aided by attachment upon a foreign judgment. Defendant pleaded the statute of limitations. Upon trial to the court, judgment was rendered subjecting the attached property to the payment of the judgment, but denying a personal judgment against defendant for the remainder. Both parties appeal; but, as defendant first perfected his appeal, he will be called "appellant."

Messrs. Dunshee & Haines and C. R. Dorn, for plaintiff:

For the purposes of the attachment proceeding, the suit was commenced by the levy of the writ of attachment.

Hagan v. Burch, 8 Iowa, 309; Sweatt v. Faville, 23 Iowa, 321; Lacey v. Newcomb, 95 Iowa, 287, 63 N. W. 704; Fritz v. Fritz, 93 Iowa, 27, 61 N. W. 169.

It was not necessary that the writ of attachment and notice should be formally offered in evidence, as the court had a right to inspect its own record, and take judicial notice of it on its own motion.

Poole v. Seney, 70 Iowa, 275, 24 N. W. 520, 30 N. W. 634; Conlee Lumber Co. v. Meyer, 74 Iowa, 403, 38 N. W. 117; Dewey v. St. Albans Trust Co. 60 Vt. 1, 6 Am. St. Rep. 84, 12 Atl. 224; Denney v. State, 144 Ind. 503, 31 L.R.A. 726, 42 N. E. 929; Washington & I. R. Co. v. Coeur d'Alene R. & Nav. Co. 160 U. S. 101, 40 L. ed. 355, 16 Sup. Ct. Rep. 239.

The first publication of an original notice of suit against a nonresident is a commencement of the suit sufficient to prevent the bar of the statute of limitations.

25 Cyc. Law & Proc. p. 1292; Ross v. Luther, 4 Cow. 158, 15 Am. Dec. 344.

Messrs. Mulvaney & Mulvaney, for defendant:

An action is not deemed commenced wherein service is had by publication, until the publication of notice is completed, and proof thereof is made by the publisher.

Tunis v. Withrow, 10 Iowa, 305, 77 Am. Dec. 117; Littlejohn v. Bulles, 136 Iowa, 150, 113 N. W. 756; Bardsley v. Hines, 33 Iowa, 157.

The writ of attachment, with the return thereof, must be introduced in evidence; otherwise there can be no competent evidence before the court upon which to render judgment, as the return of the writ constitutes the statutory evidence as to what was done thereunder.

Rock v. Singmaster, 62 Iowa, 511, 17 N. 28 L.R.A.(N.S.)

W. 744; McDonald v. Moore, 65 Iowa, 171, 21 N. W. 504; 4 Cyc. Law & Proc. pp. 606, 607.

An attachment being merely a mode of security, if the original debt becomes extinguished, then the security must fail also, the same rule applying as in the case of a mortgage and the note or debt for which the same is given.

Clinton County v. Cox, 37 Iowa, 570; Brown v. Rockhold, 49 Iowa, 282.

A writ of attachment is not to compel the payment of a debt, but to secure a lien upon the defendant's property for the payment of any judgment which the plaintiff may recover in the main suit against him.

Carothers v. Click, Morris (Iowa) 54; 3 Am. & Eng. Enc. Law, 2d ed. p. 187.

Deemer, Ch. J., delivered the opinion of the court:

A judgment in favor of plaintiff and against the defendant was rendered by a district court of the state of Minnesota on the 8th day of December, 1897, for the sum of \$416.28. On the 23d day of November, 1907, plaintiff filed a petition in the district court of Polk county, Iowa, in which she asked judgment for the amount of the Minnesota judgment, with interest and costs. Alleging that defendant was a non-resident of the state, she asked and obtained a writ of attachment against the property of the defendant, which writ was issued, and upon the same day levied upon certain property of the defendant in Polk county, Iowa. Notice of the levy was immediately served upon the manager of a company in which defendant was interested. On November 26, 1907, a proper affidavit for publication of notice was filed, and on the 24th day of December proof of publication of notice was filed in the Polk county district court. The affidavit of publication showed that the notice was published November 27, December 4, December 11, and December 18, 1907. April 11, 1908, plaintiff filed an amendment to her petition and also a supplemental petition, and on May 4, 1908, she filed another amended and supplemental petition. Defendant appeared and filed answer October 31, 1908, in which, among other things, he pleaded the statute of limitations. He also pleaded a Minnesota statute reading as follows: "No action shall be maintained upon a judgment or decree of a court of the United States, or of any state or territory thereof, unless begun within ten years after the entry of such judgment." Rev. Laws 1905, chap. 77, § 4075.

A demurrer to defendant's answer and plea of abatement was overruled, and thereupon plaintiff filed a reply, in which, among other things, she pleaded a statute of Min-

nesota reading as follows: "If, when a cause of action accrues against a person, he is out of the state, an action may be commenced within the times herein limited after his return to the state; and if, after a cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action." Rev. Laws, § 4082. She further averred that, after the rendition of said judgment, the defendant departed from the state of Minnesota, and was absent from said state several years, by reason of which plaintiff's cause of action on said judgment was never fully barred by the laws of the state of Minnesota. Upon these issues the case was tried to the court, a jury being waived, resulting in a judgment condemning the attached property, and ordering it subjected to the payment of plaintiff's judgment for the sum of \$704.93, but denying plaintiff's prayer for personal judgment.

Appellant contends that, under the Minnesota statute first quoted, plaintiff's action was fully barred, and that the trial court erred in subjecting the attached property to the payment of the Minnesota judgment. Plaintiff contends that the court erred in not rendering personal judgment against the defendant for the full amount of the Minnesota judgment, with interest and costs. It is conceded that, at all times material to our inquiry, defendant was a non-resident of this state, and it is also conceded that, if this action was not commenced within ten years from the time of the rendition of the Minnesota judgment, this action is barred. Completed service of notice by publication was not had until December 18, 1907, which was more than ten years after the rendition of the Minnesota judgment, although the first two publications were made within that time. However, the writ of attachment was issued, levied, and returned within the ten years, although defendant did not personally appear until some months after the expiration of the ten-year period. It is contended that action was not commenced until the completion of the service of notice by publication. This seems to be the rule established by this court. *Littlejohn v. Bulles*, 136 Iowa, 150, 113 N. W. 756; *Bardsley v. Hines*, 33 Iowa, 157. Neither the filing of the petition nor of the affidavit for publication in themselves amounted to the commencement of the action, and, as completed service was not had until the expiration of the ten-year period, plaintiff's action is barred, unless it be for the fact that an attachment was sued out and levied upon defendant's property in this state before the expiration of the ten-year period. We have

held that, where an action is aided by attachment, it is to be deemed commenced when the petition is filed. *Hargan v. Burch*, 8 Iowa, 309. Again, in *Sweatt v. Faville*, 23 Iowa, 321, which was an action for an injunction, it was held that the action was commenced "at least when the writ was served," and was not barred although no notice was delivered to the sheriff or served within the statutory period. In *Lacey v. Newcomb*, 95 Iowa, 287, 63 N. W. 704, we held that the filing of a claim with an assignee for the benefit of creditors was the commencement of an action, and stopped the running of the statute of limitations. So, also, it has been held that the filing of a note with an administrator of an estate is the commencement of a suit. *Fritz v. Fritz*, 93 Iowa, 27, 61 N. W. 169. These cases by analogy point the way to the decision of this appeal. This action was to subject the property of a non-resident to the payment of a foreign judgment. It could only be done by attaching the property,—the *res*,—and when that was done the action was commenced within the meaning of the limitation statutes. Moreover, defendant's agent and manager was served with notice of the levy. We are constrained to hold that the action, in so far as it was brought to subject property to the payment of the judgment, was commenced when the property was levied upon, if not before, and that it is not barred by the statute.

2. But the appellant contends that plaintiff did not offer the writ of attachment or the return of the officer thereon in evidence, and that for this reason the trial court was in error in rendering any kind of judgment in the case. The writ was issued in the case on trial, and plaintiff was relying upon the issuance and service thereof in support of her claim. The trial court found that a writ was issued, and in its judgment copied the return made by the sheriff. It does not appear that defendant made the point upon which it now relies in the trial court; but if it did, no ground for reversal on this score appears. The court was justified in taking judicial notice of all the papers properly issued and filed or returned in the case. That it did take such notice is apparent from the record. This question of the right and duty of the court to take judicial notice of the papers and proceedings in the case on trial is fully considered in the recent case of *Haaren v. Mould* (Iowa) 24 L.R.A. (N.S.) 404, 122 N. W. 921. See also *Poole v. Seney*, 70 Iowa, 275, 24 N. W. 520, 30 N. W. 634; *State v. Olds*, 106 Iowa, 114, 76 N. W. 644; *Kenosha Stove Co. v. Shedd*, 82 Iowa, 544,

48 N. W. 933; Conlee Lumber Co. v. Meyer, 74 Iowa, 403, 38 N. W. 117.

The trial court found that the levy of the writ of attachment was sufficient to stop the running of the statute in so far as the attachment was concerned, but insufficient in so far as personal judgment was sought against the defendant, who was a nonresident. Defendant did not personally appear until after the statute of Minnesota had fully barred the claim, and he pleaded that statute as a bar to the cause of action. It was only by reason of his personal appearance that judgment might be rendered against him. At that time, however, the action against him personally was barred; hence, plaintiff had no right to a personal judgment. But it does not follow that plaintiff was not entitled to subject the property attached to the payment of the judgment. The action, in so far as the attachment is concerned, was *in rem*, or quasi *in rem*. In other words, it was an action to subject the property of a nonresident to the payment of a foreign judgment against him. This action, as we have seen, was commenced in time, and could proceed to judgment even though defendant did not appear. So that whether he appeared or not, plaintiff was entitled to subject the property. Defendant's appearance gave him no greater rights in this respect than if he had not appeared. Upon appearance, plaintiff would be entitled to personal judgment against him unless the right thereto was barred; but his appearance did not deprive plaintiff of the right to proceed with the attachment. As that action was not barred, the property could be subjected to the payment of the debt, although, by reason of the statute of limitations, no personal judgment could be obtained against the defendant. Defendant's counsel reason in a circle when they say that the attachment cannot be sustained, for the reason that there is no debt which can be enforced against the defendant. When the action was commenced, there was a debt which could be made the basis of an attachment suit, and nothing which defendant might do or fail to do would affect plaintiff's right to subject the property. Upon the levy of the writ, that right became fixed; and the statute, in so far as the right to subject the property to the payment of the debt is concerned, was suspended and ceased to run. It is not necessary that the debt be enforceable as a personal claim in order to justify the subjection of property to the payment thereof. If the action had been against a resident of this state, perhaps a different rule might apply. Upon that question we make no pronouncement at this time.

3. Plaintiff's appeal is based upon the 28 L.R.A.(N.S.)

holding of the trial court that she was not entitled to personal judgment against the defendant for the full amount of the Minnesota judgment, with interest and costs. Unless the action was commenced in time, so that the statute of limitations did not bar the claim, the holding of the trial court was correct. Defendant's personal appearance was the only justification for a personal judgment against him, and as this was after the judgment was barred, no personal judgment could properly be rendered. Neither the filing of the affidavit for publication nor the two publications of notice amounted to the commencement of the action for any purpose. If publication of notice be sufficient to arrest the running of the statute upon a personal claim,—a point which we do not decide,—such publication must be complete before the action may properly be said to have been commenced. Ordinarily an action is "commenced" by the service of notice; and the service contemplated is a completed one. For the purpose of the statute of limitations, other things may be regarded as the commencement of the suit, as the delivery of the notice to the sheriff, with intent that it be served immediately, as provided in § 3450 of the Code. But there is no provision for treating any step short of completed service as the commencement of an action where the service is by publication. The trial court was right in denying plaintiff a personal judgment against the defendant.

No error appears, and the judgment must be, and it is, affirmed.

Petition for rehearing denied.

OHIO SUPREME COURT.

FRANCES A. BROWN, Plff. in Err.,

v.

THOMAS F. HUBER et al.

(80 Ohio St. 183, 88 N. E. 322.)

Deed — restrictive covenant — validity — injunction.

1. A covenant in a deed of conveyance, whereby the grantor, in part consideration for said conveyance, stipulates and agrees for himself, his heirs, and assigns, touching and concerning an adjacent lot which he then owns, "that the only building put upon said lot shall be a residence and the necessary attachments, and that it shall be used for no other purposes than that of a family residence, and shall cost not less than \$5,000 for the residence alone," is a covenant binding on the grantor and all

Headnotes by the COURT.

persons claiming under him with notice of the same, and its observance may, in equity, be enforced by injunction.

Injunction — deed — restrictive covenant — violation.

2. Where such covenant or restriction is still of substantial value to the dominant lot, notwithstanding the changed condition of the neighborhood in which said lot is situated, a court of equity will restrain its violation.

(March 30, 1909.)

ERROR to the Circuit Court for Lucas County to review a decree affirming a decree of the Court of Common Pleas dismissing the petition in a suit to enjoin the construction and maintenance of certain buildings upon certain property. Reversed.

Note. — Right to enforcement of restrictive covenant as affected by change in neighborhood.

- I. Scope and introduction, 706.
- II. Inapplicability of doctrine in law, 707.
- III. Change due to act or default of complainant or his predecessor.
 - a. In general, 707.
 - b. Failure to carry out scheme.
 1. In general, 709.
 2. What amounts to, 709.
 3. What does not amount to, 709.
 - c. Acquiescence in violations of restriction.
 1. Generally, 710.
 2. As affected by materiality of violation, 711.
 3. Where other violations not injurious to complainant, 712.
 4. Under what circumstances a bar, 712.
 5. Under what circumstances not a bar, 713.
- IV. Change due to other causes.
 - a. In general, 715.
 - b. Under what circumstances a bar, 716.
 - c. Under what circumstances not a bar.
 1. Generally, 718.
 2. Where restriction still beneficial, 719.

I. Scope and introduction.

The cases falling within the scope of this note start with the assumption that no difficulty stands in the way of granting equitable relief against the violation of the restriction sought to be enforced, other than that arising from changes in the character of the locality, due either to the act or default of the complainant or his predecessors in title, or to causes beyond their control.

Consequently, although cases in which the change, while caused by the complainant or his predecessors, did not involve a violation of the same general restriction, are included, those in which the complainant himself had been guilty of violating the restriction which he was seeking to enforce

Statement by Crew, Ch. J.:

This was a suit in equity commenced by plaintiff in error in the court of common pleas of Lucas county, Ohio, to enjoin the construction and maintenance of certain buildings upon property located on Ashland avenue in the city of Toledo. The trial of the case in the court of common pleas resulted in a finding and judgment in favor of the defendants. Plaintiff thereupon appealed said cause to the circuit court, where, on a hearing upon the pleadings and evidence, that court made the following finding of facts:

Finding of Facts.

(1) Prior to October 4, 1871, Barnett T. Scott was the owner and in possession of a

against others, and in which relief was denied upon the ground that he had not come into court with clean hands, are excluded. As instances of this sort, mention may be made of such cases as *Compton-Hill Improv. Co. v. Tower*, 158 Mo. 282, 59 S. W. 239; *Olcott v. Sheppard, K. & Co.* 96 App. Div. 281, 89 N. Y. Supp. 201 (affirmed without opinion in 185 N. Y. 584, 78 N. E. 1108); and *Schubert v. Eastman Realty Co.* 25 Ohio C. C. 336. Nor does this note include cases in which the change in the neighborhood has been produced by the violations complained of, and relief is denied on the ground of laches.

Nor does it include cases in which the change in the character of the neighborhood has been held to mark the limit of the duration of the restriction, as where it is held to apply only to the buildings in contemplation at the time it was imposed,—such as *Hamlen v. Keith*, 171 Mass. 77, 50 N. E. 462; and *American Unitarian Assn. v. Minot*, 185 Mass. 589, 71 N. E. 551.

Another class of cases which do not properly fall within the scope of this note are those in which the change in the neighborhood consists in the abandonment of an affirmative easement, which thereby terminates the corresponding servitude. See, for example, *Bangs v. Potter*, 135 Mass. 245.

As has been remarked by some courts, it is not possible to reconcile all that has been said in the cases that have discussed this subject. The resulting decisions, however, generally may be harmonized by reference to the status of the complainant and to the purpose of the covenant sought to be enforced. With reference to their purpose, negative covenants restricting the right of a purchaser to use the land purchased may be considered as falling under the three classes enumerated by Farwell, J., in *Osborne v. Bradley* [1903] 2 Ch. 446: (1) Where the covenant is entered into simply for the vendor's own benefit; (2) where the covenant is for the benefit of the vendor in his capacity of owner of a particular property; (3) where the covenant is for the benefit of the vendor in so far as he reserves unsold property, and also for the benefit of other

tract of land in the city of Toledo, Ohio, which he platted into nine lots, under the name of Barnett T. Scott's First Addition. At the time of the platting of this property, there were only one or two buildings in the neighborhood. At the time of the platting of the property and the selling of it as hereinafter found, no building restrictions of any kind whatsoever were placed upon any of the lots, except lots 1 and 2 as hereinafter found. At the time of the platting of the property for sale, no general plan of improvement was intended or undertaken by Mr. Scott. Since the first platting, this property has been replatted to make the lines of the lots conform to the lines of ownership. The plaintiff is the owner of lot No. 3, which she acquired as hereinafter set

forth. The defendant Roger Huber is the owner of lot No. 2, which he acquired as hereinafter set forth.

(2) On the 4th day of October, 1871, said Barnett T. Scott and wife conveyed by duly executed warranty deed to one Mary I. Kelley, lot three (3) in said Barnett T. Scott's First Addition to the city of Toledo, according to the terms of the deed, the body of which is as follows:

Know all men by these presents: That I, Barnett T. Scott, of the city of Toledo, Lucas County, Ohio, in consideration of three thousand two hundred (\$3,200) dollars to me paid by Mary I. Kelley, of the same place, the receipt whereof is hereby acknowledged, do hereby bargain, sell, and

purchasers as part of what is called a building scheme. It is readily apparent that the same change in the locality which would render accomplishment of the end aimed at in covenants of the third class impossible might not furnish a valid reason for declining to enforce an identical restriction imposed for the benefit of the grantor personally or of his remaining property.

The further general observation may be made that the courts of this country appear to be disposed to go further than the English courts in denying relief on the ground of change in the character of the locality. They seem, in some instances at least, inclined to strike a balance between the benefit to the complainant and the detriment to the defendant which would result from the enforcement of the restriction, irrespective of whether the successive owners of the property affected by the restriction have been in any way responsible for the change in conditions; while the English view seems to be that the question of relative advantage does not arise unless there is a personal equity against the person seeking to enforce the restriction.

This may be illustrated by reference to the opinion rendered in the case of Osborne v. Bradley, *supra*, in which Farwell, J., after dividing negative covenants restricting the right of a purchaser to use the land purchased, into the three classes above mentioned, said: "To all three classes the rule enunciated by Lord Cairns in Doherty v. Allman, L. R. 3 App. Cas. 719, applies,—that is to say, where there are negative covenants which are binding on the defendant, the court has, speaking generally, no discretion to consider the balance of convenience or matters of that nature, but is bound to give effect to the contract between the parties, unless the plaintiff seeking to enforce the covenant has by his own conduct, or by that of the persons through whom he claims, become disentitled to sue."

And see also, as requiring a personal equity against complainant in conjunction with a change of circumstances, Sayers v. Collyer, L. R. 28 Ch. Div. 103, 13 Eng. Rul. 28 L.R.A.(N.S.)

Cas. 101; and Craig v. Greer [1899] 1 Ir. Ch. 258.

It may be said in favor of the American view, that it recognizes a certain public policy that land shall not be unnecessarily burdened with permanent or long-continued restrictions; and in favor of the English view it may be said that it does not deprive persons to whom no default is attributable of the benefit of a valid contractual obligation.

II. Inapplicability of doctrine in law.

As remarked in a recent English case: "Contractual obligations do not disappear as circumstances change;" and there is no dissent from the proposition that only the granting of equitable relief, and not the binding force of the restrictive covenant, is affected by a change in the character of the neighborhood.

A change of circumstances cannot be considered, on a petition at law to ascertain the limits of a restriction in a deed, as equitable ground for not enforcing it. Welch v. Austin, 187 Mass. 256, 68 L.R.A. 189, 72 N. E. 972.

And the covenant will not for that reason, and in advance of a breach, be declared a nullity in a suit instituted by the covenantor. Coudert v. Sayre, 46 N. J. Eq. 386, 19 Atl. 190.

Nor will such change present an answer to any action at law which may be brought by one interested in the covenant for damages sustained by reason of its violation. Kountze v. Helmuth, 67 Hun, 343, 22 N. Y. Supp. 204 (affirmed on other grounds in 140 N. Y. 432, 35 N. E. 656).

III. Change due to act or default of complainant or his predecessor.

a. In general.

A leading case upon the question of the discussion is that of Bedford v. British Museum, 2 Myl. & K. 552, 6 Eng. Rul. Cas. 702. In that case the Duke of Bedford, desiring to protect his manor house upon sell-

convey to the said Mary I. Kelley, her heirs, and assigns forever, the following real estate, viz.: Lot number three (3) in Barnett T. Scott's First Addition to the city of Toledo, Lucas County, Ohio. And the said Barnett T. Scott hereby covenants and agrees for himself, his heirs, assigns, executors, and administrators, that neither he, his heirs, or assigns will at any time erect upon lot number two (2) of said Scott's First Addition to the city of Toledo, thereon, any building nearer than sixty (60) feet to the southwesterly line of Adams street, and that the only buildings put upon said lot shall be a residence and the necessary attachments, and that it shall be used for no other purpose than that of a family residence, and shall not cost less than

\$5,000 for the residence alone; together with the privileges and appurtenances to the same belonging. To have and to hold the same to the said Mary I. Kelley, her heirs, and assigns forever, I hereby covenanting that the title so conveyed is clear, free, and unencumbered, and that I will warrant and defend the same against all claims whatsoever, except taxes of A. D. 1871. And I, Clara M. Scott, wife of the said Barnett T. Scott, in consideration of \$1 to me in hand paid, do promise, release, and forever quitclaim unto the said grantee all my right, by way of dower or otherwise, in and to the above granted premises. In witness whereof, the said Barnett T. Scott, and Clara M. Scott, his wife, hereunto set our hands this

ing an adjacent tract of land, the purchaser of which contemplated the building of a family mansion, imposed certain restrictions as to the buildings to be erected. Many years thereafter, a portion of the grantor's property which was originally intended not to be built upon, having been built up in the meantime, a subsequent duke sought to restrain the trustees of the British Museum, who had become the proprietors of the restricted property, from extending their buildings contrary to the restrictive covenant. It was held that the situation of the property having been so altered by the acts of the plaintiff and his predecessors as to render enforcement of the restriction oppressive, he should be deemed voluntarily to have waived and abandoned all that control which was applicable to the property in its former state.

In *German v. Chapman*, L. R. 7 Ch. Div. 271, it is said that if there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence or by a long chain of things, the property has been either entirely or so substantially changed as that the whole character of the place or neighborhood has been altered, so that the whole object for which the covenant was originally entered into must be considered to be at an end, then the covenantee is not allowed to come into the court for the purpose merely of harassing and annoying some particular man, where the court can see he is not doing it bona fide for the purpose of effecting the object for which the covenant was originally entered into.

In *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145, it is said that, it is, as a general thing, where the acts of the grantor or those deriving their title under him have altered the character and condition of the adjoining lands, so as to make the restriction of the covenant inapplicable according to the intent and spirit of the contract, that courts of equity refuse to interfere by injunction to prevent a breach of the covenant, and leave the parties to their remedy at law.

In *Ewertsen v. Gerstenberg*, 186 Ill. 344, 28 L.R.A.(N.S.)

51 L.R.A. 310, 57 N. E. 1051, it is said that equity will not as a rule enforce a restriction where, by the acts of the grantor who imposed it, or of them who derive title under him, the property and that in the vicinage has so changed in its character and environment and in the uses to which it may be put as to make it unfit or unprofitable for use if the restriction be enforced, or where, to grant the relief would be a great hardship on the owner and of no benefit to the complainant, or where the complainant has waived or abandoned the restriction; or in short, it may be said that where, from all of the evidence, it appears that it would be against equity to enforce the restriction by injunction, relief will be denied, and the party seeking its enforcement will be left to whatever remedy he may have at law.

In *Loud v. Pendergast*, 206 Mass. 122, 92 N. E. 40, it is said that where there has been no uniform observance of the restrictions and substantially all the landowners affected thereby have so conducted themselves as to indicate an abandonment of the right, which is in the nature of an easement, to have the neighborhood kept to the standard established by the original plan, and where the enforcement of the restriction against the defendant would not tend materially to restore to the district the character impressed upon it by the scheme, and the infraction complained of does not diminish the value of other estates, then it would be inequitable and oppressive to compel at great loss a compliance with the restrictions—especially where the restrictive covenant has only a few years more to run.

In *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190, it is said that where specific enforcement of a covenant is sought, it is both the right and duty of the court to look at the conduct of the parties to the litigation, and also at the conduct of their predecessors in right and duty, to see how they dealt with each other in respect to the covenant, and also to contrast the condition of the property when the litigation arose with its condition when the covenant was made, and then either decree or deny the

4th day of October in the year eighteen hundred and seventy-one.

Barnett T. Scott. [Seal.]

Clara M. Scott. [Seal.]

Signed, acknowledged, and delivered in the presence of:

James Kelley.

Chas. M. Lang.

Said deed was duly recorded in volume 69 of Deeds, page 405, Lucas County, Ohio, Records. Within a year after said 4th day of October, 1871, said Barnett T. Scott and wife also conveyed to said Mary I. Kelley by duly executed warranty deed, (20) feet off the northerly side of lot two (2) running the same width from front to rear of said lot in said Barnett T. Scott's First Addi-

tion. All of said premises so acquired by said Kelley making a total of 120 feet front by an average depth of 318 feet on Adams street, and now known as Ashland avenue in the said city of Toledo.

(3) On the 8th day of August, 1873, Barnett T. Scott and wife conveyed by duly executed warranty deed the southeasterly 80 feet of lot two (2) and the northwesterly 20 feet of lot one (1) of Barnett T. Scott's First Addition to Toledo, Ohio, to one Samuel B. Wood. The body of which deed is as follows:

Know all men by these presents: That Barnett T. Scott, of Toledo, Ohio, in consideration of six thousand dollars (\$6,000) to me paid by Samuel B. Wood aforesaid,

specific performance as should appear to be most in accordance with justice and right under all the circumstances of the case.

In *Brown v. Wrightman*, 5 Cal. App. 391, 90 Pac. 467, it was held that the grantor of a tract of land conveyed subject to the condition that the grant should become void if the business of selling intoxicating liquors or keeping a house of prostitution was conducted on the premises was precluded from claiming a forfeiture for breach of such condition by his action in selling portions of another tract, separated from the property first granted by a street, without restricting or limiting the use of the premises, which were devoted to the prohibited uses, and in leasing other parcels with the understanding that they were to be used for such purposes, with the result that the district in which both of such tracts of land were situated ceased to be a respectable residence neighborhood.

In *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 4 L.R.A. 373, 13 Am. St. Rep. 420, 42 N. W. 532, it was held that a condition inserted in deeds of village lots by the corporation owning the plat, which provided for the forfeiture of the lots in case intoxicating liquor should be sold thereon within thirty years, would not be enforced where it appeared that the corporation had permitted its secretary and business manager to sell liquor as a beverage within the village, and that the conditions were inserted for the purpose of creating a monopoly for his benefit in the business of selling liquor therein.

b. Failure to carry out scheme.

1. In general.

Equity will not enjoin the breach of a restriction or condition imposed as a part of a general plan for the benefit of a locality, if the original plan has been abandoned or the right waived. *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84.

Equity will not lend its aid to enforce restrictions in deeds inserted in pursuance of a scheme of improvement which has aft-

erward been abandoned, or where the circumstances surrounding the property have so entirely changed in other respects as to render enforcement inequitable. *Coughlin v. Barker*, 46 Mo. App. 54; *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668.

2. What amounts to.

In *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84, it was held that where it was thoroughly proved that the original building line, established for the benefit of a number of lots, had been abandoned, and the restriction disregarded by all the complainants, except one on the opposite side of the street, who made no protest or objection to what was done by the others, equity would not interpose to prevent the defendants from erecting a building extending beyond the building line to a greater extent than those of the complainants.

In *Duncan v. Central Pass. R. Co.* 85 Ky. 525, 4 S. W. 228, it was held, where the owner of a tract of land conveyed a portion of it by deed restricting its use to residential purposes, but subsequently sold a number of lots without any restriction, that, although no buildings had been erected upon any of the lots, the general scheme had, by the grantor's own permission and conduct, been so changed, and the condition of the property so altered, that it was liable to be defeated at the pleasure of others, and might in fact be regarded as impossible of fulfilment; and, therefore, that a court of equity would not interfere.

In *Jenks v. Pawlowski*, 98 Mich. 110, 22 L.R.A. 863, 39 Am. St. Rep. 522, 56 N. W. 1105, it was held that a vendor of property upon the condition that no intoxicating liquors should be sold thereon cannot maintain a suit to enjoin the sale of liquor in violation of such condition, where he subsequently sold adjoining premises without restriction, which were used for such purpose.

3. What does not amount to.

In *Reilly v. Otto*, 108 Mich. 330, 66 N. W. 228, it was held that a restriction in a

the receipt whereof is hereby acknowledged, do hereby bargain, sell, and convey to the said Samuel B. Wood, his heirs, and assigns forever, the following real estate, *viz.*: Situate in the state of Ohio, county of Lucas, and city of Toledo, and described as the southeasterly eighty (80) feet of lot 2 and the northwesterly twenty (20) feet of lot 1 of Barnett T. Scott's First Addition to Toledo, fronting 100 feet on Adams street, and running back the same width till it meets the east line of the 20-foot alley and the south side of the 16-foot alley laid out in the plat of said addition, subject, however, to all the conditions as to location of building, etc., contained in the deed from said Scott to Mary I. Kelley of lot 3 in said addition. And said Scott also here-

by makes the same agreement for himself, his heirs, assigns, executors, and administrators concerning so much of lot 1 as remains in him after this conveyance as is contained in said last-mentioned deed, together with the privileges and appurtenances to the same belonging. To have and to hold the same to the said Samuel B. Wood, his heirs, and assigns forever, I hereby covenanting that the title so conveyed is clear, free, and unincumbered, and that I will warrant and defend the same against all claims whatsoever. And I, Clara M. Scott, wife of the said Barnett T. Scott, in consideration of \$1 to me in hand paid, do remise, release, and forever quitclaim unto the said grantee, all my right, by way of dower or otherwise, in and to the above

deed that there should not be placed or erected on the premises conveyed any store, and only dwelling houses, could not be considered as having been waived by a grantor by his conveyance of adjoining property without any restrictions as to buildings or business, and his leasing a store opposite for a saloon, where it appeared that the lease and the contracts for the sale of the unrestricted property were made before the deed containing the restriction, and the evidence showed that his purpose in buying the land sold under restriction was to prevent the erection of a saloon there, and to protect his store on the next corner and his residence property in the next block from thereby being depreciated in value.

The fact that two lots were sold without restrictions will not be regarded as inconsistent with the general scheme of the grantor, where one of these was sold before the plan was made, and the other was so small as to have been useless if the building line restriction had been placed upon it. *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936.

c. Acquiescence in violations of restriction.

1. Generally.

In *Roper v. Williams*, Turn. & R. 18, Lord Eldon declined to enjoin the breach of a covenant that the buildings to be erected upon the premises conveyed should be detached houses of a certain class, built in a line 30 feet from an intended road, where the covenantee had acquiesced in a partial deviation from the plan, saying that, while the covenantee might have a good case for damages at law, yet, having taken away the benefit of his general plan from some of his grantees, he cannot with any justice come into equity for an injunction. "It is not a question of mere acquiescence; but in every instance in which the grantor suffers grantees to deviate from a general plan intended for the benefit of all, he deprives others of the right which he had given them to have the general plan en-

forced for the benefit of all. In such cases I have always understood this court will leave the parties to their remedy at law."

And in *Peek v. Matthews*, L. R. 3 Eq. 515, it was held that a grantor of a number of lots subject to a restriction against building upon certain portions of the respective lots purchased was precluded, by his failure to enforce such restriction against others of his grantees, from enforcing it against the defendant; and that it made no difference that the covenant was also a covenant between all the purchasers *inter se*, or that the defendant executed his deed after the breach by the other covenanting parties had been committed.

In *Ocean City Asso. v. Chalfant*, 65 N. J. Eq. 156, 55 Atl. 801, 1 A. & E. Ann. Cas. 601, it is said that the recognized doctrine is, where the vendor sells off an estate in lots with restrictions upon the use of the lots sold, he will lose his right in equity to enforce the restrictions against one grantee if he has knowingly permitted other grantees to violate the same restrictions, the effect of which violation is to abrogate the purpose of the restriction and alter the general scheme intended to be conserved by it; and that this rule is applicable whether the suit is brought by the covenantee or by one of several grantees of land sold in accordance with the general scheme by the original covenantee. It rests upon the equitable ground that if anyone who has a right to enforce the covenant, and so preserve the conditions which the covenant was designed to keep unaltered, shall acquiesce in a material alteration of those conditions, he cannot thereafter ask the court of equity to assist him in preserving them, although if the complainant is in privity with the defendant he may have his action at law for the breach.

And in *Bowen v. Smith* (N. J. Eq.) 74 Atl. 675, it is said to be well settled that the equitable right to enforce restrictive covenants may be lost by a degree of acquiescence in their violation amounting to an abandonment of the right of the complainant.

The court will not specifically enforce a

granted premises. In witness whereof, the said Barnett T. Scott and wife, Clara M. Scott, hereunto set their hands this 8th day of August, in the year eighteen hundred and seventy-three (1873).

Barnett T. Scott. [Seal.]

Clara M. Scott. [Seal.]

Signed, acknowledged, and delivered in the presence of:

B. W. Rouse.

W. I. Kelley.

Said deed was duly recorded in volume 79 of Deeds, page 165, Lucas County, Ohio, Records. Said premises have a frontage of 100 feet upon said Ashland avenue by an average depth of 325 feet.

(4) Barnett T. Scott from time to time

restrictive covenant in the sense or with the meaning of the covenant as practically but erroneously construed and acted on by the complainants and the lot owners other than defendants, where defendants have not adopted or acted on such practical construction, since in such case the rights of complainants against them must depend solely on the covenant or agreement. *Righter v. Winters*, 68 N. J. Eq. 252, 59 Atl. 770.

See also, as to the effect of an erroneous practical construction, *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369; *Brigham v. H. G. Mulock Co.* 74 N. J. Eq. 287, 70 Atl. 185, under heading, "Under what circumstances not a bar," *infra*.

Acquiescence in the breach of a covenant by other grantees of the common grantor will not deprive a lot owner of the right to enforce a restrictive covenant, so long as it remains of any value to him. *Lattimer v. Livermore*, 72 N. Y. 174.

While a building line restriction will be enforced if a departure from it would result in the erection of houses on lines out of harmony with the general character of the neighborhood, yet where an enforcement would make a departure with reference to the building lines from the general location of the surrounding buildings, and if it would deprive the owner of an opportunity to improve his land as the adjacent lands have been improved, then a court of equity will not interfere. *Roth v. Jung*, 79 App. Div. 1, 79 N. Y. Supp. 823.

In *Righter v. Winters*, *supra*, where it appeared that other lot owners had built bay windows and piazzas extending beyond the building line, and that defendant's structure had not destroyed or substantially affected the general symmetry of the block of houses, it was held that under the circumstances a specific enforcement of the restrictive covenant would be inequitable; but that complainants should be left to their remedy at law.

2. As affected by materiality of violation.

In *Ocean City Asso. v. Chalfant*, 65 N. J. 28 L.R.A.(N.S.)

sold all the property in this addition without placing any building restrictions whatsoever upon any of the lots, save and except the restrictions upon lots 1 and 2 as above found. At the time of the sale of lot No. 3 to Mary I. Kelley, no restriction whatsoever was placed upon the use of lot No. 3, and no restriction has been placed thereon since. The present owner of lot No. 1 has joined with the defendants in this case in making the improvement hereinafter found to be in process of construction. In the year 1872 said Mary I. Kelley constructed a large residence and barn upon lot No. 3, which cost over \$25,000. The residence fronts upon Ashland avenue, and is not nearer the street line than 60 feet and is 50 feet from the dividing line between lot No. 3 and lot

Eq. 156, 55 Atl. 801, 1 A. & E. Ann. Cas. 601, it was said that the question of waiver of the right to enforce a restrictive covenant by permitted violations of the covenant is dependent upon the character and materiality of the permitted breach; and that while the doctrine of waiver applies both to covenants restricting erections upon, or a permanent physical change in, the property subject to restriction, and to covenants restricting the use of the property for certain occupations, the propriety of the enforcement of the doctrine in particular instances may differ in each. This results from the fact that breaches of the first class usually permanently change the conditions which the covenant was designed to perpetuate, while breaches of the second class do not necessarily have that result. It is only when the person in whom the right to enforce the covenant resides has permitted such infringement of its provisions as results in alteration that cannot be corrected, or which it is manifest there is no intention to have corrected, that he is precluded from further enforcing the covenant. When, however, the known breach consists in introducing upon the property some occupation interdicted by the covenant, and no considerable amount of money has been expended in fitting the property for a particular business, or the character of the business is such that it constitutes an inconsiderable alteration of the conditions which the parties had in view, then waiver of the right to restrain other and more considerable breaches may not result.

The materiality of the violations is to be determined by the circumstances of each case, and the question seems to be whether they are such as to indicate an abandonment of the original general plan and make its enforcement inequitable because of the changed condition of the property under restriction. *Morrow v. Hasselman*, 69 N. J. Eq. 617, 61 Atl. 369.

Violation of building restrictions will not prevent their enforcement if the violations are immaterial, and such as do not prevent the general plan from being carried out. *Hyman v. Tash* (N. J. Eq.) 71 Atl. 742.

No. 2; in other words, 50 feet from the line of the defendants' property. The residence was occupied by Mrs. Kelley and her family for some years, and was later acquired and taken over by a mortgagee, the Connecticut Mutual Life Insurance Company, and for a time stood vacant. In 1904 this property was purchased by plaintiff, Frances A. Brown, for \$11,000, and has been improved by her at a cost of several thousand dollars. Since said time the plaintiff and her family have been living in the property. The house is a large, old-fashioned residence. The living rooms, to wit, the parlor, sitting room, and dining room, are on the southerly side of said residence, next to the premises conveyed to said Wood; and the barn is located upon the rear of the

premises about 90 feet from the said party line. Said buildings are still upon said premises in good order and condition. The premises have never been used except for residence purposes.

(5) Prior to the 1st day of April, 1905, the premises described in finding of fact No. 3 were willed by Samuel B. Wood, deceased, to his wife, Minerva Wood, and upon said date were duly conveyed by deed duly executed by Jethro G. Mitchell, trustee under the will of Minerva Wood, to the defendant Roger Huber. Prior to said date these premises were never improved, except by fencing. Before said Huber improved these premises, as hereinafter stated, he was notified by T. P. Brown, the husband of plaintiff, of the terms of the building restrictions afore-

Equity will not decline to enforce a building restriction on the ground of its violation by some of the grantees affected thereby, where there has not been any such change in the character of the neighborhood as to defeat the original purpose and design of the covenants. *Bowen v. Smith* (N. J. Eq.) 74 Atl. 675; *Adams v. Howell*, 58 Misc. 435, 108 N. Y. Supp. 945.

See also *German v. Chapman*, L. R. 7 Ch. Div. 271; *Knight v. Simmonds* [1896] 2 Ch. 294; *Tripp v. O'Brien*, 57 Ill. App. 407; *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936; *Loud v. Pendergast* (Mass.) 92 N. E. 40; *Waters v. Collins* (N. J. Eq.) 70 Atl. 984; *McGuire v. Caskey*, 62 Ohio St. 419, 57 N. E. 53, 19 Atl. 190, hereinafter set out under heading, "Under what circumstances not a bar," *infra*.

3. Where other violations not injurious to complainant.

A person entitled to enforce a restrictive covenant may take no notice of violations not especially offensive to him, without losing the right to enforce the restrictions in the case of a specially offensive violation. *Knight v. Simmonds* [1896] 2 Ch. 294; *Osborne v. Bradley* [1903] 2 Ch. 446; *Craig v. Greer* [1899] 1 Ir. Ch. 258; *Barton v. Slifer*, 72 N. J. Eq. 812, 66 Atl. 899; *Rowland v. Miller*, 139 N. Y. 93, 22 L.R.A. 182, 34 N. E. 765; *Levy v. Halcyon Casino Hotel Co.* 45 Misc. 289, 92 N. Y. Supp. 231; *McDonald v. Spang*, 55 Misc. 332, 105 N. Y. Supp. 617; *Du Bois v. Darling*, 12 Jones & S. 436.

In *Brigham v. H. G. Mulock Co.* 74 N. J. Eq. 287, 70 Atl. 185, and in *Bowen v. Smith* (N. J. Eq.) 74 Atl. 675, it is said that any claim of bar asserted against the rights of an owner of a single lot, by reason of acquiescence in the violation of building restrictions, must be measured by the relation of the asserted violation to the individual lot.

A failure on the part of the grantor to enforce similar covenants in behalf of lots remaining unsold will not operate to destroy the right of the owner of a lot previously

sold to enforce in behalf of that lot covenants made for its benefit, pursuant to the general building plan. *Ibid*.

In *McGuire v. Caskey*, 62 Ohio St. 419, 57 N. E. 53, it was held that plaintiff's submission to violations of a building line restriction, most of which were upon portions of the street remote from his premises, and some were upon the opposite side of the street, which violations did not substantially affect his enjoyment of his own property, did not operate as a waiver of his right to object to other encroachments by which such enjoyment would be materially impaired.

4. Under what circumstances a bar.

An encroachment of a building upon a space reserved for a courtyard in a plat of city lots will not be prevented by injunction when all others who have constructed buildings on the same side of the block have encroached on such space, though to a less extent, and without any attempted hindrance on the part of the complainants, where it seems clear that the character of the property is somewhat changed and it is being used to a large extent for business purposes, even if the complainants' lots are still vacant. *Ewertsen v. Gerstenberg*, 186 Ill. 344, 51 L.R.A. 310, 57 N. E. 1051.

In *Loud v. Pendergast*, 206 Mass. 122, 92 N. E. 40, it was held that equity would not enforce a building line restriction where substantially all the landowners affected thereby had so conducted themselves as to indicate an abandonment of the right, and the erections complained of caused no pecuniary damage to the plaintiff and did not diminish the market value of her estate, while the enforcement of the restriction against the defendant would make her house less commodious and attractive and would thus cause her substantial loss.

In *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668, where it appeared that the grantor by whom the restriction was introduced, and all of her grantees, although their deeds contained a covenant requiring no building to be erected nearer than 25 feet to the front street line, had erected buildings upon their lots each with

said, and that the same would be enforced by the plaintiff. The property owned by the defendants, up to the time of the commencing of the improvements, has been vacant property, used in the summer time for pasturage purposes, and used generally by the neighbors as a dumping ground for rubbish of various kinds.

(6) Since the construction of the improvements upon lot No. 3, plaintiff's property, the character of the surrounding neighborhood has greatly changed. At the time of the construction of the Kelley house, this section was a very high class residence section, with large lots for residence purposes. Since said time, in the near vicinity has developed a business center with a number of business blocks, mostly small, containing

about twenty stores and shops, and two large dwellings in the immediate vicinity have been torn down and smaller buildings erected in their place, thereby dividing the large lots. There are, within two blocks distant, a large apartment house and kindergarten school. At the time of the improvement of lot No. 3 by Mrs. Kelley, the property in that neighborhood was reasonably adapted to such improvement. At the present time, the property in that neighborhood, including the property of the defendants, which is 100 feet wide by 325 to 350 feet deep, is not reasonably suitable to, and cannot be profitably used for, the purpose of one single dwelling house upon an entire lot of such dimensions. Said Ashland avenue is one of the main thorough-

its front 15 feet from the street line, it was held that the owners of such property could not restrain one of their number from erecting a building within 5 feet from the line.

In *Hemsley v. Marlborough Hotel Co.* 62 N. J. Eq. 164, 50 Atl. 14, affirmed without opinion in 63 N. J. Eq. 804, 52 Atl. 1132, it was held that a restrictive covenant against the erection of any building except as and for use as a dwelling house must be considered to have been waived, where it appeared that for at least ten years past two boarding houses, accommodating in the aggregate 350 guests, had been conducted upon adjoining property subject to the same restriction, and that the neighborhood was one largely devoted to boarding houses and hotels.

In *Ocean City Asso. v. Chalfant*, 65 N. J. Eq. 156, 55 Atl. 801, 1 A. & E. Ann. Cas. 601, in which the restriction in question was against carrying on any business upon Sunday, it was held that where it appeared that for a number of years bathhouse keepers, livery stables, and cigar and fruit stores had done business on Sundays, and that the officers of the grantor had not used reasonable diligence in prosecuting infringements of the covenant, they might be held to have waived their right to equitable assistance.

In *Chelsea Land & Improv. Co. v. Adams*, 71 N. J. Eq. 771, 66 Atl. 180, 14 A. & E. Ann. Cas. 758, it was held that where a building line restriction incorporated in the deeds of over 150 purchasers had been violated by 99 or 100 of them, without objection on the part of complainant who was the successor of the original grantee, except that in one instance a suit was instituted, but not diligently pursued, such a general consent to the nonobservance of the restrictive covenants amounted to an abandonment of the original plan.

In *Russell v. Harpel*, 20 Ohio C. C. 127, it was held that where plaintiff had permitted the erection of a house on the other side of her lot within 14 feet of the street, and had permitted without objection sixteen houses in the block to be erected nearer

to the street than 20 feet, the court would not enjoin the erection of a house on the lot adjoining plaintiff's which did not strictly conform to the 20-foot restriction.

In *Kelsey v. Dodd*, 52 L. J. Ch. N. S. 34, where the owners of an estate, in selling off a portion of it, took a covenant against, *inter alia*, beer houses, it was held that persons subsequently becoming the owners of the remaining portion of the estate, by a long-continued acquiescence in breaches of the covenant by other covenantees, had lost their right to an injunction.

5. Under what circumstances not a bar.

In *German v. Chapman*, L. R. 7 Ch. Div. 271, it was held that the fact that the grantor had permitted a private school to be conducted upon the edge of a property consisting of 57 acres of land, which did not interfere with the general scheme, the waiver in that particular instance did not preclude the enforcement in equity of a restrictive covenant that "no house or other building to be erected or built upon the land shall be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade."

In *Knight v. Simmonds* [1896] 2 Ch. 294, it was held that while, if the object to be attained by a restrictive covenant cannot be attained, equitable relief to enforce it will be refused, yet, that where such business as had been carried on in the neighborhood had not been openly carried on, but the premises in which business had been carried on had preserved their appearance of private residences, equitable relief would be granted against a breach of covenant not to carry on any trade or business.

The right to the enforcement of a covenant that no portion of the granted premises shall be used for the sale of intoxicating liquors is not lost by permitting the occupation of certain premises covered by the covenant as a drug store, where, under a so-called package license, liquors had been sold as ordinarily sold by druggists, but not to be drunk upon the premises. *Hall v. Solomon*, 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. 876.

fares, leading from the business portion to the best residence portion of the city of Toledo. It is 66 feet wide, and the premises in question are located about $1\frac{1}{4}$ miles from the business center of the city. Bancroft street crosses Ashland avenue some 445 feet from the southerly line of the Huber property, and that point is the center of the business houses in that vicinity. Ashland avenue intersects Collingwood avenue two blocks northerly from plaintiff's said property. Between Bancroft street and Collingwood avenue, Ashland avenue is built up with a good class of residences varying in value from \$3,000 to \$15,000. Within the past three years, two of the large-sized residences upon said portion of Ashland avenue have been converted into two-family flat

buildings. At the corner of Ashland avenue and Bancroft streets, on the easterly side of Ashland avenue, being the side opposite to that which the Brown and Huber properties occupy, there was in 1872 a frame horse-car barn. This was replaced some years ago with a two-story brick building for storing electric cars, which said building has been remodeled into two storerooms fronting on Ashland avenue, the corner room being occupied by a drug store. Immediately northerly of this building an old frame residence was demolished about five years ago, and small shops built next to the street line, making a total of about 180 feet front on the easterly side of Ashland avenue, next to Bancroft street, now devoted to business purposes. This is the only business prop-

Front steps over a building line, and ornamental projections, will not preclude the enforcement of the building line agreement. *Tripp v. O'Brien*, 57 Ill. App. 407.

The fact that the plaintiffs have infringed a building line restriction by allowing projections from their houses consisting of bay windows, piazzas, and steps, will not prevent them from obtaining an injunction against the building of a separate house in the space in front of the established line. *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936.

In *Stewart v. Finklestone* (Mass.) 92 N. E. 37, it was held that where there had been no change whatever in the character of the buildings contemplated by the scheme contained in the restrictions, with the exception of those at the corners of streets, which were not of sufficient moment to interfere with it as a whole, there is no room for the application of the doctrine of changed conditions.

In *Righter v. Winters*, 68 N. J. Eq. 252, 59 Atl. 770, it was held that an entire contract as to restrictions cannot be considered as waived or abandoned by reason of violations which have occurred, not with the intention of abandoning the contract, but under an erroneous construction thereof adopted by the vendors and the previous builders of houses.

The erection of porches and bay windows extending beyond the building line, if under an erroneous construction of the restrictions, is no evidence of an abandonment of the general scheme. *Brigham v. H. G. Mullock Co.* 74 N. J. Eq. 287, 70 Atl. 185; *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369.

The fact that verandas and porches have been built over the established building line is not sufficient evidence of the general abandonment of a scheme of restriction, where there has been no general change in the neighborhood rendering the restrictions useless, and the greater number of the grantees have conformed to the restrictions. *Waters v. Collins* (N. J. Eq.) 70 Atl. 984.

Acquiescence in the violation of a covenant not to erect upon the premises any

structure other than a genteel dwelling house will not deprive a lot owner of the right to enforce a distinct covenant not to cover any lot to the depth of more than 50 feet, so long as its performance remained of any value. *Lattimer v. Livermore*, 72 N. Y. 174.

The failure of the complainant to take notice of the violation of a restrictive covenant against injurious or offensive business, by business carried on remotely from his residence, will not deprive him of the right to enforce it against a business specially offensive by reason of its proximity. *Rowland v. Miller*, 139 N. Y. 93, 22 L.R.A. 182, 34 N. E. 765.

The existence of other violations of a covenant relating to the distance of dwellings from the street will not prevent a lot owner affected by the defendant's acts from compelling him to obey the covenants. *McDonald v. Spang*, 55 Misc. 332, 105 N. Y. Supp. 617.

In *Adams v. Howell*, 58 Misc. 435, 108 N. Y. Supp. 945, it was held that the fact that the steps to plaintiff's house projected about 4 feet into a 25-foot space in front of the house, reserved by a building restriction, would not deter equity from preventing a substantial violation of such restriction by defendant.

In *McGuire v. Caskey*, 62 Ohio St. 419, 57 N. E. 53, it was held that the fact that complainant and others had built porches extending beyond the building line, which were not shown to offer any obstruction to the easements of neighboring proprietors of light, air, and view, nor to be subversive of the expressed purpose of the restrictive covenant to increase the beauty of the street and enhance the value of lots for the purpose of private residence, did not preclude him from obtaining the aid of equity to prevent its substantial violation by defendant.

In *Landell v. Hamilton*, 177 Pa. 23, 34 L.R.A. 231, 35 Atl. 242, it was held that building along the division line and partly on each lot a solid wall higher than a covenant requires the servient lot to remain unobstructed, for the purpose of furnishing light and air to the dominant lot, will pre-

erty on Ashland avenue between Bancroft street and Collingwood avenue, and is included in the business properties referred to in finding No. 6.

(7) The defendants have platted said lot No. 2, as shown by the exhibits in this case, by placing a driveway upon the southerly side of said lot, and have planned the construction of four modern residences facing upon this driveway. The improvement when completed will be known as 'Ashland place,' and will include two other houses facing the driveway upon the other side and located upon the rear of lot 1. No one of the houses is proposed to be built nearer Adams street, or Ashland avenue, than 60 feet, and each and every one of the houses will cost to exceed \$5,000. Two of the houses have been

constructed upon the rear portion of lot No. 2, and defendants propose to construct two more between those erected and Ashland avenue, all fronting upon the driveway. All the houses constructed, and those proposed to be constructed, will be of modern design and modern construction. There is intended to be no outbuilding or shed of any kind upon the property. The two houses constructed are intended to be heated with hot water circulation from a central station in the neighborhood, and those to be constructed are designed to be heated in the same way, and the houses, although the rear parts thereof are towards plaintiff's residence, are so constructed that no back door thereof is observable from the residence of the plaintiff, and none of the houses are

vent the dominant owner, who builds it, from enforcing the covenant in equity as to the space below the top of the wall, but will not absolutely terminate the covenant.

IV. Change due to other causes.

a. In general.

In *Sayers v. Collyer*, L. R. 28 Ch. Div. 103, 13 Eng. Rul. Cas. 101, reversing L. R. 24 Ch. Div. 180, it was said that the rule that equity will not enforce observance of a restrictive covenant where the character of the neighborhood was changed, while applying where an alteration takes place through acts or permission of the plaintiff or those under whom he claims, so that his enforcing his covenant becomes unreasonable, does not apply to cases where the change which has taken place was beyond the control and independent of the action of the plaintiff.

And see also, as supporting this view. *Osborne v. Bradley* [1903] 2 Ch. 446, hereinbefore set forth, and *Craig v. Greer* [1899] 1 Ir. Ch. 258, *infra*.

On the other hand, it has been stated as a general rule that, while a court of equity has jurisdiction to enforce the observance of covenants made by an owner of lands in a city with an adjoining owner, in consideration of similar reciprocal agreements on the part of the latter, restricting the use of the lands to purposes of private residences, the exercise of this authority is within its discretion; and where there has been such a change in the character of the neighborhood as to defeat the purposes of the agreement and to render it inequitable to deprive such owner of the privilege of conforming his property to that character, such relief will not be granted. *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Amerman v. Deane*, 132 N. Y. 355, 28 Am. St. Rep. 584, 30 N. E. 741; *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961, 5 A. & E. Ann. Cas. 45 (reversing 97 App. Div. 518, 90 N. Y. Supp. 233); *Leonard v. Hotel Majestic Co.* 17 Misc. 229, 40 N. Y. Supp. 1044; *Russell v. Harpel*, 20 Ohio C. C. 127.

Courts will not compel the observance of restrictions and conditions when they have 28 L.R.A.(N.S.)

ceased to be of benefit. *Abraham v. Stewart*, 83 Mich. 7, 21 Am. St. Rep. 585, 46 N. W. 1030.

In *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 Pac. 308, it is said that surrounding conditions may so change that a court of equity will relieve the covenantor and the property from a restriction to a certain use, since public policy requires that land should not be unnecessarily burdened with permanent or long-continued restrictions, depreciating the value of its use to the owner, as well as its selling value in the market.

In *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145, it is said that where the change in the condition of the surrounding property is such that a performance of the covenant in the deed would injure the grantee's property, or make it yield less profit, or make it incapable of yielding any profit, the covenant will not be enforced, as being unreasonable and oppressive.

Whether an equity court will refuse to restrain the violation of a restrictive covenant and leave the parties to their legal remedies, on account of changed conditions, depends largely upon the facts, and mainly whether the enforcement of the agreement would greatly harm the defendant without any substantial benefit to the plaintiff, so as to make enforcement inequitable. *Rowland v. Miller*, 139 N. Y. 93, 22 L.R.A. 182, 34 N. E. 765.

A court of equity will enforce a covenant not to permit any noxious or offensive trade or business, but to use the premises for the erection of first-class private residences only, unless there has been such a change in the character of the neighborhood as to defeat the object and purpose of the agreement and to render it inequitable to deprive such owner of the right to conform his property to that character. *Korn v. Campbell*, 52 Misc. 220, 102 N. Y. Supp. 108, reversed on other grounds in 119 App. Div. 401, 104 N. Y. Supp. 462, which is affirmed in 192 N. Y. 490, — L.R.A.(N.S.) —, 127 Am. St. Rep. 925, 85 N. E. 687.

A change in the character of the neighborhood which will warrant a court of equi-

proposed to be nearer than 15 feet from the dividing line between lots 2 and 3. The houses now constructed are rented and occupied by desirable tenants. The defendants have contracted for the beautifying of said premises by landscape architects, and are using every means to make the improvement attractive in appearance.

(8) The property of the defendants cannot now be profitably utilized in any manner except in the way intended to be used by the defendants, and this particular property and property in this neighborhood of lots of such large proportions are adapted to the use to which the defendants are putting it, and cannot be profitably used in any other manner, owing to the great depth of the lots and the requirements of property

ty in declining to enforce a restrictive covenant need not extend to all the property affected by the agreement. *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365.

b. Under what circumstances a bar.

In *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691, it was held that where it was evident that the purpose of the restrictions as a whole was to make the locality a suitable one for residences, and that, owing to the general growth of the city and the present use of the whole neighborhood for business, this purpose could no longer be accomplished, and that if all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of the property for business purposes,—an injunction would not be granted against a threatened violation of such restrictions, since to enforce them could have no other effect than to harass and injure the defendant, without effecting the purpose for which the restrictions were originally made.

In *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11, where the purpose of a covenant fixing a minimum price that all buildings to be erected must cost, and restricting the purposes for which the premises might be used, was to protect the locality to which it applied from businesses that were likely to create a nuisance, and buildings of the cheapest grade, and thereby bring to it a better class of buildings and insure its occupation by quiet, orderly, and well-to-do people, and it appeared that immediately beyond the limits of the land subject to the covenant the character of the street had been determined by the erection of cheap houses, establishing that more expensive houses must ultimately be unmarketable and unprofitable in that street, that no buildings of the value contemplated had been built on the land affected by the covenant, that the term during which such restrictive covenant was to operate would expire in three years, and that enforcement of obedience to its requirements would prac-

generally in that neighborhood at the present time.

(9) On June 12, 1906, the date this suit was commenced, the defendants had constructed one of said residences, known as "No. 1," upon the rear of the said Huber lot, and had begun work upon the foundation of a second residence, known as "No. 2," upon the rear of said lot. Both of said residences have since been completed by defendants, each costing between \$5,000 and \$6,000.

Upon the foregoing facts the circuit court found and stated as its conclusion of law "that the plaintiff is not entitled to the injunction prayed for in her petition, and the improvement of lot No. 2 as intended by

tically result in depriving the owners of the affected land of the use of their land as long as the covenant continued in force,—it was held that in this situation it manifestly would be inequitable to deprive the defendant of the privilege of conforming the building upon his property to the character of the buildings surrounding it, especially where the compliance of the complainant himself with the restriction was questionable; but that he should be left to his remedy at law.

In *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365, in which the question was whether there had been such an entire change in the character of the neighborhood of the premises as to render it inequitable to enforce a restrictive agreement the stated object of which was "to provide for the better improvement of the said lands and to secure their permanent value," which was to be accomplished by the erection by both parties of dwelling houses of a superior class, which were to be set back 8 feet and to be used exclusively as dwelling houses; and it appeared that the general current of business affairs had reached and covered the entire premises fronting on one of the streets bounding the land covered by the restriction, both above and below the lot in question, it was held that if this was all, the plaintiff would be entitled to enjoin the defendant's use of his premises for business purposes, it being apparent from the agreement that such encroachment was anticipated, and that the parties to it intended to secure the property in question from the disturbance which business would necessarily produce; but it further appearing that an elevated railroad had been built in said street and a station established in front of the premises, rendering privacy and quiet in the adjacent buildings impossible, and occasioning a large and permanent depreciation in their rental value for residential purposes, though not rendering their use for business purposes indispensable to their practicable and profitable use and occupation, it was further held that a condition of things had arisen which frustrated the scheme devised by the parties, and deprived

the defendants should not be enjoined," and thereupon the court dismissed the plaintiff's petition at her costs. To obtain a reversal of this judgment of the circuit court, Frances A. Brown, who was plaintiff in the courts below, prosecutes the present proceeding in error.

Mr. Orville S. Brumback, for plaintiff in error:

The defendant had actual notice of the restrictive covenant, and injunction is the proper remedy.

1 Pom. Eq. Jur. 3d ed. § 221; 5 Am. & Eng. Enc. Law, pp. 9, 10; Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. 576; 5 Pom. Eq. Jur. § 281; Heidorn v. Wright, 4 Ohio N. P. 235, affirmed in 60

Ohio St. 609, 54 N. E. 1103; McGuire v. Caskey, 62 Ohio St. 419, 57 N. E. 53; Stines v. Dorman, 25 Ohio St. 583; Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Rogers Locomotive & Mach. Works v. Erie R. Co. 20 N. J. Eq. 379; Page v. Murray, 46 N. J. Eq. 329, 19 Atl. 11; Thruston v. Minke, 32 Md. 487.

The covenants run with the land.

3 Page, Contra. 1977; Masury v. Southworth, 9 Ohio St. 340; Platt v. Eggleston, 20 Ohio St. 414; Crowe v. Riley, 63 Ohio St. 1, 57 N. E. 956; Stines v. Dorman, supra.

The vital question is not whether there is a covenant running with the land, but whether the restriction was imposed upon the servient estate for the benefit of the land

the property of the benefit which might otherwise accrue from its observance, so that its enforcement would work oppression, and not equity.

In *Amerman v. Deane*, 132 N. Y. 355, 28 Am. St. Rep. 584, 30 N. E. 741, where it appeared that the vicinity had been largely devoted to flat and tenement houses, and had for other reasons become undesirable as a first-class residential neighborhood, and that if enjoined from using her building for the purpose for which it was designed, the defendant must necessarily suffer damages greatly in excess of any likely or possible to be sustained by the plaintiff, it was held that a court of equity would not interpose to prevent the occupation of defendant's building as a tenement house in violation of a restrictive agreement against the erection of any tenement house upon the premises.

In *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961, 5 A. & E. Ann. Cas. 45, reversing 97 App. Div. 518, 90 N. Y. Supp. 233, where it appeared that in the immediate vicinity of the premises owned by the plaintiff and the defendant numerous flats and tenement houses had been built; that large apartment houses had been erected upon the three corners directly opposite defendant's premises, so that the covenant in question was no longer effective for the purpose in view of the parties when they made it; that enforcement thereof could not restore the neighborhood to its former condition by making it desirable for private residences; that nineteen of the twenty five years which bounded the life of the covenant in question had passed; and that the proposed erection would greatly increase the value of the plaintiff's premises, while the enforcement of the covenant, without benefiting anyone, would cause great damage to the defendant,—it was held that a permanent injunction against a breach of covenant not to erect any apartment house should be refused, and the complainant remitted to his remedy by action at law.

In *Roth v. Jung*, 79 App. Div. 1, 79 N. Y. Supp. 822, where the purpose of the restriction was to provide for the erection of semi-

detached houses with 20 feet of yard space between them and the adjoining streets, and it appeared that the locality, instead of developing as a suburban residential quarter, contained a large orphan asylum having a stone and brick fence 15 feet high extending for an entire block, a brewery, shops, and flat and tenement houses, it was held that equity would not restrain the erection of a tenement house located on the building lines of the respective streets by which the defendant's premises were bounded.

In *Deeves v. Constable*, 87 App. Div. 352, 84 N. Y. Supp. 592, where it appeared that the purpose of the insertion of certain building restrictions in a deed was to protect the grantor in the enjoyment of his residence adjoining, that the conditions had been radically and entirely changed, and the whole street devoted exclusively to business uses, and that the grantor's residence had been replaced by a business block, it was held that the radical change and the cesser of use of property for residential purposes might be regarded as furnishing sufficient ground to deny an enforcement of the covenant.

In *Schwarz v. Duhne*, 118 App. Div. 105, 103 N. Y. Supp. 14, where it appeared that, at the time of the imposition of restrictions against buildings other than dwelling houses or stores, and noxious or offensive businesses, the locality was a residential one, but that since then the character of the locality has entirely changed, being filled with tenement houses of poor character, stables, sawdust and spaghetti factories, Chinese laundries, and various other industries incompatible with an ordinary residential district, it was held that an injunction would not issue at the instance of a complainant still occupying his premises as a dwelling, against the conversion of the adjoining premises into a stable and carriage house.

In *Schefer v. Ball*, 53 Misc. 448, 104 N. Y. Supp. 1028 (affirmed without opinion in 120 App. Div. 880, 105 N. Y. Supp. 1142), it was held that where it appeared that the locality, formerly used exclusively for residential purposes, had materially changed in character, and that the most valuable use to

in behalf of which it is sought to be enforced.

5 Am. & Eng. Enc. Law, p. 11; Dennis v. Wilson, 107 Mass. 591; Stearns v. Mullen, 4 Gray, 151.

Plaintiff is entitled to a decree restraining defendants from building upon the lot.

Peck v. Conway, 119 Mass. 549; Hamlen v. Werner, 144 Mass. 396, 11 N. E. 684; Kirkpatrick v. Peshine, 24 N. J. Eq. 206; Hills v. Miller, 3 Paige, 254, 24 Am. Dec. 218; Whitney v. Union R. Co. 11 Gray, 359, 71 Am. Dec. 715; Watrous v. Allen, 57 Mich. 368, 58 Am. Rep. 363, 24 N. W. 104; Reilly v. Otto, 108 Mich. 330, 66 N. W. 228; Lloyd v. London, C. & D. R. Co. 2 De G. J. & S. 568; Linzee v. Mixer, 101 Mass. 530; Landell v. Hamilton, 175 Pa. 327, 34 L.R.A. 227, 34 Atl. 663; Coudert v. Sayre, 46 N. J. Eq. 386, 19 Atl. 190; Columbia College v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615; Halle v. Newbold, 69 Md. 265, 14 Atl. 662; Mann v. Stephens, 15 Sim. 377; McLean v. McKay, L. R. 5 P. C. 327.

which property could be put in that neighborhood was a business use, with large business buildings, and that its enforcement would confer no benefit upon the plaintiff, equity would not enjoin a violation of a building line restriction.

In *Antes v. Manhattan R. Co.* 116 N. Y. Supp. 697, it was held that to enforce, as against defendant's occupation of the premises by its elevated railway, a covenant against offensive establishments, was inequitable where the property in the immediate neighborhood had ceased to be used for residential purposes, and had become a factory section, and the railroad had been in operation for eighteen years.

In *Orne v. Fridenberg*, 143 Pa. 487, 24 Am. St. Rep. 567, 22 Atl. 832, it was held that where certain building restrictions were evidently imposed with the idea that the premises affected would continue to be used for residential purposes, and the locality had become devoted to business uses, the court would refuse an injunction to restrain the violation of such restrictions, leaving plaintiff to his remedy at law.

c. Under what circumstances not a bar.

1. Generally.

In *Craig v. Greer* [1899] 1 Ir. Ch. 258, it was held that the right of a sublessee to enforce a restrictive covenant contained in a long-term lease of lands for building purposes, against the erection or use of any house upon the premises save for a private dwelling house, or tea and refreshment house, without the written consent of the lessor, could not be defeated by a mere change in the character of the neighborhood, due to the growth of a neighboring city, and not to circumstances over which the complainant had any control.

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A restriction is presumed to be for the benefit of the land affected, and whoever succeeds to its title has full power to enforce it.

Stines v. Dorman, supra; *High*, Inj. §§ 1154, 1155; *Cooke v. Chilcott*, L. R. 3 Ch. Div. 694; *Hays v. St. Paul M. E. Church*, 196 Ill. 635, 63 N. E. 1040; *Coughlin v. Barker*, 46 Mo. App. 54; *Gibert v. Peteler*, 38 Barb. 488.

It is only where there is such a radical change in the character of the property and neighborhood as to defeat the object and purpose of the restriction, that a court of equity is justified in refusing relief and remitting the plaintiff to an action for damages.

Orne v. Fridenberg, 143 Pa. 487, 24 Am. St. Rep. 567, 22 Atl. 832; *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; 1 Story, Eq. Jur. 10th ed. § 750; *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691; *Lattimer v. Livermore*, 72 N. Y. 174; *Amerman v. Deane*, 132

In *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145, it was held that equity would not refuse to enforce a covenant not to use the premises conveyed for saloon purposes so long as the grantor should own a certain saloon,—the object of the promisee being to eliminate possible competition,—on the ground that the number of saloons in the neighborhood had increased from two to eight, where the new saloons were not upon the promisees's land, nor was he nor anyone claiming under him responsible for the change of situation produced by their establishment, if the new saloons will not make the performance of the covenant any more injurious to the interests of the owner of the granted premises than was the case before their establishment.

In *Tobey v. Moore*, 130 Mass. 448, it was held that building line restriction has reference to the street line as existing at the date of the deed, and is intended to establish a uniform rule as of that date which cannot be affected by the subsequent widening or narrowing of the street by public authority, or by the fact whether a building is erected before or after such alteration of the line.

So also, in *McDonald v. Spang*, 55 Misc. 332, 105 N. Y. Supp. 617, it was held that a restriction against erecting a house nearer than 25 feet from the street line is not affected by a widening of the street under public authority, but such restriction will be taken as referring to the street line wherever located.

In *Evans v. Foss*, 194 Mass. 513, 9 L.R.A. (N.S.) 1039, 80 N. E. 587, 11 A. & E. Ann. Cas. 171, it is held that enforcement of a restriction upon the use of property for the purpose of preserving its residential character will not be refused in the absence of any material change in conditions directly affecting the character and use of the

N. Y. 355, 28 Am. St. Rep. 584, 30 N. E. 741.

Covenants are to be so expounded as to carry into effect the intention of the parties, and this intention is to be collected from the whole contents of the instrument, so as to make an entire and consistent construction of the whole, and should be such as to support rather than defeat the instrument.

Childress v. Foster, 3 Ark. 252; *Wadlington v. Hill*, 10 Smedes & M. 560; *Coudert v. Sayre*, 46 N. J. Eq. 395, 19 Atl. 190; *Coughlin v. Barker*, 46 Mo. App. 54; *Shoenberger v. Hay*, 40 Pa. 132; *Landell v. Hamilton*, supra; *Burton v. Coper*, 8 Ohio N. P. 406; *Gifford v. First Presby. Soc.* 56 Barb. 114; *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Clark v. Devoe*, 124 N. Y. 124, 21 Am. St. Rep. 652, 26 N. E. 275; 5 Am. & Eng. Enc. Law, p. 11.

Messrs. Marshall & Fraser for defendants in error.

Crew, Ch. J., delivered the opinion of the court:

The plaintiff in error and the defendants

property, notwithstanding indications that the property will in the future be of greater value for business than for residential purposes.

2. Where restriction still beneficial.

Where a restriction, notwithstanding the change of use of land and buildings, still is of some substantial value to the dominant lot, equity will restrain its violation if relief is promptly sought. *Landell v. Hamilton*, 175 Pa. 327, 34 L.R.A. 227, 34 Atl. 663.

The simple fact that since the imposition of the restriction, the streets in the vicinity of the premises have ceased to a large extent to be occupied by genteel dwelling houses, interposes no obstacle to the relief sought by the plaintiff against a breach of a covenant that the grantee would not erect upon his lot any other building than a genteel dwelling house, to cover the whole front of said lot, but not to a greater depth than 50 feet, so long as his house is occupied as a dwelling house and the locality remains suitable for dwelling houses, and the covenant remains of substantial value to him and has in no way been released or extinguished by him. *Lattimer v. Livermore*, 72 N. Y. 174.

In *Rowland v. Miller*, 139 N. Y. 93, 22 L.R.A. 182, 34 N. E. 765, it was held that the fact that most of the premises in the locality were no longer kept for residences would not deprive a person still residing there, and who had done or omitted nothing which would defeat it, of the right to enforce a restriction against business "injurious or offensive to the neighboring inhabitants."

In *Zipp v. Barker*, 6 App. Div. 609, 40 N. Y. Supp. 325, and in *Zipp v. Barker*, 40 App. Div. 1, 57 N. Y. Supp. 569 (affirmed 28 L.R.A.(N.S.))

in error in this case, each and all of them, derive their title to the property here involved through Barnett T. Scott. The deed of said Barnett T. Scott and wife to Mary J. Kelley, under which, through various mesne conveyances the plaintiff in error, Frances A. Brown, acquired the title to lot three (3) in Barnett T. Scott's First Addition to the city of Toledo, contains the following covenant: "And the said B. T. Scott hereby covenants and agrees for himself, his heirs, assigns, executors, and administrators, that neither he, his heirs, or assigns will at any time erect upon lot 2 of said Scott's First Addition to the city of Toledo, thereon, any building nearer than 60 feet to the southwesterly line of Adams street, and that the only buildings put upon said lot shall be a residence and the necessary attachments, and that it shall be used for no other purposes than that of a family residence, and shall cost not less than \$5,000 for the residence alone." The deed of conveyance executed by Barnett T. Scott and wife to Samuel B. Wood, for lot No. two (2) in said Scott's Addition to the city of Toledo, which lot,

without opinion in 166 N. Y. 621, 59 N. E. 1133), it was held that the fact that a street had altered from a residential to a business street was no ground for refusing to enforce a covenant the effect of which was practically to widen a 50-foot street into an 80-foot street, since this may be as advantageous where the property fronting on the street is used for business purposes as where it is used for residences.

So, also, as to a 10-foot restriction which was not plainly imposed with the idea that the property would be devoted to private dwellings only, and which was not inconsistent with its use for business purposes. *Vetter v. Flaherty*, 4 Lack. Leg. News, 175.

A like conclusion was reached upon a state of facts which was similar, except that the building line was set back only 5 feet from the street, in *Batchelor v. Hinkle*, 132 App. Div. 620, 117 N. Y. Supp. 542.

In *Holt v. Fleischman*, 75 App. Div. 593, 78 N. Y. Supp. 647, reversing 37 Misc. 172, 74 N. Y. Supp. 894, it was held that the mere fact that most of the property in the locality was no longer used for residences was not of itself sufficient ground for declining to enforce a building line restriction for the benefit of one who still occupied her property as a residence and whose use thereof for such purpose would be injuriously affected.

In *Landell v. Hamilton*, 175 Pa. 327, 34 L.R.A. 227, 34 Atl. 663, where the owner of three lots imposed certain building restrictions upon the middle one of them for the benefit of the others, it was held that so long as such restrictions were of substantial value to the dominant lots, equity would restrain their violation, notwithstanding changes in the character of the neighborhood.

E. S. O.

through mesne conveyances, was subsequently acquired, and is now owned, by the defendants in error, contains the express stipulation and agreement that the premises thereby granted and conveyed are to be "subject, however, to all the conditions as to location of building, etc., contained in the deed from said Scott to Mary I. Kelley, of lot 3 in said addition. And said Scott also hereby makes the same agreement for himself, his heirs, assigns, executors, and administrators, concerning so much of lot 1 as remains in him after this conveyance, as is contained in said last-mentioned deed." The only question presented by the record in this case is whether, upon the facts found by the circuit court, the plaintiff in error, Frances A. Brown, is entitled in equity to have enforced, for the protection of her property, the restrictive covenants and stipulations contained in the foregoing deeds of conveyance. While counsel for defendants in error concede the general rule to be that building restrictions and other limitations on the use of real property of a character which the law permits to be attached to land in such a sense as to restrict the use of one parcel thereof in favor of another will be enforced by courts of equity upon equitable grounds, in favor of the parcel designed to be benefited and against the parcel burdened by the restriction or limitation, they insist, first, that "the stipulation or covenant in the deed to Kelley is not such a one as is binding upon the defendants in this case, as it is not a covenant that runs with the land owned by the defendant."

We shall consider briefly this claim of counsel, although we are of opinion that it is not at all essential to the right of plaintiff to have such restrictive covenant enforced in equity, that the same should be, technically speaking, a covenant running with the land of the defendants. In *Ashland v. Greiner*, 58 Ohio St. 67, 50 N. E. 99, where a grant of land was made to be used for religious purposes only, and afterwards the owners of the land conveyed a strip of it to the village of Ashland, for the purposes of a street, it is said by Burket, J.: "When value is paid for the estate, such stipulation [a stipulation that the property granted should be used only for particular purposes] is construed to be a covenant running with the land in the nature of a trust, for the uses and purposes expressed in the deed of conveyance, and in case of a breach of the trust, a court of equity will, in a proper action, decree the performance of the trust by confining the uses of the estate to the uses and purposes expressed in the deed. In such cases the restricted use of the estate becomes a part of the consideration and is consented to by the

grantee, and it is no hardship on him and his assigns to be compelled to observe the covenants contained in the deed." In *Stines v. Dorman*, 25 Ohio St. 580, it is said by White, J., in the opinion in that case: "It is unnecessary to determine whether the stipulation contained in the deed in question is to be regarded, technically, as a covenant running with the land. However this may be, it has, in equity, the effect of such covenant as against the grantee and his assigns. The stipulation relates to the mode in which the premises conveyed are to be enjoyed, and qualifies the estate. This limitation on the use enters into the consideration of the conveyance, and, if not unlawful, it ought, upon plain principles of justice, to be enforced. . . . If the effect of the stipulation is not to accomplish an illegal purpose, it is lawful; and, where it affects the land or the mode of its enjoyment, its effect is to bind all deriving title under the conveyance in which the restriction is found." In *Coughlin v. Barker*, 46 Mo. App. 54, Thomson, J., in discussing the character and effect of a restrictive building covenant, says: "The question whether the covenant runs with the land seems to be material in equity only on the question of notice. If the covenant runs with the land, then it binds the owner of the land, whether he had knowledge of it or not, for he takes no greater title than his predecessors had to convey; but if the covenant does not run with the land, but the land is subject to what is sometimes called an 'equity,' and at other times a 'negative easement,' in favor of the adjoining land, then, in order to enforce this easement against the land, it is essential that the owner should have taken the land with notice of it. *Tulk v. Moxhay*, 2 Phill. Ch. 774. We understand, then, that it is a principle upon which all the courts unite that the right to equitable relief in these cases depends upon the following considerations: First. A precedent agreement, in some form, by which a restriction is imposed upon the lot owned or held by defendant for the benefit of the lot owned or held by the plaintiff. Second. In case the agreement is made by the defendant's predecessor in title, notice in some form to the defendant of the fact and nature of the agreement, either from the language of the title deed under which he holds or otherwise."

In *Tulk v. Moxhay*, 2 Phill. Ch. 775, a leading English case, the syllabus is as follows: "A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs

with the land, so as to be binding upon subsequent purchasers at law." In the course of his opinion in this case, the Lord Chancellor (Cottenham) observes: "It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape for the liability which he had himself undertaken."

We think the rule upon this subject, as clearly established by the authorities, is that, when the action is in equity to enforce a restrictive covenant controlling the use or enjoyment of land, the vital question is not whether there is a covenant running with the land, but whether the restriction asserted and relied on was one imposed upon the servient estate for the benefit of the land in behalf of which it is sought to be enforced. 5 Am. & Eng. Enc. Law, p. 11. And we apprehend the rule is the same, whether the restriction imposed is charged upon the land conveyed, or upon land retained by the grantor.

Second. It is urged by counsel for defendants in error that "a fair interpretation and construction of the building restriction, so called, does not prohibit the improvement of this property as it is being done, even conceding that the covenant is one that runs with the land." When we consider that two dwelling houses have already been constructed by defendants on said lot two (2) and that it is their plan and purpose to construct thereon two more, this claim of counsel, we think, finds sufficient answer and refutation in the plain language of the covenant itself, by which it is provided: "That the only buildings put upon said lot shall be a residence and the necessary attachments, and that it shall be used for no other purpose than that of a family residence, and shall not cost less than \$5,000 for the residence alone."

Obviously, this covenant was one made for the benefit and protection of lot three (3) now owned by plaintiff in error, and, as shown by its terms, its purpose was to restrict and limit the use and occupancy of lot two (2) to purposes of a family residence with the necessary appurtenances, and, if given effect at all, should be given effect according to its plain and positive provisions.

Third. The further contention is here

made that the plaintiff, Frances A. Brown, is now without right to enforce said covenant because "even though the covenant is one running with the land, and therefore binding upon the defendants in favor of the plaintiff, the change in the character of the neighborhood has rendered the enforcement of such a covenant inequitable and oppressive upon the defendants, and would be of no material value to the plaintiff." This it would seem was the defense chiefly relied on in the court below, and, as appears from the opinion of the circuit court, was the ground upon which that court denied to plaintiff the relief she asked. In its opinion the circuit court says: "The important question in the case is whether there has been any substantial change in the drift of the population and character of the property as to its greater availability and value for use in the manner in which it is proposed to be improved by the defendants, or whether the character is not so substantially changed." And having found, as appears from the above statement of facts (paragraph 6), that, since the construction of the improvements of lot 3 (plaintiff's property), the character of the surrounding neighborhood had greatly changed in the particulars therein designated and pointed out, and having further found that by reason of such changed condition (paragraph 8) "the property of the defendants cannot now be profitably utilized in any manner except in the way intended to be used by the defendants, and this particular property and property in this neighborhood of lots of such larger proportions are adapted to the use to which the defendants are putting it, and cannot be profitably used in any other manner, owing to the great depth of the lots and the requirements of property generally in that neighborhood at the present time." The court held that therefore the defendants were absolved from the duty and obligation of longer observing and keeping said covenant, and refused to enforce it against them, predicated such judgment, it would seem, largely, if not wholly, upon a consideration of the injury and damage, by loss of profits, that would result to defendants from its enforcement.

It is important to note in the present case that the covenant which plaintiff is seeking to enforce is one made for the exclusive benefit of the property now owned and occupied by her as a residence, and therefore one which a court of equity will require to be specifically performed so long as said covenant remains of substantial value to her. The rule upon this subject, generally adopted and followed by the courts of this country, is, we think, correctly stated in Kerr on Injunctions, 2d ed. p. 356: "If

the right at law under the covenant is clearly established, and the breach is clear, and the covenant is of such a nature that it can, consistently with the rules and principles of the court, be specifically enforced, the court will not, unless under very exceptional circumstances, take into consideration at the hearing the comparative injury to the parties from granting or withholding the injunction. There may be cases in which it is clear that the damage to arise from the breach would be inappreciable, and in which the court would refuse to interfere; but the case must be free from all possibility of doubt. It must be clear that there is no appreciable, or at all events no substantial, damage before the court will refuse, upon the ground of smallness of damage, to withhold its hand from enforcing the execution. The mere fact that there has been a breach of covenant is a sufficient ground for the interference of the court by injunction. A covenantee has the right to have the actual enjoyment of property *modo et forma* as stipulated for by him. It is no answer to say that the act complained of will inflict no injury on the plaintiff, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be preserved as far as he is concerned, or whether he shall permit it to be violated. It is not necessary that he should show that any damage has been done. It being established that the acts of the defendant are a violation of the contract entered into by him, the court will protect the plaintiff in the enjoyment of the right which he has purchased."

In the case at bar there is no express finding by the circuit court that the contemplated improvement of the defendants' property will not appreciably injure or damage the property of plaintiff, by impairing or diminishing the use and enjoyment of the same for residence purposes and as a home, thereby greatly depreciating its value. In its opinion the circuit court says: "The plaintiff may or may not have been damaged. The lot of the plaintiff may be more or less valuable by reason of the construction of these buildings by the Hubers; but there would seem to be no greater difficulty, if the plaintiff has been damaged by the depreciation of his property, in ascertaining the amount of such damage by an action, than there is in very many cases where damages are sought and where verdicts are rendered therefor, although the opinions of witnesses may differ as to the exact extent of such damages. I am not holding or indicating that the plaintiff has been damaged in any substantial way, or has not." In *Lattimer v. Livermore*, 72 N. Y. 174, which was an action to restrain defendant from

infringing upon an alleged easement, Earl, J., says: "The simple fact that, since the deeds were given by Hurry, the streets in the vicinity of this block have ceased to a large extent to be occupied for genteel dwelling houses, interposes no obstacle to the relief sought by the plaintiff. If, by the change in the surrounding circumstances, this covenant had ceased to be of any substantial value to the plaintiff, she would not be permitted in equity to enforce it simply to annoy and damage other people; but so long as her house is occupied as a dwelling house, and the locality remains suitable for dwelling houses, and this covenant remains of substantial value to her, and she has in no way extinguished or released her easement, she must be permitted to enforce it." In *Landell v. Hamilton*, 175 Pa. 336, 337, 34 L.R.A. 227, 34 Atl. 663, 666, Mr. Justice Dean, in discussing the binding obligation of a restrictive building covenant similar to the one here in question, says: "As long as such restrictions are not unlawful, it is to no purpose to argue that they seriously retard the improvement of the city. We can no more strike down by decree a lawful restriction creating an easement, than we can compel the lot owner to erect buildings in accord with the best style of architecture. Contracts such as this, whether construed as covenants or conditions, since *Spencer's Case*, 5 Cope, 16, 1 Smith, Lead. Cas. 9th Am. ed. p. 174, have been enforced, both at law and in equity, between the immediate parties to them and their grantees, near and remote. . . . We concede some of the cases decided in other states are in apparent conflict with our decision; but what this court has uniformly held, and now holds, is that where the restriction, notwithstanding the change of use of the land and buildings, still is of substantial value to the dominant lot, equity will restrain its violation, if relief, as here, is promptly sought." *Peck v. Conway*, 119 Mass. 546; *Coudert v. Sayre*, 46 N. J. Eq. 286, 19 Atl. 190; *McGuire v. Caskey*, 62 Ohio St. 419, 57 N. E. 53; *Columbia College v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; 5 Pom. Eq. Jur. § 281; 2 High, Inj. § 1158.

The English rule would seem to be that, in cases of the character of the one at bar, relief by injunction will be denied only on the ground of equitable estoppel. In *Craig v. Greer* [1899] 1 Ir. Ch. 278, the vice chancellor, after reviewing many English cases, says: "The principle to be deduced from these authorities seems to me to be that, in order to defeat the right of a person with whom a covenant has been entered into restricting the mode of user of lands sold or demised, it must be clearly established that there is a personal equity against him

arising from his acts or conduct in sanctioning or knowingly permitting such a change in the character of the neighborhood as to render it unjust in him to seek to enforce his covenant by injunction. A change resulting from causes independent of him will not have such an operation." The court of appeal, affirming the decision of the vice chancellor, held: "That the right of a person to enforce a restrictive covenant by injunction could not be defeated by mere change in the character of the neighborhood, unless there was an equity against him arising from his acts or conduct in sanctioning or knowingly permitting such change as to render it unjust for him to seek relief by injunction."

We have examined the several cases cited and relied on by counsel for defendants in error, and find that in many, in fact in nearly all of them, the decision was governed by certain controlling facts which clearly distinguished them from the case at bar. Without reviewing in detail, or discussing at length, the finding of facts made by the circuit court, which is set out in full in the statement of this case, we think it enough to say that, in the light of the foregoing authorities, the facts found do not, in our judgment, show that there has been such a radical change in the character of the neighborhood in which the plaintiff's property is situated as can be held destructive of the covenant relied on, or such as would render its enforcement oppressive and inequitable. That the neighborhood continues to be a locality suitable for and devoted to residence purposes affirmatively appears through the fact found by the circuit court that defendants have recently erected on lot 2 two residence properties "of modern design and modern construction, each costing more than \$5,000," and they are now threatening to construct thereon two more dwellings of like character, neither of which is to cost less than that sum. Before the defendants commenced to improve their property (lot 2), they had actual notice of the terms of the building restriction imposed on said lot, and they were advised that the same would be insisted upon and enforced by the plaintiff. Under these circumstances, it being established that the acts of defendants would be in clear violation of the covenant and the restriction thereby imposed, a court of equity will not deny to plaintiff the relief she asks, merely because the property of defendants can now be profitably utilized only in the manner contemplated by the proposed improvement.

The judgment of the Circuit Court will be reversed, and upon the facts found judgment 28 L.R.A. (N.S.)

will be entered in favor of the plaintiff in error, Frances A. Brown, according to the prayer of her petition.

Summers, Spear, Davis, Shauck, and Price, JJ., concur.

NEBRASKA SUPREME COURT.

GEORGE T. HAMILTON et al.

v.

WILLIAM V. ALLEN et al.

(86 Neb. 401, 125 N. W. 610.)

Appeal — cross appeal — dismissal.

1. Where a full examination of the merits of an appeal shows that cross appellants are entitled to no relief except that already granted by the trial court, a motion by appellants to dismiss the cross appeal may be disregarded.

Same — misjoinder — harmless error.

2. On appeal from a decree in equity, failure of the trial court to dismiss the suit for misjoinder of plaintiffs and of causes of action does not require a reversal, where the record clearly shows appellants were in no wise prejudiced.

Evidence — attorney — purchase from client — burden of proof.

3. Where attorneys purchase from their clients and resell the subject-matter of their employment, the burden is on them, when sued by their clients for resulting profits, to prove the original purchase price was fair.

Same — resale by attorney — price realized — admissibility to show value.

4. In a suit to recover the profits made by attorneys out of an undivided half interest in land purchased from their clients, subject to a life estate, evidence of the prices realized, when the identical property was exchanged or resold at a large profit by the attorneys at various times within a few months, may be considered in determining whether the price paid by the attorneys was fair, where their witnesses testified to the changes in values in the meantime, and that the undivided interest had no market value at the time of the original purchase.

(March 28 1910.)

Headnotes by ROSE, J.

Note. — Right of attorney to purchase subject-matter of litigation or retain-er from client and his duty in relation thereto.

This subject is treated in the note to Crocheron v. Savage, 23 L.R.A. (N.S.) 679, attention being here called to a few later decisions.

It was held in Newkirk v. Stevens, 152 N. C. 498, 67 S. E. 1013, that the purchase from a client by an attorney of an interest in the subject-matter of litigation three

CROSS APPEALS from a judgment of the District Court for Madison County in plaintiffs' favor as to defendants Allen and Reed in a suit for an accounting as to the profits realized by an alleged wrongful purchase from plaintiffs and resale by defendants of certain lands; defendants Allen and Reed appealing from the judgment taken against them, and plaintiffs appealing from so much of the judgment as dismissed the action as to defendants Losey et al. Reversed on defendants' appeal.

The facts are stated in the opinion.

Mr. William V. Allen, *pro se*.

Messrs. M. D. Tyler, Burt Mapes, and N. D. Jackson for defendants.

Messrs. A. O. Abbott and James Nichols, for plaintiffs:

Where a party occupying a fiduciary relation to another acquires title to the property which is the subject-matter of such relationship, he may, at the option of the owner of such property, be required to surrender the same and account as a trustee for the proceeds of any of the property disposed of.

Columbus Co. v. Hurford, 1 Neb. 146; Stettinische v. Lamb, 18 Neb. 619, 26 N. W. 374; Rockford Watch Co. v. Manifold, 36 Neb. 801, 55 N. W. 236; Jansen v. Williams, 36 Neb. 869, 20 L.R.A. 207, 55 N. W. 279; Oliver v. Lansing, 48 Neb. 354, 67 N. W. 195; Olson v. Lamb, 56 Neb. 104, 71 Am. St. Rep. 670, 76 N. W. 433; Veeder v. McKinley-Lanning Loan & T. Co. 61 Neb. 892, 86 N. W. 982; Johnson v. Haywood, 74 Neb. 157, 5 L.R.A.(N.S.) 112, 103 N. W. 1058, 107 N. W. 384, 12 A. & E. Ann. Cas. 800; Levara v. McNeny, 73 Neb. 414, 102 N. W. 1042.

An attorney who is employed in a proceeding involving the property of his client, and who acquires title to the property, subject-matter of such employment, is under disability, and may, at the option of such client, be required to surrender the property in his hands, and account as trustee for any property disposed of.

Levara v. McNeny, *supra*; Dennis v. McCagg, 32 Ill. 429; Gardner v. Odgen, 22

N. Y. 327, 78 Am. Dec. 192; Michoud v. Girod, 4 How. 503, 45 L. ed. 1076; Story, Agency, §§ 210, 211; 2 Pom. Eq. Jur. § A. 5a.

Rose, J., delivered the opinion of the court:

This is a suit in equity to require defendants to account as fiduciaries for the profits made by them out of the interests of plaintiffs in 720 acres of land in Madison county, or as trustees holding title for the benefit of plaintiffs. The realty described was formerly owned by James B. Gibbs, who died intestate without issue June 5, 1901. It seems to be conceded that under the statutes then in force his widow, Nancy C. Gibbs, took a life estate in all the lands in controversy, and that subject thereto the title descended to six heirs, each inheriting an undivided one-sixth interest. These heirs and their relationship to intestate are as follows: George T. Hamilton, half-brother; Annie Minehart and Matilda Rodeck, half-sisters; Margaret A. Owens and Susan Beck, full sisters; Lizzie M. Mazurie, niece, the only child of a deceased sister of the full blood. The heirs named are plaintiffs, with the exception of Matilda Rodeck, who died after the death of James B. Gibbs. Her heirs are Ida McKee, Harry Rodeck, and William Rodeck, and they are plaintiffs also. William V. Allen and Willis E. Reed, who were formerly partners as Allen & Reed, and George W. Losey and wife are defendants. Losey was administrator of the Gibbs estate, and by mesne conveyances to which the heirs were not parties acquired title to 160 acres of the Gibbs land. The petition seeks to charge him and his wife as trustees holding title for the benefit of plaintiffs. John S. Robinson, now deceased, was attorney for the heirs of the full blood, and during the existence of that relation bought from his clients their undivided half interest, subject to the widow's life estate, taking title in the name of Thomas F. Memminger. The property thus acquired was sold by Robinson, and after his death his clients filed claims against his estate to re-

years after the rendition of judgment therein would be sustained, as the relation of attorney and client had terminated, and the former could deal with the latter without any possibility of undue influence or advantage.

But where an attorney who obtained a judgment for \$200 for a woman buys from her the defendant's interest in land worth \$6,000, which had been purchased by her at execution sale, and induced her to convey it to him for \$150, the difference between the amount of the judgment and his fee, the deed will be set aside, as the amount of 28 L.R.A.(N.S.)

the consideration was entirely out of proportion with the value of the property purchased, notwithstanding it is claimed that the attorney's employment ceased upon buying in the land for his client at a sheriff's sale, as a court will not enforce any contract between attorney and client made while the confidence engendered by that relation still continues, and it is manifest from all the circumstances that the parties were not dealing at arm's length and did not stand on an equal footing. Cline v. Charles (Ky.) 124 S. W. 347.

W. J. L

quire an accounting. The county court rejected the claims, and from the disallowance appeals were taken to the district court, where the cases were settled by stipulation. Allen & Reed were attorneys for the heirs of the half blood, and during the existence of that relation bought from their clients the latter's undivided half interest, subject to the widow's life estate. After the title of all the heirs had been purchased by their attorneys, the latter conveyed to the widow their interest in 160 acres occupied by her as a homestead in exchange for her life estate in the remainder of the 720 acres. Within a short time the property acquired by Allen & Reed from the heirs of the half blood was resold at a profit. In the petition the attorneys are charged with fraud in suppressing and misrepresenting facts affecting the interests of their clients and the value of their property. Any joint liability of defendants to plaintiffs seems to rest on the following averment of the petition: "Plaintiffs allege that said William V. Allen, Willis E. Reed, and John S. Robinson, not regarding their duties and obligations as such attorneys, as aforesaid, but contriving and intending to procure title to themselves from said heirs at grossly inadequate prices, they, the said William V. Allen, Willis E. Reed, John S. Robinson, and defendant George W. Losey, entered into an agreement to procure conveyances of and from said heirs of their interest in all of said lands, to the end and for the purpose of exchanging a part thereof with the said Nancy C. Gibbs, for a conveyance, satisfaction, and release of her life estate in the residue, and holding such residue for the common gain, profit, and advantage of them, the said William V. Allen, Willis E. Reed, John S. Robinson, and George W. Losey." All charges of fraud and the conspiracy to procure from the heirs their property at grossly inadequate prices and to divide the resulting profits are denied by defendants, and in separate answers by Allen & Reed faithful performance of their duties as attorneys is alleged. The district court upon a full hearing found, in substance, that there had been no conspiracy formed as pleaded in plaintiffs' petition; that in purchasing the interests of the heirs Allen & Reed and Robinson had no previous understanding among themselves or with the widow as to any future disposition of the property purchased; that there was no fraud or wrongdoing on the part of Losey, and that the conveyances to him were valid; that Allen & Reed were accountable for the profits made by them out of the property purchased from their clients. As to the heirs of the full blood and Losey and wife,

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the suit was dismissed. Judgment was entered against Allen & Reed in favor of their clients for \$11,592.37. Allen & Reed appeal, and plaintiffs have filed a cross appeal.

Two preliminary matters are presented. The first is a motion by defendants to dismiss the cross appeal of plaintiffs. It is unnecessary to pass on this motion, since an examination of the entire record in considering the appeal of Allen & Reed has led to the conclusion that the averments upon which cross appellants seek redress are not established by the evidence. Their right to the relief denied by the trial court depends upon the truth of the allegation that defendants and John S. Robinson entered into and carried out an agreement to procure plaintiffs' title at grossly inadequate prices, or that plaintiffs were injured by the misconduct of Losey or other fiduciaries. The finding of the district court to the effect that the conspiracy pleaded had never been formed is clearly sustained by the evidence. Any claim which the heirs of the full blood may have had against the estate of John S. Robinson on account of his breach of duty as their attorney was settled in the district court for Madison county in the cases appealed from the county court, and plaintiffs' right of recovery for injuries growing out of the conspiracy pleaded was lost with their failure to prove that charge. Defendant Losey is not answerable in this suit to any of the plaintiffs, unless he was guilty of a breach of trust, or participated in some species of fraud through which they were injured. There was no direct conveyance from the heirs to him, and an examination of every transaction with which he was in any way connected results in the approval of the trial court's finding that he was guilty of no wrong or fraud which made him plaintiffs' trustee, or required him to answer to them for acquiring title with which they had parted. It follows that on the merits of the case the findings assailed by cross appellants must be approved. A ruling on defendants' motion is therefore unnecessary.

The other preliminary matter is also presented by defendants. They argue that there is a misjoinder of parties plaintiff and of causes of action. Conceding this position to be well taken, when viewed from a technical standpoint, it does not necessarily follow that defendants were prejudiced by the action of the trial court in refusing to dismiss the suit, or in deciding the controversy between Allen & Reed and their clients, after it was found that the evidence disclosed no joint liability of defendants to plaintiffs. The suit was one in equity. The

court had jurisdiction of the parties. A statute declares that "the court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others." Code, § 46. "Judgment may be given for or against one or more of several plaintiffs," says the Code, "and for or against one or more of several defendants." Code, § 429. The record indicates clearly that in the adjudication of the controversy between Allen & Reed and their clients the trial court was not influenced in the slightest degree by testimony relating to other issues or to other parties. Allen & Reed understood the issues that resulted in the decree against them. In the petition their employment and professional relations were pleaded. The purchase of their clients' property, the prices paid, and what each received when the property was resold, were also stated. There was a specific prayer for relief as against them, and a prayer for general relief. The petition is held sufficient to require them to account. In separate answers they denied fraud, and pleaded the faithful performance of all their duties as attorneys. They accepted the real issue as to their accountability to their clients, and offered proof to show that they paid a fair price for the property purchased. On such a record it cannot be possible that they were prejudiced by the failure to dismiss the suit for the misjoinders challenged, or that the trial court erred to their prejudice in retaining for adjudication the controversy between them and their clients. In these respects the trial court will be sustained.

The important question for determination is: Shall Allen & Reed be required to account for the profits made by them out of the real estate purchased from their clients? The clients lived in Delaware, and what they knew about their inherited property and their rights during the time they held the title was, in a large measure at least, learned either directly or indirectly from their attorneys, Allen & Reed. The employment of counsel and the nature of their professional relations are not open to serious controversy. They had authority in writing from each of their clients, as follows: "I desire you, as attorneys, to look after my interests, whatever they may be, in the estate of James B. Gibbs, late of Madison county, Nebraska, deceased, for which I agree to pay you a reasonable attorneys' fee out of my share of the estate." They were authorized to sell their clients' interests in the subject-matter of their employment, and the relations continued until they became

the purchasers thereof. After some correspondence the clients executed and delivered the following document:

Stanton, Delaware, April 21, 1902.
To Messrs. Allen & Reed,
Madison, Nebraska.

We and each of us do hereby authorize you to sell our interest in the estate of James B. Gibbs, deceased, for the sum of three thousand dollars (\$3,000) net to us, we to be at no expense, and the aforesaid sum of \$3,000 to be paid us for our joint interests in the said estate. The purchaser at said sale is to take our interests in the said estate subject to the dower or other rights of the widow of the said James B. Gibbs, in the same, and also subject to the rights or claims of any and all creditors of the said James B. Gibbs in the said estate, and the amount of the above stated consideration shall not be subject to deduction on account of commissions or counsel fees or from any other cause whatsoever; provided that said sale shall be made within sixty days from this date. In witness whereof, we, Annie Meinhart, Matilda Rodeck, and George T. Hamilton have hereto set our hands the day and year aforesaid.

Annie M. Minehart,
Matilda R. Rodeck,
George T. Hamilton.

Witness: George Himsivorth.

June 14, 1902, Allen & Reed wrote to F. M. Walker, Wilmington, Delaware, a local attorney for the heirs of the half blood, as follows:

Inclosed herewith please find common form of deed to be signed and acknowledged and witnessed by Hamilton and wife and his two sisters. We expect a Mr. Douglass to take this deed, if he can raise the money; but as you will notice, we have left the grantee blank, and if he fails to produce \$3,000 to send to pay for the deed, and also pay us our fees in addition, we will wish to let some other person take same, and if they fail, as a last resort, we will take it ourselves. So please have Hamilton and his sisters sign a letter or statement to the First National Bank of this place to fill into the inclosed deed such person or persons as our firm directs, and deliver deed to us, upon the payment of \$3,000, and our firm signing a receipt releasing all claims for attorneys' fees, expense, etc. You draw such as we are to sign as you understand the same. Please attend to this at once as the writer [Reed]

must leave for the West to be gone some time.

Following is the reply:

Wilmington, Del., June 26, 1902.

Messrs. Allen & Reed,
Madison, Nebraska.

Dear Sirs:—

I am sending you to-day through my bank here the executed deed of Hamilton and wife and his sisters to the First National Bank of Madison, with authority to the cashier of the First National Bank of Madison to fill in the name of the grantee or grantees and deliver on payment of \$3,000, as requested by you in your letter of the 14th inst. As you have stated in the deed that the grantee takes subject to dower and creditors' rights of Mr. Gibbs, I do not think it worth while to take any release from them, and as you have stated that the amount to be paid Hamilton and his sisters is \$3,000, without any deduction for your counsel fees or other expenses, I am satisfied with your statement in that matter.

Hoping that you may be able to close the matter soon, I remain,

Very truly yours,

F. M. Walker.

The deed, executed in blank by the clients, was received by the First National Bank of Madison during the latter part of June, 1902. June 30, 1902, Allen & Reed directed the bank to insert in the blanks their own names as grantees, and paid the purchase price. Within a few months the property was sold by them at a large profit. The record shows, and it is proper to say, that the senior member of the firm objected to taking the title of his clients, and only consented when informed that the firm obligation to do so had already been given. When the attorneys directed the bank to insert their names in the deed, they acted both for themselves and their clients. In that act they united their personal interests with those of their clients. Their conduct was dual in character. Upon these facts equity raises a presumption against the validity of the transaction, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action. Such is the rule of general acceptance, as applied to dealings between fiduciaries and their principals in which both parties knowingly and intentionally deal with each other. 2 Pom. Eq. Jur. 3d ed. § 957. It is dictated by high considerations of public policy, and springs from the philosophy of the Galilean who declared that "no man can serve two masters," and who prayed, "Lead us not

into temptation." It is founded on His divine knowledge of the human heart. The doctrine is firmly established in this state. In a different form it was made applicable to the conduct of executive state officers by a constitutional provision that they shall receive no compensation except their salaries, and that their fees for services shall be paid in advance into the state treasury. The legislature, by adopting that part of the common law not inconsistent with the Constitution and statutes, has adopted the same rule for the protection of confidential relations. The courts have steadfastly required of attorneys the same high standard of professional accountability, and have consistently enforced the doctrine in both actions at law and suits in equity. A late expression of this court, in an opinion by Judge Barnes, is as follows: "Where the attorney purchases the subject of the suit, the client may set aside the purchase at will, unless the attorney shows by clear and conclusive proof that no advantage was taken, that everything was explained to the client, and that the price was fair and reasonable." *Levara v. McNeny*, 73 Neb. 414, 420, 102 N. W. 1042, 1044. The power to enforce this rule does not depend upon proof of actual fraud. Its application is the same whether attorneys abuse their trust, or act on generous impulses to assume risks and burdens of clients who are poor. Its enforcement does not involve an inquiry into the motives which prompt clients to sue for profits, when viewed from an ethical standpoint. Solicitude for them on account of their improvident contracts is not the basis of relief. The doctrine is founded on public policy. It is demanded by the welfare of society. It arises from the necessity of protecting proper relations of trust and confidence wherever they exist. Adherence to a principle which deprives fiduciaries of undue profits lessens the temptation to violate confidential relations. The attorneys are familiar with the rule stated, and their answer to plaintiffs' demand for its enforcement is that it is shown by uncontradicted evidence that the price paid was the full value of the property purchased. On this issue some of the witnesses expressed opinions as to the value of an heir's undivided one-sixth interest, subject to the widow's life estate. The opinions were based on general knowledge of land values, but knowledge of the value of an undivided sixth or half interest in land subject to a life estate was very meager. Two witnesses, one a banker and the other a dealer in real estate, testified that the interest of each heir, or an undivided one-sixth interest, had no market value, and that its

value was purely speculative. They did not state the value for speculative purposes. The testimony of defendant Reed was to the same effect, and in addition he said: "I considered that the undivided one-sixth interest in the 720 acres, which was embarrassed with the life estate of Mrs. Gibbs, considering her age and condition of health, was purely speculative, and that \$1,000 was really more than it was actually worth, but we figured we might get that amount out of it." It is insisted by the attorneys that this testimony, or testimony of like import, is the only competent proof of value at the time of the original purchase, and that it is uncontradicted, and must be accepted as conclusive evidence that the price paid was the fair value of the property. That this is the only alternative cannot be conceded. The property purchased by Allen & Reed was resold within a short time. Copies of their deeds appear in the evidence, and the consideration is correctly stated therein, according to one of the grantors. The prices were fixed by mutual understanding of the parties to the transfers. The trial court made these matters the subject of inquiry. Intestate's land is described in the petition as follows: The W. $\frac{1}{2}$ of section 6, the S. E. $\frac{1}{4}$ of section 5, the S. W. $\frac{1}{4}$ of section 7, all in township 22 N., range 2 W. of the sixth principal meridian, and the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 31 in township 23 N., range 2 W. of the sixth principal meridian, and containing, according to government survey, 720 acres, more or less. At the time of the death of Gibbs the N. W. $\frac{1}{4}$ of section 6 was occupied by himself and wife as their home, and is described in the record as a homestead. An undivided half interest in this land, subject to the widow's life estate, is what Allen & Reed bought. How they disposed of it, including dates, description, prices, and grantees, is shown by the following findings of the district court:

"July 7, 1902, William V. Allen and Willis E. Reed and their wives conveyed an undivided one-half interest in the N. W. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 6, township 22 N., range 2 W. of the sixth principal meridian, to Nancy C. Gibbs, and on the same day Nancy C. Gibbs conveyed to said William V. Allen and Willis E. Reed her life estate in the rest of said land of which the said James B. Gibbs died seised, and paid them \$3,000. August 9, 1902, Thomas F. Memminger and wife conveyed the undivided one-half remainder in the N. W. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 6, township 22 N., range 2 W. of the sixth principal meridian, to Nancy C. Gibbs, for which she paid nothing, but the same was in part ful-

filment of an agreement to vest the fee title thereof in her by the said Allen & Reed.

"August 9, 1902, William V. Allen and wife, Willis E. Reed and wife, and Thomas F. Memminger and wife, at the request of John S. Robinson, conveyed to John Prauner, Jr., the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 31, township 23 N., range 2 W. of the sixth principal meridian, for which Allen and Reed received \$3,600; about the same day said Allen and wife and said Reed and wife conveyed to George W. Losey the undivided $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 5, township 22 N., range 2 W. of the sixth principal meridian, for \$3,250; the same day Thomas F. Memminger and wife conveyed to said Losey the undivided one-half of the same premises for \$3,250; January 5, 1903, Memminger and wife for \$1 conveyed to John S. Robinson and George W. Losey the undivided $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 7, and the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 6, all in township 22 N., range 2 W. of the sixth principal meridian; and January 3, 1903, said Allen and said Reed and their wives, and John S. Robinson and his wife and George W. Losey and his wife conveyed to Vaclav Devorak, the S. W. $\frac{1}{4}$ of section 7, township 22 N., range 2 W. of the sixth principal meridian, for \$7,500; and January 16, 1903, said Allen and wife and Reed and wife, Robinson and wife and George W. Losey and wife, conveyed the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 6, township 22 N., range 2 W. of the sixth principal meridian, to Ralph E. Simmons for \$3,500.

"That by the aforesaid several transfers and conveyances of said lands, and as consideration therefor, the said defendants Allen & Reed have received from the interests therein of their said clients George T. Hamilton, Matilda Rodeck, and Annie Minehart the several sums respectively set forth and at the dates as follows, to wit: August 9, 1902, of Nancy C. Gibbs, \$3,000; of George W. Losey, \$3,250; of John Prauner, Jr., \$1,800; January 3, 1903, of W. M. Devorak, \$3,750; February 16, 1903, of Ralph E. Simmons, \$1,750; total \$13,550; and that said Allen & Reed have paid out, on account of said sales and interests of their said clients in the aforesaid real estate, the several sums, at the dates set forth, as follows: June 30, 1902, to their said clients \$3,000; August 9, 1902, to the said John S. Robinson, to procure a conveyance to the widow of said James B. Gibbs of the interest of his clients in the 240 acres conveyed to said widow, and to procure a settlement of the claim of Margaret A. Owens against said estate, \$2,000; total \$5,000."

It thus appears that on what amounted to an investment of \$5,000 in the clients' property June 30, 1902, the attorneys realized,

on exchanges and resales between that date and February 16, 1903, \$13,550. May the prices on resale be considered as evidence that the price paid to the clients was unfair? The prices on resale are shown by deeds admitted in evidence. On cross-examination defendant Reed was asked: "And within six months from the time you made your purchase you sold all of this land, and none of it for less than \$40 an acre?" This was answered without objection: "The respective deeds show the consideration." The considerations proved by deeds and oral testimony are not opinions based on knowledge of sales of other lands, but are positive proofs of the actual prices realized from mutual and voluntary exchanges and sales of the identical interests purchased. Subsequent changes in the prices are explained. Reed testified that in 1902 prices increased after the purchase \$10 to \$15 an acre, but a dealer in real estate made an estimate of \$2.50 to \$7 an acre. With this explanation of the rise in prices after the original purchase there is no good reason why realized prices amounting to \$13,550 for an undivided half interest, when mutually and voluntarily agreed upon by the parties to the resales, should be wholly excluded as evidence of value at the time of the original purchase. The burden was on the attorneys to show by "clear and conclusive proof that no advantage was taken," and that "the price was fair and reasonable." The proof was directed to those questions. The purpose of the testimony is not to fix the precise sum which shall be paid for land taken from the owner without his consent. Proof of what the undivided half interest brought on resale should not be rejected in the present case, under the rule that in a proceeding to condemn land for railway purposes, the owner should not be required to state on cross-examination what he previously paid for land intersected by the right of way. *Dietrichs v. Lincoln & N. W. R. Co.* 12 Neb. 225, 10 N. W. 718; *Omaha Southern R. Co. v. Todd*, 39 Neb. 818, 58 N. W. 289; *Chicago, R. I. & P. R. Co. v. Griffith*, 44 Neb. 690, 62 N. W. 868. Testimony that an undivided sixth interest subject to the widow's life estate had no market value, and the meager general knowledge on which defendant Reed based his opinion that the estate mentioned was not worth \$1,000, suggest a substantial reason for considering, in connection with proof of the rise in values, evidence that the undivided half interest purchased by the attorneys was exchanged or resold for \$13,550, within a short time. In *Rawson v. Prior*, 57 Vt. 612, 615, the court said that "what property sells for, which

has no regular market price, may be proper evidence tending to show its value."

Upon a showing of the fiduciary relation, and that the fiduciary purchased the property of his principal and sold it within a short time at a large advance, the fiduciary, under the rule in equity heretofore stated, is chargeable, *prima facie*, with the profits made upon the resale. The principal in such a case is not put to the burden of proving the actual market value at the date of conveyance to the fiduciary. That rule necessarily implies that the price actually received upon a resale by the fiduciary is provable against him. In view of the great disparity between the price paid by Allen & Reed and the prices received by them, proof that the actual increase in the market value of lands was not more than from \$2.50 to \$15 an acre certainly warrants a finding that the price paid by them was below the fair value, under the rule which makes the prices at which they conveyed competent proof against them.

Another consideration which leads to the conclusion that the proofs are not sufficient to warrant a denial of relief to the clients is that on July 7, 1902, seven days after the delivery of the deed by which the attorneys took title, they had entirely disencumbered their title of the embarrassment of the widow's life estate. This was accomplished by their obtaining her deed of conveyance of 480 acres and \$3,000 in exchange for their own deed and the deed of their cotenant in the remainder, or fee estate in 240 acres, to the widow. This adjustment, which operated to make the title merchantable, was well-nigh contemporaneous with their own acquisition of title. Their previous employment as attorneys to safeguard the interests of their clients in these lands, enlarged by express written power to sell, obligated them to bestow their skill and judgment in their clients' cause, and to give full advice as to the most appropriate means of disentangling and disencumbering the title of the life estate of the widow, so that the property of the clients would become merchantable. Where this object is fairly within the purview of the retainer, so that completion of the service of the attorneys may be expected to make the title a merchantable one, equity will not regard as conclusive a showing of value based upon the hypothesis that the embarrassment of the title which gave rise to the retainer made the lands unmerchantable. Without disparaging the motives of the attorneys whose dealings are here in question, any other rule would permit attorneys, after having ascertained by their employment that there was a feasible and practicable method of terminating the life

estate by conveying to the life tenant the fee of a fractional area of the lands, to justify their own acquisition of title at a depreciated valuation, when their knowledge derived by their employment in a confidential relationship assured them of their area of merchantable land. Equity does not sanction any rule which, in a situation so sensitive, affords a motive or temptation to profit by betrayal of fiduciary obligations. So, upon the undisputed facts disclosed by the record, the court is not bound or concluded by testimony that the value of an undivided one-sixth interest in the lands embarrassed by the life estate of the widow was of no market value, or that its market value was not in excess of \$1,000, the sum paid. The proof of the attorneys as to value was directed principally to a one-sixth interest. In the present case the three heirs had previously authorized a sale of their entire interest, and they in fact joined in one deed. The latter fact, while material, is not the controlling consideration. The vital consideration is the confidential relationship. Under their employment the attorneys had opportunity to gain special knowledge of means to clear the title, and of the actual worth of the interests acquired, and of speedy means of disposal on the footing of a merchantable title. To permit them now to justify upon a showing of depreciated value of a small interest in an embarrassed title, as rated in the market in the estimation of dealers in real estate generally, would operate practically to relieve them of their just burdens of accountability as fiduciaries.

When evidence of the prices on resale is considered, the attorneys have not shown by clear and convincing proofs that the price paid to their clients was fair. On the contrary, the proper deduction from all the evidence is that the price was inadequate. The right of the clients to an accounting is therefore established. This conclusion makes it unnecessary to inquire into the correctness of the several findings of the trial court, or into its reasons for its decree. It was conceded in oral argument by counsel for plaintiffs, however, that the judgment was excessive, and permission will be given to the district court to correct any errors in the account as set out in the decree. It further appears from documents quoted herein that expenses incurred and fees earned by Allen & Reed were parts of the consideration for the interests purchased, and the circumstances are such that, upon proper evidence, they should be credited with these items; the amounts, as to reasonableness, to be determined by the trial court. To this end the attorneys will

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be permitted to make the necessary proof, if they so desire. For these purposes the judgment is reversed, and the cause remanded for further proceedings.

Reversed.

Petition for rehearing denied.

NEW HAMPSHIRE SUPREME COURT.

OLA ANDERSON

v.

ÆTNA LIFE INSURANCE COMPANY.

(75 N. H. 375, 74 Atl. 1051.)

Accident insurance — alternative provisions — weekly indemnity and special loss.

1. An accident insurance company cannot escape liability on its contract for weekly indemnity during a certain period, for total disability caused by an accident which, among other things, results in loss of a limb, because provision for such indemnity is made subject to subsequent provisions, one of which is that, if injury results in loss of such limb, a specified sum less than the claim for total disability shall be paid, whereupon the policy shall be surrendered; and another of which provides that in no event will claim for weekly indemnity be valid, if a valid claim for any of the amounts provided for special injuries can be based upon the same accident and resulting injury,—at least where, among the provisions for special allowances, is one to the effect that, if the injuries result in total disability, the indem-

Note. — Insurance: Liability for indemnity against total disability which results from an injury for which an independent indemnity is provided.

In *Hart v. National Masonic Acci. Asso.* 105 Iowa, 717, 75 N. W. 508, it was held under a policy insuring against loss of time and providing for an indemnity for the loss of a foot, that the weekly indemnity, as well as the indemnity for the loss of a foot, could be recovered, though resulting from the same accident, if the total amount recovered did not exceed the limit fixed by the terms of the contract.

In *Cunningham v. Union Casualty & Surety Co.* 82 Mo. App. 607, a recovery was allowed for the loss of sight, as provided for in the contract of insurance, though the insured had already been paid the indemnity for a continued disability from the same accident, and had released the insurer from all claims for indemnity resulting therefrom, and the policy itself provided that the payment for the loss of sight should terminate the policy and discharge the insurer.

J. A. C.

nity shall be the sum per week named on the face of the policy for a certain period, provided the disability continue so long.

Same—allowance for operations.

2. A separate allowance may be made for each operation necessitated by an accident, which is mentioned on the schedule of an accident insurance policy which provides that, in case an operation is necessitated by any accident, a sum shall be paid in addition to the indemnity provided for by the policy, of the sum indicated for such operation in the schedule, "provided always that not more than one amount shall be payable for one or more operations performed as the result of one accident."

Action—commencement—preparation of writ.

3. A suit is commenced when the writ is filled out with the intention of having it served.

(December 7, 1909.)

EXCEPTIONS by defendant to rulings of the Superior Court for Merrimack County, made during the trial of an action brought to recover the amount alleged to be due on an accident insurance policy, which resulted in verdicts for plaintiff. Overruled.

The facts sufficiently appear in the opinion.

Mr. Fred C. Demond, with Messrs. Streeter & Hollis and Edward K. Woodworth, for defendant:

The plaintiff is precluded by the express and unmistakable terms of the policy from recovering weekly indemnity for disability on account of the injuries received by him in this accident.

Employers' Liability Assur. Corp. v. Morrow, 74 C. C. A. 640, 143 Fed. 750.

Messrs. Martin & Howe, for plaintiff:

When the words of a policy are, without violence, susceptible of two interpretations, that which will sustain the claim of the insured and cover his loss must, in preference, be adopted.

L'Engle v. Scottish Union & Nat. F. Ins. Co. 48 Fla. 82, 67 L.R.A. 581, 37 So. 462, 5 A. & E. Ann. Cas. 748; *Page, Contr.* § 1121; *Bickford v. Ætna Ins. Co.* 101 Me. 124, 63 Atl. 552, 8 A. & E. Ann. Cas. 92; *Kratzenstein v. Western Assur. Co.* 116 N. Y. 54, 5 L.R.A. 799, 22 N. E. 221; *Lovelace v. Travelers' Protective Asso.* 126 Mo. 104, 30 L.R.A. 209, 47 Am. St. Rep. 638, 28 S. W. 877; *Duran v. Standard Life & Acci. Ins. Co.* 63 Vt. 437, 13 L.R.A. 638, 25 Am. St. Rep. 773, 22 Atl. 530; *Imperial F. Ins. Co. v. Coös County*, 151 U. S. 452, 455, 38 L. ed. 231, 235, 14 Sup. Ct. Rep. 379; *Cowles v. Continental L. Ins. Co.* 63 N. H. 300; *Eddy v. Phoenix Mut. L. Ins. Co.* 65 N. H. 27, 23 Am. St. Rep. 17, 18 Atl. 89; 28 L.R.A. (N.S.)

Thayer v. Standard Life & Acci. Ins. Co. 68 N. H. 577, 41 Atl. 182; *Scales v. Masonic Protective Asso.* 70 N. H. 490, 48 Atl. 1084; *Richards, Ins.* 3d ed. p. 537; *Provident Sav. Life Assur. Soc. v. Cannon*, 103 Ill. App. 534; 1 May, Ins. 4th ed. § 174; *Jennings v. Brotherhood Acci. Co.* 44 Colo. 68, 18 L.R.A. (N.S.) 113, 130 Am. St. Rep. 109, 96 Pac. 982; *Dow v. Hope Ins. Co.* 1 Hall, 174; *Johnson v. Hathorn*, 2 Keyes, 484, s. c. 3 Keyes, 133, 2 Abb. App. Dec. 468; *Webster v. Dwelling House Ins. Co.* 53 Ohio St. 558, 30 L.R.A. 719, 53 Am. St. Rep. 658, 42 N. E. 546; *Hoffman v. Ætna F. Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337; *Boon v. Ætna Ins. Co.* 40 Conn. 575; *Travelers' Ins. Co. v. Ebert*, 20 Ky. L. Rep. 1008, 47 S. W. 865; *Lewis v. Brotherhood Acci. Co.* 194 Mass. 1, 17 L.R.A. (N.S.) 714, 79 N. E. 802.

The plaintiff is entitled to recover both the weekly benefits and for the loss of his hand.

Hart v. National Masonic Acci. Asso. 105 Iowa, 717, 75 N. W. 508; *Cowles v. Continental L. Ins. Co.* and *Eddy v. Phoenix Mut. L. Ins. Co.* supra; *Cook v. Benefit League*, 76 Minn. 382, 79 N. W. 320.

Parsons, Ch. J., delivered the opinion of the court:

The policy upon its face insures against loss of life, limbs, sight, or time, and states that the principal sum insured is \$5,000, and that the weekly indemnity for total disability is \$25. The plaintiff was injured during the life and within the terms of the policy, and offered evidence from which the court has drawn the inference that he was totally disabled, within the meaning of the policy, because of the results of the injuries proved. There is no contention that the evidence was not legally sufficient to authorize the finding of total disability. Why, then, should not the defendants pay the plaintiff the indemnity for total disability promised by the face of the policy? If the plaintiff's total disability is permanent, as it appears to be conceded it will be, he would, if he has any right to such indemnity, be entitled to weekly indemnity for 200 weeks, thus exhausting the full principal sum. But the engagements upon the face of the policy are made "subject to the conditions and benefits printed on the following pages."

The defendants, for the purpose of escaping their apparent liability for the principal sum insured, contend that one of the "benefits" to which the plaintiff is entitled is the payment to him of one fifth the principal sum, or \$1,000, for the loss of his left hand, which was one of the injuries he received, and that a correct construction of

the conditions of the contract releases them, upon payment of the fixed sum for the disability produced by this injury, from their engagement to indemnify the plaintiff for the total disability actually resulting from the injuries he received. The main controversy, therefore, is whether the plaintiff can recover the weekly indemnity of \$25, stipulated in the policy, for the total disability resulting from an accident occurring during the life of the policy, or whether his recovery must be limited to the fixed sum which the policy provided should be paid for the removal of the left hand at or above the wrist. The plaintiff, standing on his policy, in this suit is necessarily bound by its provisions, and the defendants are liable only in accordance with the terms of the contract. *Johnson v. Maryland Casualty Co.* 73 N. H. 259-261, 111 Am. St. Rep. 609, 60 Atl. 1009, and cases cited. This does not mean that an insured who has been fraudulently induced to enter into an unconscionable contract, or deceitfully persuaded to accept as evidence of the contract a policy which misrepresents it, has no remedy, but merely that, in a suit on the policy, he must accept the contract proved by the evidence which he offers. The only question therefore is: What was the contract?

"In construing insurance policies, courts are governed by the same general rules which are applicable to other written contracts. That is to say, it is the duty of the court to adopt that construction of the policy which, in its judgment, shall best correspond with the intention of the parties." *Stone v. Granite State F. Ins. Co.* 69 N. H. 438, 45 Atl. 235. The intention of the parties, so found from competent evidence, is the contract the court in each case is called upon to enforce." *Johnson v. Maryland Casualty Co.* 73 N. H. 259, 262, 111 Am. St. Rep. 609, 60 Atl. 1009. The evidence from which such intention is to be found is the language of the written instrument, read in the light of the situation and general purpose of the parties. As men in general do not enter into contracts that are absurd or frivolous, or understandingly include in a written contract stipulations tending to defeat its main purpose, the inconvenience, hardship, or absurdity of one construction, or its contradiction of the general purpose of the contract, is weighty evidence that such meaning was not intended, when the language is open to a construction which is neither absurd nor frivolous, and is in agreement with the general purpose of the parties. *Sanders v. Frankfort Marine & Plate Glass Ins. Co.* 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 655; 28 L.R.A.(N.S.)

Kendall v. Green, 67 N. H. 557, 562, 563, 42 Atl. 178.

"Insurance, then, is a contract of indemnity," under which "satisfaction is to be made to the person insured for loss he may have sustained." *Cummings v. Cheshire County M. F. Ins. Co.* 55 N. H. 457-459. The general purpose of the contract under consideration was therefore to indemnify the insured for loss resulting from accidental personal injury. With such end in view, it would be natural to expect that the greater the loss, the larger would be the sum payable as indemnity. Such are the main provisions of the contract. For injuries producing a partial disability, disabling the insured from the performance of one or more of the duties of his occupation, payment at the rate of \$10 per week for twenty-six weeks is stipulated. For a total disability, \$25 per week is agreed to be paid during the continuance of such disability, for a time sufficient to exhaust the policy. The limit, therefore, of indemnity provided for partial disability, is \$260, while for permanent total disability, the full face of the policy, or \$5,000, is payable. The policy also prescribes the sums payable for certain specified results following an injury. For loss of life, death resulting within ninety days of the injury, the loss of both hands at or above the wrists, both feet at or above the ankles, one hand and one foot at those places, or the irrecoverable loss of the sight of both eyes, the full principal sum is payable; for the similar loss of the right hand, or of either leg at or above the knee, one half the principal sum is payable; for the similar removal of the left hand, or either foot at or above the ankle, one fifth that sum is payable; and for the loss of one eye, one eighth is promised. These provisions grade the payment according to the injury. The cases where the full sum is payable are cases which would ordinarily result in total permanent disability, and the policy provides for the payment of the same sum which would be called for by the stipulation as to weekly indemnity; while where a less sum is provided, the cases are of a disability not permanently total, and the effect of the provisions is to define the liability of the insurer for such disabilities, for all these provisions are "in lieu of weekly indemnity." An insured who is immediately, continuously, and wholly disabled from prosecuting any and every kind of business pertaining to his occupation for the term of 200 weeks (using the language of the policy defining a permanent total disability) has, it would be generally considered, suffered a more serious loss than one who has merely lost his left hand at the wrist;

and one who suffers such permanent total disability, resulting from other injuries in the same accident, would incontrovertibly suffer greater loss if the removal of his left hand were added to his other injuries.

In view of the general purpose of insurance—the satisfaction of the loss—and the general provisions of this policy which have been mentioned, it would be expected that, for the greater loss, the policy would in all cases provide the greater recompense. But the defendants, while conceding that they would otherwise be liable to pay the plaintiff weekly indemnity for the total disability resulting to him from the injuries received, contend that, because he had the misfortune to lose his left hand, they are only liable to pay one fifth the amount insured. If he had been so unfortunate as to lose the sight of one eye, the same contention would reduce their liability to one eighth the principal sum. The contention is that an increase in the plaintiff's loss diminished the indemnity (called "benefit" in the policy) which the plaintiff was entitled to receive. There is no element of insurance in such a contract. Provisions in the policy by which an increase in injury should diminish the indemnity payable would not only be opposed to the general purpose of the contract of insurance, but to the general purpose of this contract, as evidenced by repeated provisions contained therein. No reason is suggested why the parties should have made such an agreement. The only ground of the claim is that it is so written in the bond. This requires an examination of the portion of the policy entitled "conditions and benefits," which are contained in twenty-four numbered paragraphs.

The first paragraph, as to which no question is made, prescribes the conditions under which the policy becomes a claim; the second provides for the payment of the full principal sum in case of death within ninety days after injury; the third stipulates that the full principal sum shall be paid if the injuries result in loss of sight or limbs within ninety days; and by the fourth, one half the principal sum is to be paid for certain other loss of limbs. Paragraph 5 is the particular provision involved, and is as follows: "If such injuries alone result within ninety days in loss by removal of the left hand at or above the wrist, or either foot at or above the ankle, the insured shall be paid one fifth the principal sum insured, in lieu of weekly indemnity as herein provided, and this policy shall thereupon cease, and be surrendered to the company;" or (6) if the injuries result in the same time in the irrecoverable loss of the sight of one eye, one eighth

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the principal sum is payable in the same way; or (7) if such injuries result in total disability, an indemnity of \$25 per week is provided for 200 weeks, if total disability exists during that period. Paragraph 7 also provides for a weekly indemnity of \$10 for a partial disability for a limited period.

There is nothing in these provisions as to "benefits" that supports the defendants' contention. It is to be observed that the prominent idea throughout the policy is the payment of weekly indemnity. Such is the promise on the face of the policy, and the fixed payments in paragraphs 3 to 6, inclusive, are all in lieu of weekly indemnity, to which the parties must have understood the insured would otherwise be entitled. Hence the company agreed to pay, and the insured to receive, for the losses respectively described in each paragraph, the sums named, in place of the weekly indemnity of \$25 or \$10 per week, to which he would otherwise be entitled. The provisions are each in the alternative. If the plaintiff's proof shows that his loss is described in any one of these paragraphs, he is entitled to the satisfaction therein provided. If in this case his proof had stopped with showing that the injuries had, within ninety days, resulted in the loss by removal of his left hand at the wrist, he could have recovered the sum named in paragraph 5; but he went further, and brought his case within the alternative promise contained in paragraph 7, by showing that the injuries received had resulted, not merely in the loss of his left hand, provided for by paragraph 5, but in a total disability. The total disability provided for by paragraph 7 is a separate and distinct loss from the loss of the left hand or foot, covered by paragraph 5, as that is from the loss of a right hand or a leg, covered by paragraph 4, and equally insured against.

No paragraph is found in the policy prescribing a fixed sum to be paid and received in lieu of weekly indemnity for the loss of memory and ability to figure contracts, loss of left arm and thumb and first two fingers of the right hand, fracture of nose and ribs, and scalding. The only complete description of the plaintiff's loss is found in paragraph 7, describing disability for which weekly indemnity is payable. The plaintiff is therefore entitled to recover the weekly indemnity which paragraph 7 provides, unless some other provision of the contract is found requiring an insured, who suffers any loss particularly described in paragraphs 3 to 6, inclusive, to waive all claim for compensation for other losses. The defendants claim such

provision is contained in paragraph 21, the material part of which is as follows: "In no event will claim for weekly indemnity be valid, if a valid claim for any of the amounts herein provided for specified injuries can be based upon the same accident and resulting injuries." It is, of course, true that an insured who, as a result of an accident within the terms of the policy, had irrecoverably lost the use of his limbs and the sight of one eye, might waive all claim for the serious results of his injury, and maintain a valid claim for the amount provided for the loss of an eye, as the plaintiff might, as has been suggested, have in this case confined his evidence to the loss of his arm. In the same way one who had suffered the loss of the left hand and foot, for which he would be entitled to the principal sum under paragraph 3, might waive the loss of his foot, and, proving only the loss of his left hand, establish a valid claim under paragraph 5. It would be as logical to claim in such case that because, upon payment of one fifth of the total sum for the loss of a left hand, the defendants are entitled to have the policy surrendered to them under paragraph 5, therefore they are under no obligation to pay the principal sum promised for the loss sustained under paragraph 3, as it is to claim in this case that, upon like payment, no obligation exists for satisfaction of the loss specified in paragraph 7. It is not probable that paragraph 21 was intended to release the defendants from the liability of paragraph 7 for the injuries there specified. Such result can be reached only by construing the provision as requiring the plaintiff to limit his proof to a portion of his loss; for in this way only can his injury be brought within the list of specified injuries for which a definite amount is fixed. Such an interpretation produces a result so foreign to the general purpose of insurance, and the repeated prior provisions of the contract in suit, that it is not probable the parties, in entering into the contract, attached such meaning to the language. Neither does such meaning attend the literal construction of the language; for, while a valid claim could be made for an amount provided for a specified injury which was one of the results of the accident, the policy, as has already been seen, does not declare that any particular sum should be a satisfaction of all the loss from the injuries in this case. Consequently, no valid claim for a particular amount as compensation for the plaintiff's entire loss can be made, and the paragraph relied upon has no bearing in the case. Its manifest purpose is plainly to make clear that when an insured's loss is covered by

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paragraphs 3 to 6, he could recover only the amounts named therein. It cannot be construed as excusing the defendants from liability for losses not described in those paragraphs, without disregarding the purpose of the parties and the plain meaning of the language which they have used to express that purpose.

Paragraph 10 of the policy is: "If such injuries shall necessitate a surgical operation within ninety days from the date thereof, the insured shall be paid, in addition to the indemnity herein provided, the sum indicated for such operation in the schedule hereinafter contained, provided always that not more than one amount shall be payable for one or more operations performed as the result of one accident." The defendants contend that, under this paragraph, they agreed to pay only one of the sums named in the schedule for the different operations; or, in other words, for only one, if several of the different operations enumerated should be necessary as the result of one accident. If such had been the defendants' purpose in drafting the policy, they could have easily provided that payment should be made for only one operation following an accident; but the paragraph distinctly recognizes their liability for "one or more" operations, and provides not that they shall pay for only one operation, but only one amount for one or more operations. The schedule attached to the policy contains a long list of amounts payable for different operations. The amounts vary according to the nature of the operation; and, if payment for only one operation was intended to be promised when several were necessary, it is probable some method would have been provided by which to determine which one of the different amounts should be paid. If the defendants are liable for only one, the policy contains nothing which makes them liable to pay for the amputation of the arm, rather than for the reduction of the fracture of the nose or ribs. Which operation should be paid for could be determined only by invoking an arbitrary rule against one of the parties. But it is common knowledge that a surgical operation is not always successful in the first instance and may have to be repeated. In this case there is reference to reamputation of crushed limbs. For amputation of the arm the defendants promised to pay \$50. They protected themselves by paragraph 10 from the payment of a second amount for reamputation. Similarly, they are liable to pay only once for the reduction of the fracture of the nose and ribs and for the amputation of the fingers. That is all that has been found against them. There is no error in the verdict. The de-

fendants' refusal to pay on other grounds was a waiver of any defects in the proof of loss. *Seely v. Manhattan L. Ins. Co.* 72 N. H. 49, 54, 55 Atl. 425. The detailed statement of the injuries in the certificate of the attending physician accompanying the proof was notice to persons of ordinary intelligence of the necessity of surgical attention, even without the distinct reference to reamputation.

Whether the suit was commenced within one year after the accident, or within six months of the proof of loss, depended upon whether that was done which the law deems essential to the commencement of the suit. Under our practice, a suit is commenced when the writ is filled out with the intention of having it served. *Buswell v. Babbitt*, 65 N. H. 168, 169, 18 Atl. 748; *Society for Propagating the Gospel v. Whitcomb*, 2 N. H. 229, 230. There was evidence that this was done within the time limited. The fact that the writ was not served or delivered to the sheriff for service until afterward is evidence on the question when, and the purpose with which, the writ was filled out, but it is not conclusive. The verdict for the plaintiff involves a finding that the writ was made, when it was made, with the intention of having it served, from which it follows that the suit was commenced on the date of the writ.

Exceptions overruled.

All concur.

WASHINGTON SUPREME COURT.

SHAW & HODGINS, Respts.,
v.

CITY OF SNOHOMISH et al.
and

C. W. WALDRON, Appt.

(55 Wash. 271, 104 Pac. 272.)

Tax—special assessment—limitation of action.

1. Owners of property against which a special assessment for local improvements is directed to be made by the court after an attempted levy has been set aside cannot avoid liability thereon on the ground that the limitation period has run since the first assessment became delinquent, if it has not run since the court ordered the new assessment.

Municipality—supplies—official interest—validity.

2. The entire claim of a contractor for work which he has performed for a municipality is not defeated by the fact that he purchased some of his supplies from the mayor, where the statute provides that any

claim for materials furnished in which that officer is interested shall be void.

(Fullerton, J., dissents.)

(October 11, 1909.)

APPEAL by defendant Waldron from a judgment of the Superior Court for Snohomish County in plaintiffs' favor in an action brought to restrain the City of Snohomish and its officers from collecting certain special assessments for improvements and from paying certain warrants held by defendant Waldron. Reversed.

The facts are stated in the opinion.

Messrs. Kerr & McCord, Frank D. Nash, and Merrick & Mills, for appellant:

The reassessment is not barred by the statute of limitations.

Note.—Effect of running of limitation since original assessment for local improvement upon a reassessment ordered because of invalidity of original.

In *Murray v. Chicago*, 175 Ill. 340, 51 N. E. 654, the court said in effect that even if the general statute of limitations applied to assessments, the running thereof was interrupted by the setting aside of the original assessment, and that the right to make a new assessment would not have been barred until the lapse of the statutory period of limitation which commenced to run upon vacation of the original assessment.

The Washington court said in *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393, that no statute limited the time for making a reassessment after the original assessment had been declared void. Nevertheless it was held in *Frye v. Mt. Vernon*, 42 Wash. 268, 84 Pac. 864, that where the statutory period for the enforcement of an assessment had elapsed since the original was declared void, the right to make a new assessment was barred, as was the right of a holder of warrants to compel a reassessment by mandamus. Language employed in this case is quoted in *SHAW v. SNOHOMISH*. Likewise denying the right of the municipality to make a reassessment after the statutory period has elapsed since the vacation of the original assessment is *Olympia v. Knox*, 49 Wash. 537, 95 Pac. 1090.

The Washington court also holds that the statute limiting the right to enforce the assessment does not commence to run until the reassessment, where the original assessment has been set aside. *Bowman v. Colfax*, 17 Wash. 344, 49 Pac. 551; *Fogg v. Hoquiam*, 23 Wash. 340, 63 Pac. 234. A similar result was reached in the analogous case of state ex rel. *Heman v. Ballard*, 16 Wash. 418, 47 Pac. 970, where it was held that the statute of limitations did not begin to run against actions on improvement warrants of a town illegally incorporated until the subsequent legislative validation of its incorporation and prior contracts.

L. A. W.

Espy Estate Co. v. Pacific County, 40 Wash. 67, 82 Pac. 129; *State ex rel. Ames v. Lewis County*, 45 Wash. 423, 88 Pac. 760; *Fogg v. Hoquiam*, 23 Wash. 340, 63 Pac. 234; *Potter v. New Whatcom*, 20 Wash. 589, 72 Am. St. Rep. 135, 56 Pac. 394; *New York Security & Trust Co. v. Tacoma*, 30 Wash. 661, 71 Pac. 194; *Bowman v. Colfax*, 17 Wash. 344, 49 Pac. 551; *New Whatcom v. Bellingham Bay Improv. Co.* 16 Wash. 131, 47 Pac. 236; *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353; *Northwestern & P. Hypotheek Bank v. Spokane*, 18 Wash. 456, 51 Pac. 1070; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686; *Barlow v. Tacoma*, 12 Wash. 32, 40 Pac. 382; *Wingate v. Tacoma*, 13 Wash. 603, 43 Pac. 874; *Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446; *Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632; *Renard v. Spokane*, 48 Wash. 345, 93 Pac. 517; *Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114.

Messrs. Brownell & Coleman and Robert McMurchie, for respondents:

The right to make a reassessment was barred.

Frye v. Mt. Vernon, 42 Wash. 272, 84 Pac. 864; *Olympia v. Knox*, 49 Wash. 537, 95 Pac. 1090; *Wilson v. Aberdeen*, 19 Wash. 90, 52 Pac. 524; *Spokane v. Stevens*, 12 Wash. 667, 42 Pac. 123.

Defendant Waldron's warrants are void for the reason that the street contractor, in violation of the positive terms of the statute, purchased the material used in the street improvement from the mayor of the city.

Northport v. Northport Townsite Co. 27 Wash. 543, 68 Pac. 204; *Miller v. Sullivan*, 32 Wash. 115, 72 Pac. 1022; *Note to Bay v. Davidson*, 9 L.R.A. (N.S.) 1014.

Chadwick, J., delivered the opinion of the court:

In the year 1890 the city of Snohomish adopted ordinances creating improvement districts, made improvements, and issued warrants to cover the cost. In 1891 a special assessment was made upon the lands abutting on the streets which had been improved. In 1894 this assessment was adjudged by the court to be void, whereupon the city made another assessment which was also declared to be void. Thereafter, and from time to time, appellant, Waldron, who was the holder of most of the warrants, urged and demanded of the city council that they make a reassessment upon the property benefited. This might have been done under the act of 1895, chap. 79, p. 142, but no action was ever taken by the

city authorities. In 1901 Waldron instituted a proceeding in the superior court for Snohomish county against the mayor and councilmen of the city of Snohomish to compel a reassessment. This proceeding was defended by the city, and, being brought on for trial in 1902, was taken under advisement by the court, who so held it until the 7th day of January, 1905, when he issued a writ of mandate compelling the city to proceed with the assessment as prayed for in the petition. Upon appeal (*Waldron v. Snohomish*, 41 Wash. 566, 83 Pac. 1106) this judgment was affirmed, and a reassessment was thereafter made by the city. After due notice given, this assessment was confirmed by the council early in the year 1907. Thereafter respondents and several others brought actions to restrain the city from proceeding further, or in any manner undertaking to collect any part of the assessments, and from paying any of the warrants held by appellant, Waldron. A demurrer to the complaint being overruled, defendants answered, defendant Waldron setting up as an affirmative defense the matters to which we have briefly referred and to all of which a demurrer was sustained. Certain facts were stipulated, after which the court rendered judgment in favor of the plaintiffs, and defendant Waldron has appealed.

There seem to be two grounds upon which respondents rest their case: (1) That the right to levy and collect this special assessment is barred by the statute of limitations; (2) that the original contract is void in that the then mayor of the city did in violation of the statute (*Ballinger's Anno. Codes & Statutes*, § 968 [*Pierce's Code*, § 3510]) contract with and furnish the original contractors with materials and supplies to be used in the prosecution of the work. The record indicates that the first is the only ground considered by the trial court. This court has held that special assessments are not charges against the general funds of the city. *State ex rel. American Freehold-Land Mortg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321, where the authorities are collected and discussed; and also *Dean v. Walla Walla*, 48 Wash. 76, 92 Pac. 895; *Soule v. Ocosta*, 49 Wash. 518, 95 Pac. 1083; *Jurey v. Seattle*, 50 Wash. 272, 97 Pac. 107. Therefore, if the landowner can plead the statute, this action cannot be maintained under the authority of *Frye v. Mt. Vernon*, 42 Wash. 272, 84 Pac. 864, and *Olympia v. Knox*, 49 Wash. 537, 95 Pac. 1090. The exact date upon which the original assessment became delinquent is not made certain in the record, but it is admitted that it was in the year 1891; and, inasmuch as the defense of the statute

was not set up in the case of *Waldron v. Snohomish*, we must assume that appellant *Waldron* instituted that action within the ten-year period of limitations, as provided in the act of 1895. At any rate, under the decision of this court rendered in that case, a peremptory writ issued to compel the reassessment which respondents now seek to defeat.

The remaining question then is: Was the statute of limitations arrested while appellant, *Waldron*, pursued his remedy against the city? It must be borne in mind that *Waldron* had no remedy against the property owners, and the city no direct interest in the result of the litigation. *Waldron* brought his action against the only party chargeable in the first instance. He pursued the only remedy he had, and the defense made by the city was for the benefit of the property owners. Had the city won, they would have had the benefit of the improvement with the property discharged of all liens. It lost, and they are bound by the judgment, and precluded from asserting any defense that might have been made in the principal action. An action begun within the period of limitation to compel an assessment is equivalent in law to a valid assessment.

In the cases relied on by respondents, no legal assessment was made within ten years after the work was done or the assessment became delinquent on the first attempted levy. In *Frye v. Mt. Vernon*, the court said: "It will thus appear that on December 22, 1904, when respondent, as relator herein, filed his original affidavit asking a writ of mandamus, a period of over thirteen years had expired since the original assessment now claimed to be invalid had become delinquent. . . . No question can arise but that a period of more than ten years has expired, not only since the original pretended assessment became delinquent, but also since, as claimed by respondent, it was adjudged to be void. . . . Assume that the town council of Mt. Vernon should, of its own motion, make a reassessment to pay these warrants, the original assessment having been delinquent for more than ten years, would it be contended that the owners of property assessed could not plead the statute of limitations when the municipality endeavored to enforce its lien? To say they could not plead the statute would be to hold that the council could delay making a reassessment for any indefinite period of time, and yet hold that, whenever any council at a later date might perchance be seized with an inclination or desire to reassess, they could and would be permitted to do so, without regard to lapse of time. We do not think this could be permitted. But if, aft-

er the lapse of ten years, the council could not make a valid reassessment of its own motion, it will not be required to do so by a peremptory writ of mandate." The necessary implication from this language is that, if the action had been instituted by *Frye* within the ten-year period of limitation, the decision in that case would have been different, and the city would have been compelled to levy an assessment to pay the improvement warrants. The logical sequence of this reasoning is that, if it be lawful to compel the city to levy an assessment, the courts will not restrain the collection of the tax. The remedy to which the court has said appellant is entitled is not so much the levy of the assessment as its collection; and the rights and liabilities of all parties, including the property owner, who was in law the party charged in the mandamus proceeding, although prosecuted against the city, related back to and are fixed as of the time the action was begun. The mandamus proceeding having been begun within the period of limitation, the property owner must be held to be bound by the acts and defenses made by the city council. Otherwise appellant would be without remedy. We concede the rule to be otherwise where the warrant holder allows the full limit of the statute to run before beginning an action to compel a valid assessment. Upon this principle this case is to be distinguished from the late case of *State ex rel. Seymour v. Slater*, 53 Wash. 608, 102 Pac. 651.

The following facts were stipulated, and, although probably not passed upon by the trial judge, are before us for legal construction: "It is stipulated that the books of *Blackman Bros.* show that between October 31, 1890, and December 31, 1890, *Joseph Plaskett*, the contractor, purchased from *Blackman Bros.* three bills of lumber aggregating two thousand eighty-eight dollars and ninety cents (\$2,088.00), and that said books show that from January 8 to June 12, 1891, *Blackman Bros.* credited *Plaskett's* accounts with the sum of eighteen hundred and fifty-two (\$1,852) dollars, which *Mr. Blackman* states was paid out by *Plaskett* to the men employed in his mill on their wage account upon the order of *Blackman Bros.*, and that *Mr. Blackman* will also testify that this lumber was sold by his firm in the ordinary course of business. It is stipulated that the contractor, *Mr. Plaskett*, purchased lumber from other mills for said contract to the extent of at least ten thousand dollars (\$10,000), and that, in purchasing the lumber from *Blackman Bros.*, he acted in good faith, in the ordinary course of his business. It is admitted that *Mr. Plaskett* will testify that

he purchased this timber in the ordinary course of his business, and that he had no agreement with Blackman Bros., or the mayor as a member of the firm of Blackman Bros., for a share of any of the profits that might inure to him in the prosecution of his contract with the city for these improvements, and that both Mr. Blackman and Mr. Plaskett will testify that the contract for the sale of the lumber above referred to was entered into subsequent to the time the contract for the improvement herein referred to had been let to Mr. Plaskett by the city of Snohomish, and that there was no understanding of any character whatsoever had at or prior to the time said contract was let that the firm of Blackman Bros. were to furnish any part of the lumber to be used in connection therewith. "That the said H. Blackman was at all of said times a member of a firm known as Blackman Bros., and owned a large and substantial interest in the business of said firm. That the said firm entered into a contract with the said J. H. Plaskett, the contractor for said work, whereby the said Blackman Bros. agreed to furnish all the lumber required for the planking of said street and the construction of the sidewalks on each side thereof, and agreed to accept in payment for said lumber warrants thereafter to be issued by the said defendant, city of Snohomish, to the said contractor for said work. That large quantities of lumber were used in planking said streets and constructing sidewalks and curbing thereon. That the said Blackman Bros. furnished all the lumber therefor pursuant to said agreement, and received from said contractor in payment therefor warrants issued by said city to said contractor for said work.'" The record shows that H. Blackman was the mayor of Snohomish at that time. The case of *Northport v. Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204, is relied on by respondents to defeat a recovery. The concrete question presented is whether the whole claim of an independent contractor can be avoided because, in the execution of his contract, he has bought necessary supplies or materials from a member of the city council or the mayor. Although the construction put upon the *Northport* Case by respondents may seem warranted, yet we cannot think that it was ever the intention of the court to hold that a dealing on the part of the contractor with a city officer would do more than avoid a contract *pro tanto*. Section 968, Ballinger's Anno. Codes & Statutes (P. C. § 3510), among other things provides: "And any claim for compensation for work done, or supplies or materials furnished, in which any such officer is interested, shall be void, 28 L.R.A.(N.S.)

and if audited and allowed, shall not be paid by the treasurer." It also provides for removal from office and for punishment in case of wilful violation. The statute is aimed at the officer, and intended to prevent a recovery on his part or to the extent of his interest when the claim is asserted by another. This object is attained when the amount of his interest is determined and rejected. Out of the whole amount due on the original contract the value of the material furnished and in which the mayor had an interest was inconsiderable. The record shows that an appeal is pending from the order of assessment. The correctness of the amount of the assessment is made a proper subject for the determination of the superior court upon such appeal, and we doubt not that the court will reject the warrants so unlawfully issued, as well as consider other irregularities, and give judgment accordingly.

This cause will be reversed, and remanded for further proceedings in accordance with this opinion.

Rudkin, Ch. J., and Morris and Gose, JJ., concur.

Fullerton, J., dissenting:

I am unable to distinguish this case from that of *State ex rel. Seymour v. Slater*, cited in the majority opinion, and on the authority of that case I think this one should be affirmed.

Petition for rehearing denied.

ILLINOIS SUPREME COURT.

HENRY F. HARTENBOWER et al.

v.

ELIZA UDEN et al., Appts.

(242 Ill. 434, 90 N. E. 298.)

Statute of frauds — contract by cotenant — authorization in writing.

1. A written contract or memorandum of sale is necessary to enforce against one tenant in common a contract for sale of real estate negotiated by his cotenant, although he authorizes the latter in writing to make the sale.

Note. — Written authority to agent to contract for sale of property as dispensing with necessity that contract of sale itself be in writing.

The conclusion reached in the above decision that written authority to an agent to sell property is insufficient to dispense with the requirement of the statute of

Same — memorandum — sufficiency — draft of deed.

2. Neither a draft of a deed nor a written notice to execute the same is sufficient to satisfy the requirements of the statute of frauds as to a memorandum of the sale of real estate, where they do not contain the terms of sale.

Contract — cotenants — compliance with authority.

3. A contract by one cotenant to sell the real estate belonging to both is not binding on the other where it does not comply with the terms of the written authority conferred upon him.

(December 22, 1909.)

A PPEAL by defendants from a decree of the Circuit Court for La Salle County in complainants' favor in a suit to compel specific performance of an alleged contract for the sale of certain lands. Reversed.

Statement by Dunn, J.:

William Patterson died intestate owning certain real estate in La Salle county, and on October 16, 1908, his heirs executed the following writing:

"This agreement, made and entered into this sixteenth day of October, A. D. 1908, by and between Sarah Trout and A. B. Trout, her husband, Elizabeth Marsh and Henry C. Marsh, her husband, T. H. Patterson and Ella Patterson, his wife, Jane Hurton and Ebenezer Hurton, her husband, Mary Gardner and Fred Gardner, her husband, John Patterson and Rose Patterson, his wife, Eliza Uden and B. S. Uden, her husband, and Noah Patterson and Elnora Patterson, his wife, Marion Patterson, wife of Benjamin A. Patterson, parties of the first part, and Benjamin A. Patterson, party of the second part (the said Sarah Trout, Elizabeth Marsh, T. H. Patterson, Jane Hurton, Mary Gardner, John Patterson, Eliza Uden, Noah Patterson, and Benjamin A. Patterson being all and the only heirs at law of William Patterson, deceased):

"Witnesseth, that the parties of the first part, for the purpose of saving the expense of a partition sale of the lands hereinafter described, agree with the said second party as follows:

"First—That said second party may and shall offer for public sale, at auction, for cash, not later than December 15, 1908, the following described real estate, to wit: The west half (W. $\frac{1}{2}$) of the north half (N. $\frac{1}{2}$)

of the northeast quarter (N. E. $\frac{1}{4}$) and the east half (E. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$), all in section twenty-seven (27), township thirty-two (32), north, range two (2), east of the third principal meridian, in the county of La Salle and state of Illinois.

"Second—That said parties of the first part will join with said party of the second part in the making, execution, and delivery of a good and sufficient warranty deed for said above described premises to the purchaser or purchasers thereof at said sale.

"Third—That out of the proceeds of said sale said party of the second part shall first retain and pay all necessary expenses of such sale, including auctioneer's fees, expenses of advertising, abstract of title, and a reasonable compensation to said second party for his time in advertising and making such sale; also that he shall retain out of the proceeds of such sale a sufficient sum to pay any and all unpaid claims allowed against the estate of William Patterson, deceased, as well as costs and expenses of administration of said estate.

"Fourth—That the purchaser or purchasers at said sale shall pay at least 10 per cent (10%) of the purchase price cash in hand on the day of sale, and the balance thereof as soon as warranty deed conveying a good and merchantable title to said premises shall be tendered to such purchaser or purchasers.

"Fifth—That said parties of the first part will join with said party of the second part in the execution of a good and sufficient bond to such purchaser or purchasers, in such a sum as will protect him or them against any unpaid claims which might be a lien against said premises, should such purchaser or purchasers require. Said party of the second part agrees that he will make distribution of the residue of the proceeds of such sale (after making the payments and deductions aforesaid) to the parties entitled thereto, according to their respective rights and interests within ——— after final payment has been made by such purchaser or purchasers."

On December 12, 1908, Benjamin A. Patterson offered the land at public auction. Henry F. Hartenbower was the highest bidder therefor, and the land was struck off to him, but no written contract or memorandum of sale was made. On January 25, 1909, Benjamin A. Patterson served on ap-

frauds, that the contract itself be written, was also reached in two other cases from the same jurisdiction: *Lasher v. Gardner*, 124 Ill. 441, 16 N. E. 919, and *Fletcher v. Underwood*, 240 Ill. 554, 88 N. E. 1030.

To the same effect is *Haydock v. Stow*, 40 N. Y. 363, in which it was held that a 28 L.R.A.(N.S.)

written instrument authorizing an agent to sell land, across which an intending purchaser had written an agreement to purchase the land upon the terms therein stated, was not a compliance with the statute of frauds, though the owner subsequently gave his verbal assent thereto.

J. A. C.

pellants, Eliza Uden and Benjamin S. Uden, the following notice:

To Eliza Uden and B. S. Uden, her Husband:

You and each of you will please take notice that the certain warranty deed dated the 19th day of December 1908 to be executed by the heirs at law of William Patterson, deceased conveying to Henry F. Hartenbower, for the consideration of \$12,720, the west half of the north half of the north-east quarter and the east half of the north-west quarter, all in section 27, township 32, north, range 2, east of the third P. M., in La Salle county, Illinois (said deed being the same one this day presented to you and each of you for your signature and acknowledgment), will be at the Tonica Exchange Bank, at Tonica, Ill., for a period of ten days from this date, for the purpose of giving you and each of you an opportunity of signing and acknowledging the same. If you fail to sign and acknowledge said deed within ten days from this date I shall commence a suit in the circuit court of La Salle county, Illinois, for the specific performance of the certain contract entered into on the 16th day of October, 1908, by and between said heirs at law of William Patterson, deceased (you and each of you having signed said contract), parties of the first part, and by myself, party of the second part, the costs of said suit and other damages to be recovered from you for your failure to execute said deed pursuant to said contract. Benjamin A. Patterson.

Dated this 25th day of January, A. D. 1909.

The deed mentioned in the notice was a statutory warranty deed from the heirs of William Patterson to Henry F. Hartenbower, conveying to him, for a consideration of \$12,720, the land described in the notice. It was signed by all of the heirs except Eliza Uden. Benjamin A. Patterson asked her and her husband to sign it, before serving the notice on them. She did not sign the deed, and on February 15, 1909, the appellees, Henry F. Hartenbower and Benjamin A. Patterson, filed their bill against her and her husband in the circuit court of La Salle county, alleging the execution of the writing of October 16, 1908; the sale to Hartenbower; that Patterson presented to Hartenbower an abstract of title which was acceptable to him, and he is now ready and willing to pay the full purchase price on the presentation to him of a deed signed by all of the cotenants; that a deed was prepared and signed by all the heirs except appellants, but they refused to sign the same. 28 L.R.A.(N.S.)

The prayer of the bill was that the appellants be required to join the other heirs of William Patterson in the execution of a proper deed of conveyance of said premises to said Hartenbower. The appellants filed a plea setting up that there was no contract of sale in writing, nor was there any note or memorandum thereof in writing, signed by the defendants or by any person by them lawfully authorized, and claiming the benefit of the statute of frauds. Replication was filed, and upon the hearing the court rendered a decree that the appellants join with the other heirs of William Patterson in the execution of a proper deed of conveyance of said premises, and deliver the same to Benjamin A. Patterson, who, upon receipt of the purchase money, shall deliver it to Hartenbower.

Messrs. H. L. Richolson and R. A. Green, for appellants:

An oral sale of real estate cannot be enforced, where there has been no part performance of the contract, and where the statute of frauds is relied on as a defense.

Pickerell v. Morss, 97 Ill. 220; *Van Cloostere v. Logan*, 149 Ill. 588, 36 N. E. 946; *Wright v. Raftree*, 181 Ill. 464, 54 N. E. 998; *Messmore v. Cunningham*, 78 Mich. 623, 44 N. W. 145.

A letter of an attorney authorizing an agent to sell real estate is not a memorandum of a contract made in pursuance of such authority.

Lasher v. Gardner, 124 Ill. 441, 16 N. E. 919; *Fletcher v. Underwood*, 240 Ill. 554, 88 N. E. 1030.

The notice of January 25th, 1909, which refers to the undelivered deed, neither of which contains the terms and conditions of the contract, is not a memorandum of the contract sufficient to satisfy the statute of frauds.

Kopp v. Reiter, 146 Ill. 437, 22 L.R.A. 273, 37 Am. St. Rep. 156, 34 N. E. 942; *Shovers v. Warrick*, 152 Ill. 355, 38 N. E. 792; *Swain v. Burnette*, 89 Cal. 564, 26 Pac. 1093; *Freeland v. Charnley*, 80 Ind. 132.

One dealing with an agent does so at his peril, and when the agent's authority is in writing is bound to take notice of its terms.

Short v. Kieffer, 142 Ill. 258, 31 N. E. 427; *Blackmer v. Summitt Coal & Min. Co.* 187 Ill. 32, 58 N. E. 289.

An agent cannot bind his principal by a contract which he was not authorized to make.

Coddington v. Goddard, 16 Gray, 436; *Kelly v. Holbrook*, 191 Mass. 565, 77 N. E. 1037; *Wanless v. McCandless*, 38 Iowa, 20; *Bosseau v. O'Brien*, 4 Biss. 395, Fed. Cas. No. 1,667; *Siebold v. Davis*, 67 Iowa, 560,

25 N. W. 778; Jackson v. Badger, 35 Minn. 52, 26 N. W. 908; Smith v. Allen, 101 Iowa, 608, 70 N. W. 694; Holbrook v. McCarthy, 61 Cal. 216; Hoyt v. Shipherd, 70 Ill. 300; Monson v. Kill, 144 Ill. 248, 33 N. E. 43; Sea v. Morehouse, 79 Ill. 216; Baxter v. Lamont, 60 Ill. 237.

A party who is demanding that a contract be enforced is bound to show he has always been ready, eager, and willing to perform on his part, and that he is not himself in default.

McCabe v. Crosier, 69 Ill. 501; Hoyt v. Tuxbury, 70 Ill. 331; Beach v. Dyer, 93 Ill. 295; Short v. Kieffer, *supra*; Skeen v. Patterson, 180 Ill. 289, 54 N. E. 196.

Messrs. E. E. Roberts and H. M. Kelly for appellees.

Dunn, J., delivered the opinion of the court:

The statute of frauds having been pleaded, it was necessary for the complainants to produce a contract, or some note or memorandum thereof in writing, signed by the defendants, or some other person thereunto by them lawfully authorized in writing signed by them. The authority of Benjamin A. Patterson sufficiently appears from the writing of October 16, 1908. It was not, however, a contract of sale. The statute further requires that the contract entered into for the sale of the land, or some note or memorandum thereof, shall also be in writing. Fletcher v. Underwood, 240 Ill. 554, 88 N. E. 1030; Lasher v. Gardner, 124 Ill. 441, 16 N. E. 919. No particular form is necessary to constitute the memorandum required by the statute. An admission in writing of the making of the contract is sufficient, and the writing need not all be on one piece of paper. It is essential, however, that the writings contain everything necessary to show the contract between the parties, so that there be no need of parol proof of any of the terms or conditions of the sale or the intention of the parties. The contract cannot rest partly in writing and partly in parol, but the written memorandum must disclose all the terms. Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; McConnell v. Brillhart, 17 Ill. 354, 65 Am. Dec. 661; Farwell v. Lowther, 18 Ill. 252; Esmay v. Gorton, 18 Ill. 483; Lasher v. Gardner, *supra*. The undelivered deed to Hartenbower, executed by the heirs of William Patterson other than the defendants, contains no conditions whatever, and makes no mention of the terms of the contract under which it was made. It purports to be simply a conveyance of the land. It is no memorandum or note of the contract. Kopp v. Reiter, 146 Ill. 437, 22 L.R.A. 273, 37 28 L.R.A.(N.S.)

Am. St. Rep. 156, 34 N. E. 942; Shovers v. Warrick, 152 Ill. 355, 38 N. E. 792.

Neither is the notice that was served on appellants any memorandum or note of a contract of sale. That notice merely informed appellants that a deed which had been presented to them for execution, conveying the land in question to Henry F. Hartenbower for the consideration of \$12,720, would be at the bank in Tonica for ten days, to give them an opportunity to execute it, and that if they did not do so, Benjamin A. Patterson would commence suit for the specific performance of the agreement of October 16, 1908, for costs and damages, for their failure to execute said deed pursuant to said contract. They had not agreed to execute this deed by the contract referred to. This notice did not state that Benjamin A. Patterson had made a contract for the sale of the lands, or that Hartenbower had bought it. It does not, on its face, purport to relate to any contract of sale. The mere demand that the heirs execute a deed did not amount to evidence of a contract for the sale of the land. To satisfy the requirements of the statute it is essential that all the material terms and conditions of the contract appear in writing, without the necessity of resorting to parol evidence. Leave out the parol evidence of the auction sale, and there is no evidence in this record of any sale to Hartenbower.

If the notice were otherwise sufficient as a memorandum of a contract of sale to Hartenbower, it is defective because it does not require the payment of 10 per cent of the purchase money in cash on the day of sale. An owner of land has the right to prescribe the terms on which he will sell, and his agent has no authority to make a contract of sale on different terms from those prescribed. If the written authority to the agent to sell fixes the amount of the cash payment and the amount and date of the deferred payments, he has no authority to make a contract for a different cash payment, or for deferred payments of different dates or amounts. Oliver v. Sattler, 233 Ill. 536, 84 N. E. 652; Monson v. Kill, 144 Ill. 248, 33 N. E. 43; Hoyt v. Shipherd, 70 Ill. 309. The deed shows that one of the heirs lived in Missouri and another in Oklahoma. The conveyance could not be made until after the sale was made and the name of the purchaser known. The authority was to sell for 10 per cent cash and the balance on the delivery of a warranty deed. This authorized the making of a contract for sale for 10 per cent cash and the balance in such reasonable time as might be required for the execution of the deed by all the parties. The notice contains no allusion to any such terms, and nothing from which it can be in-

ferred that any cash payment was to be made before the delivery of the deed. It is said by appellees that the evidence shows that a cash payment of 10 per cent was made. It is not a question, however, of what may be proved by parol to have been done, but what the written contract shows. The statute of frauds being pleaded, a contract or memorandum in writing must be shown. The writing authorized the agent to make a certain contract, and the contract shown must be in conformity with the authority conferred. If it is not, then it is unauthorized, and there is no contract or memorandum signed by any person lawfully authorized thereto.

The decree of the Circuit Court will be reversed, and the cause remanded, with directions to dismiss the bill.

Reversed and remanded, with directions.

IOWA SUPREME COURT.

A. L. HILL, Admr., etc., of George H. Craine, Deceased, Appt.,
v.

TRAVELERS' INSURANCE COMPANY
OF HARTFORD, CONNECTICUT.

(— Iowa —, 124 N. W. 898.)

Insurance — disability — liability for death.

1. No liability for death arises upon a policy insuring against permanent disability.

Same — indorsement on policy — effect.

2. An indorsement on an insurance policy, designating its kind, is no part of it, and insured cannot be held to have relied on it rather than on the terms of the instrument.

(February 17, 1910.)

APPEAL by plaintiff from a judgment of the District Court for Jefferson County sustaining a demurrer to the petition in an action brought to recover the amount alleged to be due on a limited health insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Crail & Crail, for appellant:

Policies of insurance must be strictly con-

strued against the insurer, and every doubt or ambiguity resolved in favor of the insured.

Lord v. American Mut. Acci. Asso. 89 Wis. 19, 26 L.R.A. 741, 46 Am. St. Rep. 815, 61 N. W. 293; Sheanon v. Pacific Mut. L. Ins. Co. 77 Wis. 618, 9 L.R.A. 685, 20 Am. St. Rep. 151, 46 N. W. 799; 1 Cyc. Law & Proc. p. 243; 19 Cyc. Law & Proc. p. 656; 25 Cyc. Law & Proc. p. 739.

In construing a policy of insurance, the question is not what did the company intend, but rather what had the policy holder a right to think was meant.

Matthes v. Imperial Acci. Asso. 110 Iowa, 222, 81 N. W. 484; Goodwin v. Provident Sav. Life Assur. Asso. 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157; Wadsworth v. Jewelers' & T. Co. 132 N. Y. 540, 29 N. E. 1104.

Messrs. Jayne & Hoffman, for appellee:

No recovery can be had, under the terms of the policy sued on, for permanent disability, unless such disability continues for one year or more.

Gilchrist Transp. Co. v. Phenix Ins. Co. 95 C. C. A. 475, 170 Fed. 282; Hastings v. Bankers' Acci. Ins. Co. 140 Iowa, 626, 119 N. W. 80; Rosenberry v. Fidelity & C. Co. 14 Ind. App. 625, 43 N. E. 317; Burnett v. Railway Officials & E. Acci. Asso. 107 Tenn. 185, 64 S. W. 18; Hall v. American Employers' Liability Ins. Co. 96 Ga. 413, 23 S. E. 310.

Death is not disability.

Rosenberry v. Fidelity & C. Co.; Burnett v. Railway Officials & E. Acci. Asso.; and Hall v. American Employers' Liability Ins. Co.,—supra.

Sherwin, J., delivered the opinion of the court:

On the 8th day of April, 1907, the defendant issued to George H. Craine a policy of insurance, denominated a "limited health policy," agreeing to pay him the sum of \$25 a week for temporary disability, for a period not in excess of twenty-six consecutive weeks' duration, and agreeing to pay him for permanent disability in the following language: "(2) In a sum equal to one hundred weeks' indemnity for temporary disability as aforesaid; to be paid

Note. — Liability for death under policy insuring against permanent or total disability.

That death is not the kind of disability contemplated by a policy providing for indemnity to insured in case of his total disability was also the conclusion reached in Hall v. American Employers' Liability Ins. Co. 96 Ga. 413, 23 S. E. 310; Rosenberry v. Fidelity & C. Co. 14 Ind. App. 625, 43 N. E. 28 L.R.A.(N.S.)

317; Dawson v. Accident Ins. Co. 38 Mo. App. 355; Shaw v. Equitable Mut. Acci. Asso. 5 Neb. (Unof.) 584, 99 N. W. 672; Burnett v. Railway Official & E. Acci. Asso. 107 Tenn. 185, 64 S. W. 18.

For a discussion of the general question as to what constitutes disability within the meaning of an accident or health policy, see the notes to Turner v. Fidelity & C. Co. 38 L.R.A. 529, and Keith v. Chicago, B. & Q. R. Co. 23 L.R.A.(N.S.) 352. J. A. C.

to him upon satisfactory proof at the company's home office, in Hartford, Connecticut, that he has, as the result of disease contracted during the term of his policy, entirely and irrecoverably lost the sight of both eyes, or by incurable paralysis permanently and entirely lost the use of both hands or both feet, or of one hand and one foot, and also that on account of either of said conditions he has been for one year, and will be thereafter and during life, permanently disabled from engaging in any work or occupation for wages or profit." The insured died on July 6, 1907, as the result of cerebral apoplexy, and in January, 1909, this suit was commenced to recover the full indemnity provided for in the second clause of the policy. The petition alleged that as the result of apoplexy the insured had "entirely and irrecoverably lost the sight of both eyes, and by incurable paralysis permanently and entirely lost the use of both hands and both feet; and that on account of said conditions he has been for one year and will be thereafter and forever permanently disabled from engaging in any work or occupation for wages or profit." A demurrer to the petition, which raised the question of the right of the plaintiff to recover \$2,500 under the policy, was sustained, and the plaintiff's appeal brings the question to us for review.

The entire contract clearly shows that it is not one insuring the life of Craine. It insures against loss on account of temporary and permanent disability, as the terms are ordinarily used and understood. The word "disability" does not express the same meaning as the word "death;" nor is it ordinarily used as signifying the same thing. "Disability" is defined as a want of competent power, strength, or physical ability; weakness; incapacity; impotence. Century Dict. None of the lexicographers, so far as we are advised, give it any broader meaning, and the appellant has cited no case in which it is held to mean death. It is a rule that the language of contracts shall be given its ordinary and usual meaning, unless it is clear that some other meaning was intended by both parties. Here nothing appears that indicated an exception to the rule. Indeed, the very language used negatives any such thought. The indemnity was to be paid to the insured, and then, only upon proof that he had been disabled for a year, and "that he will be thereafter and during life" permanently disabled. The words "temporary or permanent disability" are used in many places in the policy, and there is not a word therein indicating that liability was to be incurred for death. The back of the policy has in print on the folder the following: "The Travelers' In-

surance Company of Hartford, Connecticut. Limited Health Policy of Life of George H. Craine;" and the appellant contends that the statement that it was a "limited health policy on the life" of the insured is sufficient warrant for holding the defendant liable in this case. It is sufficient answer to say that the indorsement was no part of the contract, and it is not to be presumed that the insured relied thereon rather than upon his contract. Where an accident insurance policy provided for a weekly indemnity, not exceeding a certain number of weeks, for total "disability," and the insured died within twenty-four hours after the accident, it was held that his estate could not recover for the full period, as death cannot be said to be disability. *Rosenberry v. Fidelity & C. Co.* 14 Ind. App. 625, 43 N. E. 317. A weekly indemnity insurance policy agreed to indemnify the insured against injury resulting in disability caused by external means, etc., and provided that the death of the insured would immediately terminate all liability under the policy. There was no provision in express terms as to the death of the insured and providing a payment therefor. Held, that the death of the insured, caused by accidental means, was not a disability within the meaning of the policy. *Burnett v. Railway Officials & E. Acci. Asso.* 107 Tenn. 185, 64 S. W. 18. See also *Hall v. American Employers' Liability Ins. Co.* 96 Ga. 413, 23 S. E. 310; *Brown v. United States Casualty Co. (C. C.)* 95 Fed. 935. The demurrer was rightly sustained, and the judgment is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

LOUISA W. ROGERS

v.

BOSTON CLUB et al.

ALEXANDER M. FERRIS, Receiver of the Boston Club et al., Impleaded, etc., Appts.

(205 Mass. 261, 91 N. E. 321.)

Appeal — decree adjusting rights — prematurity.

1. Appeals from decrees directing members of a social club to pay assessments, disallowing the claim of receivers for special assessments against them, and allowing

Note. — Jurisdiction of equity, on the ground of preventing a multiplicity of suits, to enforce liability of members of a club or corporation.

It is not intended to consider in this note the general question of equitable jurisdic-

claims against the assets of the club, will lie without waiting for a final decree distributing its assets.

Equity — jurisdiction — unrelated claims.

2. A bill in equity will not lie in behalf of a receiver of a club against its members to recover from them due owing under its by-law, and the purchase money of supplies received from it, since the claims are cognizable at law, and are not common in such sense that they can be joined to prevent a multiplicity of suits.

Same — claims for dues — actions at law.

3. Claims by the receiver of a social club against its members for unpaid dues cannot be joined in an equity proceeding against all to prevent a multiplicity of suits, but must be enforced in separate actions at law.

tion over proceedings to enforce the liability of stockholders of an insolvent corporation, but only the question whether such jurisdiction may rest upon the ground that a multiplicity may therefore be avoided.

Equity will not assume jurisdiction over a proceeding to enforce the liability of the stockholders in an insolvent corporation, whether such liability is based upon a statutory provision, is for unpaid stock, or arises from some other transaction or dealing with the corporation, where such liability is fixed in amount and is due from different stockholders by reason of their individual liability, if the sole ground for equitable intervention is that a multiplicity of suits will thereby be avoided, even though to some extent there is a community of interest and a similarity of questions of law and fact involved in the controversy. *Hale v. Allison*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *People's Nat. Bank v. Saville*, 25 App. D. C. 139; *Fidelity Trust & S. D. Co. v. Archer*, 179 Fed. 32; *Marsh v. Kaye*, 168 N. Y. 196, 61 N. E. 177; *Miller v. Willett*, 71 N. J. Eq. 741, 65 Atl. 981. This is also the doctrine of *ROGERS v. BOSTON CLUB*.

The doctrine of equitable jurisdiction to avoid a multiplicity of suits is based on the ground that the convenience of the parties will be thereby promoted and more exact justice accomplished without substantially affecting the material interests of any of the parties. As said by the court in *Hale v. Allison*: "It is easy to say it rests upon the prevention of multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested, and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction 28 L.R.A.(N.S.)

Club — receiver — right to avoid dues.

4. Members of a social club cannot avoid paying their dues to its receiver on the theory that they have not, because of the receivership, enjoyed the expected benefits of membership, where they accrued before the receiver was appointed.

Same — governing board — quorum — majority.

5. Under by-laws of a social club permitting assessments to be made by a majority of an executive committee and constituting one fourth of the committee a quorum, the assessments must be made by a majority of the committee, and not of the quorum.

(February 24, 1910.)

A PPEALS by certain defendants from an order of the Superior Court for Suf-

on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff; and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction."

Applying this doctrine to the facts in that case the court said that "even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose convenience must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The costs of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law."

In *People's Nat. Bank v. Saville*, equitable jurisdiction was sought to enforce the liability of stockholders in an insolvent corporation for unpaid stock subscriptions. The court said that the liability was several, and not joint and it was not competent for the creditors, or any person who became subrogated by operation of law to the place of the creditors, to bring a joint action against several or all the stockholders to

folk County overruling demurrers to a petition, filed in a proceeding to appoint a receiver for the Boston Club, by Alexander M. Ferris, the receiver appointed therein, to compel certain members of that club to pay their club dues and other amounts owing thereto and from a decree adjudging payment of such accounts; by such receiver from a decree dismissing a second petition filed by him to recover the amount of special assessments made against the members of the Boston Club, and by certain defendants from a decree allowing certain creditors' claims against the club. Demurrers to receiver's first petition sustained. Decree in receiver's favor on first petition reversed. Decree dismissing receiver's second petition

affirmed. Decree as to allowance of claims affirmed.

The facts are stated in the opinion.

Mr. William B. Durant for appellant receiver.

Messrs. Whipple, Sears, & Ogden and Walter A. Powers, for appellants Alcott et al.:

A receiver cannot join in one petition all alleged debtors of the corporation of which he is receiver, send notices to ten of them by mail to come in and show cause why a decree should not be entered against them, and thereupon, after hearing, have execution issue against those men so served with notice.

Tompkins v. Craig, 93 Fed. 885; Hale v. Allinson, 102 Fed. 790, affirmed in 45 C. C.

enforce such a liability, and added that such a proceeding could not be sustained in equity on the ground that a multiplicity of suits could thereby be avoided. On this point it was said "there is no common interest in such a case such as the law would recognize as a good ground for the prevention of a multiplicity of suits; on the contrary, there is great danger that such a combination of independent suits in one proceeding may entail far greater vexation, expense, and annoyance than it could possibly prevent."

In *Miller v. Willett*, where the only ground urged for equitable jurisdiction of a bill to enforce the statutory liability of a number of stockholders in a corporation was that a multiplicity of actions at law would thereby be avoided, jurisdiction was denied; the court saying that there must be something more than the mere fact that two or more parties are jointly and severally indebted to a large number of creditors whose claims are entirely independent of each other, to justify a court of equity in assuming jurisdiction to try and determine rights which are purely legal in their character.

This distinction was also pointed out in *Marsh v. Kaye*, which held that a suit in equity would not lie, to enforce the liability of the directors of a charitable corporation, by one creditor on behalf of himself and all others, where there was no fund to be distributed among the creditors except such as might proceed from the conversion of the assets of the corporation, and there had already been a receiver appointed for the corporation, in which action a distribution of the assets could be had, and the only relief sought was to reach the personal liability of the directors, which was absolute and unlimited. In denying equitable jurisdiction the court said that, while, undoubtedly, resort may often be had to equity to enforce legal obligations, "still it is the rule that a court of law is primarily the proper form for such litigation, and that resort to equity can be had only where the remedy at law is inadequate or will lead to inequitable results. It is therefore incumbent

on the plaintiff to show why an equitable action is necessary to secure his rights, where the liability of the stockholders or directors is limited in amount, and the fund to accrue from such liability may be inadequate to satisfy all the claims against the corporation. An action in equity on behalf of all the creditors in which the fund can be applied ratably on all claims is absolutely necessary to secure equality."

To the same effect is *Fidelity Trust & S. D. Co. v. Archer*, wherein equitable jurisdiction was invoked to enforce from the stockholders the payment of an assessment of a fixed sum per share on the stock of an insolvent corporation. The proceeding did not involve an accounting or contribution, but the relief sought was simply the recovery of separate and independent legal pecuniary demands.

Where, however, equitable aid is invoked to enforce the payment, by the stockholders of an insolvent corporation, of their liability for the debts of the corporation, whether such liability is statutory or otherwise, equity will assume jurisdiction of a multiplicity of suits is thereby avoided and, because of the nature of the relief sought, the remedy afforded will be more adequate than that which can be obtained in actions at law. *Hayden v. Thompson*, 17 C. C. A. 592, 36 U. S. App. 361, 71 Fed. 60; *Bailey v. Tillinghast*, 40 C. C. A. 93, 99 Fed. 801; *Wyman v. Bowman*, 62 C. C. A. 189, 127 Fed. 257; *Allen v. Montgomery R. Co.* 11 Ala. 437; *Pickering v. Townsend*, 118 Ala. 357, 23 So. 703; *Henderson v. Hall*, 134 Ala. 455, 63 L.R.A. 673, 32 So. 840; *Dalton & M. R. Co. v. McDaniel*, 56 Ga. 191; *Queenan v. Palmer*, 117 Ill. 619, 7 N. E. 613; *Maine Trust & Bkg. Co. v. Southern Loan & T. Co.* 92 Me. 444, 43 Atl. 24; *Fremont Package Mfg. Co. v. Storey*, 2 Neb. (Unof.) 325, 96 N. W. 416; *German Nat. Bank v. Farmers' & M. Bank*, 54 Neb. 593, 74 N. W. 1086; *Pfohl v. Simpson*, 74 N. Y. 137; *Cook v. Carpenter*, 212 Pa. 165, 1 L.R.A.(N.S.) 900, 108 Am. St. Rep. 854, 61 Atl. 799, 4 A. & E. Ann. Cas. 723; *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

In the majority of the cases sustaining

A. 270, 106 Fed. 258; Freeman v. Winchester, 10 Smedes & M. 577; Smith v. Johnson, 57 Ohio St. 486, 49 N. E. 693; State Bank v. First Nat. Bank, 34 N. J. Eq. 450; Andrews v. Paschen, 67 Wis. 413, 30 N. W. 712; Wheaton v. Daily Teleg. Co. 59 C. C. A. 427, 124 Fed. 61; Horn v. Pere Marquette R. Co. 151 Fed. 626.

Annual dues cannot be collected from club members when the club has passed out of existence as a going concern and no *quid pro quo* is returned to such members.

Warren v. Stearns, 19 Pick. 73; United Hebrew Benev. Asso. v. Benshimol, 130 Mass. 325; Free Schools v. Flint, 13 Met. 539; Duluth Club v. MacDonald, 74 Minn. 254, 73 Am. St. Rep. 344, 76 N. W. 1128; Beaudry v. Le Club St. Antoine, Rap. Jud. Quebec, 19 C. S. 452.

Messrs. J. J. Feely and Roger Clapp for appellees Shepard-Norwell Company, et al.

Knowlton, Ch. J., delivered the opinion of the court:

The Boston Club, a corporation organized under Rev. Laws, chap. 125, for social and other kindred purposes, became deeply indebted to many persons. It had small assets, and it made a voluntary assignment for the benefit of its creditors. Subsequent-

equitable jurisdiction the proceeding was in the nature of a creditor's bill, and the relief sought was the ascertainment of the amount required to be contributed by the stockholders in order to liquidate the debts of the corporation, the payment of such amount, and the distribution of same among the creditors. Under such circumstances the right to invoke equitable interposition is clear. Thus, in Pickering v. Townsend, it is said that when a corporation becomes insolvent and a judgment creditor has exhausted his legal remedies, he may resort to a court of equity to compel stockholders to pay their subscriptions for stock in satisfaction of the corporate debts; such jurisdiction is supported on the ground of preventing a multiplicity of suits, by enforcing an equal distribution between the corporate creditors and equal contribution among the stockholders.

And in Maine Trust & Bkg. Co. v. Southern Loan & T. Co. the doctrine was asserted that a creditor's bill to compel the stockholders of an insolvent corporation ratably to contribute to the corporate debts under a liability provided by statute is the more appropriate, if not the exclusive remedy, as the rights of all the creditors can be ascertained and adjusted and the ratable liability of the stockholders determined in one suit without the vexation and expense of multiplied suits.

So, in Barton Nat. Bank v. Atkins, it is said that the interference of a court of equity to enforce the statutory liability of 28 L.R.A.(N.S.)

by this bill in equity was brought in behalf of a judgment creditor for the benefit of herself and other creditors, against the corporation and the assignee, praying that a receiver might be appointed to collect and receive from the assignee and from all other persons, including the members of the corporation, all the corporation's assets, and to distribute them ratably among all such creditors as should prove their debts before the court, and to dispose of any balance, if any there should be, in such manner as the court should direct.

Inasmuch as the statutes of this commonwealth relative to proceedings in insolvency by or against insolvent corporations (Rev. Laws, chap. 163, §§ 143-149), are suspended by the bankrupt law of the United States, and as this class of corporations is not included in those whose estates may be settled under this law (bankr. act U. S. [act July 1, 1898, chap. 541, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418] § 4b), we may assume that, upon its averments, the plaintiff's bill was within the jurisdiction of the court. Upon this bill a receiver was appointed, who was directed to collect all the assets of the corporation and all moneys and debts due it from the members thereof.

The receiver filed a petition setting forth the names of all the alleged members of the

stockholders of an insolvent corporation was justified upon the ground that a comprehensive decree covering the whole controversy could there be made, thus avoiding the multiplicity of suits that would otherwise arise.

And in Cook v. Carpenter the court said that the numerous actions that would be required at law, together with the fact that the remedy in equity was of greater certainty, uniformity, and convenience, was sufficient to sustain equitable jurisdiction of an action by an assignee for the benefit of the creditors of an insolvent corporation, to collect and administer as a trust fund the unpaid stock subscriptions of the stockholders of such corporation.

This was also the reasoning of Dalton & M. R. Co. v. McDaniel, wherein it was said that, "with its power to appoint an auditor or master in chancery to audit the amount of the debts of the corporation in gross and the debt due to each creditor, to ascertain the number of stockholders solvent and insolvent, the per cent necessary to be paid by each stockholder in proportion to his stock, it is perfectly clear that complete justice can be better administered to every creditor and to each solvent stockholder by a court of equity, than by any other form of procedure. It will prevent a multiplicity of suits, save costs, and give speedy and effectual relief. Principle, therefore, and sound reason accord with authority that equity will grant relief in all such cases as this at bar."

In Queenan v. Palmer, it was asserted in

Boston Club, more than 300 in number, in which petition, as it was amended, he averred that these members were indebted to the club in the sum of \$25 each for the half of the annual dues to June 1, 1908, under a by-law of the club, and in the same sum, under the same by-law, for dues to December 1, 1908, and that forty-one of these alleged members were indebted to the club in various sums for ordinary charges for food and other refreshments which they had received, and praying that an account might be taken of the several amounts due from the several respondents, and for a decree requiring payment to the receiver of such sums as should be found due from each of them. Upon this petition there was an order of notice, the notice to be given by sending by mail a printed copy to counsel of record, and to twelve of the respondents "designated by the court, upon whom service of this order shall be made in lieu of serving upon all the persons mentioned in this petition." After this service upon these designated persons, most of them appeared and filed demurrers and answers to the petition. The demurrers having been overruled, an appeal was taken to this court. Afterwards, upon a hearing, there was an interlocutory decree, or order for a final decree, in which it was adjudged that, under the by-

laws of the corporation, each resident member was bound to pay an annual assessment of \$50, and each nonresident member an annual assessment of \$25; that these designated respondents and other respondents, 343 in all, were members of the club who had neglected and refused to pay the amount of this annual assessment for the half year ending December 1, 1908, although 153 of them had paid the installment for the half year ending June 1, 1908, and that forty-one members of the club, including six of these designated members, were indebted to the club in various stated sums for ordinary charges for food and other refreshments. It was also decreed that, to save expense of service of the petition upon all of the 343 members, the twelve respondents were designated as persons upon whom service of process should be made as representatives of a class; that the payment of the assessment was necessary in order that the indebtedness of the club might be paid, and that the designated respondents, respectively, should pay to the receiver the amounts found due from each of them, as stated in the decree, being in part for the annual assessments, and in part for the charges for food and refreshments. Subsequently a final decree against these respondents was made, directing payment of these sums, and

general terms that the jurisdiction of a court of equity to entertain a bill against all the stockholders of an insolvent corporation to enforce their statutory liability exists upon the ground that the remedy at law was totally inadequate to afford the full measure of relief without bringing a multiplicity of suits. To the same effect is *German Nat. Bank v. Farmers' & M. Bank*.

Equity jurisdiction was sustained in *Wyman v. Bowman* on the ground that there was a community of interest of the stockholders in an insolvent corporation in every question of law and of fact involved in the proceeding to enforce their statutory liability for unpaid stock subscriptions, an inadequacy of separate actions at law against each stockholder, and a greater convenience and less expense to all parties in the determination of the questions involved by the one suit in equity.

And in *Bailey v. Tillinghast* the receiver of a national bank was held entitled to invoke equitable aid to enforce an assessment against stockholders, where such an assessment was less than the full amount of their liability and the question of law involved in the proceeding was common to all the defendants and rested upon substantially the same state of facts. The court said that these circumstances, namely, "the great number of the parties on one side or the other, the identity of the question of law, and the similarity of the facts in the several controversies between the respective parties, 28 L.R.A.(N.S.)

are the basis on which the jurisdiction rests."

Equity jurisdiction was sustained in *Hayden v. Thompson*, in an action by a receiver of an insolvent national bank to recover dividends that had been unlawfully paid the stockholders, on the ground that the purpose of the suit was to execute a trust, undo a fraud, and avoid a multiplicity of suits.

In *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476, the doctrine was asserted that equity had jurisdiction of such a proceeding where a multiplicity of suits would be avoided, if the amount to be paid was less than the entire liability of each stockholder, but did not have jurisdiction on these grounds where the amount to be paid was the full liability of each stockholder. The question presented to the court did not require the consideration of this question, and the opinion has been criticized in later cases. (See *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244, and *Fidelity Trust & S. D. Co. v. Archer*.) What the court in that case evidently had in mind was that equity would assume jurisdiction, to avoid a multiplicity of suits, where the amount to be paid by each stockholder was not fixed, but had to be determined and was less than the entire liability, while equity would not assume jurisdiction where the amount to be paid was fixed and was for the full liability of each stockholder.

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that executions should issue against them severally to enforce payment. From this decree an appeal was taken to this court.

A second petition, similar in form, was presented to the court, to recover the amount of a special assessment made under a by-law by the executive committee. Upon this petition, after similar proceedings, the judge found that the assessment was invalid because the by-law authorized it to be made only by a majority of the committee present at the time of making it, and a decree was entered dismissing the petition. From this decree the receiver appealed.

An appeal was also taken by some of the defendants from the decree of the court allowing claims against the corporation, and especially the claims of Shepard-Norwell Company, Smith-Patterson Company, and McKenney & Waterbury Company.

A question has been raised as to whether these appeals are ripe for hearing, or whether they must await a final decree ordering distribution of the property of the corporation among the creditors. The decree for payment to the receiver by the members of the corporation, and awarding execution against them, purports to be a final decree; and it is in fact a final decree in the separate and independent proceeding to which it relates. Not only is payment decreed, but executions are ordered for the enforcement of payment. This appeal is plainly ripe for hearing. The rights of the appealing parties could not be protected if the hearing were postponed to any later time. For similar, although not quite so strong reasons, we are of the opinion that the appeal of the receiver from the disallowance of his claims for special assessments should be heard at this time. The determination of the amount of the claims against the estate and the appeal from the allowance of certain claims should not await a decree for the final distribution of the assets. It is so far independent, and it comprises such substantive elements in the litigation, that in the peculiar circumstances of this case the appeal may well be heard now with the others.

The demurring respondents assigned six causes of demurrer, among which were want of equity, misjoinder of respondents, and multifariousness. The first petition was to recover a large number of legal claims from debtors of the corporation. Upon the facts found by the judge, as appears in his order for a decree, the members of the corporation were indebted under a by-law of the corporation by which they had agreed to be bound. Many of them were also indebted for goods sold and delivered by the corporation. The case is quite unlike the summary proceedings which the receiver may take by application to the court to protect his right

of possession to tangible property of a corporation which is transferred to him by the action of the court under his appointment. Such property is in the control of the court whose representative he is. The collection of a debt stands differently. *Smith v. Johnson*, 57 Ohio St. 486, 49 N. E. 693; *State Bank v. First Nat. Bank*, 34 N. J. Eq. 450; *Andrews v. Paschen*, 67 Wis. 413, 30 N. W. 712; *Wheaton v. Daily Teleg. Co.* 59 C. C. A. 427, 124 Fed. 61; *Horn v. Pere Marquette R. Co.* (C. C.) 151 Fed. 626-629. As to these claims the receiver had no greater rights than the corporation. The respondents were severally liable in an action of contract, each for the amount of his debt. Against each the receiver had a plain, adequate, and complete remedy at law. The only question as to this last proposition is whether his remedy at law would be inadequate because separate actions would involve a multiplicity of suits. The only branch of jurisdiction in equity to which the receiver can appeal for the maintenance of his petition is that which is exercised to avoid a multiplicity of suits.

Upon this subject there have been a great many decisions, with considerable conflict among them. The subject is very ably and fully discussed, with a citation of a large number of cases, in 1 Pomeroy on Equity Jurisprudence, 3d ed. §§ 251-274. It seems now to be settled by a great weight of authority that jurisdiction may sometimes be exercised on behalf of a single party against a numerous body, although there is no common title nor community of right or interest in the subject-matter among those individuals, and where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. On the other hand, as was said by Mr. Justice Peckham, speaking for the court in *Hale v. Allinson*, 188 U. S. 56-77, 47 L. ed. 380-392, 23 Sup. Ct. Rep. 244, 252: "The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction, is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless, be attended with more and deeper inconveniences to the defendants than would be compensated for by the convenience of a single plaintiff, and where the case is not covered by any controlling precedent, the inconvenience might constitute good ground for denying jurisdiction." It seems too plain for doubt that the receiver's first petition in this case, which joined legal claims for annual dues

against all the different members of the corporation, and included charges against a large number of them for food and refreshments, cannot be sustained on any principle of equity jurisprudence. As to these charges, there was no community of interest among the respondents in any question of law or fact involved, or in the kind or form of relief demanded. The petition included claims for a large number of separate debts which had no relation to one another. They had no more in common than the bills of a grocer against the customers to whom he has sold goods. It follows that the decree overruling the demurrers and the final decree directing payment and awarding execution must be reversed.

A question of more difficulty, which was included in the appeal and has been argued by counsel, and which may arise again in subsequent proceedings in the case, is whether the claims against all the members for the annual dues can be joined in a petition in equity. Similar questions have been passed upon by the courts. A bill was brought by a receiver of a state banking corporation in Iowa, to recover from stockholders assessments levied to enforce a personal liability for debts under a law of that state. It was held that the suit could not be maintained, and that the remedy was at law. *Tompkins v. Craig* (C. C.) 93 Fed. 885. In *Hale v. Allinson* (C. C.) 102 Fed. 790, there was an attempt by a receiver to enforce in equity a personal liability imposed by statute upon stockholders in a corporation, and it was held that there was no jurisdiction in equity. Judge McPherson in giving the opinion said: "Two classes of questions remain to be decided: The first is whether a given stockholder was ever liable as such; and the second is whether, if he were originally liable, his liability has ceased either in whole or in part. Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is no doubt similar to his cause of action against every other. But this is only part of the matter. The real issue—the actual dispute—can only be known after each defendant has set up his defense; and defenses may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, different defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff who has similar claims against many persons. But as each of these persons became liable, if at all, by

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reason of a contract entered into by himself alone, with the making of which his codefendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability." This decree was affirmed in 45 C. C. A. 270, 106 Fed. 258, by the unanimous decision of the circuit court of appeals, which adopted the opinion given in the circuit court. The same question arose under the same statute in *Hale v. Allinson*, 188 U. S. 56, 77, 78, 47 L. ed. 380, 392, 393, 23 Sup. Ct. Rep. 244, and the same result was reached by the Supreme Court of the United States, which quoted at length from the opinion of Judge McPherson and adopted it as a statement of the law. In this case, too, on page 78 of 188 U. S., Mr. Justice Peckham reaffirmed the rule stated in *Kennedy v. Gibson*, 8 Wall. 498-505, 19 L. ed. 476-479, and followed in *Bailey v. Tillinghast*, 40 C. C. A. 93, 99 Fed. 801, and in several other cases, as to the enforcement of the statutory liability of stockholders for debts in a national bank, that "where the whole amount is to be recovered, the proceeding must be at law; where less is required, the proceeding may be in equity, and in such a case an interlocutory decree may be taken for contribution."

The considerations which led to the decision in *Hale v. Allinson* apply with almost equal force to the present case. There is one question presented by the receiver in which the respondents all have a common interest, namely, whether there was a by-law and a liability of members under it, as he avers. There are other questions which pertain to each individual respondent, namely, whether he became a member of the corporation so as to be subject to the liabilities of members, and if so, whether he ceased to be a member before this particular liability attached, and whether, if it attached, it was ever discharged. In none of these questions has any other member any interest. As to them there must be a separate trial against each respondent.

This is not a case in which a decree for payment can be made against a particular respondent without service upon him. As to questions of the kind above stated, he is not a member of a class who can be represented by other members. Before he can be found liable as for a debt, he must be given notice of the claim against him, and an opportunity to make his defense. Inasmuch as there must be a service of process upon each defendant, it would seem to be a more simple and orderly method to bring an action at law against each member, and almost if not quite as economical a way for the receiver.

We are inclined to the view that this case should be governed by the decision above

stated, and that it should be treated as presenting nothing but separate claims for the payment of debts in which different questions may arise, such that they cannot properly be joined in equity for the purpose of preventing a multiplicity of suits.

The respondents contend that there can be no liability for these annual dues, because a receiver has been appointed for the property of the corporation, and the respondents have not enjoyed the expected benefits of membership. From what appears upon this record, we must assume that the liability for the dues for the year ending December 1, 1908, accrued on December 1, 1907, and that nothing had occurred at that time to relieve the respondents from liability for this annual assessment. We have no report of evidence, nor anything on the subject but the pleadings and the decrees. Dealing with the case only upon the facts before us, we hold that this defense is not made out.

Nor is there any good ground for the appeal of the respondents as to the allowance of the claims of creditors against the corporation, including the claims of Shepard-Norwell Company, Smith-Patterson Company, and McKenney & Waterbury Company. The decree as to these is founded upon findings of fact by the trial judge, which are well sustained by the evidence.

The appeal of the receiver from the dismissal of the second petition rests upon the fact that a quorum of the executive committee were present when the special assessment was made, and the vote was passed by a majority of the quorum. The by-law under which action was taken provides that an assessment may be made by a majority of the executive committee. The committee consisted of twenty members, fifteen chosen specially, and five other officers who were members of the committee *ex officio*. By article 3, § 10, five members of the committee constitute a quorum. The question is whether the by-law authorizing a special assessment to be made by a majority of the committee means by a majority of the quorum, or a majority of the whole committee. We are of opinion that the judge was right in holding that it means a majority of the whole committee. It gives an unusual and important power. It uses words which naturally signify more than half of the whole number of the committee. It is hardly to be expected that this power would be given to a majority of a quorum of five, which is so small a part of the whole committee.

Decree reversed.

Demurrers sustained.

Decree as to allowance of claims affirmed.

Decree dismissing receiver's second petition affirmed.

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NEBRASKA SUPREME COURT.

EX PARTE HOMER M. SULLIVAN.

RE GEORGE LOOMIS et al.

(84 Neb. 493, 121 N. W. 450.)

Receiving stolen property — nature of offense.

1. In this state the receiving or buying of stolen goods with intent to defraud the owner is not an accessory, but a substantive offense, and a conviction may be had without regard to the person who stole the goods, or from whom they were received.

Same — property stolen in other state — effect.

2. The charge of buying stolen horses in this state, knowing the same to have been stolen, with intent by such buying to defraud the owner, states an offense, even though the charge further recites that the horses were stolen in South Dakota.

(May 21, 1909.)

Headnotes by LETTON, J.

Note. — Prosecution for receiving stolen property where property in question was stolen in foreign state or country.

The cases are agreed, in states where by common law or statute it is held to be larceny to bring property into the state which has been stolen in another state or country, that one who receives such property knowing it to have been stolen is guilty of receiving stolen property.

Thus, in the following cases, where the property in question had been stolen in one state, those who received it in another state with knowledge of the fact that it had been stolen were held guilty of receiving stolen property: *State v. Suppe*, 60 Kan. 566, 57 Pac. 106; *State v. Stimpson*, 45 Me. 608; *Com. v. Andrews*, 2 Mass. 14, 3 Am. Dec. 17; *United States v. Mortimer*, 1 Hayw. & H. 215, Fed. Cas. No. 15,821; *Curran v. State*, 12 Wyo. 553, 76 Pac. 577.

Dana, Ch. J., in *Com. v. Andrews*, *supra*, said: "The offense charged on the defendant is the receiving the goods in Boston knowing them to have been stolen. If the principal could be tried and convicted in this county, the accessory may be tried and convicted here also. The same reason which authorizes a conviction in the case of stealing goods in one county and bringing them into another applies, in my mind, to the case of stealing in one state and bringing them into another,—viz., that every moment's felonious possession is, in contemplation of the law, a new taking, stealing, and carrying away."

And one who received goods from an agent of the thief was held guilty of receiving stolen property, where the goods were stolen in New York and sent to an agent in Massa-

APPPLICATION by Homer M. Sullivan for a writ of habeas corpus to secure the release of George C. Loomis et al. from custody in which they were held under warrants which were alleged to be void. Denied.

The facts are stated in the opinion.

Messrs. Sullivan & Squires, for relator:

One cannot be held for receiving and buying stolen property where the same was stolen in another state, in the absence of a special statute, or in the absence of judicial determination that the bringing from one state into another of stolen property renders the thief guilty in the state to which it is brought.

Bishop, New Crim. Law, 8th ed. § 1142; 12 Cyc. Law & Proc. p. 210; 24 Am. & Eng. Enc. Law, p. 46; Rorer, International Law, 2d ed. 309-320; Durham v. State, 2 Ga. App. 401, 58 S. E. 557; R. v. Debruiel, 11 Cox C. C. 207; R. v. Carr, 15 Cox, C. C. 131; Com. v. Andrews, 2 Mass. 14, 3 Am. Dec. 17.

Messrs. W. T. Thompson, George W. Ayres, John Tucker, and Wolcott & Morrissey for respondent.

Letton, J., delivered the opinion of the court:

This is an original application for a writ of habeas corpus. The parties in whose behalf the writ is applied for were informed against in the district court for Cherry

achusetts for disposal. Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

The statute in Michigan provides that "every receiver of personal property that shall have been feloniously stolen, knowing the same to have been stolen, may be indicted, convicted, and punished in any county where he received or had such property, in the same manner that receivers of personal property stolen in this state are indicted, convicted, and punished, notwithstanding such theft was committed in any other state or country." Comp. Laws, 1871, § 7607. Under this statute it is held not necessary to allege the place of the theft in order to admit proof that the goods were stolen in Canada. People v. Goldberg, 39 Mich. 545.

But where it is held not to be larceny to bring property stolen in one state into another state, it is held that one who receives such property is not guilty of receiving stolen property. Golden v. State, 2 Ga. App. 440, 58 S. E. 557. The court here said: "The courts of this state could not inflict any punishment against the principal felon for his crime committed beyond her borders; and the same punishment as to the accessory after the fact in this view would be no punishment at all. . . . We think that the law should be otherwise; but, upon a careful review of the authorities in this country and in England, we are sure that 28 L.R.A.(N.S.)

county on the charge of buying and receiving stolen horses, which had been stolen in the state of South Dakota, knowing them to have been stolen, and with the intent to defraud the owners. A demurrer was filed to the information, which was overruled by the district court. Pending further proceedings, this application was made upon the ground that the information and warrant upon which the prisoners are held are each void, for the reason that no offense against the laws of the state of Nebraska is charged.

It is contended that since, in this state, under the rule announced in People v. Loughridge, 1 Neb. 11, 93 Am. Dec. 325, it is no crime to bring into the state property stolen in another state, it can be no crime to receive such property; that, since an act which may constitute the crime of larceny in this state may not be a crime in South Dakota, the courts of this state cannot try such question; that offenses against the laws of a sister state cannot be examined into or punished in this state; that since, in order to commit the offense of horse stealing, with which § 117 of the Criminal Code is mainly concerned, the horses must have been stolen in this state, the offenses of bringing stolen property, concealing the thief and concealing the animal, depending thereon and covered by the same section of the Code, cannot be committed if the prop-

it is not. Many states, recognizing this rule as existing in the absence of express statute to the contrary, have enacted laws making criminal the receiving of goods stolen in another jurisdiction. Georgia should have such a statute; but until such a law is passed we must enforce the rule as we find it."

And the rule in England is that it is not larceny to bring goods stolen in a foreign country into the Kingdom, and that one receiving them cannot be held guilty of receiving stolen property. R. v. Debruiel, 11 Cox, C. C. 207; R. v. Carr, 15 Cox, C. C. 131. The court in the first case said: "Nor could the prisoner be convicted of receiving, because that crime consisted in the guilty receipt of stolen goods; that is to say, goods stolen according to the law of England, and that law does not recognize a stealing in a foreign country as a crime which it will punish."

It was held in R. & Carr, 15 Cox, C. C. 129, however, that admiralty had jurisdiction where one in England received bonds which had been stolen from a vessel moored in a navigable river at Rotterdam, and a conviction was affirmed.

As to what law governs in determining whether larceny has been committed, in prosecution under statute against bringing stolen property into the state, see note in 14 L.R.A. (N.S.) 556.

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erty was stolen outside of the state. By Stat. 3 and 4 Wm. & Mary, chap. 9, if a person received stolen property from the thief, knowing the same to have been stolen, and with the intent to assist the thief in depriving the owner of his property, he is an accessory to the larceny. 1 Hale, P. C. 617. Following this statute, in a number of states the offense is deemed to be accessorial in its nature. In *Engster v. State*, 11 Neb. 542, 10 N. W. 453, it was determined that this offense is a substantive crime in this state, and not accessorial, and that conviction may be had without regard to the person who stole the goods or from whom they were received. This case was followed in *Levi v. State*, 14 Neb. 1, 14 N. W. 543, and *Ream v. State*, 52 Neb. 727, 73 N. W. 227. In the latter case it was contended that it was necessary for the state to allege and prove the conviction of the person by whom the property was originally stolen, but the court say: "That such was the rule under the former practice may be conceded, since one guilty of receiving and concealing stolen property is, at common law, treated as an accessory after the fact; but in this state the offense charged is an independent substantive crime, and the conviction of one charged therewith is in no wise dependent upon the prosecution of the original thief." There are two lines of authority upon the question of whether, in the absence of a statute, it is larceny to bring stolen property into another state than that in which the property was stolen. So far as this state is concerned, this question was settled at a very early period in the case of *People v. Loughridge*, supra, in which it was held that the bringing into this state by the thief of goods stolen in another state is not larceny. This case was followed recently in *Van Buren v. State*, 65 Neb. 223, 91 N. W. 201, 14 Am. Crim. Rep. 430. An interesting presentation of the arguments pro and con and the holdings of the several courts is to be found in 1 Bishop's Criminal Law, 8th ed. §§ 140, 141. In this state, therefore, it is settled that it is not a crime to bring stolen property into the state, and that the offense of receiving stolen property is an independent substantive offense, with no element of an accessorial nature.

The plaintiff contends, and a number of text-book writers upon this branch of the law seem to agree with him (12 Cyc. Law & Proc. p. 210; 1 Bishop, Crim. Law, 8th ed. § 1142; Clark & M. Crimes, § 503), that it is not a crime to receive stolen property in a state other than that in which it was stolen, unless the laws of the state in which the property is received make it a crime to bring stolen property into the state. This

is the English rule. *R. v. Carr*, 15 Cox, C. C. 131; *R. v. Debruiel*, 11 Cox, C. C. 207. A contrary view is taken by Judge McClain, 1 Criminal Law, § 720, wherein he says: "It has been held in England that if the goods were stolen outside of the Kingdom, there could not be a guilty receiving of them in the Kingdom. In this country it has been held that it is immaterial that the goods were stolen outside of the state, and there is sometimes a statutory provision to that effect. The venue of the offense, if deemed a substantive one, is in the county where the goods are received; but, if it is accessorial in its character by the statute, the venue is where the goods were stolen." See also *Beal v. State*, 15 Ind. 378; *State v. Crawford*, 39 S. C. 343, 17 S. E. 799; *Licette v. State*, 75 Ga. 253; *State v. Stimpson*, 45 Me. 608. The arguments of the applicant in this case are identical with those used in a case where it has been sought to convict one of larceny when he brings stolen property into a state where there is no statute making such an act an offense against the latter state. There seems to be no doubt that where a statute makes bringing stolen property into the state a substantive crime against that state, such laws are constitutional and may be enforced. *People v. Williams*, 24 Mich. 161, 9 Am. Rep. 119. The states of Michigan, New York, Illinois, Alabama, and Mississippi have such statutes. In this state it was said by Holcomb, J., in *Van Buren v. State*, supra: "That the legislature may declare the bringing into this state property stolen in another an offense, and provide suitable punishment therefor, is abundantly supported by the authorities; but this phase of the subject is not before us." While this remark is dictum, still it indicates that the mind of the court does not run counter to the decisions of those states in which such a statute has been enacted and tested.

Under such statutes the first requisite to a conviction is that the property must be identified as belonging to the class of stolen property. It is the bringing of such property into the state that is made a crime. Now it is no more difficult to identify stolen property in the case of a prosecution for receiving the same knowingly and fraudulently, than in a prosecution for bringing such property into the state. The right of the receiving state to punish, and the manner and quantum of proof that the property falls within the prohibited class, must necessarily be the same. If a statute may be enforced which punishes the bringing of stolen property within the borders of the state, it is difficult to see why a statute making the buying or receiving of such

stolen property a crime may not also be enforced. The inquiry is the same in both cases. In the one case: Is the property which is brought into the state "stolen property?" In the other: Is the property purchased "stolen property?" We are unable to see any ground for distinction. If the statute makes it a crime to bring stolen property into the state, the bringing into the state is considered as a substantive offense committed against the receiving state. It is not an offense against the laws of the state where the property was stolen, and its prosecution is not, as is argued, an attempt to punish for an infraction of the laws of that state. There is no better or more logical reason for holding that a conviction may be had in the one case than in the other.

The act of the legislature in either case is not obnoxious to the rule that one state will not administer the penal laws of another; for the act denounced is one committed within the state, though the property received its taint outside of its bounds. What the legislature sought to prevent was the trade and commerce in stolen goods in this state. It had the right to make it a crime to receive goods of this character with the intention to defraud the owner, and this is the gist of the offense. It is immaterial that the owner may reside in another state. The prisoners are not charged with the infraction of the laws of South Dakota, but with the infraction of the laws of this state. It may or may not be necessary for the prosecution, in its effort to establish the class to which the goods are alleged to belong, to show that their original taking was in violation of the laws of South Dakota (*People v. Staples*, 91 Cal. 23, 27 Pac. 523; *Barclay v. United States*, 11 Okla. 503, 69 Pac. 799); but, however this may be, it does not alter the fact that the offense described in the statute is one committed against the laws of this state.

Whatever may be the rule which is applicable in England under the peculiar conditions surrounding that "tight little island," the conditions existing along the northern and western boundaries of this state are such as require a common-sense interpretation of the statute. If we should construe the law as the relator contends, the effect would be to make possible a flourishing industry in receiving stolen horses and cattle in what is known as "the cattle country," in the western portion of this state, and to foster and build up the pernicious practices which the statute is intended to prevent. If the charge in this case is substantiated by the proof, a more striking illustration of the consequences

liable to ensue could not well be had. The prisoners are charged with unlawfully buying and receiving thirteen horses and mares with the intent to defraud the respective owners, well knowing all the property to have been stolen in South Dakota. The profit of such a commerce may be large, as this charge indicates.

It seems clear to us that stolen property is stolen property, wherever it may have acquired that distinctive character, and wherever it may be found, and that, where the receiving of it with the intent to defraud the owner is made a substantive crime, the locality of the theft or the personality of the thief is not material. The material questions are, Does it belong to that class of property, the buying of which is condemned by the statute? and was it bought with criminal knowledge and intent? If so, the buying with such knowledge and unlawful intent violates the statute.

For these reasons, we are of the opinion that the information charges an offense against the laws of this state, and that the prisoners are not unlawfully restrained of their liberty.

The writ is denied.

Fawcett, J., not sitting.

Petition for rehearing denied.

NEBRASKA SUPREME COURT.

STATE OF NEBRASKA

v.

JAMES HAND et al.

(— Neb. —, 126 N. W. 1002.)

Marriage — evasion of law — validity.

A marriage which is prohibited by statute because contrary to the policy of our laws is yet valid if celebrated elsewhere according to the laws of the place where celebrated, even if the parties are citizens and residents of this state, and have gone abroad for the purpose of evading our laws, there being no legislative enactment that such marriages out of the state shall have no validity here.

(June 10, 1910.)

Headnote by FAWCETT, J.

Note. — Law governing validity of marriage.

This subject is covered in notes in 57 L.R.A. 155, 11 L.R.A.(N.S.) 1082, 17 L.R.A.(N.S.) 800, and 26 L.R.A.(N.S.) 179.

As shown in those notes the general rule in this country, contrary to the rule sustained by the weight of authority in Eng-

EXCEPTIONS by the state to the acquittal and discharge by the District Court for Otoe County of defendants, who were charged with fornication. Overruled.

The facts are stated in the opinion.

Mr. D. W. Livingston, for the State:

The alleged marriage was absolutely void *ab initio*, for the reason that the parties were both under a personal incapacity which followed them wherever they went, so long as they remained domiciled in Nebraska.

State v. Kennedy, 76 N. C. 251, 22 Am. Rep. 684; Story, Conf. L. § 65; Williams v. Oates, 27 N. C. (5 Ired. L.) 535; Kinney v. Com. '30 Gratt. 858, 32 Am. Rep. 690; Stull's Estate, 183 Pa. 625, 39 L.R.A. 539, 63 Am. St. Rep. 776, 39 Atl. 16; Lanham v. Lanham, 136 Wis. 360, 17 L.R.A. (N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787.

Mr. John C. Watson, for defendants:

The validity of a marriage is determined by the law of the place where it was celebrated.

land, is that the capacity of the parties to marry, as well as the formal validity of the marriage, is in general to be determined by the law of the place where the marriage is celebrated, rather than by the law of the domicil of the parties. Some cases, however, while conceding this to be the general rule, refuse to recognize the marriage, though valid by the law of the place where it was celebrated, if the parties were domiciled at the forum and went into the other state in order to evade the law of their domicil, upon the ground that it would be contrary to public policy of the forum to recognize such a marriage. The general rule, however, was applied in *STATE v. HAND*, notwithstanding the facts were such as to have rendered the exception applicable if the court had seen fit to adopt it. The decision is even stronger from the fact which appears from the briefs, that the marriage was challenged on the ground that it violated the miscegenation statute of Nebraska, and the case involved the right of the parties to live together in Nebraska in the marital relation, and not merely the question of property rights. It would seem that no statute on the subject of marriage would be more likely to be regarded as a distinctive part of the public policy of the forum, which the courts would not suffer to be evaded by a marriage between their own citizens celebrated in another state, than a statute forbidding marriage between persons of the white and colored races.

The case of *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131, otherwise substantially like *STATE v. HAND*, both in facts and decision, differed from it in that it apparently involved merely the question of settlement of the parties for the purposes of the poor law, and not, directly at least, their right to live together in the marital relation.

28 L.R.A. (N.S.)

Dumaresly v. Fishly, 3 A. K. Marsh. 368; *Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. 81; *Minor v. Jones*, 2 Redf. 289; *Phillips v. Gregg*, 10 Watts, 158, 36 Am. Dec. 158.

A marriage valid in the country where celebrated will be held valid in other countries where the parties may be domiciled, though it would have been invalid by the law of the subsequent domicil if it had been originally celebrated there.

Gaines v. Relf, 12 How. 472, 13 L. ed. 1071; *Campbell v. Crampton*, 18 Blatchf. 150, 2 Fed. 417; *Pearson v. Pearson*, 51 Cal. 120; *Stevenson v. Gray*, 17 B. Mon. 193; *Dannelli v. Dannelli*, 4 Bush. 51; *Fornhill v. Murray*, 1 Bland, Ch. 479, 18 Am. Dec. 344; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Johnson v. Johnson*, 30 Mo. 72, 77 Am. Dec. 598; *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131; *Putnam v. Putnam*, 8 Pick. 433; *Cambridge v. Lexington*, 1 Pick. 506, 11 Am. Dec. 231; *Sutton v. Warren*, 10 Met. 451; *Com. v. Graham*, 157 Mass. 73, 16

The facts in *Garcia v. Garcia* (S. D.) — L.R.A. (N.S.) —, 127 N. W. 586, only required a decision that a marriage between cousins, valid by the law of the state where the marriage was celebrated and where the parties were then domiciled, will not be held invalid in South Dakota, although it would have been invalid if celebrated in that state. The decision, however, is referred to the general rule that the law of the place where the marriage is celebrated governs. There is an intimation that the marriage might have been held invalid as contrary to the public policy of the forum, if it had been incestuous according to the generally accepted opinion of Christendom, which relates only to persons in direct line of consanguinity and brothers and sisters, and does not embrace cousins.

As shown in the earlier notes, the English courts, contrary to the general rule recognized in this country, while conceding that the validity of the marriage, so far as it depends upon form or ceremony, depends upon the law of the place where it was celebrated, hold that matrimonial capacity depends upon the law of the domicil, or at least that if, by the law of the domicil of both parties, they are incapable of intermarrying, the marriage must be held invalid, though celebrated in England, by the law of which it would be valid. The English doctrine rests principally on the case of *Sottomayer v. De Barros*, L. R. 5 Prob. Div. 94, 5 Eng. Rul. Cas. 814 (which is discussed at page 163 of the note in 57 L.R.A.).

The subject has been recently discussed at length in an opinion in the court of appeal in *Ogden v. Ogden* [1908] p. 46, and while the court disclaims any intention to overturn the doctrine of the *Sottomayer* Case, the opinion seems to evince a doubt in the mind of the court as to the soundness

L.R.A. 578, 34 Am. St. Rep. 255, 31 N. E. 706; Courtright v. Courtright, 11 Ohio Dec. Reprint, 413; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505.

A marriage legal where solemnized is valid everywhere.

Hills v. State, 57 L.R.A. 155, note, 61 Neb. 589, 85 N. W. 836; Gibson v. Gibson, 24 Neb. 429, 39 N. W. 450; Bailey v. State, 36 Neb. 808, 55 N. W. 242; Norman v. Norman, 121 Cal. 620, 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac. 143; Sturgis v. Sturgis, 51 Or. 10, 15 L.R.A.(N.S.) 1034, 131 Am. St. Rep. 724, 93 Pac. 696; State v. Shattuck, 69 Vt. 403, 40 L.R.A. 428, 60 Am. St. Rep. 936, 38 Atl. 81; Re Chace, 26 R. I. 351, 69 L.R.A. 493, 58 Atl. 978, 3 A. & E. Ann. Cas. 1050; State v. Lowell, 79 Am. St. Rep. 366, note.

Although a person is rendered by the law of the place incapable of contracting a marriage, yet if he enters into a contract of marriage in another state where the same disability does not exist, the marriage is valid.

of the doctrine, even within the somewhat narrow limits laid down in that case.

And the same comment applies in a measure to the still later case of Chetti v. Chetti [1909] p. 67. Both of these cases, however, on their facts, are clearly distinguishable from the Sottomayer Case, or at least from the state of facts which the court of appeal in that case assumed for the purposes of its decision, and which must therefore be regarded as limiting the doctrine of that case.

The question in Ogden v. Ogden was whether the validity of a marriage celebrated in England, between an English woman domiciled in England and a Frenchman temporarily residing in England, was governed by the law of England, according to which it would be valid, or by the law of France, according to which it would be invalid because the parties did not comply with the formalities required by the French law, and the husband did not obtain the consent of his parents as required by that law. It will be observed that upon its facts the case came clearly within the decision in Simonin v. Millac, 2 Swabey & T. 67 (cited at page 172 of the note in 57 L.R.A.), and exactly within the ground on which the latter case was distinguished in the Sottomayer Case, namely, that the matter of consent of the parents went to the ceremony, rather than the capacity of the parties. And upon the authority of the Simonin Case and the distinction made in the Sottomayer Case, the court in the Ogden Case held that the marriage was valid. While not perhaps within the scope of this note, it may be added that the court further held in this case that a decree of nullity of the marriage entered by a French court at the instance of the husband was not binding on the English court, since, unlike a decree for divorce, it did not presuppose the

8 Am. & Eng. Enc. Law, p. 599; Van Voorhis v. Brintnall, supra; Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189; Moore v. Hegeman, 92 N. Y. 521, 44 Am. Rep. 408; Putnam v. Putnam and Medway v. Needham, supra; Bishop, Marr. & Div. 4th ed. ¶¶ 348-389; Story, Conf. L. ¶¶ 79-81.

Fawcett, J., delivered the opinion of the court:

The defendants were informed against by the county attorney of Otoe county for the crime of fornication. There was a trial to the court without a jury upon a stipulation of facts. The court found the defendants not guilty, and ordered that they be discharged. Thereupon the county attorney by leave of court, under the provisions of § 483 of the Criminal Code, filed this petition in error in this court, alleging that the finding and judgment of the court below "in acquitting and discharging the said defendants was contrary to law." From the stipulation of facts, it appears that the defend-

existence of a marriage, but declared invalid a marriage which was valid according to the law of England, which the court held to be the governing law.

By referring to page 163 of the note in 57 L.R.A., it will be observed that the decision of the court of appeal in the Sottomayer Case was expressly rendered upon the assumption that both parties were domiciled in Portugal, and that when the case subsequently came before the probate division, Hannen, President, contrary to that assumption, found as a fact that the husband was domiciled in England at the time of the marriage and the wife in Portugal, and taking advantage of the liberty allowed by the opinion of the court of appeal in that situation, upheld the marriage as in accordance with the law of England, where it was celebrated, although it would have been invalid by the law of Portugal.

The Chetti Case came exactly within the last decision, except that in this instance it was the woman who was domiciled in England and the man who was domiciled elsewhere. The court, however, held that that difference would not affect the result, and the decision upholding the marriage rested, in part at least, upon the authority of the president of the probate division in the Sottomayer Case, which the court held was justified by the opinion of the court of appeal in that case.

It thus appears that while these recent English cases show a disposition on the part of the English courts to question the foundation of the English doctrine which refers matrimonial capacity to the *lex domicilii*, at least if both parties have the same domicil, rather than the *lex loci celebrationis*, that doctrine cannot as yet be regarded as materially impaired in England, since those decisions are clearly reconcilable with it.

G. H. P.

ants are within the class prohibited by the laws of this state from entering into the marriage relation; that on November 23, 1892, while both defendants were residents of this state, they went into the state of Iowa to celebrate their marriage, for the express purpose of evading the laws of the state of Nebraska. This is the question for our consideration. After their marriage, they returned to Omaha, and there lived together as husband and wife for a period of three years. They then removed successively to the states of Utah, Idaho, and Oregon, in all of which states they lived and cohabited together and were known among their friends and acquaintances as husband and wife. Thereafter they returned to Nebraska, where they also lived in that relation until the time of their arrest. It is conceded that by the laws of Iowa the marriage of defendants, when consummated there, was lawful in that state. Did the court err in finding them not guilty of the charge preferred against them and in ordering their discharge? We think not. In *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131, the man, a mulatto, and the woman, a white woman, were inhabitants and residents of Massachusetts. Desiring to be married, and the law of Massachusetts prohibiting such marriage, they went into the neighboring province of Rhode Island and were there married according to the laws of that province, such a marriage not being then prohibited by the laws thereof. In the syllabus, the court say: "A marriage which is good by the laws of the country where it is entered into is valid in any other country; and although it should appear that the parties went into another state to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign state will nevertheless be valid in the country where the parties live." In the opinion the court say: "The law now in force in this state not only prohibits the marriage of negroes and mulattoes with white persons, but expressly declares such marriages to be void. But they are only void if contracted within this state, in violation of its laws. If the marriage takes place in a state whose laws allow it, the marriage is certainly good there; and it would produce greater inconveniences than those attempted to be guarded against, if a contract of this solemn nature, valid in a neighboring state, could be dissolved at the will of either of the parties, by stepping over the line of a state which might prohibit such marriages." In *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, in the syllabus, the court say: "The validity of a marriage contract is to be determined by the law of the state where it was

entered into. If valid there, it is to be recognized as such in the courts of this state, unless contrary to the prohibitions of natural law, or the express prohibitions of a statute. While every state can regulate the status of its own citizens, in the absence of express words a legislative intent to contravene the *jus gentium*, under which the question of the validity of a marriage contract is referred to the *lex loci contractus*, cannot be inferred. The intent must find clear and unmistakable expression." The court cites *Medway v. Needham*, supra, and also quotes from *Putnam v. Putnam*, 8 Pick. 433, the following: "If it shall be found inconvenient or repugnant to sound principle, it may be expected that the legislature will explicitly enact that marriages contracted within another state which if entered into here would be void shall have no force within this commonwealth." Acting on that idea, Massachusetts subsequently enacted a law as follows: "Where persons resident in this state, in order to evade the preceding provisions and with an intention of returning to reside in this state, go into another state or country, and there have their marriage solemnized, and afterward return and reside here, the marriage shall be deemed void in this state." After the passage of that law, the supreme court of Massachusetts in *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, in an opinion by Mr. Chief Justice Gray, on page 464 of 113 Mass. say: "A marriage which is prohibited here by statute because contrary to the policy of our laws is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the state shall have no validity here. This has been repeatedly affirmed by well-considered decisions." And this seems to be the overwhelming weight of the better reasoned cases on the subject. 1 Bishop, Marr. Div. § 880; *Courtright v. Courtright*, 11 Ohio Dec. Reprint, 413; *State v. Shattuck*, 69 Vt. 403. 40 L.R.A. 428, 60 Am. St. Rep. 936, 38 Atl. 81; *Norman v. Norman*, 121 Cal. 620, 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac. 143, quoting from *Com. v. Lane*, supra; *Sturgis v. Sturgis*, 51 Or. 10, 15 L.R.A. (N.S.) 1034. 131 Am. St. Rep. 724, 93 Pac. 696.

To hold otherwise would be to render void numberless marriages and to make illegitimate thousands of children the country over. In 1 Bishop on Marriage & Divorce, 882, this thought seems to have been in the mind of the author. He says: "It was formerly common for English parties wishing to intermarry without a compliance with

their own marriage acts to go into Scotland, and there interchange the matrimonial consent simply in the presence of witnesses. Gretna Green was the most convenient point for the required hasty visit; and thus Gretna Green marriages became famous, and there was no question of their validity. But Parliament, in 1856, by Stat. 19 & 20 Vict. chap. 96, § 1, put an end to this by declaring that thereafter 'no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony shall be valid unless one of the parties had, at the date thereof, his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage.' We do not question the power of a state to pass a law similar to that passed by Massachusetts, as hereinbefore set out, but our legislature has not seen fit to do so. On the contrary, § 5316, Cobbey's Anno. Stat. 1907, provides: "All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state." See *Gibson v. Gibson*, 24 Neb. 394, 429, 39 N. W. 450; *Bailey v. State*, 36 Neb. 808, 812, 55 N. W. 241; *Hills v. State*, 61 Neb. 589, 57 L.R.A. 155, 85 N. W. 836.

While the decisions upon this point are not uniform, and authorities can be found opposed to those above cited, the reasoning of such authorities does not appeal to us as being sound in law or for the good of society. The District Court did not err in its construction of the law, and the exceptions of the state are therefore overruled.

NORTH DAKOTA SUPREME COURT.

CLEVELAND SCHOOL DISTRICT, Respt.,
v.

GREAT NORTHERN RAILWAY COMPANY,
Appt.

(— N. D. —, 126 N. W. 995.)

Damages — measure — destruction of shade trees.

Where shade trees are destroyed by the wrongful act of another, and they have no separable and independent value, or when their value is nominal, the measure of damages is the difference between the value of the land before and after they were destroyed.

(May 21, 1910.)

APPEAL by defendant from a judgment of the District Court for Nelson County

Headnote by CARMODY, J.
28 L.R.A.(N.S.)

in plaintiff's favor in an action brought to recover damages for injuries to plaintiff's property alleged to have been caused by the negligent destruction by fire of certain shade trees growing thereon. Affirmed.

The facts are stated in the opinion.

Messrs. C. J. Murphy and Fred S. Duggan, for appellant:

The value of the trees destroyed as they stood at the time of the fire is the true measure of damages.

Birket v. Williams, 30 Ill. App. 451; *Louisville & N. R. Co. v. Beeler*, 126 Ky. 328, 11 L.R.A.(N.S.) 930, 128 Am. St. Rep. 291, 103 S. W. 300, 15 A. & E. Ann. Cas. 913; *Union P. R. Co. v. Murphy*, 76 Neb. 545, 107 N. W. 757; *Alberts v. Husenetter*, 77 Neb. 699, 110 N. W. 657; *Kansas City & O. R. Co. v. Rogers*, 48 Neb. 653, 67 N. W. 602; *Missouri P. R. Co. v. Tipton*, 61 Neb. 49, 84 N. W. 416; *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb. 70, 46 N. W. 217; *Andrews v. Youmans*, 82 Wis. 81, 52 N. W. 23; *Gilman v. Brown*, 115 Wis. 1, 91 N. W. 227; *Missouri, K. & T. R. Co. v. Lycan*,

Note. — Measure of damages for injury to, or destruction of, trees or shrubbery not valuable for their timber or firewood.

A note to *Bailey v. Chicago, M. & St. P. R. Co.* 19 L.R.A. 653, and a note to *Louisville & N. R. Co. v. Beeler*, 11 L.R.A.(N.S.) 930, supplementary thereto, contain the earlier cases on the question here discussed.

It was said in the latter note that the difference in value of the realty before and after the injury as a statement of the measure of damages for the injury or destruction of trees applied with peculiar fitness in case of fruit trees, shade trees, and other shrubbery, which apart from the realty have little or no value.

In addition to the many cases cited in the earlier notes in support of that rule, the following recent cases may also be cited therefor: *Jordan v. Delaware & A. Teleg. & Teleph. Co.* (Del.) 75 Atl. 1014 (cutting of shade trees for purposes of constructing telephone lines); *Doty v. Quincy, O. & K. C. R. Co.* 136 Mo. App. 254, 116 S. W. 1126 (apple trees destroyed by fire); *Diggs v. Wabash R. Co.* 131 Mo. App. 457, 110 S. W. 9 (maple trees destroyed by fire); *Nichols v. New York & P. Teleg. & Teleph. Co.* 126 App. Div. 184, 110 N. Y. Supp. 325 (unnecessary trimming of shade trees by telephone company); *Texas & P. R. Co. v. Graffeo* (Tex. Civ. App.) 118 S. W. 873 (peach trees and grapevines destroyed by fire).

It was also pointed out in the note to the *Beeler* Case that, since there might be a difference of opinion as to whether a certain tract of land is more valuable with an orchard or with shade trees and shrubbery than without them, the measure of damages in a few cases has been held to be the fair

57 Kan. 635, 47 Pac. 526; Atchison T. & S. F. R. Co. v. Hays, 8 Kan. App. 545, 54 Pac. 322; Kansas City, Ft. S. & M. R. Co. v. Perry, 65 Kan. 792, 70 Pac. 876; Atchison, T. & S. F. R. Co. v. Geiser, 68 Kan. 281, 75 Pac. 68, 1 A. & E. Ann. Cas. 812; Mogollon Gold & Copper Co. v. Stout, 14 N. M. 245, 91 Pac. 724; Hooper v. Smith (Tex. Civ. App.) 53 S. W. 65; Norfolk & W. R. Co. v. Bohannon, 85 Va. 293, 7 S. E. 236; Montgomery v. Locke, 72 Cal. 75, 13 Pac. 401; Stoner v. Texas & P. R. Co. 45 La. Ann. 115, 11 So. 875; White v. Chicago, M. & St. P. R. Co. 1 S. D. 326, 9 L.R.A. 824, 47 N. W. 146; Atkinson v. Atlantic & P. R. Co. 63 Mo. 367; Elvins v. Delaware & A. Teleg. & Teleph. Co. 63 N. J. L. 243, 76 Am. St. Rep. 217, 43 Atl. 903.

Messrs. Kelly & Samson and Scott Rex, for respondent:

The plaintiff had the right of election to sue either for the value of the thing destroyed or for the injury to the freehold, *i. e.*, for the difference in value of the real estate before and after the fire.

Bailey v. Chicago, M. & St. P. R. Co. 3 S. D. 531, 19 L.R.A. 653, 54 N. W. 596; Atchison, T. & S. F. R. Co. v. Geiser, 68 Kan. 281, 75 Pac. 68, 1 A. & E. Ann. Cas. 812; St. Louis & S. F. R. Co. v. Noland, 75 Kan. 691, 90 Pac. 273; Mogollon Gold &

Copper Co. v. Stout, 14 N. M. 245, 91 Pac. 724; Missouri, K. & T. R. Co. v. Lycan, 57 Kan. 635, 47 Pac. 526.

The measure of damages for the negligent destruction of shade trees by fire is the difference between the value of the land before and after the injury.

Dwight v. Elmira, C. & N. R. Co. 132 N. Y. 199, 15 L.R.A. 612, 28 Am. St. Rep. 563, 30 N. E. 398; Carner v. Chicago, St. P. M. & O. R. Co. 43 Minn. 375, 45 N. W. 713; Evans v. Keystone Gas Co. 148 N. Y. 112, 30 L.R.A. 651, 51 Am. St. Rep. 681, 42 N. E. 513; Hayes v. Chicago, M. & St. P. R. Co. 45 Minn. 18, 47 N. W. 260; Missouri, K. & T. R. Co. v. Lycan, 57 Kan. 635, 47 Pac. 526; Atchison, T. & S. F. R. Co. v. Geiser, *supra*; 13 Am. & Eng. Enc. Law, pp. 538, 541; Joyce, Damages, § 2134; St. Louis, I. M. & S. R. Co. v. Ayres, 67 Ark. 371, 55 S. W. 159; Alberts v. Husenetter, 77 Neb. 699, 110 N. W. 657; Rowe v. Chicago & N. W. R. Co. 102 Iowa, 286, 71 N. W. 409; Joyce, Damages, § 220.

Carmody, J., delivered the opinion of the court:

This action was brought to recover damages for the destruction of 95 shade trees situated on plaintiff's property, adjacent to the right of way of defendant. Plaintiff

and reasonable value of the trees destroyed, and, if the trees were only injured, the difference in their value before and after the injury.

In observing that, practically at least, these two methods will often lead to the same amount of damages, it was pointed out that many cases which hold to the rule that the substantive measure of damages is the difference between the value of the land before and after the destruction of the trees admit evidence as to the value of the trees, to aid the jury in applying that rule.

This rule of evidence was also recognized in Chicago, R. I. & P. R. Co. v. Mosher, 76 Kan. 599, 92 Pac. 554; Atchison, T. & S. F. R. Co. v. Arthurs, 63 Kan. 404, 65 Pac. 651; Atchison, T. & S. F. R. Co. v. Owens, 6 Kan. App. 515, 50 Pac. 962.

That these two methods of measuring the damages will practically lead to the same amount of damages is also illustrated by Alberts v. Husenetter, 77 Neb. 699, 110 N. W. 657, a case arising in a jurisdiction recognizing the measure of damages for the injury of fruit trees and shade trees to be the lessened value of the trees, where it was held that, in an action for damages to growing trees, evidence showing the effect the destruction of the trees had on the value of the land is admissible when the nature of the trees destroyed is such that they have no value except with reference to and as part of the land.

In Diggs v. Wabash R. Co. *supra*, evidence of the cost of reproducing as good shade maples as those burned was held ad- 28 L.R.A.(N.S.)

missible. To the same effect is Muldrow v. Missouri, K. & T. R. Co. 62 Mo. App. 431 (destruction of hedge).

In Doty v. Quincy, O. & K. C. R. Co. *supra*, besides the difference in value of the land before and after the fire, the plaintiff was also held entitled to the difference in the market value of the apples.

In Galveston, H. & S. A. R. Co. v. Warnecke, 43 Tex. Civ. App. 83, 95 S. W. 600, where it appeared that fruit trees were destroyed by fire, the court said: "We understand the law to be that the owner of land upon which growing trees have been destroyed by the negligence of another may sue to recover damages for the injury caused his land by the loss of the trees, or may sue for the value of the trees, and under some circumstances both claims for damage might be asserted; but when the injured party sues only to recover the value of the trees, his measure of damage is their value when detached from the soil, and if they have no value when separated from the land, the only cause of action which arises from their destruction is one for damages for injury to the land, the measure of damage in such case being the difference between the value of the land before and after the injury." It was expressly held in this case that when the plaintiff seeks to recover the value of the trees, he cannot recover the value of the trees when attached to the soil, for that would in effect allow him to recover for the injury to his land, for which he has not sued.

G. V.

owns about 1½ acres of land adjoining the defendant's right of way, and had on this land on October 4, 1906, a consolidated school building, erected at a cost somewhat in excess of \$6,000, and 95 to 100 young shade trees. The trees were set out in the spring of 1904, and formed a double row along the westerly side and northerly end of the school ground. They were destroyed by a fire on October 4, 1906, set out and allowed to escape by defendant's section men, who were engaged in burning off defendant's right of way adjacent to plaintiff's property. The evidence shows that at the time of the fire the trees had three seasons' growth, and were in a thrifty, healthy condition. About 100 trees had been set out, a few had been broken down or died, so that the 95 trees destroyed by the fire were practically all the trees on the premises. Plaintiff in the complaint laid its damages at \$950. The jury returned a verdict for \$573, upon which judgment was entered. A motion for new trial was made and denied, and this appeal is from such order and judgment. On this appeal the controversy turns on the measure of damages to be adopted in such a case, and the admissibility of testimony of value.

This case was tried in the court below by respondent on the theory that the measure of respondent's damages was the difference in value of the school property before and after the fire, and was submitted to the jury on such theory. The court charged the jury as follows: "In determining plaintiff's damages, if any, you will compare the actual value of plaintiff's property just before the fire and before the trees were burned with the actual value of the same property after the fire and after the trees were burned. The difference in value will be the amount that plaintiff is entitled to recover, if anything." This instruction was excepted to by appellant, and is assigned as error. The case was tried in the court below by appellant on the theory that the cost of replacing the trees was the measure of respondent's damages. In this court, however, the rule of damages for which appellant contends is the value of the trees destroyed as they stood appurtenant to and attached to the realty, and contends that the damage could not in any event exceed the difference between the value of the land before and after the fire. The value of the trees as they stood must be limited to the difference between the value of the land entire before and after the fire. Appellant, however, argues with great force and plausibility that the fact that the damages should not exceed the said difference does not mean that such difference is the most accurate or direct test of the loss. It 28 L.R.A.(N.S.)

contends that such damages should be exactly the same, no matter by which method they are measured, if they are properly proven and found, and that it is a settled general rule of law that the measure of damages should be adopted which is the most direct and easiest of accurate application, likewise the simplest; that the rule adopted offends against this general principle; that it is indirect in attempting to ascertain the damages by a proposition in subtraction. It is inaccurate in its practical application for the reason that it compels the jury to think in thousands of dollars in values, where the actual damages could not be more than a few hundred dollars. It seems to us that the rule to be adopted in any case depends upon the character and object of the particular action. Some courts hold that the plaintiff has his election to sue either for the value of the thing destroyed or for the injury to the freehold; that is, for the difference in value of the real estate before and after the fire. *Bailey v. Chicago, M. & St. P. R. Co.* 3 S. D. 531, 19 L.R.A. 653, 54 N. W. 596. In *Bailey v. Chicago, M. & St. P. R. Co.* supra, which was an action to recover damages for burning and destroying trees and shrubbery, the court says: "A party injured as complained of in this action may bring his suit for destroying his trees, and in such action recover the value of such trees, not as a part of the realty, but their intrinsic value as detached and separated therefrom and proved in the usual mode of proving value; or he may bring his action for injury to his real estate, and recover its diminution in value. Each action has its appropriate rule of damages." In the case at bar, the plaintiff having brought its action for injury to the real estate, we think the measure of damages laid down by the trial court is correct.

Although the authorities are not uniform, the true rule is believed to be that, where property attached to realty is destroyed by fire, the plaintiff may, at his election, seek to recover its value in its detached form, or as part of the realty, in which latter event the measure would be the difference in the value of the realty before and after the fire. 13 Am. & Eng. Enc. Law, p. 540, and cases cited. The measure of damages for the destruction of fruit, shade, ornamental, or growing trees or shrubbery is the difference between the value of the land before and after they were destroyed. Section 2134, *Joyce on Damages*, and cases cited: *Carner v. Chicago, M. & St. P. R. Co.* 43 Minn. 375, 45 N. W. 713; *Hayes v. Chicago, M. & St. P. R. Co.* 45 Minn. 17, 47 N. W. 260; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 209, 25 Am. Rep. 214; *Bevier*

v. Delaware & H. Canal Co. 13 Hun, 254; St. Louis, I. M. & S. R. Co. v. Ayres, 67 Ark. 371, 55 S. W. 159; Evans v. Keystone Gas Co. 148 N. Y. 112, 30 L.R.A. 651, 51 Am. St. Rep. 681, 42 N. E. 513; Rowe v. Chicago & N. W. R. Co. 102 Iowa, 286, 71 N. W. 409; Hooper v. Smith (Tex. Civ. App.) 53 S. W. 65; Mogollon Gold & Copper Co. v. Stout, 14 N. M. 245, 91 Pac. 724; Atchison, T. & S. F. R. Co. v. Geiser, 68 Kan. 281, 75 Pac. 68, 1 A. & E. Ann. Cas. 812; St. Louis & S. F. R. Co. v. Noland, 75 Kan. 691, 90 Pac. 273; Bailey v. A. Siegel Gas Mixture Co. 54 Mo. App. 50; Central R. & Bkg. Co. v. Murray, 93 Ga. 256, 20 S. E. 129; Hoyt v. Southern New England Teleph. Co. 60 Conn. 385, 22 Atl. 957; Shannon v. Hannibal & St. J. R. Co. 54 Mo. App. 223; Cleveland, C. C. & St. L. R. Co. v. Stephens, 74 Ill. App. 586; Terre Haute & L. R. Co. v. Walsh, 11 Ind. App. 13, 38 N. E. 534; Stertz v. Stewart, 74 Wis. 160, 42 N. W. 214; In Dwight v. Elmira, C. & N. R. Co. 132 N. Y. 199, 15 L.R.A. 612, 28 Am. St. Rep. 563, 30 N. E. 398, the court says: "A party may be content to accept the market value of the thing taken, when he is also entitled to recover for the injury done to the freehold. But if he asserts his right to go beyond the value of the thing taken or destroyed, after severance from the freehold, so as to secure compensation for the damage done to his land because of it, then the measure of damages is the difference in value of the land before and after the injury. In this case the plaintiff was not satisfied with a recovery based on the value of the trees destroyed, after separation from the realty of which they formed a part, as indeed he should not have been, as such value was little or nothing, so he sought to obtain the loss occasioned to the land by reason of the destruction of an orchard of fruit-bearing trees which added largely to its productive value. This was his right, but the measure of damages in such a case is, as we have observed, the difference in value of the land before and after the injury." In Rowe v. Chicago & N. W. R. Co. supra, which was an action for damages for the destruction of an orchard by fire, the court says: "The true rule in such cases is that, 'when the property destroyed or injured is so closely connected with the real estate on which it stands or to which it is attached that it has no value separate and independent of the real estate, or the injury is to the soil itself, the measure of damages is the difference in value between the real estate before the injury and after it.'" In this case the court instructed the jury "that, as to the orchard, the measure of plaintiff's damage would be the 'difference between the fair market value of the plaintiff's farm of 160 acres, upon which said orchard was,

not including the grass or fences injured or destroyed, immediately before the fire, and its fair market value immediately after the fire, as injuriously affected by said fire.'" The rule contended for by the defendant was as follows: "The measure of damages in this case is the difference in value of the orchard just before and its value just after the fire as an orchard." The court says: "We think the rule announced in the instruction given by the court is correct, and it is supported by the great weight of authority. It is impossible to separate the orchard from the land in estimating the damages. Appellant's contention results in fixing the value of each tree destroyed or damaged by the fire, and the aggregate of such values would be the measure of plaintiff's recovery. Such a rule may well be held applicable to the destruction by fire of buildings, fences, and other improvements, which may at once be replaced, where the exact cost of restoring the property destroyed is capable of definite ascertainment, and where there is no damage to the realty itself." In support of the rule laid down by the Iowa court it cites 3 Elliott, Railroads, § 1239, Minnesota, Illinois, Wisconsin, New York, Kansas, Texas, Indiana, and 5 Am. & Eng. Ency. Law, p. 36. The rule of damages contended for by appellant in this case is held the correct rule in a few of the states, notably Nebraska, and in an early case in South Dakota. The great weight of authority, however, sustains the measure of damages laid down by the trial court in the case at bar.

None of the assignments of error by the appellant, as to the admission or exclusion of testimony, are well taken. The testimony shows that the growing trees had a nominal value as trees for timber, separate from the ground on which they grew. The testimony offered by the defendant, as stated by its attorney, was the following: "Mr. Duggan: The defendant at this time offers to prove by this witness that the trees such as were upon the Cleveland school district property at the time of the fire have and had then an actual market value, which market value was between \$15 and \$20 per hundred. Furthermore, that such trees are customarily carried in stock by dealers and transplanted, and that such dealers sell, transplant, and care for such trees, and that it is a known fact among nurserymen that 90 per cent of such trees live, grow, and thrive in this climate and locality, and that all the trees such as were upon the Cleveland school district at the time of this fire, or as many of similar trees, can be planted upon that school district, guaranteed to grow, replaced if they do not grow, and such a number according to all the known

experience of nurserymen, all at a cost less than \$150; that such trees—that is, box elders—of the age, size, height, and quality of trees that were upon this school district, have an actual market value.” Under the rule of damages as laid down by the court this testimony was inadmissible. It did not tend in any way to prove or disprove the plaintiff’s damages. See cases hereinbefore cited, as sustaining the measure of damages laid down by the learned trial court.

The order and judgment appealed from are affirmed.

All concur.

OHIO SUPREME COURT.

UNITED POWER COMPANY, Plff. in Err.,
v.
MATHENY.

(81 Ohio St. 204, 90 N. E. 154.)

Evidence — *res gestæ* — ejection from car — complaints of passengers.

1. Where, in an action to recover damages for unlawfully and forcibly ejecting the plaintiff from a street car, evidence was offered by the defendant tending to show that passengers had left the car on account of the conduct of the plaintiff and his companions, and in doing so complained to the conductor or within his hearing in regard to such conduct, such evidence was competent as part of the *res gestæ* and as tending to explain the motive of the conductor, and it was error for the court to instruct the jury to disregard the same unless they should find that what was said by the passengers to the conductor or in his hearing was in the hearing of the plaintiff, or so that he could have heard it.

Damages — ejection from car — counsel fees.

2. In such case it was error for the court to charge the jury that if they found that the ejection of the plaintiff was not justified, but was without malice or insult, they could award compensatory damages only, and as part thereof they might allow plaintiff a reasonable sum for the services of counsel in his behalf.

(Price and Spear, JJ., dissent from proposition 2.)

(November 30, 1909.)

ERROR to the Circuit Court for Cumbiana County to review a judgment affirming a judgment of the Court of Common Pleas in plaintiff’s favor in an action brought to recover damages for alleged

wrongful ejection of plaintiff from defendant’s street car. Reversed.

Statement by Davis, J.:

The defendant in error sued the plaintiff in error to recover damages for an alleged unlawful, wrongful, and forcible expulsion from a street car belonging to and operated by the plaintiff in error. The plaintiff in error in its answer denied all the allegations contained in the petition, except that it was a corporation and engaged as a common carrier of passengers, and that the plaintiff was ejected from a car belonging to said company; and it alleged as follows: “The defendant says that the plaintiff was so ejected from said car for being disorderly and for using profane language in said car; that plaintiff was requested and warned by the employees of defendant in charge of said

Note. — Counsel fees and other expenses of bringing suit as part of compensatory damages recoverable in an action for tort.

It will be noted that the court, in *UNITED POWER CO. v. MATHENY*, recognized that in actions for damages for tort where punitive or exemplary damages are recoverable, the jury may include a reasonable counsel fee as part of the damages, and the sole question at issue was, conceding that counsel fees are recoverable as part of the damages when the tort is of such a nature as to call for punitive or exemplary damages, May counsel fees also be recovered when the tort is of such a nature that only compensatory damages can be recovered?

This note is limited to cases similar to the *MATHENY CASE*, and is intended only to determine whether the courts in those jurisdictions where counsel fees and other expenses of bringing suit, over and above the taxable costs, are held recoverable as part of the damages in a case where the tort is of such a nature as to call for punitive or exemplary damages, will also permit the recovery of such fees and expenses when the tort is of such a nature that only compensatory damages are allowed.

Bearing in mind the limited scope of the question under annotation it will be readily perceived that cases which, although concerning the recovery of compensatory damages, arise in jurisdictions which do not permit recovery of such items even when punitive or exemplary damages are allowed, are of no practical value in this note; for if it be conceded or held that even in case of gross fraud, malice, or insult, counsel fees are not recoverable as damages, *a fortiori* the courts would hold that counsel fees are not recoverable as part of the damages in the absence of malice or insult which would sustain a recovery of punitive or exemplary damages. Of very little more value are those cases which, although passing upon the question whether counsel fees are recoverable as part of the damages in a case

car to desist from said disorderly conduct and to refrain from using said profane language; but plaintiff refused and failed so to desist and refrain, and the defendant's employees were thereupon obliged to and did eject the plaintiff from said car, but without violence, and not in the manner set forth in the petition." In reply the plaintiff below denied these allegations contained in the answer. On the trial of the issues the plaintiff gave evidence tending to sustain the claims made in his petition, and the defendant gave evidence tending to support the foregoing allegations contained in its answer. The testimony tended to show that the plaintiff and his two companions were noisy and hilarious, perhaps to the extent of using coarse, profane, and indecent lan-

guage, to the annoyance of some of the other passengers, and that the conductor had at least once admonished them; that there were several white women and three colored women in the car, the latter sitting just in front of the plaintiff and his companions; that something occurred between the colored women and the plaintiff and his company which was not understood by the other passengers; that the colored women got up and went to the rear exit of the car, and in doing so passed the plaintiff and his companions, and some words passed between them, which were not understood by the witnesses, owing to the noise; and that as the women came out and got off the car they said to the conductor in the hearing of witnesses, but not in the hearing of the

where only compensatory damages are allowed, contain nothing tending to show that they would hold otherwise in cases where punitive or exemplary damages are recoverable.

The only state outside of the one represented by the *MATHENY CASE* in which the question here discussed has received very much consideration is Connecticut; and the cases from that state agree with the *MATHENY CASE* in holding that counsel fees and other expenses of bringing suit, over and above the taxable costs, cannot be recovered as part of the damages in an action for tort. where only compensatory damages are recoverable, although they at the same time recognize that where punitive damages are recoverable, the rule is otherwise.

The cases referred to are: *St. Peter's Church v. Beach*, 26 Conn. 355 (damages for entry upon lot and removal of fence); *Hurd v. Hubbell*, 26 Conn. 389 (action of trover); *Dibble v. Morris*, 26 Conn. 416 (damages for wrongful taking of property); *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552 (wrongful, though peaceable, entry by landlord on premises); *Bader v. Columbus, B. L. & N. Traction Co.* 5 Ohio N. P. N. S. 495 (damages for ejection from car).

In *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213, 42 Atl. 67, where an action was brought to recover damages for assault and battery and for the wrongful ejection by the defendant's agent from a dance hall, it was held that since the principal, in the absence of authorizing or ratifying the agent's conduct, cannot be held responsible or punished for the latter's malicious purpose or intent which prompted his conduct, the person ejected could not recover as punitive damages the expenses of trial in excess of taxable costs.

The case of *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875, is not strictly in point because it was sought, in an action for damages, to recover attorney's fees paid on a prior injunction suit, but the court, after recognizing that on the trial of an action for malicious prosecution or false imprisonment, where exemplary damages are recoverable, and fees paid or incurred to counsel

for defending the original suit or proceeding may be proved, and, if reasonable and necessarily incurred, may be taken into consideration by the jury in the assessment of damages, said: "But if the injury was not wanton or malicious, and exemplary damages are not recoverable, the allowance of counsel fees is improper."

The following cases throw some light upon this question, but it should be noted that unless it is known that in those jurisdictions the rule is recognized that, in cases of tort where punitive damages are recoverable, counsel fees and other expenses will be allowed as part of such damages, too much reliance must not be placed upon them as authorities for the question here under annotation. In this connection, see the annotation referred to at the end of this note.

In *Atkins v. Gladwish*, 25 Neb. 390, 41 N. W. 347, the court said: "I think it may be said to be a general, if not an universal, rule, that the expenses supposed to be incurred by a plaintiff in prosecuting a suit for tort will only be considered where punitive or exemplary damages are recoverable."

In *Cowden v. Lockridge*, 60 Miss. 385, it was held improper to allow a recovery by the defendant in a replevin suit of attorney's fees as damages, where no wilful wrong, fraud, malice, or oppression on the part of the plaintiff was shown. To the same effect are *Taylor v. Morton*, 61 Miss. 24 (replevin for mule); *Gregory v. Woodbery*, 53 Fla. 566, 43 So. 504 (this case expressly refused to pass upon the question whether counsel fees are recoverable where exemplary damages are recoverable).

In *Winstead v. Hulme*, 32 Kan. 568, 4 Pac. 994, where an action was brought to recover personal property wrongfully seized by a sheriff, it was held that the plaintiff was not entitled to recover as damages attorney's fees for the prosecution of the case, where no malice or wilful wrong was proved. To the same effect is *Atchison, T. & S. F. R. Co. v. Stewart*, 55 Kan. 667, 41 Pac. 961 (action for damages for personal injuries received in endeavoring to alight from a train).

In *Houston & T. R. Co. v. Oram*, 49 Tex.

plaintiff and his companions, "It is a pity a person can't ride on these cars without being insulted by somebody that is drunk." "If we can't ride without being insulted, we will get off," which they did do; that thereafter the conductor went to the men and said, "I have told you twice now. You will have to cut it out or get off," to which one of them replied, "God damn you, get back in the back end where you belong and tend to your own business;" and that thereupon the conductor stopped the car, tendered the men their fare, which they refused, and with the assistance of the motorman ejected the men with no more force than was necessary, and that in the case of the plaintiff no force was used except to take him by the arm and lead him out.

The court charged the jury, in part, as follows: "The court admitted in evidence the statement of a witness as to what was said by some colored women in leaving the car. At that time the court said in your presence that that evidence would not be proper or competent for your consideration unless it was said in the presence and hearing of the plaintiff. The plaintiff and one or two other witnesses deny that they heard any such statement as was made by these colored women. The court instructs you that, before you should consider what witnesses say they may have said in leaving the car, you should determine whether or not it was said by them loud enough to be heard by the plaintiff in this case, for, if it was not said in his hearing, then that evi-

341, it was said: "Counsel fees for the prosecution of plaintiff's demand in cases of tort for negligence are not a natural or proximate result of the injury, and are not to be regarded in such cases in estimating actual damages, but may be considered by the jury, in a proper case, in fixing the amount of exemplary damages."

In *Hughes v. Brooks*, 36 Tex. 379, it was held that where a jury find that an attachment was wrongfully sent out, without further finding that it was malicious and without probable cause, they are not warranted in allowing attorney's fees as part of the damages.

In *Flack v. Neill*, 22 Tex. 253, it was said that the right of a party to recover reasonable attorney's fees as special damages, in cases of fraud, is confined to cases where a party is obliged to take the initiative in order to redress a wrong perpetrated through fraud or malice, and that where a plaintiff has an apparently good cause of action arising *ex contractu*, and the defendant sets up fraud as a defense, he cannot recover special damages.

In *Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App. 529, 33 N. E. 991, it was said: "As a general rule in actions of tort, counsel fees are not recoverable except in suits for malicious prosecution. Our own supreme court has never passed upon the question to our knowledge, and though it would seem that in some of the states counsel fees may be recovered in some classes of tort other than malicious prosecutions, we know of no cases where they are allowable as 'compensation', in actions of libel and slander." To the same effect holds *Grotius v. Ross*, 24 Ind. App. 543, 57 N. E. 46 (action for slander).

In *Kelly v. Rogers*, 21 Minn. 146, it was said: "It is perfectly well settled that the fees of attorneys and counsel, and other expenses of the litigation beyond legal costs, cannot be recovered by the plaintiff in any actions of contract, or in those actions of tort in which punitive damages are not allowed; for, first, these expenses are not the legitimate consequence of the tort or breach of contract complained of; second, 28 L.R.A.(N.S.)

to allow these expenses to the plaintiff, which are never allowed to a successful defendant, would give the former an unfair advantage in the contest; and, third, where, as in this state, it is provided by statute that 'the prevailing party' may be allowed certain sums, termed costs, by way of indemnity for his expenses in the action,' it is not in the power of courts or juries to increase the allowance fixed by statute, however inadequate that allowance may be." This case, however, recognizes that even in cases proper for the inflicting of punitive damages, it is the better opinion that no allowance can be made to the plaintiff for counsel fees and other expenses of prosecuting the suit.

There are many cases in which only compensatory damages were allowed, which have denied the recovery of counsel fees without suggesting any distinction between cases where only compensatory damages are recoverable and those where punitive damages are permitted, or intimating that counsel fees are recoverable if the tort is of such a nature as to call for exemplary damages. Among many others the following cases are of this nature: *Jacobson v. Poin Dexter*, 42 Ark. 97 (replevin for the recovery of hides wrongfully sold by third person); *Joslin v. Teats*, 5 Colo. App. 531, 39 Pac. 349 (intervention in attachment proceeding to recover goods); *Spencer v. Murphy*, 6 Colo. App. 453, 41 Pac. 841 (action for damages by fire set out by defendant); *Jandt v. South*, 2 Dak. 46, 47 N. W. 779 (damages for wrongful detention of property); *Young v. Tustin*, 4 Blackf. 277 (trespass for killing horse); *Irlbeck v. Bierle*, 84 Iowa, 47, 50 N. W. 36 (action for slander); *Day v. New Orleans P. R. Co.* 35 La. Ann. 694 (suit for value of mules killed by trains); *Barnard v. Poor*, 21 Pick. 378 (destruction of wood by fire); *Warren v. Cole*, 15 Mich. 265 (action for deceit); *Hatch v. Hart*, 2 Mich. 289 (replevin); *Lincoln v. Saratoga & S. R. Co.* 23 Wend. 425 (action for damages for injury received on train); *Good v. Mylin*, 8 Pa. 51, 49 Am. Dec. 493 (injury from flooding by erection of dam); *Stopp v. Smith*, 71 Pa. 285 (action for tres-

dence would be entirely incompetent in this case; and, if you should find from all the evidence that the plaintiff did not or could not have heard this language or this statement by these colored women who left the car, then I instruct you to entirely disregard such testimony. If, however, you should find that it was spoken in a way that the plaintiff could have heard it, or did hear it, then the court instructs you that you would have a right to consider it along with the other evidence in the case in determining the issue which has been submitted to you. . . . You should also, if you should determine that this ejectment was not justified, and should further determine that the employees who ejected him acted with actual malice and ill-will, and with a deliberate intention of insulting the passenger in ejecting him, I say, if you should so find, then you would be entitled not only to allow him compensatory damages, but should also allow him an additional amount by way of punitive damages; that is, as a punishment for this defendant for having in its service employees who would thus disregard the rights of others. This is a matter, however, which you are not called upon to determine unless you should, as I say, find that this ejectment was done not only without justification, but in a malicious and insulting manner. Otherwise you should only allow such an amount as would fairly compensate him in the respects to which I have called your attention. And, as a matter of compensation, you would have a right to allow him a reasonable amount for the services of his counsel in bringing and maintaining this action against the company."

There was a verdict and judgment in favor of the plaintiff in the court of common pleas, and this judgment was affirmed by the circuit court.

pass to property); *Welch v. North Eastern R. Co.* 12 Rich. L. 290 (action on the case to recover damages for loss of a trunk).

There are a few early cases in which it seems to have been held that counsel fees and expenses of bringing suit are recoverable as part of the damages in an action for tort, even though only compensatory damages were allowed. These cases, however, it is safe to say, cannot at the present time be regarded as authority.

In *Boston Mfg. Co. v. Fiske*, 2 Mason, 120, Fed. Cas. No. 1681, when an action was brought for infringing a patent, it was held that the jury are at liberty, if they see fit, to allow the plaintiff as part of his "actual damages" any expenditure for counsel fees or other charges, which were necessarily incurred to vindicate the rights derived under his patent, and are not taxable in the 28 L.R.A.(N.S.)

Messrs. Brookes & Thompson for plaintiff in error.

Messrs. Hollis E. Grosshans and C. S. Speaker for defendant in error.

Davis, J., delivered the opinion of the court:

The testimony clearly shows that the plaintiff below, defendant in error here, was one of a party of men who were creating some disturbance in a street car. Whether or not it would be regarded in that locality as "disorderly conduct" is not for us to say, for there seems to be some dispute about it; but it is certain that the conduct of the party was such as was likely to mar the comfort of peaceable and well-behaved passengers in a public conveyance, especially of ladies. There were some white women and also three colored women in the car, the latter sitting in front of and near to the plaintiff and his friends. The testimony tends to prove that something passed between the plaintiff and his party and the colored women which caused the latter to get up and leave the car by the rear door in a manner indicating displeasure; and that, as they left the car, they said to the conductor: "If we can't ride without being insulted, we will get off," and, "It is a pity a person can't ride on these cars without being insulted by somebody that is drunk." There is testimony tending to prove that at the time this occurred the conductor had already warned the men once, and perhaps twice. Under these circumstances, the court instructed the jury, as to what was said by the colored women when leaving the car, that if these words were not spoken in the hearing of the plaintiff, or loud enough to be heard by him, they should entirely disregard what was said. We do not understand that this evidence was offered for the purpose of proving that the plaintiff and his companions were intoxicated and had in-

bill of costs. To same effect are *Pierson v. Eagle Screw Co.* 3 Story, 402, Fed. Cas. No. 11,156 (infringement of patent); *Allen v. Blunt*, 2 Woodb. & M. 121, Fed. Cas. No. 217 (infringement of patent); *Whipple v. Cumberland Mfg. Co.* 2 Story, 661, Fed. Cas. No. 17,516 (action on the case for flowing back water of river).

In *The Apollon*, 9 Wheat. 378, 6 L. ed. 115, where a libel was brought by the master of a vessel for its illegal seizure, the court said that it was the common course of the admiralty to allow counsel fees, either in the shape of damages or as part of the costs.

A note to *Hanna v. Sweeney*, 4 L.R.A. (N.S.) 1907, discusses the question of expense of litigation as element or as limit of punitive or exemplary damages.

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sulted the women. In other words, it was not offered as an admission by reason of the failure of the plaintiff to deny the statement. If that were the sole purpose of the introduction of the evidence and the sole effect of it, there would be nothing objectionable in the instruction to the jury. We are all of the opinion, however, that this evidence was competent as part of the *res gestæ*, whether the words were or could have been heard by the plaintiff or not; but it was also in issue in the case whether the plaintiff had been unlawfully ejected from the car, and it was also a question whether the defendant's servants acted with malice or insult towards the plaintiff. To maintain the issues on its part, the defendant was not only entitled to show the actual conduct of the plaintiff, but the effect of it on the passengers, and the complaints of the latter in regard to it, in order to show that its servants acted justifiably and without malice. It cannot, with any reason, be said that such complaints must be made in the presence or hearing of the offender. In this aspect of the case we regard the charge of the court as erroneous and highly prejudicial.

Again, the court proceeded to correctly define the circumstances under which, if found by the jury, they might award to the plaintiff not only compensatory damages, but in addition thereto exemplary or punitive damages. The court even cautioned the jury that they should not award exemplary damages unless they should find that the expulsion of the plaintiff from the car "was done not only without justification, but in a malicious and insulting manner." The court then proceeded to say: "Otherwise you should only allow such an amount as would fairly compensate him. . . . And as a matter of compensation you would have a right to allow him a reasonable amount for the services of his counsel in bringing and maintaining this action against the company." In this last sentence we think that the court fell into a serious error.

Although the doctrine announced in *Roberts v. Mason*, 10 Ohio St. 277, has never been universally accepted in the other states, yet from that time to the present it has been the settled law of Ohio that in cases involving the elements of fraud, malice, or insult the jury may award exemplary or punitive damages in addition to damages merely compensatory; and that "in such a case" the jury may include reasonable counsel fees in their estimate of compensatory damages. *Ibid.* *Atlantic & G. W. R. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *Finney v. Smith*, 31 Ohio St. 529, 27 Am. Rep. 524; *Stevenson v. Morris*, 37 Ohio St. 10, 41 Am. Rep. 481; *Peckham Iron Co. v. Harper*, 41 28 L.R.A.(N.S.)

Ohio St. 100; *Railroad Co. v. Scott*, 56 Ohio St. 736, 49 N. E. 1115; *contra*, *Kelly v. Rogers*, 21 Minn. 146. But, although we have made a somewhat extended search, we are not aware of any well-considered case in which it was held that, in the absence of statute or express agreement, attorney's fees might be included as part of the damages where compensatory damages only could be allowed. There are, however, numerous cases in which the contrary doctrine has been distinctly announced and applied. We cite a few of them: *Burruss v. Hines*, 94 Va. 413, 420, 26 S. E. 875; *St. Peter's Church v. Beach*, 26 Conn. 355; *Eatman v. New Orleans P. R. Co.* 35 La. Ann. 1018; *Welch v. North Eastern R. Co.* 12 Rich. L. 290; *Lincoln v. Saratoga & S. R. Co.* 23 Wend. 425; *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181; *Flanders v. Tweed*, 15 Wall. 450, 21 L. ed. 203; *Joslin v. Teats*, 5 Colo. App. 531, 39 Pac. 349; *Spencer v. Murphy*, 6 Colo. App. 453, 41 Pac. 841. *Finney v. Smith*, 31 Ohio St. 529, 27 Am. Rep. 524, is chiefly relied upon to support the rule of damages given to the jury in this case. *Finney v. Smith* was an action for libel, and, in interpreting the language of the court, it should not be forgotten that, when an alleged libel is shown to be false, malice is presumed. In such a case evidence in mitigation only tends to rebut malice, but it cannot amount to a complete defense or justification. Therefore, so long as the presumption of malice is not entirely overcome, the rule of damages laid down in *Roberts v. Mason* applies; that is, compensatory damages, including counsel fees, and, in addition, if the jury see fit, exemplary damages. In *Finney v. Smith*, 31 Ohio St. 535, 27 Am. Rep. 524, the court notes the fact that the record contains evidence tending to establish the charge made in the petition and also evidence tending to show that the defendants may have acted under a misapprehension, and so the court says: "The clause of the charge excepted to is not drawn with accuracy and fullness of expression in itself, but, when taken in connection with the whole charge, which is set out, we do not find it erroneous; and we see no reason to apprehend that the jury could have been misled by it to the prejudice of defendants." In our view of the case, the few lines of opinion by Boynton, J., ring clear and true and meet our approval.

Indeed, it is difficult to understand how the rule of damages given to the jury in this case can be worked out in harmony with *Roberts v. Mason*, 10 Ohio St. 278, in which it was said that "the better opinion now seems to be that in actions *ex contractu*, and in cases nominally in tort, but where no wrong in the moral sense of the term is com-

plained of, the fees of counsel ought not to be included in the estimate of damages;" and, as it was said by Mr. Justice Grier, in *Day v. Woodworth*, ut supra, "It is a moral offense of no higher order to refuse to pay the . . . damages for a trespass which is not wilful or malicious, than to refuse the payment of a just debt."

The court below properly said to the jury that if they should find that the ejectment of plaintiff from the car was not justified, but was not done with malice or in an insulting manner, they could award compensatory damages only; but the court erred in instructing the jury in that connection that, in case they should so find, as a matter of compensation they might allow to the plaintiff a reasonable amount for services of his counsel.

The judgment of the Circuit Court and that of the Court of Common Pleas are therefore reversed.

Crew, Ch. J., and Summers and Shauck, JJ., concur.

Price, J., dissenting:

I am satisfied with the reversal of the case on the first ground stated in the syllabus and in the opinion, but the second ground in my opinion should not be declared to be the law in Ohio.

The plaintiff in the court of common pleas sued to recover damages resulting from an assault made on him by the servants of the defendant company, and it is alleged that the plaintiff was violently seized and tightly grasped by the servant, and violently pushed along the aisle of the car, and ejected therefrom, whereby the plaintiff not only suffered mental and physical pain, but was humiliated by the acts and violence of the servant. The defendant pleaded facts—disorderly conduct, etc.—in justification of the acts of its servants in ejecting the plaintiff. The issues made a case in which it was entirely proper and necessary that the court instruct the jury as to the rule of compensatory and that of exemplary damages, for there was evidence introduced which tended to support plaintiff's charge. As I understand the majority opinion and the second branch of the syllabus, the right of the jury to allow counsel fees as an element of compensatory damages is contingent upon a finding by the jury that a case was made out for exemplary damages; and if a case for exemplary damages is not made out, counsel fees cannot be considered in awarding compensatory damages. This contingency seems unwarranted by the well-settled law of this state. Compensatory damages in such actions sounding in tort—assault and battery, and similar acts of personal violence—are to be awarded as com-

penensation for the wrong inflicted, and the compensation should be adequate in so far as the law will afford it. As often said in the books and decisions, exemplary damages or punitive damages are awarded to make an example of the offending party so that others may be deterred from committing similar wrongs; or, if not as a deterrent, then as punishment of the wrongdoer. These are not awarded as compensation to the injured party, but for the purpose already stated, and why, after the jury has concluded that there should be exemplary damages awarded, shall it then go back and again take up the subject of compensatory damages and add the fees of counsel? The trial court could not anticipate what the verdict would be—whether it would include exemplary damages or not, and it attempted, and I think correctly, to lay down the measure as to each kind of damage.

There ought not to be any misunderstanding of what this court has decided upon this question. Commencing with *Stevens v. Handly*, Wright (Ohio) 121, and *Sexton v. Todd*, Wright (Ohio) 316, we find the rule of damages stated. In *Stevens v. Handly*, supra, which was a slander case, the court lays down the rule on page 122, as follows: "But if the words were uttered under circumstances merely mitigating, without justification or excuse, the damages should be compensatory; that they should be sufficient to cover all the expenses and costs of the plaintiffs in litigating the matter, including their loss of time,—such as will make them whole. Where the words are spoken without justification, excuse, or other mitigating circumstances, the damages should be exemplary, to express the estimation in which the jury hold a good character in society, and their reprehension of the habit of wantonly attacking it." We have in that case an instance where there were circumstances in mitigation, and not of wantonness, and yet a right of the injured party to compensatory damages, including all expenses, distinctly recognized. *Sexton v. Todd*, supra, is on the same line. These two cases were reviewed and approved in *Roberts v. Mason*, 10 Ohio St. 277. Some language in the opinion of the court might be clearer and less confusing, but the syllabus, which is the law of the case, seems entirely plain. It is: "(1) In an action to recover damages for a tort [not merely a slander or libel] which involves the ingredients of fraud, malice, or insult, a jury may go beyond the rule of mere compensation to the party aggrieved, and award exemplary or punitive damages; and this they may do although the defendant may have been punished criminally for the same wrong. (2) In such a case the jury may in their esti-

mate of compensatory damages take into consideration and include reasonable fees of counsel employed by the plaintiff in the prosecution of the action." The counsel fees are classed with compensatory damages, and they form no part of the exemplary damages, and are not to be awarded as part of the same. In *Finney v. Smith*, 31 Ohio St. 529, 27 Am. Rep. 524, and cited in the majority opinion in this case, this court reviews the cases in Wright's Report already cited and *Roberts v. Mason*, and points out the difference between the syllabus and some language of the judge writing the opinion in *Roberts v. Mason*, supra, which was an assault and battery case. The syllabus in *Finney v. Smith*, supra, is: "In an action for libel the jury may, in estimating compensatory damages, allow to the plaintiff reasonable counsel fees in the prosecution of his action, although there may be circumstances of mitigation, not amounting to a justification." The questions presented to the court in that case called for just such a clear statement of the law; and, while Boynton, J., was not willing to place his concurrence on that proposition, he does not controvert it, nor endeavor to show its weakness. We have not space to quote from the case at greater length. The opinion refers to and approves other authorities which support the doctrine.

Therefore the trial court did not err in that part of the charge relating to compensatory damages. This, like *Roberts v. Mason*, was an assault and battery case, leading to ejectment from a car. It is a case sounding in tort, in which both compensatory and exemplary damages might be awarded, and it seems to me the trial judge correctly stated the law to the jury on that subject.

Spear, J., concurs in the dissenting opinion.

KENTUCKY COURT OF APPEALS.

LOUISA K. THOMAS, Appt.,
v.

J. W. GAYLE et al.

(134 Ky. 330, 120 S. W. 290.)

Landlord — trade fixtures — renewal of lease.

A tenant does not lose the right to remove trade fixtures which can be removed without the least injury to the freehold, by renewing his lease, and entering upon a new term thereunder, without reserving the right to remove the fixtures.

(June 18, 1909.)

28 L.R.A.(N.S.)

APPEAL by plaintiff from a judgment of the Circuit Court for Franklin County in defendant's favor in an action brought to recover damages for the alleged wrongful removal of certain trade fixtures from plaintiff's premises. Affirmed.

The facts are stated in the opinion.

Messrs. Lindsay & Edelen, William Lindsay, J. H. Polsgrove, and J. A. Violett for appellant.

Messrs. Greene, Van Winkle, & Schoolfield and B. G. Williams for appellees.

Clay, C., delivered the opinion of the court:

Appellant, Louisa K. Thomas, is the owner of a certain house and lot on the north side of Main street in Frankfort, Kentucky, known as the "Chiles Drug Store." Appellees, J. W. Gayle and B. Ebner, partners doing business under the firm name of "J. W. Gayle & Company," occupied said premises as a drug store under a lease which expired January 1, 1907. Before the expiration of their lease, they vacated the building and took with them certain trade fixtures, consisting of counters, prescription cases, shelving, etc. Appellant, claiming to be the owner of the fixtures, brought this action to recover the value thereof and damages for the injury done to her freehold. Appellees defended on the ground that they were the owners of the fixtures, and denied that they had in any way damaged the building. They also filed a counterclaim for damages to their goods, alleged to have been caused by the failure of appellant to keep the building in reasonable repair. The jury returned a verdict in favor of appellees. From the judgment based thereon, this appeal is prosecuted.

The facts are as follows: In 1873 one Chiles owned the building referred to. His son, Richard Chiles, bought and placed in the building certain drug store fixtures, consisting of counters, shelving, prescription cases, etc., for the purpose of conducting a drug store therein. The father died, and devised the building to his wife, Unetta Shiles,

Note. — Effect of renewal of a tenancy without reserving the right to remove fixtures is treated in a note in 17 L.R.A.(N.S.) 1135.

In a subsequent case, *Woods v. Bank of Haywards*, 10 Cal. App. 93, 106 Pac. 730, it was held that the continued occupancy of the premises by the lessee, with the consent of the lessor, from month to month, at an increased rental, following the expiration of the term of a lease for years, which provided for the removal of certain trade fixtures, was an extension of that lease, and that the right to remove the fixtures was therefore not lost by failure to exercise it during the original term.

who died in 1901, and devised the building to appellant. Richard Chiles conducted a drug store in the building from 1873 until his death. Upon his death, the fixtures were appraised as a portion of his estate, and were sold by his administratrix and widow, Sallie Chiles, to Wickliffe Chapman, for \$550. Prior to 1891, Chapman leased the building from Mrs. Unetta Chiles, and conducted a drug store therein. John W. R. Williams bought a two-fifths interest in the store and fixtures from Chapman about the year 1891, and he and Chapman continued to conduct the business as partners until Chapman's death, in 1892. Upon Chapman's death, his three-fifths interest in the drug store and fixtures was sold by his administrator, Walter Chapman, to John W. R. Williams, in the year 1893. The lease to Chapman expired January 1, 1892. A new lease was made to Williams for a period of five years, beginning January 1, 1892, and ending January 1, 1897. In the year 1896, and during the pendency of this lease, the building caught fire, and the fixtures were practically destroyed. Mrs. Chiles carried insurance on the building, which she collected after the fire. Williams carried insurance on the stock and fixtures, which he likewise collected. Thereafter Williams bought new fixtures and paid for same. In 1896, Mrs. Chiles executed another lease to Williams, which began January 1, 1897, and ended January 1, 1902. In 1901 Williams sold his drugs and trade fixtures to South-Longmoor & Company. In June, 1901, Mrs. Chiles made a new lease of the building to South-Longmoor & Company for a period of five years, beginning January 1, 1902, and ending January 1, 1907. In February, 1903, South-Longmoor & Company sold the trade fixtures to appellees, J. W. Gayle & Company, and with the consent of appellant assigned the lease on the building to appellees. For these fixtures appellees paid \$2,100. In December, 1906, appellees leased another building, and removed thereto their stock of drugs and the counters, prescription cases, shelving, soda fountain, etc., which they had purchased from South-Longmoor & Company. It is the value of these fixtures which appellant seeks to recover in this action.

The first ground assigned for reversal is the failure of the court to give certain instructions offered by appellant. It is the contention of appellant that the tenant Williams procured and held under a new lease commencing January 1, 1897, which lease did not reserve to him the right to remove the fixtures placed in the drug store in 1896, and that he thereby abandoned any right he may have had to said fixtures, and had no title thereto which he could convey to

South-Longmoor & Company. The same contention is made in regard to South-Longmoor & Company, who held under a new lease, commencing January 1, 1902, and which did not reserve to them the right to remove the fixtures in question. The instructions refused submitted these propositions to the jury. There can be no doubt that there is abundant authority to support appellant's position that where a tenant having a right to remove fixtures erected by him on the demised premises accepts a new lease of such premises without reservation or mention of any claim of such fixtures, and enters upon a new term thereunder, the right to remove is lost, notwithstanding his actual possession has been continuous. *Ewell, Fixtures*, p. 174; *Bronson, Fixtures*, p. 219; *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 370, 16 Atl. 301. This doctrine, however, has been modified by some courts, and utterly repudiated by others, when the fixtures are what is known as "trade fixtures," and may be removed without injury to the freehold.

In *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, the court said: "The right of a tenant to remove the erections made by him in furtherance of the purpose for which the premises were leased is conceded. The principle which permits it is one of public policy, and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all is based upon a corresponding rule of public policy for the protection of the landlord, and which is that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant to remove fixtures which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term; indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of tenant. *Penton v. Robart*, 2 East, 88; *Weeton v. Woodcock*, 7 Mees. & W. 14. But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine. On the contrary, the reasons which saved to the tenant his right to the fixtures in the first

place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble, and incur the loss, of removing your erections during the term and of again, afterwards, bringing them back they shall be yours; otherwise, you will be deemed to abandon them to your landlord.'"

In the case of *Radey v. McCurdy*, 209 Pa. 306, 67 L.R.A. 359, 103 Am. St. Rep. 1009, 58 Atl. 558, trade fixtures were placed in a building by the tenant. He afterwards renewed his lease without reserving the right to remove the fixtures. The trial court held that the failure of the tenant to remove before the expiration of the first lease, or to reserve the right to so remove in the new lease, was an abandonment of the trade fixtures to the landlord. In reversing, the supreme court of Pennsylvania said: "Though this has been declared to be the law by some courts, and the learned judge had authority outside of this state to sustain him, we cannot subscribe to such a doctrine as being either in harmony with reason or consistent with fair dealing with man and man. When a tenant attaches to the land fixtures necessary for him in the conduct of his business, the presumption is that, at the expiration of his lease, he will remove them; and it is right to do so. They are not put in for the benefit of the landlord; and until the tenant, after his term expires, leaves them on the premises in which he no longer has any interest, no intention can be imputed to him to abandon them to his lessor. *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Watts v. Lehman*, 107 Pa. 106."

A very good discussion of the question may be found in *Bergh v. Herring-Hall-Marvin Safe Co.* 70 L.R.A. 756, 69 C. C. A. 212, 136 Fed. 368, wherein the court said: "Counsel for defendants have collected numerous authorities in support of this rule, and it cannot be denied that many of them, broadly considered, sustain the defendants' contention; but we are constrained to think that the better reasoning so limits the application of the rule as not to include the present controversy. The rule is of ancient origin and has grown up step by step; the common law accepting some of the harsh analogies of the civil law, until, as trade and commerce expanded, it was found that a harsh application of it to the new relations was producing inequitable results never contemplated at the time the rule had its origin. The trend of recent authority is toward a restricted application of the rule to trade fixtures, so as to prevent mani-

fest injustice. . . . If the fixtures are appurtenant to the land, so that a deed or lease of the premises will necessarily include them, a reservation should be made if the tenant desires to retain them; but, as to chattels which can be removed and carried away without injury [to the freehold], no such exception should be necessary. There can be no presumption that a tenant intends to present his personal property to his landlord because the lease fails to give him the right to remove it. He has that right without regard to the landlord's wishes, and nothing short of conduct which amounts to an estoppel, and evinces a clear intention to abandon his property, can deprive him of that right. The law does not favor forfeitures."

A well-considered case upon the subject is that of *Smusch v. Kohn*, 22 Misc. 344, 49 N. Y. Supp. 176. In that case the court said: "The defendant [landlord] bases this claim upon *Loughran v. Ross*, 45 N. Y. 702, 6 Am. Rep. 173; *Talbot v. Cruger*, 81 Hun, 504, 30 N. Y. Supp. 1011, affirmed in 151 N. Y. 118, 45 N. E. 564; *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694; and *McIver v. Estabrook*, 134 Mass. 550; but it will be found that these cases relate to buildings erected by the tenant, or to bank vaults, and such like permanent and substantial structures put up by him, which became appurtenant to the land, and consequently an incident of the subject-matter rehired as part of the premises and their appurtenances. They do not concern ordinary movable chattels, which retain their distinctive character as personal property, in reference to which a different rule—one much more liberal to the tenants—prevails. . . . Neither the presumed intention of the parties nor the character of the chattels gives any color whatever to the contention that they were to become the property of the landlord."

For the purpose of applying the rule of law above announced to the facts of this case, it will be necessary to consider the character of the fixtures in question. The evidence shows that the counters, prescription cases, soda fountain, etc., were not attached in any way to the realty, but could be moved about in the storeroom in any manner the tenant desired. The shelving cases were set up against the walls on the side of the building, and the only manner in which they were connected was by a small wire stuck in the wall and attached to the top of the case, merely to keep it in position. Thus it will be seen that the fixtures were such as could be easily removed without the least injury to the freehold. While it is true that this court, in the case of *Unz v. Price*, 22 Ky. L. Rep. 701, 58 S.

W. 705, recognized to a certain extent the doctrine contended for by appellant, we are not inclined to extend the doctrine any further than announced therein. In that case the tenant erected improvements upon the landlord's land. They were of a permanent character, and necessarily annexed to the freehold. In the case before us, however, no such question is presented. A greater part of the so-called "fixtures" were never annexed in any manner to the freehold. They were simply movable, personal property. Only the shelving cases were attached, and they were attached in a manner that permitted of their easy removal. Such fixtures are more nearly furniture than realty, and are not useful to the next tenant unless he happens to be in the same trade. To extend the doctrine founded upon permanent improvements annexed to the realty to trade fixtures such as are involved in this action would be to work a manifest injury in a great majority of cases.

Complaint is made of the admission of incompetent evidence. Even if incompetent, it was not prejudicial. Appellees, by the overwhelming weight of the evidence, showed title to the property in question.

Appellant's whole right to recover was based upon abandonment by the various tenants because of their failure to reserve in the new leases the right to remove the fixtures. Having held that this doctrine has no application to the facts of this case, appellees were, as a matter of fact, entitled to a peremptory instruction.

Judgment affirmed.

Petition for rehearing denied.

OHIO SUPREME COURT.

STATE OF OHIO

v.

DELL COLLINGSWORTH.

(82 Ohio St. 154, 92 N. E. 22.)

Homicide — violation of municipal ordinance — "unlawful killing."

The violation of a penal ordinance of a municipality, as a result of which violation death ensues, is not an "unlawful killing" within the provisions of § 6811, Revised Statutes, which defines the crime of manslaughter.

(April 12, 1910.)

EXCEPTIONS by the State to the direction by the Court of Common Pleas for Franklin County of a verdict of acquit-

Headnote by the COURT.
28 L.R.A.(N.S.)

tal in a prosecution for manslaughter. Overruled.

The facts are stated in the opinion.

Messrs. Webber, McCoy, King, & Game, for the State:

Where the general assembly authorizes municipalities to legislate upon matters pertaining to the regulation and use of the highways within their corporate limits, and, within the scope of their authority, they legislate upon such matters, such municipal legislation is a law, with all the force and effect of a statute.

Markle v. Akron, 14 Ohio, 591; Alvord v. Richmond, 3 Ohio N. P. 136.

Where a penal ordinance of a municipality defines what shall constitute a misdemeanor, and prescribes a punishment for the violation of such an ordinance, it is manslaughter to kill a person while engaged in the wilful violation of such an ordinance.

State v. Horton, 4 A. & E. Ann. Cas. 800, note; 3 Russell, Crimes, § 4, p. 173; Wharton, Homicide, 3d ed. § 4, p. 5.

The criminality of the conduct of the de-

Note. — Homicide: death inflicted while defendant is violating a municipal ordinance.

As to negligent homicide in general, see the note to Johnson v. State, 61 L.R.A. 277. As to homicide in the commission of an unlawful act, see the note to People v. Sullivan, 63 L.R.A. 353. And as to accidents while hunting in violation of law, see the note to State v. Horton, 1 L.R.A.(N.S.) 991.

Where manslaughter is defined by statute as the unintentional killing of a human being in the commission of an unlawful act, the mere violation of a municipal ordinance, notwithstanding death ensues during such violation, and in connection therewith, does not render the wrongdoer liable to punishment for manslaughter, as one can be held criminally liable only for the consequences of his unintentional unlawful act which, in itself, is in the nature of a wrongful act, independent of the enactment, where the natural consequences thereof are dangerous to life or limb. People v. Davis, 1 Ill. C. C. 245.

Although not within the scope of this note, attention is called to Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, which holds that one would not be guilty of a criminal assault and battery by negligently driving over another person while exceeding the speed limit fixed by a municipal ordinance. The court said: "It is true that one in pursuit of an unlawful act may sometimes be punished for another act, done without design and by mistake, if the act done was one for which he could have been punished if done wilfully. But the act, to be unlawful in this sense, must be an act bad in itself and done with an evil intent; and the law

fendant does not turn upon the distinction between *malum prohibitum* and *malum in se*.

Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362; Thompson v. State, 131 Ala. 18, 31 So. 725; 1 Bishop, Crim. Law, § 327.

Messrs. Edward C. Turner and John A. Connor, for appellee:

If that part of the ordinance under which the indictment is drawn states an unlawful act, then such unlawful act is merely *malum prohibitum*, and not *malum in se*. The act being merely *malum prohibitum*, it is not such a one as would be "unlawful" under the manslaughter statute.

Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362; People v. Pearne, 118 Cal. 154, 50 Pac. 376; Johnson v. State, 66 Ohio St. 59, 61 L.R.A. 277, 90 Am. St. Rep. 564, 63 N. E. 607; Estell v. State, 51 N. J. L. 182, 17 Atl. 118, 8 Am. Crim. Rep. 514; 1 Bishop Crim. Law, 2d ed. p. 258; Archbold, New Crim. Proc. p. 9.

Per Curiam:

The grand jury of Franklin county presented an indictment against Dell Collingsworth, of which the following is a copy:

Indictment for Manslaughter.

The State of Ohio, }
Franklin County. } ss.:

In the court of common pleas, Franklin county, Ohio, of the term of January, in

the year of our Lord one thousand nine hundred and nine.

The jurors of the grand jury of the state of Ohio, duly elected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin county, in the state of Ohio, in the name and by the authority of the state of Ohio, upon their oaths, do find and present that at the time hereinafter mentioned the city of Columbus, Ohio, had adopted and there was in force in said city the following ordinance.

"Whoever shall ride or drive any animals in any highway, thoroughfare, or public place in this city quicker than or beyond a moderate gait, or shall not slacken the pace of such animal or animals in approaching any cross walk upon which any person may be in the act of passing, or in the act of approaching or leaving a street car, or shall ride or drive any such animal so as to cause such animal or any vehicle there-to attached, to come in collision with or strike any other object or other person, or shall leave any such animal standing in any public place without being fastened or so guarded as to prevent its running away, or shall turn any such animal loose in any thoroughfare, or shall hitch or fasten any such animal to any tree or tree box without the consent of the owner, or shall hitch or fasten any horse or other animal to any lamp post or water hydrant, shall be deemed guilty of a misdemeanor, and, upon convic-

has always made this distinction: that if the act the party was doing was merely *malum prohibitum* [under which the violation of such an ordinance falls], he shall not be punishable for the act arising from misfortune or mistake; but if *malum in se*, it is otherwise. . . . Besides, to prove the violation of such an ordinance, it is not necessary to show that it was done wilfully or corruptly. . . . It is therefore immaterial whether a party violates the ordinance wilfully or not. The offense consists not in the intent with which the act is done, but in doing the act prohibited, but not otherwise wrong. It is obvious, therefore, that the violation of the ordinance does not in itself supply the intent to do another act which requires a criminal intent to be proved." See also Com. v. Hawkins, 157 Mass. 551, 32 N. E. 862, *infra*.

In People v. Pearne, 118 Cal. 154, 50 Pac. 376 (which was a prosecution for involuntary manslaughter caused by defendant, while intoxicated, by reckless driving of a team of horses through the principal street of a town at a great and unusual rate of speed) it was held that the charge must rest upon the commission of an act which might produce death if done without due caution or circumspection; and that a county ordinance declaring it a misdemeanor to drive at a greater rate of speed than 6 28 L.R.A.(N.S.)

miles an hour, which was offered for the purpose of showing defendant's violation thereof, so as to establish that he was engaged in the commission of an unlawful act, was open to the objection that an act which was merely *malum prohibitum* is not an unlawful act; and the court, while not deeming a disposal of this question necessary, said that the case could not be strengthened by the admission of the ordinance, and that upon a new trial it had better be omitted.

But it was held in People v. Davis, *supra*, that the failure to equip a theater with such fire apparatus and equipment as were required by a municipal ordinance, which resulted in the loss of life by fire, was the proximate cause of death, as such omission was dangerous to life and limb, and that an indictment based thereon against the manager of the theater, who was responsible for such omission or neglect, would be sustained. The court said: "But if this conclusion be wrong, then there is another consideration which disposes of the objection; though a violation of the ordinance in question in the manner charged may not constitute an unlawful act within the meaning of the statute [defining manslaughter by wrongful act], even though its natural consequences were dangerous, yet there can be no

tion thereof, shall be fined not less than five nor more than fifty dollars, or be imprisoned not more than thirty days, or both."

And that at the time hereinafter mentioned one James Brady was then and there walking upon a certain highway, to wit, Buttles avenue, in said city of Columbus.

And the jurors of the grand jury aforesaid do further find and present that Dell Collingsworth, late of said county of Franklin, on or about the thirtieth day of December, in the year of our Lord one thousand nine hundred and eight, within the county of Franklin, aforesaid, and within the corporate limits of said city of Columbus, did drive a certain horse with a vehicle attached to said horse, so that said horse and the vehicle thereto attached unlawfully, and in violation of said ordinance, did then and there come in collision with and strike and wound the said James Brady while the said James Brady was so walking upon the said Buttles avenue, as aforesaid, from which said wounds so inflicted by the said horse and vehicle so driven by the said Dell Collingsworth, as aforesaid, the said James Brady then and there died. And so the jurors of the grand jury aforesaid, upon their oaths, as aforesaid, do say that the said Dell Collingsworth, in the manner and by the means aforesaid, did then and there unlawfully kill one James Brady, then and there being, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Ohio.

Karl T. Webber,
Prosecuting Attorney,
Franklin County.

The accused demurred to the indictment,

but the demurrer was overruled, and on a plea of not guilty the case proceeded to trial by jury. During the progress of the trial the state offered in evidence the ordinance adopted by the city of Columbus, and which is copied in said indictment. The accused objected to the introduction of the ordinance, which objection the court sustained. To this decision the state excepted. As this ruling was fatal to the case sought to be made by the state, the court instructed the jury to return a verdict of acquittal, which was done. The prosecuting attorney took a bill of exceptions containing the points decided, and obtained leave to file the same in this court, under § 7305, Rev. Stat. to obtain the opinion of this court upon the questions decided.

We have an imperfect record of the proceedings below, but the indictment discloses that the state predicated the charge of manslaughter upon the violation of a municipal ordinance; or, to put the proposition in another form, it is alleged that the unlawful act committed by the accused, which resulted in the death of Brady, was the violation of said ordinance. The present statute defining manslaughter provides that "whoever unlawfully kills another, except as provided in the last three sections, is guilty of manslaughter, and shall be punished," etc. Before the section assumed its present brief form, the crime of manslaughter was defined thus: "That if any person shall unlawfully kill another without malice, either upon a sudden quarrel, or, unintentionally while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter."

question but what the omission makes prima facie a case of negligence," to be passed upon by a jury." See *Com. v. Hawkins*, *infra*.

However, in an earlier case, *People v. Davis*, 1 Ill. C. C. 217, an indictment for manslaughter, based upon such omission, against the manager, business manager, and stage carpenter of such theater, was quashed on the ground that the ordinance in question did not specifically designate the person who was to perform the duty of providing the building with fire apparatus and equipment.

But in the latter case (1 Ill. C. C. 245), it was held that the manager of the theater, although no obligation rested upon him, either as agent, owner, lessee, or manager, to comply with such ordinance, was in duty bound to refrain from using the structure as a theater unless so equipped; and that if he did so knowing of its unlawful, defective, and dangerous condition in regard to such equipment, he was within the clause of the ordinance imposing a fine upon any person violating it, and therefore liable to prosecution for manslaughter.

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Attention is called to *Com. v. Hawkins*, 157 Mass. 551, 32 N. E. 862, although not within the scope of this note, which holds that inasmuch as recklessness or gross carelessness lies at the foundation of a charge of assaulting one with a dangerous weapon, where the defendant, who had been annoyed by different persons ringing his door bell, and insulting him when he came to the door, came out of his house in the nighttime, and, in a thickly settled portion of the city, where people were liable to be passing in the street, fired a pistol, the shot from which struck a person standing some distance away, it was proper to show on the question of negligence that the defendant's act was in violation of a municipal ordinance.

But in the last case the trial court instructed the jury that the fact that the firing of the pistol was an unlawful act, or in violation of the ordinance, did not make it an act wrongful in itself, done with evil intent, nor render the defendant criminally liable for the shooting. *Com. v. Hawkins*, *supra*.
W. J. I.

ter, and on conviction thereof, be punished," etc.

In addition to what this court said in *Johnson v. State*, 66 Ohio St. 59, 61 L.R.A. 277, 90 Am. St. Rep. 504, 63 N. E. 607, we think it is sufficient to say that the unlawful act being committed, which results in the death, must be an act prohibited by law, as distinguished from an act forbidden by an ordinance of one of the municipalities of Ohio. It would seem that the case just cited decides the question before us, and leaves little to be said in justification of the decision of the trial court. There are many municipal corporations in this state, and each may have its ordinances, appropriate to its local needs, and therefore there cannot be any uniformity in such local laws, if they should be entitled to the name of laws. Many of the counties of the state contain several municipal corporations. What may be an unlawful or prohibited act in one may be lawful in another, and so throughout the state. We are not permitted to say that what may constitute an essential element of manslaughter in one city or village need not be present in the ordinances of other cities or villages of the state. If the act of killing of a person, which ensues from violating a municipal ordinance, constitutes manslaughter, then we have a law of a general nature, which perhaps is not of uniform operation throughout even Franklin county. Neither is it of uniform operation throughout the various municipalities of the state. The unlawful act contemplated as an essential element of manslaughter must be uniformly unlawful throughout the state. Otherwise, what might be that crime in Columbus might not be such in Dayton, Toledo, Cleveland, or any other city or village in the state.

While the ordinance excluded by the court in the case under consideration may be a wise public regulation for Columbus, its vitality is expended in punishing persons who violate its provisions, according to the scope of the penalties therein prescribed. It may be that there is need for action by our general assembly to provide a general law to cover cases similar to this; but until it answers the call, the courts are powerless in the premises.

In our judgment, the trial court committed no error in excluding the ordinance, and the exceptions to its rulings are overruled.

Summers, Ch. J., and Crew, Spear, Davis, Shauck, and Price, JJ., concur.
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VIRGINIA SUPREME COURT OF APPEALS.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plff. in Err.,

v.

E. D. BELL, Admr., etc., of James R. Paris, Deceased.

(— Va. —, 68 S. E. 398.)

Carrier — attempt to prevent leaving moving train — injury — liability.

1. A railroad company is not liable for injury to a passenger who falls from a train in consequence of the attempt of its brakeman to prevent his alighting from it after it is in motion.

Proximate cause — leaving moving train — negligent starting.

2. The negligence of a railroad company in starting its train before one who has entered to assist a passenger has had time to alight is not the proximate cause of his injury in attempting to alight after the train is in motion, without the consent and against the will of the carrier's servants.

Carrier — premature starting of train — duty of passenger.

3. A person who is not given a reasonable time to alight from a train before it continues on its journey is bound to minimize the possible loss to the company because of

Note. — Duty of carrier to one who goes upon a train to assist a passenger.

But one case upon this question, in addition to *CHESAPEAKE & O. R. Co. v. BELL*, has been reported since the note accompanying *Arkansas & L. R. Co. v. Sain*, 22 L.R.A. (N.S.) 910, was written.

In *Wickert v. Wisconsin C. R. Co.* 142 Wis. 375, 125 N. W. 943, the liability of a railroad carrier to a person assisting a passenger to board a train, where the carrier has knowledge, or is chargeable with knowledge, of the conditions, was impliedly recognized, but a recovery was denied because it clearly appeared from the facts that the train crew of the train in question was not chargeable with knowledge of the plaintiff's intention to leave the train after rendering assistance to a passenger.

See also *Fortune v. Southern R. Co.* 150 N. C. 695, 64 S. E. 759, where the question was as to the carrier's duty to a woman who accompanied her husband to the train, on which he was intending to depart, boarded it with him, and was injured as she was alighting. The court held that the plaintiff was present at the time by implied invitation of the carrier, and that it was bound to use ordinary care for her safety. From the facts and from the language of the opinion it would seem that the duty of the carrier in this case was looked upon as owing to plaintiff as merely accompanying a passenger, rather than as rendering necessary assistance, even though the plaintiff actually went aboard the train. W. A. S.

its wrongdoing by staying on the train, and not attempting to leave it after it is in motion, to the peril of his life and limb, with the view of holding the company liable in case of injury.

(Buchanan and Whittle, JJ., dissent.)

(June 3, 1910.)

ERROR to the Circuit Court for Augusta County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Messrs. R. L. Parrish and J. M. Perry, for plaintiff in error:

It was incumbent upon the intestate not to leap from a moving train, and his declaration, showing that the accident would not have occurred but for his attempting to leave while the train was in motion, is insufficient.

Richmond & D. R. Co. v. Morris, 31 Gratt. 209; Jammison v. Chesapeake & O. R. Co. 92 Va. 327, 53 Am. St. Rep. 813, 23 S. E. 758; Newport News & O. P. R. & Electric Co. v. McCormick, 106 Va. 517, 56 S. E. 281.

In the absence of proof that Mr. Paris was rendering necessary assistance to a sick or infirm passenger, even if he inquired as to whether or not he had time to go on and get off the train, he was but a permissive licensee. No duty was owing to him by the company except to avoid wantonly injuring him.

Little Rock & Ft. S. R. Co. v. Lawton, 55 Ark. 428, 15 L.R.A. 434, 29 Am. St. Rep. 48, 18 S. W. 543; Peterson v. South & Western R. Co. 143 N. C. 260, 8 L.R.A. (N.S.) 1240, 118 Am. St. Rep. 799, 55 S. E. 620.

Messrs. Charles Curry, Duncan Curry, and Harry St. George Tucker for defendant in error.

Kelth, P., delivered the opinion of the court:

This is the second time this case has been before this court. In the opinion upon the former writ of error, the circumstances under which the death of the plaintiff's decedent occurred, as they then appeared from the record, are stated, and upon the case then made it was held that the verdict of the jury against the railway company could not be sustained, and the cause was remanded for a new trial. See 107 Va. 408-411, 59 S. E. 398. Upon the next trial there was a demurrer to the evidence and judgment for the plaintiff again. To that judgment this writ of error was awarded.

The duty of a railway company to a person who, in conformity to a custom acqui-

esced in by the carrier, goes to a railway station to assist a passenger in entering or leaving the train, is declared. It was held that such a person is an invitee, to whom the carrier owes the duty of ordinary care to see that he is not injured, and that, if he enters the train and his purpose is known, it is the duty of the carrier to give him a reasonable time within which to leave it; but if his purpose is not known, and there are no circumstances to put the carrier upon notice, then the carrier is not bound to hold the train till he has had time to alight, or to notify him before the train starts.

Upon the former writ it was not shown that the railway company had notice that the deceased was merely assisting his daughter on the train when he entered the car. The want of such notice, direct or circumstantial, was held on the former writ to relieve the railway company from the charge of negligence in starting its train before the plaintiff's decedent had gotten off. Upon the last trial, on this point the case was different. Two witnesses testified that the plaintiff's decedent, when he entered the car, inquired of a brakeman if he would have time to take his daughter's dress suit case into the car, set it down, and get off before the train started, and was told that he would, to "go ahead." That it had such notice, or that there was any such inquiry made, is denied by the railway company, and the preponderance of evidence, direct and circumstantial, is in favor of its contention; but on a demurrer to evidence, the testimony of the two witnesses to the contrary must be taken as true. The evidence of the plaintiff tended further to prove that the deceased, when he assisted his daughter upon the train, found her a seat about the middle of the car, placed the dress suit case on the seat with her, told her good-by, and started to leave the train, but was delayed in getting off because of the crowded condition of the car and the narrow passage through which he had to or did pass in making his way to the platform of the car; that when he reached the platform it was crowded, and persons were still getting on the train with bundles; that he asked the brakeman not to start the train until he could get off; that he was diligent in his effort to get off; that the day of the accident was Saturday before Christmas, which came on Monday; that the train was a local train, crowded when it reached Staunton, many of whose passengers were getting off; that a large crowd there boarded the train; that the train's usual stop at that station was five minutes; that it only stopped the usual time that day; that, although the train was moving slowly when the deceased

got on the steps to alight, he could have done so successfully but for the interference of a brakeman, who grabbed him and then let him go, unbalancing him, and thus preventing him from alighting safely.

Upon all material points the evidence of the railway company is directly in conflict with that of the plaintiff, and upon most of them preponderates. While upon the whole evidence the jury, as it seems to us, ought to have found a verdict for the defendant, yet, as the evidence was conflicting, the verdict of the jury cannot be interfered with, if there was sufficient evidence to sustain it.

We do not think the act of the brakeman, as testified to by the plaintiff's witnesses, makes out a case of negligence against the railway company. As was said in the opinion of the court on the former writ of error, it was the brakeman's duty to have attempted to protect the plaintiff's intestate from damage incident to his stepping off a moving train, and if perchance disaster attended his efforts in that regard, the master cannot be held answerable in damages for the fortuitous result.

The case made by the evidence, it may be conceded, shows that the railway company was negligent in failing to give Paris a reasonable time within which to leave the train. The fact remains, however, that, in attempting to alight from a moving train, he was the author of his own wrong.

Negligence, whether contributory or otherwise, is a mixed question of law and fact. If the facts be doubtful, or about which reasonable men may differ, their determination becomes a question for the jury; but where the facts are undisputed, the law applicable to them is a question for the court.

The decided cases with reference to alighting from moving trains are almost without number. Many of them deal with passengers alighting from street cars, and it is almost universally held that to alight from a slowly moving street car is not negligence *per se*. Where a passenger is invited to alight by an officer of the train, or is told that he may do so in safety, the cases hold that circumstance to justify his action, provided the train has not attained such a speed that the danger would be obvious; if he is induced to leap from the train by a well-founded apprehension of peril to life or limb, induced by occurrences which might have been guarded against by the utmost care of the carrier, he is entitled to recover for any injury he may have sustained thereby, although no injury would have occurred if he had remained quiet; and we admit that there are cases which have held the carrier responsible where there was no invitation extended, no assurance given, and no peril apprehended. But we are of opin-

ion that the just and proper rule of decision that which we understand to prevail in this state.

In *Richmond & D. R. Co. v. Morris*, 31 Gratt. 200, it appears that it was night when the train arrived at the station B.; that Morris had fallen asleep, and when approaching the station, the conductor awakened him, telling him that they were at B. The train went a short distance beyond the freight house and reception room without stopping, and when the engine reached the frog on the west side of the freight house and reception room, it stopped, and the conductor, seeing Morris still in the caboose, asleep, again aroused him. The train stopped about a minute, and Morris could then have gotten off whilst the train was not in motion. The conductor then went to the other end of the car, and, looking back, saw that Morris did not get up. He returned, shook Morris, and told him to get up, or get off; he was at B. Immediately after waking Morris the last time, the conductor went out at the end of the caboose with his lantern in his hand, and stood on the stationary platform about 2½ feet from the platform of the car. The train commenced backing, and Morris got up and walked out to the end of the car and jumped off, not knowing, as he said, which way the car was going, and the caboose car and several others passed over him, injuring him severely. The point where Morris jumped off was opposite the platform, which extended 35 steps west and a much greater distance east of the pumphouse, and was that part of the platform at which passengers going east got off, and was in good condition. It was a dark, drizzly night, and the only lights at the station were two lanterns, one in the hands of the conductor, and the other in the hands of a servant of the company at the station. Upon these facts this court held that "the company was guilty of culpable negligence, and this negligence was the proximate cause of M's injury. The conductor should not have put the train in motion until M. could leave the car; or, if put in motion, he should have cautioned him not to attempt to get off until the train was stopped. Instead of this, he told him to get off, and the train immediately commenced backing. . . . The company was also in fault in not having stationary lights at the place, and this made it all the more incumbent on the conductor to exercise more than usual care and caution in letting off passengers. . . . But whilst the injury sustained by M. is directly traceable to the culpable negligence of the company, the negligence or absence of ordinary prudence and caution on the part of M. contributed to his injury; and

he is not entitled to recover of the company damages for the injury he sustained. . . . One who, by his negligence, has brought an injury upon himself, cannot recover damages for it. Such is the rule of the civil and common law. A plaintiff in such cases is entitled to no relief."

It is obvious, we think, that the case just cited was a far stronger one in behalf of the passenger than the one under consideration. The court rightly characterized the conduct of the conductor as culpable negligence, and held that this negligence was the proximate cause of the injury to Morris; but Morris was in a place of safety, and in attempting to alight from a moving car was held to have brought the injury upon himself, and was therefore not entitled to relief. Judge Burks, who delivered the opinion of a unanimous court, cites the case of *Pennsylvania R. Co. v. Aspell*, 23 Pa. 147, 62 Am. Dec. 323, and quotes with approval the following language of Chief Justice Black: "It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual fault of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained. A railroad company is not liable for an accident which the passenger might have prevented by ordinary attention to his safety, even though the agents in the train are also remiss in their duty. . . . From these principles it follows very clearly that, if a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of traveling back, because these are the direct consequences of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross negligence, for which he can blame nobody but himself. If there be any man who does not know that such leaps are dangerous, especially when taken in the dark, his friends should see that he does not travel on a railroad."

Continuing, Judge Burks says further: "It is to be borne in mind, however, that if a passenger is induced to leap from the carriage, whether by coach or railway, by a well-founded apprehension of peril to life or limb, induced by occurrences which might have been guarded against by the utmost care of the carriers, he is entitled to recover for any injury he may sustain thereby, although no injury would have occurred if he had remained quiet."

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In *Jammison v. Chesapeake & O. R. Co.* 92 Va. 327, 53 Am. St. Rep. 813, 23 S. E. 758, it was held that, if a passenger train fails to stop at a station to which a passenger has purchased a ticket, it is the duty of the passenger to retain his seat until he arrives at the next station at which the train stops; and, if he feels aggrieved, to institute his action against the company for any loss or injury he may have sustained by reason of the failure to stop the train at the proper station. But if he fails to do this, and, in passing from one coach to another, in search of the conductor, to get him to stop the train, he is thrown from the train and injured, his negligence is the proximate cause of the injury, and he cannot recover damages of the company therefor.

The person injured in this case was upon the train, where he had the right to be as an invitee. He was in a place of safety. Had he elected to remain upon the train, his right of action was complete for whatever inconvenience he had suffered, or might suffer, as the direct consequence of the railroad company's negligence. But when he undertook to alight from the train, the negligence of the railroad company had ceased to operate, and it was the voluntary act of Paris which became the proximate cause of his injury.

As was said by this court in *Chesapeake & O. R. Co. v. Wills*, 111 Va. —, 68 S. E. 395. "The direct and efficient cause of the injury for which this suit was brought was the alighting from the train while in motion. In that act the railroad company had no part."

If it were conceded that Paris was not guilty of negligence in alighting from the train, we do not perceive that his case would be strengthened, for his act of alighting was the proximate cause of the injury. In order to recover, he must show negligence upon the part of the railroad company as the proximate cause of the injury for which he sues. He cannot recover merely because he was not guilty of a negligent act; and in this case the negligence of the railroad company had ceased to operate,—was exhausted,—and his alighting from the train whether under conditions that convict him of negligence or not, is immaterial. If the act of the railroad was a mere condition, and not the proximate and efficient cause of the injury, and if Paris, in alighting from the train, under the circumstances disclosed in this record, was free from fault, and guilty of no negligence, then the occurrence must be classed as an accident for which there can be no recovery.

It has often been held that the act of a responsible agent, intervening between the

negligence of the railway company and the injury sued for, relieves the railway company of responsibility. If the intervening act of a third person has that effect, how much more where the person injured was himself the author of his own wrong.

But it is said that if this view prevail, and a person injured while leaving a moving train under circumstances similar to those under consideration is denied the right to recover for such injury, and is left to compensation for damages for the inconvenience, loss of time, and the labor of traveling back, which are the direct consequences of the act of the railroad company, the recovery in many instances would not adequately redress the wrong suffered. To this we reply that experience does not warrant the apprehension that courts and juries may not safely be trusted to do full justice to the citizen in such controversies; and that, even if this were not so, the difficulty or the inability to obtain full compensation for an admitted wrong cannot be made the basis for a recovery against a railroad company in excess of just compensation for the injury which its negligence had occasioned, measured by the ascertained and established rules of law in such cases.

There is another view, which we think is not without merit. Where an injury is inflicted by a negligent act, it is the duty of the party injured by reasonable care to diminish the consequences of the wrong he has suffered, in the interest of the wrongdoer. This is not merely good law, but good morals, and flows from that rule which has the highest possible sanction, that we should do unto others as we would have others do unto us.

Where a passenger has been wrongfully carried beyond his station, or has not been given a reasonable time to leave a train, this principle requires him to submit for the time to the situation, secure in his right ultimately to recover for the inconvenience he may suffer, but forbids him to step from a moving train, thereby imperiling his life and limb, and then turn around and ingraft the consequences of his own rash act upon the antecedent negligence of the railroad, and recover for both.

For a full discussion of the doctrine of remote and proximate cause, we refer to *Chesapeake & O. R. Co. v. Wills*, supra, and the authorities there cited. As was said in that case, there is no evidence that any agent of the company directed, advised, encouraged, or even had knowledge of the intention of plaintiff's intestate to alight from the train, except the brakeman, whose conduct was held not to fix negligence upon the railroad company. There was in this case, as in that, the intervening act of a

responsible agent, that agent being the plaintiff's intestate himself; and while the railroad company was guilty of negligence in not giving a sufficient time for Paris to alight from the train, it cannot be said that the injury for which he sues was the natural and continuous sequence, unbroken by any new and independent cause, of that negligent act.

For these reasons we are of opinion that the judgment of the Circuit Court should be reversed, and this court will proceed to enter such judgment as the Circuit Court ought to have rendered.

Buchanan, J., dissenting:

I cannot concur in the opinion of the court, in so far as it holds that the plaintiff's intestate, in attempting to get off the train, was guilty of contributory negligence, as a matter of law; nor in the general rule laid down in that opinion that it is *per se* negligence in every case for a person to attempt to get off a moving train, except under the circumstances pointed out in the opinion. Whether or not the conduct of plaintiff's intestate, under the circumstances disclosed by the record, was negligence constituting the proximate cause of his death, was, in my opinion, a question for the jury, to be determined from all the facts and circumstances of the case. It is a mistaken view, as it seems to me, to take the single act of stepping off the moving train, and inquire if it alone constituted the proximate cause. The combined effect of the act of the plaintiff's intestate and the wrongful and unlawful conduct of the railroad company, which caused or induced him to attempt to step off the train after it was in motion, ought all to be considered in determining the question of proximate cause. Negligence and contributory negligence are mixed questions of law and fact, and are ordinarily questions for the jury, and not for the court.

It is the province of the jury, as was said in *Baltimore & O. R. Co. v. Griffith*, 159 U. S. 603, 611, 40 L. ed. 274, 278, 16 Sup. Ct. Rep. 105, 108, "to note the special circumstances and surroundings of each particular case, and then to say whether the conduct of the parties in that case was such as would be expected of a reasonably prudent man under a similar state of affairs."

"Negligence," said Judge Burks in *Carlington v. Ficklin*, 32 Gratt. 670, 676, 677, "cannot be conclusively established by a state of facts upon which fair-minded men may well differ."

I do not understand, as stated in the majority opinion, that it is *per se* negligence in this state to get on or off of a moving train, except in cases under the circum-

stances pointed out in that opinion. Neither *Jammison v. Chesapeake & O. R. Co.* 92 Va. 327, 53 Am. St. Rep. 813, 23 S. E. 758, nor *Richmond & D. R. Co. v. Morris*, 31 Gratt. 200, cited as settling the rule in this state, involved that question. In the first-named case, the plaintiff was not injured in attempting to get on or off a moving train. The *Morris Case* was a case of gross negligence on the part of the passenger, and, while there may be language used in both cases broad enough to sustain the statement in the majority opinion, such language was unnecessary for a decision of those cases, and not binding in a case like this, where the facts are entirely different; for the language of an opinion must always be construed in the light of the facts of the case in which it was rendered, and is not binding as a precedent in a subsequent case unless the case called for its expression. *Griffin v. Woolford*, 100 Va. 473, 41 S. E. 949.

In the *Morris Case*, the court says that time sufficient was given the person, "according to the proof, to leave the car while the train was standing; and after he was cautioned the last time, if he had at once followed the conductor, who stepped onto the platform with the lantern in his hand, he might have reached the platform with equal convenience and safety, or if, tarrying longer and finding the train in motion, when told to get off he should either have declined, as he had the right to do, to obey the direction, or, if he chose to take the risk of getting off under the circumstances, he should have gotten off on the stationary platform, which, as shown, was alongside of the train. Such would have been the dictates of common prudence. He did not heed them, but, according to his own statement, he got up, walked to the end of the car, and 'jumped off,' not knowing, nor seeking to know, in which direction the train was moving. This would seem to be something more than the want of ordinary prudence and caution. It appears to be gross negligence,—extreme recklessness."

It is clear that a case like that did not call for any expression of opinion which would control a case like this.

Neither did the opinion of the supreme court of Pennsylvania in *Pennsylvania R. Co. v. Aspell*, 23 Pa. 147, 62 Am. Dec. 323, cited and relied on in the majority opinion in this case and in the *Morris Case*, require a decision of the question involved in this case. In that case, when the passenger, as Judge Black says in his opinion, "was about to jump, the conductor and the brakeman entreated him not to do it, warned him of his danger, and assured him

that the train should be stopped and backed in the station. If he had heeded them, he would have been safely let down at the place he desired to stop at, in less than a minute and a half. Instead of this, he took a leap which promised him nothing but death; for it was made in the darkness of midnight, against a wood pile close to the track, and from a car going probably at the full rate of 10 miles an hour."

Not only was the language used in that case not necessary to its decision, but in a later case in the same court (*Johnson v. West Chester & P. R. Co.* 70 Pa. 357), where the passenger attempted to get on a moving train, in which the trial court had instructed the jury that, "if the train was distinctly running on the track when the plaintiff attempted to enter, he was guilty of negligence and could not recover," that instruction was held to be erroneous, and that "it was for the jury to say whether the danger of boarding the train when in motion was so apparent as to make it the duty of the passenger to desist from the attempt." The language of Judge Agnew, in delivering the unanimous opinion of the court in that case, is so apt I cannot do better than quote it as expressing my views, especially as the earlier decision of that court in the *Aspell Case* is quoted and relied on to sustain the majority opinion in this case.

In that case the plaintiff had not been given sufficient time to get on the train before it began to move. "Now, though the train," says the court, "was distinctly in motion, so that a bystander, cool and unconcerned, could see it visibly running on the track, are we to say, as a matter of law, binding on the jury, that a passenger, having a right to go on the train, and seeing himself about to be left improperly by the wayside, is guilty of culpable legal negligence if he should essay to reach his destination, no matter how slow the motion in running might be or how little danger was apparent to him? He may be guilty of negligence, but of this the jury should judge, under the circumstances. He may not 'set his life or limbs on the hazard of a leap at the running train,' as the judge emphatically said, and doubtless if such were the character of his attempt it would be negligence. The expression 'leap at a running train' denotes a higher effort and less consideration on the part of the traveler than merely attempting to board a car under way. . . . In discussing the conduct of the passenger, merely, we are not to lay out of sight the wrong of the company in its influence upon his mind and act. He may have strong motives to reach his destination. Indeed, no man but must feel, and

feel strongly, at being left by the wayside; he is conscious of his right to go aboard, and naturally becomes excited at the sight of the moving train; perhaps is alarmed, and in some degree confused. If the train be running slowly, and the danger is not apparent to him, what so natural as that he should hurry to reach the train and to get aboard? But if we lay down the inexorable rule for this and every other case that, whenever the train can be seen to be distinctly running, it is legal negligence to attempt to get on, we set a premium on the wrong of the company which influenced the very act itself. To say that, whenever the motion of the train is so distinct that bystanders can distinctly see it under way and running along the track, the passenger is to be as cool and unconcerned as they, fold his arms, and say to himself, 'I'll sue you for this breach of contract in leaving me here,' is to him bitterness itself. He may be a stranger and know not where to find accommodation; the severity of the winter may surround him, or the heat of summer oppress him; the elements may war against him, and night or approaching darkness may heighten his alarm; or, if no stranger, his business may be urgent, his family may require his presence, his health may be poor, his means limited, his desire to reach his destination overpowering, and a hundred reasons may influence him to go on. Now, are we to say that the wrong which has caused his mind to be excited and aroused his fears, which confuses him, and has made him less cool and calculating than those who are standing by and can look upon the departing train without emotion, is not to be taken into the account in considering his act? What caused his state of mind? Not his own carelessness or breach of duty as a passenger, but the illegal and wrongful act of the carriers. Surely it does not lie in the mouth of the railroad company to say to him: 'The law will take no account of our breach of duty in its effect upon you. You ought not to have suffered it to move you; but, if you saw our train was moving along the track, the slack taken up, the train stretched out, and the cars under way, so that anyone else could distinctly see it running, you ought to have looked upon our leaving you on the wayside with perfect coolness, made no effort to go, and sued us for our breach of the contract of carriage. No matter how slow the motion of the train was, nor how little danger in getting on was apparent to you, or what the state of your mind caused by our wrongful act, it is not a question for the jury under the circumstances, but the law holds you guilty of culpable negligence in the attempt to board the train, and we

are allowed to go free.' This is too stringent a rule for the case. Culpable negligence is the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do, under all the circumstances surrounding the particular case. Shearm. & Redf. Neg. § 7; *Kay v. Pennsylvania R. Co.* 65 Pa. 273, 3 Am. Rep. 628. Instead, therefore, of the rule laid down by the learned judge, he should have left it to the jury to say, under all the circumstances in evidence, whether the danger of boarding the train, when in motion, was so apparent as to have made it the duty of the plaintiff to desist from the attempt. There is no objection to the court's assisting the jury in the performance of their duty by reminding them of the danger of boarding a train in motion, and the caution and care that passengers should use, as well as of the duties of the carriers, and the influence of their wrongful acts in producing the catastrophe. But railroad companies are bound to remember that they owe duties to the public, for whose benefit their charters have been granted, and, therefore should not be lightly loosed from the effects of their own wrongful acts."

In *Filer v. New York C. R. Co.* (a steam railroad) 49 N. Y. 47, 10 Am. Rep. 327, cited with approval by this court in the case of *Newport News & O. P. R. & Electric Co. v. McCormick*, 106 Va. 517, 521, 56 S. E. 281, in which last-named case it was held that it was not *per se* negligence to step from a moving street car, it was said by the court of appeals of New York: "That there was more hazard in leaving a car while in motion, although moving ever so slowly, than when it is at rest, is self-evident. But whether it is imprudent and careless to make the attempt depends upon circumstances; and where a party, by the wrongful act of another, has been placed in circumstances calling for an election between leaving the cars or submitting to an inconvenience and a further wrong, it is a proper question for the jury whether it was a prudent and ordinarily careful act, or whether it was a rash and reckless exposure of the person to peril and hazard."

The rule laid down in those cases seems to me to be the correct one, sustained by the better reason, and in accord with the weight of authority. See *New York, P. & N. R. Co. v. Coulbourn*, 69 Md. 360, 1 L.R.A. 541, 9 Am. St. Rep. 430, 16 Atl. 208; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 27, 37, 21 Am. Rep. 371; *Strand v. Chicago & W. M. R. Co.* 64 Mich. 216, 219, 31 N. W. 184; *Central R. & Bkg. Co. v. Miles*, 88 Ala. 256, 261, 262, 6 So. 696; *Cumberland Valley R. Co. v. Maugans*, 61 Md. 53, 60-63, 48

Am. Rep. 88; Carr v. Eel River & E. R. Co. 98 Cal. 366, 21 L.R.A. 354, 33 Pac. 213; Mills v. Missouri, K. & T. R. Co. 94 Tex. 242, 55 L.R.A. 497, 59 S. W. 874; Louisville & N. R. Co. v. Crunk, 119 Ind. 542, 12 Am. St. Rep. 443, 21 N. E. 31; Atchison, T. & S. F. R. Co. v. Holloway, 71 Kan. 1, 114 Am. St. Rep. 462, 80 Pac. 31; Sanders v. Southern R. Co. 107 Ga. 132, 32 S. E. 840.

The plaintiff's intestate in this case, according to the plaintiff's evidence, had the right to be upon the train; he was told that the train would remain there long enough for him to find his daughter a seat and deposit her baggage and get off; he was diligent in what he had to do on the train, and in his effort to leave it. He was going down the steps of the coach, almost in the very act of getting off on the station platform, in the daytime, when the train, by the wrongful and unlawful act of the defendant, began to move slowly. Whether, under these circumstances, it was negligence to attempt to get off of the train, was, in my judgment, a question about which reasonably fair-minded men might differ, and was therefore a question for the jury, and not for the court.

Whittle, J., concurs.

WISCONSIN SUPREME COURT.

LOWELL LINCOLN et al., Respts.,

v.

CHARLES ALSHULER MANUFACTURING COMPANY, Appt.

(142 Wis. 475, 125 N. W. 908.)

Sale — breach by executory vendee — nature of action.

1. If an executory vendee refuses to carry out his agreement to purchase a specified quantity of manufactured goods not identified and made specific at the time of the agreement nor thereafter before the refusal, the remedy of the executory vendor is for damages for the breach, not for the purchase price.

Executory contract — right to breach.

2. The foregoing follows the rule that ordinarily any person has the right to breach his mere executory agreement and submit to legal damages therefor.

Sale — goods to be manufactured — breach by vendee — nature of action.

3. The situation supposed in No. 1 is unlike where there is a sale *in presenti*, there having either been a transition of title or something equivalent thereto before the breach; or where an article to be manu-

factured to order, prior to the breach, was in whole or some substantial part created, and has no general marketable quality; it is one where the particular goods to satisfy the agreement have not, prior to the breach, been segregated from a stock of such goods, or the materials for the manufactured product are yet to be acquired by the executory vendor or on hand as ordinary manufacturer's stock, and are available to such vendor without special loss either for sale or incorporation into manufactured articles for others.

Same — measure of damages.

4. In such a case the general rule applies that recoverable damage is limited to such as may be reasonably said to have been in mutual contemplation at the inception of the contract as the probable result of a breach of it.

Same — loss of profits.

5. The more particular rule applicable to the situation supposed is that the recoverable damage is the difference between the agreed price and the fair market value of the property at the time of the breach and place for delivery, subject to the exception that, in case of there being no such market value at such place, such value may be determined at some other place just to the executory vendee.

Same — repudiation of executory agreement — right of vendor to sell.

6. Where a mere agreement to purchase is repudiated by the executory vendee before tender of the subject of sale or before the executory vendor has done all required of him in order to a transition of title, he cannot liquidate his damages by selling the subject, or an ostensible subject, of the agreement as the property of the executory vendee; but a sale fairly conducted by him of the actual or a similar subject might create evidence on the question of damages.

Same — executory sale on credit — default of purchaser — effect.

7. In case of an executory contract to sell and deliver goods on credit, the seller may, if in the meantime the purchaser becomes insolvent, or shows evidence of incapacity to pay for the property by de-

Note. — The question whether a seller has the right, upon breach of an executory contract, to maintain an action for the contract price, is discussed in notes to Acme Food Co. v. Older, 17 L.R.A.(N.S.) 808, and Fairbanks, M. & Co. v. Heltsley, 26 L.R.A. (N.S.) 248.

A note to Gardner v. Deeds & Hirsig, 4 L.R.A.(N.S.) 740, and a note to Ridgeway Dynamo & Engine Co. v. Pennsylvania Cement Co. 18 L.R.A.(N.S.) 613, discuss the question of measure of damages for purchaser's refusal to accept goods specifically manufactured for him.

The remedy of conditional vendor for refusal to accept is discussed in a note to National Cash Register Co. v. Hill, 63 L.R.A. 100.

faulting on existing indebtedness, eliminate such element and treat the contract as an agreement for a cash sale.

Same — rights of vendor.

8. In the circumstances stated in the last foregoing, the executory vendor cannot eliminate any other element than that of credit; the feature as to time and place of delivery, he must comply with, at his peril of being liable for a breach.

Appeal — nonprejudicial judgment — harmless error.

9. In an action in form, to recover the purchase price of chattels, where the cause of action is in fact for damages for breach of the agreement to purchase, a recovery in form, upon the theory of the pleader, will not be disturbed on appeal if the record shows the judgment is not in excess of the amount plaintiff would have recovered had he proceeded in the proper way.

(April 5, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Racine County in plaintiffs' favor in an action brought to recover the balance of the purchase price alleged to be due on a contract for the sale of certain cloth. Modified.

Statement by Marshall, J.:

Action in form to recover a balance due on contract, with some allegations in the complaint appropriate to an action for damages for nonfulfilment of an agreement to purchase. The issues were thus decided as to facts: (1) Plaintiffs sold defendant and defendant purchased from plaintiffs, on July 20, 1907, fifteen cases of cheviot cloth, to be manufactured and delivered at $7\frac{1}{4}$ cents per yard, five cases October 5, 1907, five cases November 15, 1907, and five cases December 15, 1907, of which the first five were delivered and paid for; and also sold defendant and it purchased twenty-five cases of like goods about July 24, 1907, for December, 1907, delivery. (2) The place of delivery agreed upon was defendant's factory at Racine, Wisconsin, or other factories to be designated by it. (3) Under the agreement, shipping directions were necessary and defendant agreed to give such. (4) Defendant refused to give shipping directions for any of the goods subsequent to shipment of the first five cases, which were duly forwarded and paid for, and refused to receive the balance or any part thereof, wherefore plaintiffs were prevented from making delivery though they were ready and willing to do so, which defendant well knew. (5) April 1, 1908, plaintiffs notified defendant that, unless it received and paid for the balance of the goods by April 10th thereafter, they would sell the same in the open market for the best price

obtainable, and hold defendant for any deficiency between the amount received and the sale price. Pursuant thereto, July 27th thereafter, plaintiffs sold the goods, using reasonable care to obtain the best price practicable, realizing \$4,032.16, which they applied upon the sale price, leaving \$1,447.36, subject to the freight charges which plaintiffs would have had to pay, had the goods been accepted at the agreed destination, or a net loss of \$1,287.82.

Upon such facts the court concluded that plaintiffs were entitled to recover of defendant the aforesaid balance with interest, amounting to \$1,484.55, and costs. Judgment was entered accordingly.

The finding that there was a sale of goods to defendant was based on the making and acceptance of two orders, each in this form:

Sold to Chas. Ashuler Mfg. Co.
Racine, Wis.
Terms 2-10 60 ex.
Ship frt. pd.
Bill Dup.
Bill Lading.
Shipments as below.
15 cs. Saxon Cheviots
blue @ $7\frac{1}{4}$

5 Oct. 15
5 Nov. 15
5 Dec. 15
Pack in cases.
2,000 yds.
Accepted for Seller W. A. West.
Accepted for Buyer.

The only difference between the two orders was the number of cases and time for shipment.

The evidence was to this effect: Shipping orders were given as to ten cases, but there was delay in the matter on the part of plaintiffs. Before plaintiffs were ready to make shipment they were informed by defendant that, on account of the financial condition of the country and its condition in that respect, it would be unable to take the twenty-five cases and requested plaintiffs to consent to a cancelation of the order therefor. At such time defendant was in default to plaintiffs, on the theory that it was bound to pay for goods at dates specified in the order, whether they had been forwarded or not. On such theory plaintiffs refused to ship the ten cases, at the same time refusing to cancel the order for twenty-five cases. Many communications passed between the parties, defendant at no time refusing to take and pay for the ten cases when delivered as agreed upon, but insisting that it would not take any of the twenty-five cases, resulting in plaintiffs refusing, under any circumstances, to cancel

the order therefor, and refusing to ship the ten cases except upon payment therefor, and defendant persisting in its refusal to accept any of the twenty-five cases, and requesting plaintiffs to dispose of them for its account, because of their superior opportunity for realizing thereon. In that situation plaintiffs renewed their refusal to consent to a cancelation of the order for the twenty-five cases, continued to neglect to ship or offer to ship the ten cases, and demanded payment for the entire thirty-five cases, but offered to consider any proposition made to give defendant additional time. Thereupon, and on March 19, 1908, defendant notified plaintiffs that it would take the twenty-five cases, paying therefor by July 31st, upon condition of the goods being perfect in every particular and freer from defects than goods previously shipped, and on such condition ordered shipment of five cases at once. Plaintiffs thereupon positively refused to ship any goods in advance of payment for the whole thirty-five cases, and sent their account to defendant accordingly, making claim for the full delivered price and on over 4,000 yards of goods in excess of thirty-five cases of 2,000 yards each, following it by a draft, which was refused payment. Prior to such refusal plaintiffs declined to forward any of the ten cases, though they had in hand urgent shipping orders therefor, till the draft was paid. Thereafter circumstances occurred detailed in the findings respecting sale of thirty-five cases of goods, corresponding as to amount of cloth therein to the bill as aforesaid, ostensibly as defendant's goods and on its account, liquidating their pretended claim to the amount found by the court, for which judgment was rendered.

Messrs. Kearney, Thompson, & Myers, for appellant:

The plaintiffs had no right to resell the goods elsewhere than at the place of delivery, in the absence of a showing on their part that no market existed at such place or in that vicinity, at the time of resale.

2 Mechem, Sales, § 1650; Chapman v. Ingram, 30 Wis. 290; Hill v. Chipman, 59 Wis. 211, 18 N. W. 160; Tustin Fruit Asso. v. Earl Fruit Co. (Cal.) 53 Pac. 693.

A refusal to deliver specific property upon which a lien is claimed, unless and until the demandant pays other items not lienable upon the property demanded, constitutes a waiver of the specific lien.

Hamilton v. McLaughlin, 145 Mass. 20, 12 N. E. 424; Stephenson v. Lichtenstein, 72 N. J. L. 113, 59 Atl. 1033; Bowden v. Dugan, 91 Me. 141, 39 Atl. 467; Burdick, Sales, § 377, p. 230; 25 Cyc. Law & Proc. p. 672; Price v. Moses, 10 Rich. L. 454; 28 L.R.A.(N.S.)

Talbot v. McPherson, 2 Cranch, C. C. 281, Fed. Cas. No. 13,728; Chilton v. Carrington, 15 C. B. 95; Beyer v. Dobeas, 141 Wis. 89, 123 N. W. 638; Glover v. Hynes Lumber Co. 94 Wis. 457, 69 N. W. 62; McGeorge v. Stanton-DeLong Lumber Co. 131 Wis. 7, 110 N. W. 788; Chandler Lumber Co. v. Radke, 136 Wis. 495, 22 L.R.A.(N.S.) 713, 118 N. W. 185.

Plaintiffs were not justified in selling the thirty-five cases or any part thereof at a price less than the price offered by defendant.

Gehl v. Milwaukee Produce Co. 105 Wis. 573, 81 N. W. 666, s. c. 116 Wis. 263, 93 N. W. 26; Deere v. Lewis, 51 Ill. 254; Lawrence v. Porter, 26 L.R.A. 167, 11 C. C. A. 27, 22 U. S. App. 483, 63 Fed. 62; Tilt v. LaSalle Silk Mfg. Co. 5 Daly, 19.

Plaintiffs will not be permitted to create damages at defendant's expense, when, by dealing with defendant, such damages could be obviated.

Warren v. Stoddart, 105 U. S. 224, 229, 230, 26 L. ed. 1117, 1120; Creve Cœur Lake Ice Co. v. Tamm, 90 Mo. App. 197; Halstead Lumber Co. v. Sutton, 46 Kan. 192, 26 Pac. 444.

There was no proper foundation laid to plaintiffs' claimed right of resale on defendant's account.

Barth v. Graf, 101 Wis. 27, 76 N. W. 1100; Levis v. Black River Improv. Co. 105 Wis. 391, 81 N. W. 405, 669; Ellis v. Southwestern Land Co. 108 Wis. 313, 81 Am. St. Rep. 909, 84 N. W. 417; Thompson v. Taylor, 30 Wis. 68; Learned v. Bishop, 42 Wis. 470; Taylor v. Coon, 79 Wis. 77, 48 N. W. 123; Selleck v. Griswold, 57 Wis. 291, 15 N. W. 151.

The plaintiffs never offered to deliver the goods contracted for, after defendant stated it would accept and pay for them, and neither the title nor right of possession ever passed to defendant.

Doyle v. Roth Mfg. Co. 76 Wis. 48, 44 N. W. 1100; Hoffman v. King, 58 Wis. 314, 17 N. W. 136; 2 Mechem, Sales, §§ 1150, 1151; Gehl v. Milwaukee Produce Co. 116 Wis. 263, 93 N. W. 26; Chandler Lumber Co. v. Radke, 136 Wis. 495, 22 L.R.A.(N.S.) 713, 118 N. W. 185.

The place of delivery being within Wisconsin, the place of payment, in absence of stipulation to the contrary, was likewise in Wisconsin, and plaintiffs had no right to exact payment of exchange on New York as a condition to delivery, or as the foundation for the proposed resale on defendant's account.

2 Mechem, Sales, § 1417, p. 1226.

Messrs. Simmons & Walker, for respondent:

The seller's right to resell the goods which

the buyer refused to accept is not restricted to the place where the buyer ought to receive the goods, but he may sell in a distant market, provided he exercises good faith to realize the best price he can on resale.

Waples v. Overaker, 77 Tex. 7, 19 Am. St. Rep. 727, 13 S. W. 527; Ingram v. Wackernagel, 83 Iowa, 82, 48 N. W. 998; Chapman v. Ingram, 30 Wis. 290; 24 Am. & Eng. Enc. Law, 2d ed. p. 1142; Walsh v. Myers, 92 Wis. 397, 66 N. W. 250; Lindon v. Eldred, 49 Wis. 305, 5 N. W. 862; Guetzkow Bros. Co. v. A. H. Andrews & Co. 92 Wis. 214, 52 L.R.A. 209, 53 Am. St. Rep. 909, 66 N. W. 119.

If the buyer has refused to accept, no special tender or offer to deliver is necessary before bringing suit.

Benjamin, Sales, Bennett's 7th Am. ed. p. 793, note.

Marshall, J., delivered the opinion of the court:

This case seems to have been disposed of on a wrong theory. The contracts, notwithstanding words of sale *in presenti*, were obviously mere agreements to sell in consideration of agreements to purchase. They did not contemplate the passing of title to the goods till arrival at the delivery point in Wisconsin, freight paid. Therefore, as the goods were never so delivered or tendered, the contingency never happened rendering it competent for respondents to sell the goods as the property of appellant. They merely sold their own property.

Again, as the contracts were mere agreements to sell and agreements to purchase, neither sales *in presenti*, nor agreements to manufacture and sell specific articles, or sell specific identified articles, but to sell quantities of goods, manufactured or unmanufactured at the time, of the ordinary output of the factory, and the second agreement was not only repudiated by the executory vendee before any goods called for thereby were set aside as its particular goods, but before they were tendered at the delivery point, so that the contracts were never completed by the executory vendors, so as to enable them to treat the property as, in any sense, that of such executory vendee, and, after its repudiation the second contract could not have been performed by such vendors so as to enable them to treat the goods as property of such vendee or enhance its liability for the breach,—respondents' cause of action was not for a balance due upon a sale of goods, but for damages for breach of contract determinable as of the time of its breach, and limited according to the familiar rule that such damages can only be such as may be reasonably con-

sidered to have been in mutual contemplation by both parties at the time of making the contracts as the probable result of the breach thereof. Guetzkow Bros. Co. v. A. H. Andrews & Co. 92 Wis. 214, 52 L.R.A. 209, 53 Am. St. Rep. 909, 66 N. W. 119; Serlling v. Andrews, 106 Wis. 78, 81 N. W. 991; Malueg v. Hatten Lumber Co. 140 Wis. 381, 122 N. W. 1057.

The optional rights of action suggested in Pratt v. S. Freeman & Sons Mfg. Co. 115 Wis. 648, 92 N. W. 368, do not all apply to such a situation. There the article was specially manufactured and set aside for the vendee at the delivery point, so it was competent for the vendor to deal therewith as the property of such vendee. Here the goods could not be dealt with as property of the executory vendee without its consent, till the executory vendors had done everything on their part, so that, in a case of destruction of the goods by fire or otherwise, the loss would have fallen on the former because of the title having passed.

The rule formulated in Pratt v. S. Freeman & Sons Mfg. Co. *supra*, is elementary, but was there adopted, as to its phrasing, from Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415, where the facts were that the title to the property had actually passed to the vendee, leaving nothing executory but the mere act of delivery. The court held that the rule applies in cases where the title passes *in presenti* and where the contract is executory, but the property is identified, and there is a valid tender as contemplated in the sale contract, and a refusal to perform. The facts of this case do not satisfy either of such situations. The title did not pass at the date of the contract, the property was never tendered at the agreed place of delivery, and was not specific prior to the breach.

Again, it is an elementary principle that, in case of a bargain and sale of goods not specific, and before they are set aside for the vendee, if he notifies the executory vendor that he elects to and does cancel the contract and will not receive the goods, he cannot be made liable for the purchase price, as on a sale of goods, but only for damages for his breach of contract. That being upon the theory, often declared, that, ordinarily, any person has a right to breach his mere executory agreement and submit to damages therefor. Ward v. American Health Food Co. 119 Wis. 12, 96 N. W. 388; Malueg v. Hatten Lumber Co. *supra*. Unexcelled Fire-Works Co. v. Polites, 130 Pa. 536, 17 Am. St. Rep. 788, 18 Atl. 1058, is a good illustrative case.

The facts in the last case cited are on all fours with those in this case. The court remarked that "whilst the manifest tendency

of the cases in the American courts, now, is to the doctrine that when the vendor stands in the position of a complete performance on his part, he is entitled to recover the contract price as his measure of damages, in the case of an executory contract for the sale of goods not specific, the rule undoubtedly is that the measure of damages for a refusal to receive the goods is the difference between the price agreed upon and the market value on the day appointed for delivery." And the court might well have added, to accurately round out the rule, at the place of delivery.

In this case, as before indicated, the agreements were with reference to goods from the ordinary output of a manufactory, to be selected from stock to be accumulated or on hand. That is plain. The second agreement was repudiated about a month and a half before expiration of the time for delivery, and some three weeks before delivery could have been requested. It is very evident that no goods had been set aside for appellant, even at the necessary starting point of the contemplated transit, prior to the notification that the second agreement would not be carried out by appellant. It may well be that if they existed at all it was as a part of the general stock. So respondents, in any view, never had a cause of action against appellant for the contract price of the twenty-five cases of goods.

As to the ten cases, it seems the finding that appellant refused to receive them is contrary to the evidence. As we read the record, appellant ordered the ten cases forward, urgently, but respondents refused to send the same without prepayment not only for the ten cases, but for the thirty-five cases. In face of the letters found in record ordering forward the ten cases, and the reply, in effect, refusing to ship except upon condition of payment for the thirty-five cases, it is not perceived how the finding that shipments were not made because no shipping directions had been given, and because appellant had refused to receive any of the goods, has any support whatever. The declination to ship the ten cases was upon the sole ground that the sale price for the whole thirty-five had not been paid. The court must have assumed that circumstances existed when the goods were ordered forward, authorizing the executory vendors to eliminate the element of credit, and demand prepayment before parting with possession of the goods, under the familiar rule applied in *Pratt v. S. Freeman & Sons Mfg. Co.* supra, though there is no finding of insolvency or of any fact justifying even the elimination from the contract of the element of credit.

True, in case of an executory agreement

for sale of property on credit, if, before the time for delivery, the executory vendee becomes insolvent, or shows evidence of insolvency by defaulting in payment of existing indebtedness, the seller may insist upon completion of the sale contract, eliminating the element of credit, but not eliminating any other element of the contract, as that in this case to deliver the subject of the sale f. o. b. cars at a point distant from the location of the goods at the time of the sale or that of the contemplated commencement of the transit to the purchaser. Much less can the vendor, as was done here, not only eliminate the element of credit, but a material part of the contract in addition, by imposing the condition of payment for goods under other contracts, especially goods not recoverable for in any event, because of the agreement to purchase the same having been seasonably repudiated, leaving the vendor only his action for damages. So the record not only does not support the finding, but negatives any right to recover on the first contract either the purchase price of the goods or damages for breach of contract. That contract was breached by respondents, not by appellant.

As to the twenty-five cases, it seems the finding that appellant repudiated the contract is well supported, and also the evidence seems conclusive that appellant never after first taking that attitude changed it by agreeing to take the goods as promised, or withdrew the request for respondents to liquidate their damages by selling the goods in their discretion for its account. It is quite likely that had appellant, after breaching the contract, seasonably changed its attitude, respondents would have refused to start the goods for delivery at the agreed termination of the transit, only eliminating the element of credit so as not to lose control of the property before receiving payment therefor, or stood ready to do so, but would have insisted upon payment before starting the goods on the journey, in which case they could not have recovered damages, but, on the contrary, might have been liable for damages for their breach of contract. However, that course was not taken, so the right of respondents to reimbursement for damages for the breach, which became fixed by the refusal to receive the goods before and at the agreed time for forwarding, remained to the end.

The measure of damages, by the ordinary rule, is the difference between the amount the appellant agreed to pay for the goods and the reasonable market value thereof at the agreed delivery point in Wisconsin at the time of the breach, less the freight, which respondents agreed to, but did not, under the circumstances, have to pay. That

is subject to the exception that where there is no fair market value at the delivery point, such value may be determined at some other point, just to both parties, which in this case not only seems, as above, to have been the place where the goods were sold, but the one consented to by appellant by the request for a sale thereof on its account.

It must be remembered that this is not a case of manufacture of an article to order, which was not a stock article having a general marketable quality, in which case sometimes the full price is the measure of damages for breach of the contract to accept after the article has been completed, or substantially so; nor a case where the article, though of a general marketable quality, was completed and ready for delivery before the breach. It is a case where, so far as the record shows, while the material for the proposed sale was still the property of the executory vendors and in their hands, or the subject formed part of the general stock of manufactured goods at the factory, the vendee refused to perform. In such a case the profit on the contract is the true measure of recovery.

Now, while this was not a case for liquidation of damages by a sale of goods substantially as property of the vendees, as in *Pratt v. S. Freeman & Sons Mfg. Co.* and *Van Brocklen v. Smeallie*, supra, and *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271, appellant has no reason to complain, (1) because it consented, in advance, to such liquidation; (2) because, in any event, such a sale is, in effect, only a manner of making evidence of damages, which in this case were the same whether the action be regarded as one on contract for balance of the purchase price, or for mere damages for breach of contract; and (3) because the evidence shows that the sale price was the fair market value at the place of sale and in excess of what could have been obtained at the agreed delivery point, or at the nearest point thereto where the goods were fairly marketable.

Again, while the time the market value was determined as a basis for recoverable damages was several months after the date of the breach, which fixed the rights of the parties, that is rather to appellant's advantage than otherwise, since the evidence is to the effect that property of the sort increased in value in the meantime, rather than decreased.

Further, while the action was for the balance of the purchase price for goods instead of a mere action for damages for breach of contract, as it should have been, that is not to appellant's prejudice, since the recoverable amount, under the circumstances,

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would be no different in one case than in the other.

It follows that the judgment must be considered as one for damages for breach of contract to buy goods, and erroneous as to the ten cases. It must, therefore, be reduced as of the time of its rendition to the extent of two sevenths, to wit, to the sum of \$1,060.40, and further reduced by the amount of the damages awarded on the excess of goods in the twenty-five cases over 2,000 yards per case, which seem to be 4,096½ yards, on which damages were incorporated in the judgment, including interest, of substantially \$79.49, making the amount for which judgment should have been rendered \$980.91, to which sum it is reduced as of its date. As so reduced, it should be affirmed.

So ordered.

GEORGIA SUPREME COURT.

J. E. DOLVIN, Plff. in Err.,
v.

AMERICAN HARROW COMPANY.

(125 Ga. 699, 54 S. E. 706.)

Res judicata — striking plea.

1. If, upon demurrer to a plea, the court has decided as to the merits of the defense thus sought to be set up, and stricken the plea, the judgment is conclusive, if the same or substantially the same plea is again offered. But if, in rendering his judgment upon a demurrer to the plea, the court does not decide as to its merits, but strikes it on a ground of special demurrer, that there is a mere general allegation of fraud, without setting out any facts which constitute such fraud, this does not become *res judicata* so as to prevent a complete plea of fraud, with proper allegations, from being offered by way of amendment to the answer.

Appeal — question not considered.

2. The trial court not having passed upon the merits of the plea of fraud offered by way of amendment, but having rejected it on the ground that it was *res judicata*, this court expresses no opinion as to its merits.

Equity — mistake of law — relief.

3. An honest mistake of law as to the ef-

Headnotes by LUMPKIN, J.

Note. — Relief from mistake of law as to effect of instrument.

I. Scope, 787.

II. General rules.

a. Statement of and application generally, 788.

b. Principles on which relief is granted, 791.

III. Mistake of law defined, 792.

fect of an instrument, on the part of both contracting parties, when such mistake operates as a gross injustice to one and gives an unconscionable advantage to the other, may be relieved in equity, or under equitable pleadings, in a proper case.

Pleading — plea — demurrer.

4. The plea of mutual mistake, offered in this case, as to the effect of the instrument given by the agent of the payee of a note to the maker thereof, at the time when it was made, by which the payee agreed "to receipt J. G. Dolvin [the maker] for note given me to-day," was sufficient to withstand an objection in the nature of a general demurrer, although the plea may have contained certain allegations regarding, and references to, other papers and transactions, which did not constitute a good plea of mutual mistake as to them.

Agent — ratification of acts.

5. Ratification involves knowledge of the facts, on the part of the person ratifying, at the time when the ratification is made; but if an agent exceeds his authority, the principal cannot ratify in part and repudiate in part. He must adopt either the whole or none.

(May 18, 1906.)

ERROR to the Superior Court for Greene County to review a judgment in plaintiff's favor in an action brought to enforce payment of a promissory note. Reversed.

Statement by Lumpkin, J.:

The American Harrow Company brought suit against J. G. Dolvin on a promissory

IV. For what mistakes relief may be had.

- a. Generally, 792.
- b. Rule that ignorance or mistake of law does not excuse.
 1. General statement of, 796.
 2. Construction of instrument, 799.
 3. Mistake or ignorance as to legal consequences.
 - (a) General rules, 799.
 - (b) Application to particular cases.
 - (1) Deeds, mortgages, leases, etc., 801.
 - (2) Bonds, common contracts, and other miscellaneous matters, 804.
- c. Rule that mistake of law may be cause for reformation.
 1. Generally, 808.
 2. Mistake resulting in failure to carry out intention, 811.
 3. Application to particular cases.
 - (a) Deeds.
 - (1) Generally, 813.
 - (2) Omissions, 814.
 - (3) Insertions wrongfully made, 816.
 - (4) Reservations, 817.
 - (5) Assumption of mortgages or other encumbrances, 819.
 - (6) As to interest conveyed, 819.
 - (7) As to tract or parcel conveyed, 821.
 - (8) Description, 822.
 - (b) Deeds of appointment or settlement, 822.
 - (c) Mortgages and deeds of trust.
 - (1) Generally, 823.
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- (3) Mortgages and bills of sale of chattels, 826.
- (d) Leases, 826.
- (e) Contracts with reference to lands, 827.
- (f) Bonds, 828.
- (g) Negotiable instruments, 830.
- (h) Insurance policies, 831.
- (i) Other miscellaneous acts and contracts, 837.
- (j) Omission of seal, 839.
- d. Mistake as to one's own legal rights, interests, or relations, 840.
- e. Mistake as to legal rights, as affecting compromises and settlements, 841.
- f. Mutuality, as affecting ignorance or mistake of law.
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 2. Application in particular cases, 847.
- g. Mistake superinduced or accompanied by fraud or inequitable conduct.
 1. General rules, 851.
 2. Fraud.
 - (a) General rules as to, 853.
 - (b) Application in particular cases, 854.
 3. Inequitable conduct.
 - (a) General rules as to, 858.
 - (b) Application in particular cases, 861.
- h. Effect of character of the act or instrument on reformability.
 1. Void acts or instruments, 864.
 2. Voluntary acts or instruments, 867.
 3. Wills, 870.

note which stated that "this is given in settlement of old note No. 3,975." The third paragraph of the petition alleged, that the note was past due, that the defendant refused to pay it, and that judgment was prayed for the amount due. The third paragraph of the answer was as follows: "In answer to paragraph 3 of said petition, defendant says that there was a fraud in the procurement of said note, and there was never any consideration to support the same. Defendant gives this as his reason for refusing to pay the said note." The sixth paragraph of the answer alleged that the note grew out of an agreement between the plaintiff and the defendant by which the latter was to sell certain harrows for the former; that he sold some of them and paid

certain freight, which amounts he pleaded as a set-off. A demurrer to the answer contained the following, among other grounds: "Paragraph 3. The fraud alleged is not set forth as required by law, and said paragraph sets forth no facts as to the consideration." The other paragraph stated above was also demurred to as lacking in specification. An amendment was made to the answer, which alleged that the defendant was to sell harrows for the plaintiff, taking notes and sending them to the plaintiff, and accounting at the end of the season, returning unsold harrows, and receiving commission; that the agent making the contract stated that the plaintiff kept no books, but took as security from its agents to sell, notes which stood for the machines shipped,

IV. b.—continued.

4. Contracts with reference to homesteads, 872.
5. Contracts of married women, 873.

V. Statutes of frauds as affecting parol variation.

- a. The general rule, 876.
- b. Rule that mistake and fraud create admissibility.
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- c. Rule permitting taking from but not adding to contract.
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- d. Collateral oral contracts, 882.

VI. Effect of negligence accompanying mistake.

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- b. Necessity that negligence be detrimental to other party, 883.
- c. Ability to ascertain real facts, 884.
- d. Obligation to disclose, 886.
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- f. Waiver, confirmation.
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VII. Remedies.

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- b. What courts have jurisdiction, 896.
- c. The relief granted.
 1. Generally, 896.
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 - (a) Generally, 900.
 - (b) Reinstatement, *statu quo*, 902.
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- d. Contracts and instruments subject to reformation.
 1. Generally, 905.
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- g. Necessity that injury be substantial, 911.
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 - (a) General rules, 917.
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VIII. Conclusion, 927.

I. Scope.

This note is confined by its subject to mistakes of law as to effect of instrument. This, of course, excludes questions of mistake of fact. But mixed questions of law and fact are included. And in the large and growing class of cases which go upon the theory that a mistake is correctable or reformable in equity where it results in a failure to carry out the intentions of the parties concerned, without reference to whether the mistake was one of law or fact, questions of mistake and relief therefrom have frequently been passed upon without taking pains to consider whether the mistake was one of law or fact. With reference to cases of this class, it has to be the aim of the writer to

giving a receipt against said notes to protect the agent; that this was done in the present case, and the note was not in consideration of the purchase of any machines, but only as security for defendant's accounting; that he did account for the machines shipped, and sent the notes received for all which were sold, and offered to deliver to them all the machines remaining unsold; that the note sued on was given for the purpose of standing as security for a settlement agreed on as thus understood by defendant, which was adopted and agreed upon in the settlement; that a receipt was given by the plaintiff's agent solely on the understanding and for the consideration that the note stood as a security for the settlement, and not as a compromise and

settlement of a money indebtedness; that he has always offered to perform all of his part of the settlement, and is entitled to a surrender of the note and the payment of his claim for freight and commissions. No other demurrer appears in the record: but on that stated above, the court passed the following order: "The demurrer to the original answer and to this amendment is overruled, except as to so much of the plea as attempts to set up fraud, which is stricken." After a trial, the case was brought to this court, and a reversal had. 119 Ga. 186, 45 S. E. 983.

When the case again came on for trial, the defendant tendered an amendment striking the former amendment to his plea, and in lieu thereof alleged, in brief, as follows:

take and use such cases, and only such cases, as have some matter of law involved in the mistake. Likewise, the note is confined to questions of mistake as to the effect of an instrument. This, of course, excludes mistakes as to, and ignorance of, general public law, and as to rights based upon it. But if written instruments and their effect are in any way involved in the mistake, the case is a proper part of this note.

II. General rules.

a. Statement of and application generally.

The general rule, subject to various and varying restrictions, is that equity will reform instruments for the correction of mistake. Rowley v. Flannelly, 30 N. J. Eq. 612; Read v. Cramer, 2 N. J. Eq. 277, 34 Am. Dec. 204; Whitehead v. Brown, 18 Ala. 682; Phelan v. Tomlin (Ala.) 51 So. 382; Ligon v. Rogers, 12 Ga. 281; McCloskey v. McCormick, 44 Ill. 336; Way v. Roth, 159 Ill. 162, 42 N. E. 321; Quimby v. Shearer, 56 Minn. 534, 58 N. W. 155; Mosby v. Wall, 23 Miss. 81, 55 Am. Dec. 71; Martin v. Nixon, 92 Mo. 26, 4 S. W. 503; Young v. Coleman, 43 Mo. 179; Tilton v. Tilton, 9 N. H. 385; Rosevelt v. Dale, 2 Cow. 129; Jenkins v. Lefaiver, 29 N. Y. S. R. 886, 9 N. Y. Supp. 19; Foster v. Schmeer, 15 Or. 363, 15 Pac. 626; Desell v. Casey, 3 Desauss. Eq. 85; Murray Co. v. Putman (Tex. Civ. App.) 130 S. W. 631; Bedell v. Wilder, 65 Vt. 406, 36 Am. St. Rep. 871, 26 Atl. 589; Johnson v. Parker, 34 Wis. 596; Zohrlaut v. Mengelberg (Wis.) 124 N. W. 247; Rhode Island v. Massachusetts, 15 Pet. 233, 10 L. ed. 721; Bingham v. Bingham, 1 Ves. Sr. 126; Taylor v. Rudd, cited in 3 Bro. Ch. 454.

The reformation of written instruments when by mistake they express more or less than the parties intended is a well-established branch of equity jurisdiction. Franklin v. Jones, 22 Fla. 526; Jackson v. Magbee, 21 Fla. 622; Clopton v. Martin, 11 Ala. 187; Trout v. Goodman, 7 Ga. 383; Mendenhall v. Steckel, 47 Md. 453, 28 Am. Rep. 28 L.R.A.(N.S.)

481; Somerville v. Trueman, 4 Harr. & Mc. H. 43, 1 Am. Dec. 389; Sawyer v. Hovey, 3 Allen, 331, 81 Am. Dec. 659; Loss v. Obry, 22 N. J. Eq. 52; Braddy v. Parker, 39 N. C. (4 Iréd. Eq.) 430; Gee v. Spencer, 1 Vern. 32.

And an innocent omission or insertion of a material stipulation, contrary to the mutual intention of the parties to a written instrument, will be corrected by a court of equity, and the instrument reformed in that particular on a timely application after the discovery of the mistake. Turner v. Kelly, 70 Ala. 85.

Reformation of a contract is authorized where it appears that, through the mistake of both parties to it, the intentions of neither have been expressed in it. Brown v. Brown, 79 Hun, 44, 29 N. Y. Supp. 652.

So, courts of equity have power to reform written instruments, to make them conform to the true intention of the parties. Forester v. VanAuken, 12 N. D. 175, 96 N. W. 301; Clark v. Hart, 57 Ala. 390; Pickett v. Merchants' Nat. Bank, 32 Ark. 346; Chamberlain v. Thompson, 10 Conn. 243, 26 Am. Dec. 390; Louisville & N. R. Co. v. Cox, 133 Ga. 763, 66 S. E. 1088; Hunter v. Bilyeu, 30 Ill. 228; Hileman v. Wright, 9 Ind. 126; Braddy v. Parker, supra; First Nat. Bank v. Wentworth, 28 Kan. 183; McElderry v. Shipley, 2 Md. 25, 56 Am. Dec. 703; Showman v. Miller, 6 Md. 479; Aldridge v. Weems, 2 Gill. & J. 36, 19 Am. Dec. 250; Delaware State F. & M. Ins. Co. v. Gillett, 54 Md. 219; Smith v. Jordan, 13 Minn. 264, Gil. 246, 97 Am. Dec. 232; Nebraska Loan & T. Co. v. Ignowski, 54 Neb. 398, 74 N. W. 852; Story v. Gammell, 68 Neb. 709, 94 N. W. 982; Uihlein v. Matthews, 93 App. Div. 57, 86 N. Y. Supp. 924; Pennell v. Wilson, 2 Robt. 505; Southern Finishing & Warehouse Co. v. Ozment, 132 N. C. 839, 44 S. E. 681; Thompson v. Thompson, 18 Ohio St. 73; North & West Branch R. Co. v. Swank, 105 Pa. 555; Desell v. Casey, supra; Bailey v. Bailey, 8 Humph. 230.

And equity, in a proper case, will reform a contract so as to make it speak the actual agreement between the parties. Louisville & N. R. Co. v. Cox, supra; Alexander v.

He admits the execution and ownership of the note sued on, and assumes the burden of proof. About a year before the signing of this note, a salesman for the plaintiff entered into an agreement with defendant, whereby, as defendant understood, he was to sell certain harrows manufactured by the plaintiff, on commission. Under this arrangement, the defendant authorized the plaintiff to ship out fifty harrows, on which he paid freight amounting to \$158. He sold thirty of them, and became entitled to a commission of \$450. The remaining twenty were never unpacked. The harrows were not reasonably suited for the purpose intended, were totally unfit for such uses, and were worthless. The purchasers refused to pay for them, and returned them

to defendant for the plaintiff. The notes taken for them were defeasible. The original note given by the defendant, while absolute on its face, did not truly represent the transaction, but was signed at the time on the representation of the agent that the plaintiff kept no book accounts, and took such notes as collateral security for goods shipped out on consignment for sale. If the note and papers have a different legal purport, it was the result of a mistake of the parties as to their legal effect; or if not a mistake on the part of the agent, it was a wilful and fraudulent scheme to entrap the defendant into giving a legal evidence of a sale when no sale was intended. If the first transaction amounted to a sale to the defendant, he had a complete de-

Caldwell, 55 Ala. 517; Conner v. Baxter, 124 Iowa, 219, 99 N. W. 726; First Nat. Bank v. Wentworth, 28 Kan. 183; Minot v. Tilton, 64 N. H. 371, 10 Atl. 682; Firmstone v. DeCamp, 17 N. J. Eq. 317; Loss v. Obry, 22 N. J. Eq. 52; Pennell v. Wilson, supra; Hunt v. Freeman, 1 Ohio, 490; M'Louth v. Rathbone, 19 Ohio, 21.

This is the principle of *DOLVIN v. AMERICAN HARROW CO.*

When the minds of two persons come together and agree on the terms of a contract, and a mistake is made not in the terms agreed upon, but in their expression, or in the memorial made and kept to furnish evidence of them, chancery will, as a rule, reform the memorial or evidence, so as to make it express their real agreement. *Houston v. Faul*, 86 Ala. 232, 5 So. 433.

And if an agreement be entered into between two parties in mutual mistake as to their relative and respective rights, either of them is entitled to have it set aside. *Bottorff v. Lewis*, 121 Iowa, 27, 95 N. W. 262.

And a plaintiff may be entitled to relief from a contract or conveyance on the ground of ignorance and mistake, although the defendant with whom he dealt, and against whom relief is sought, was also in ignorance and under mistake, the contract or conveyance not having been made upon the principle of compromising doubtful rights. *Reynell v. Sprye*, 8 Hare, 222.

And an order made in an action by consent, and based upon and intended to carry out the agreement between the parties, can be set aside on any ground on which an agreement in the terms of the order could be set aside, including the ground of mistake. *Wilding v. Sanderson* [1897] 2 Ch. 534.

So, in case of mistake or of fraud, or where there is a mistake by one party and fraud by the other, a court of equity is authorized to, and, upon proper proof, should, reform a written contract between the parties. *Devereux v. Sun Fire Office*, 51 Hun, 147, 4 N. Y. Supp. 655; *Uihlein v. Matthews*, supra; *Berry v. Sowell*, 72 Ala. 14; *Gewin v. Shields* (Ala.) 52 So. 887; *Trout v. Goodman*, supra; *Price v. Cutts*, 29 Ga. 142, 74 28 L.R.A.(N.S.)

Am. Dec. 52; *Webb v. Hammond*, 31 Ind. App. 613, 68 N. E. 916; *Worley v. Tuggle*, 4 Bush, 168; *Farrell v. Bean*, 10 Md. 217; *Bush v. Merriman*, 87 Mich. 260, 49 N. W. 567; *Bailey v. American Cent. Ins. Co.* 4 McCrary, 221, 13 Fed. 250.

Equity has jurisdiction to reform written instruments where there is a mutual mistake on one side, and fraud or inequitable conduct on the other. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239; *Campbell v. Hatchett*, 55 Ala. 548; *Webb v. Hammond*, supra.

And where a mistake in a contract is shown which, if not corrected, would operate to the prejudice of a party, and which did not occur through such party's carelessness or negligence, a court of equity will correct it. *Foster v. Schmeer*, 15 Or. 363, 15 Pac. 626; *Blair v. Chicago & A. R. Co.* 89 Mo. 383, 1 S. W. 350.

Equity relieves against a mistake as well as against fraud in a deed or contract in writing, whether it concerns land or anything else. *Wall v. Arrington*, 13 Ga. 88; *Rogers v. Atkinson*, 1 Ga. 12; *Wagenblast v. Washburn*, 12 Cal. 208; *Gray v. Woods*, 4 Blackf. 432; *Trusdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391; *Gillespie v. Moon*, 2 Johns. Ch. 596, 7 Am. Dec. 559; *Ashcom v. Smith*, 2 Penr. & W. 211, 21 Am. Dec. 437; *Nutter v. Brown*, 51 W. Va. 598, 42 S. E. 661; *Williams v. United States*, 138 U. S. 517, 34 L. ed. 1028, 11 Sup. Ct. Rep. 459.

And this is so either where the plaintiff seeks relief affirmatively, on the ground of mistake, or where the defendants set it up as a defense to rebut an equity. *Rogers v. Atkinson*, 1 Ga. 12; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390.

So, equity will relieve where an instrument has been delivered up and canceled through fraud or mistake. *Banta v. Vreeland*, 15 N. J. Eq. 103, 82 Am. Dec. 269.

No written contract is beyond the reach of a court of equity for the purpose of reforming it, if the prayer for relief is presented in due season. *Palmer v. Hartford F. Ins. Co.* 54 Conn. 488, 9 Atl. 248.

But a resolution of a common council of a city, directing the mayor to purchase cer-

fense of failure of consideration, which was known to the plaintiff's agent, and that note would have been entirely uncollectable. The agent agreed with defendant upon a settlement of the transaction represented by the first note. The defendant had already paid the freight, and remitted such collections as had been made upon sales, and these were entered on the first note. The notes taken from customers were in the hands of the plaintiff, or were placed in bank, by its instructions, for collection, and were not in defendant's possession. The agent represented that he could not then receive back the harrows, because he did not know where to have them shipped, and stated that he had traveling salesmen in south Georgia, that he would later notify defendant where

to ship such harrows. For this reason the settlement was not then closed, but the agent, desiring a note as a security for an accounting by defendant, under this settlement, until it should be consummated, and representing that the old note was too much written upon to be intelligible, proposed to deduct the money payments from the value of the harrows shipped, and take a new note for the amount thus unaccounted for, until the settlement should be carried out. The defendant agreed to sign this, but required of the agent a written showing, for his own protection against the papers which he signed. The agent thereupon wrote, signed, and delivered an instrument as follows: "I agree to receipt J. G. Dolvin for note given me to-day, April 11, 1901, for \$934.18, note

tain real estate upon terms stated, does not have the qualities of a contract, and it cannot be reformed by the court, so as to give it the quality and force of a contract. *Car-skaddon v. South Bend*, 141 Ind. 596, 39 N. E. 667.

Nor does the fact that the complainant in an action to reform a written instrument is a purchaser with warranty bar his right to relief. *Wall v. Arrington*, 13 Ga. 88.

And equity will grant relief to prevent the unconscientious use of an instrument which does not express the real contract between the parties. *Reade v. Armstrong*, 7 Ir. Ch. Rep. 375, affirming 7 Ir. Ch. Rep. 266.

Before a court of equity will interfere to reform a written contract, however, it must be substantially alleged in the pleadings, and appear, that there was in fact a valid agreement sufficiently expressing in terms the real intention of the parties; that there was in fact a written contract which failed to express such true intention; and that this failure was due to mutual mistake, or to mistake on one side and fraud or inequitable conduct on the other. *Fritz v. Fritz*, 94 Minn. 264, 102 N. W. 705; *Calverly v. Harper*, 40 Ill. App. 96; *Slobodisky v. Phenix Ins. Co.* 52 Neb. 395, 72 N. W. 483; *Garnar v. Bird*, 57 Barb. 277; *Hyland v. Hyland*, 19 Or. 51, 23 Pac. 811; *Mitchell v. Holmar*, 20 Or. 280, 47 Pac. 616.

The complaint in a suit to reform a deed or mortgage on the ground of mistake must allege distinctly what the original agreement was, and point out with clearness wherein there was a mistake, and show that it did not arise from gross negligence of the plaintiff. *Meier v. Kelly*, 20 Or. 86, 25 Pac. 73.

And where the only mistake in an instrument is as to its legal effect as executed, and as to the right of the parties to show by parol what they really intended, equity will not reform it by importing into it expressions which the parties thereto did not intend to use, unless this be necessary for the correction or prevention of fraud. *Freed v. Brown*, 41 Ark. 495.

To set up a contract where no execution of anything had been had would be to make

a contract for the parties, and not to reform one, and cannot be done. *Price v. Cutts*, 29 Ga. 142, 74 Am. Dec. 52.

And where a writing embodies the contract actually made, the fact that the parties acted under a mistake of law, equity, or fact will not authorize a reformation. *Delaware Ins. Co. v. Hill* (Tex. Civ. App.) 127 S. W. 283.

So, though relief will be granted against a mistake of law, a contract made under such mistake with full knowledge of the facts will not be set aside in cases where neither party has acquired a right or suffered a loss by the contract. *Lawrence v. Beaubien*, 2 Bail. L. 623, 23 Am. Dec. 155.

The maxim, Ignorance of the law is no excuse, is not universally applicable, but only when damages have been inflicted or crimes committed. *Brock v. Weiss*, 44 N. J. L. 241.

And where a party asks for the reformation of a deed, he must stand upon some superior equity to that of the party against whom he asks it. *Conaway v. Gore*, 21 Kan. 725.

Nor have courts of equity any power, and they are under no duty, to reform a written instrument on account of a mistake of the draftsman, where the party seeking to reform the writing is a mere volunteer, and the other party is dead. *White v. Campbell*, 80 Va. 180.

And where the intention of the parties to a contract is sufficiently apparent to be recognized in any court, the fact that a word is omitted is not sufficient reason for bringing a party into a court of equity for a reformation of the contract. *Atlanta & W. P. R. Co. v. Speer*, 32 Ga. 550, 79 Am. Dec. 305.

And to entitle a party to a judgment reforming a written contract, he must prove that it was the intention of both parties to have a contract, not as it appears, but as he claims it should have been, and that this intent was frustrated by fraud or mutual mistake. *Jackson v. Andrews*, 59 N. Y. 244; *Leavitt v. Palmer*, 3 N. Y. 19, 51 Am. Dec. 333; *American Min. Co. v. Basin & Bay State Min. Co.* 39 Mont. 476, 24 L.R.A. (N.S.) 305, 104 Pac. 525.

due January 1st, 1902. American Harrow Company, by F. P. Webster." This instrument was intended by the parties thereto to signify an agreement on the part of the plaintiff, through its agent, to receipt for and cancel the obligation represented by the new note upon compliance by the defendant with his agreement to deliver up the unsold harrows and account for those sold as above stated. It was drawn by the plaintiff's agent. This defendant was unlearned in law, and the omission of apt words more fully to express said meaning was the result of accident and due to a mistake of both parties. The instrument, as it stands, by mistake of law on the part of the draftsman and of the parties, does not fulfil, but violates, in its operation, the real contract

of the parties, it being supposed to be efficient to secure the defendant his rights under the settlement, as against the other papers signed by him. The plaintiff's agent had theretofore acted with apparent fairness, had conceded all that the defendant claimed as his rights in the settlement, and had won his confidence. If he did not share in the alleged mistake, then his conduct throughout was in pursuance of a scheme of fraud by which he saw that the original note could not be enforced against a plea of total failure of consideration, and led the defendant to make a new note, with the purpose to cause him to waive this defense, and to become absolutely bound by the terms of the writings to pay a debt which he never owed, and by pretenses of fairness and con-

Nor can a court of equity give a deed a more extended operation than the natural and legal import of the words in it authorizes. *Mayo v. Feaster*, 2 M'Cord, Eq. 137.

And the fact that an agreement when executed failed to accomplish the result which the parties to it had in mind does not entitle one of them to have another agreement substituted for it, nor to have the desired result accomplished by some other means. *Smith v. Hitchcock*, 130 Mass. 570.

And equity has no power to reform a written contract by substituting a person not named therein for one of the parties named, and who executed the contract as such party. *Mabb v. Merriam*, 129 Cal. 663, 62 Pac. 212.

Nor does the fact that a person making a bond employed a lawyer who gave him bad advice, and thereby deceived him as to his rights, and induced him to execute the bond, furnish any authority to the court to alter the contract of the parties. *Garnar v. Bird*, 57 Barb. 277.

So, applying the rule that ignorance of or mistake of law will not excuse mistake, it has been held that equity will not, in an independent action, relieve from mistakes of law, unless accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence. *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561.

Under this rule a court of equity will not interpose to grant relief for mistake in a contract unless there was either a mixed question of law and fact, or there were circumstances indicating fraud, misrepresentation, undue influence, or deceit. *Ottenheimer v. Cook*, 10 Heisk. 309.

A mistake which will be relieved against in equity must arise from ignorance, surprise, imposition, or misplaced confidence, and be unmixed with negligence. *Iverson v. Wilburn*, 65 Ga. 103.

And where there is neither averment nor proof of fraud, accident, or mistake, a court of equity cannot be asked to reform a deed. *Grubb's Appeal*, 90 Pa. 228.

And a bill brought for the reformation of a deed must, to accomplish that object, con-

tain an averment of fraud, accident, or mistake in making it, or of facts from which the fraud, accident, or mistake would necessarily be implied. *Hollenback's Appeal*, 121 Pa. 322, 15 Atl. 616.

b. Principles on which relief is granted.

Courts of equity go on the broad principle that where a mistake is manifest, they will, in the exercise of their ordinary jurisdiction, correct it, and hold a party according to his original intention. *Hendrickson v. Ivins*, 1 N. J. Eq. 562.

A court of chancery considers that as done which is agreed to be done, and in accordance with this principle will correct mistakes in conveyances and other instruments when clearly and unequivocally proved, and make the instrument such, both in its form and effect, as will fulfil the intention of the parties. *Beardsley v. Knight*, 10 Vt. 185, 33 Am. Dec. 193; *Kennard v. George*, 44 N. H. 440.

The principle upon which courts of equity relieve by reforming contracts is that, through ignorance or misapprehension of the legal effect of the terms agreed upon, the parties have made a contract variant in legal construction from the one intended. *Hemphill v. Moody*, 64 Ala. 468.

A written instrument is made the evidence of the contract between the parties, and if it fails to present their agreement, the contract it expresses is not their agreement, and the true contract remains unexecuted, and in such case equity will reform the writing, causing it to express the intention of the parties. *Stafford v. Fetters*, 55 Iowa, 484, 8 N. W. 322; *Hausbrandt v. Hoßler*, 117 Iowa, 103, 94 Am. St. Rep. 289, 90 N. W. 494.

So, upon equitable principles, no contract to which the parties did not understandingly assent should be enforced. *Reed v. Root*, 59 Iowa, 359, 13 N. W. 323.

And whether or not a court of equity will correct a mistake in a written instrument depends upon whether the case falls within the fundamental principle of equity that, in legal transactions, no one shall be al-

cessions, and by proffering to him a legally meaningless obligation, lured him into signing the paper sued on, intending to deprive him of his just defenses and to trap him into the assumption of an obligation to pay for worthless articles that he had never bought. The agent was authorized to make settlement with defendant; but if not so, he undertook to act for the plaintiff, received the note sued on and the other writing then signed by the defendant, and signed the instrument above set out, all as a part of one transaction,—namely, the settlement. Plaintiff cannot ratify the acts of such agent by suing on the note and claiming that the defenses to the old note are waived, without ratifying the whole transaction. It must either accept the entire transaction

made in its behalf, or must repudiate the whole, and stand upon its original note, subject to such defenses as the defendant had thereto. To disarm the defendant of his defenses to the first note by a settlement thereof, and then to adopt the settlement only in so far as it is favorable to the plaintiff, would be to commit a fraud. He prayed that the note and the instrument of writing referred to be declared by mistake not to represent truly the contract of the parties, and that under the true contract the note is unenforceable, the defendant having, prior to the institution of the suit, tendered, and still tendering, all the money collected on the harrows, and all the notes taken therefor, and all the harrows remaining unsold. He also prayed

lowed to enrich himself unjustly at the expense of another, through or by reason of an innocent mistake of law or fact, entertained without negligence by the loser, or by both parties. *Park Bros. v. Blodgett & C. Co.* 64 Conn. 28, 29 Atl. 133.

III. Mistake of law defined.

A mistake of law, to which this note is confined by its subject, has been defined to be an erroneous conclusion as to the legal effect of known facts. *Deseret Nat. Bank v. Dinwoodey*, 17 Utah, 43, 53 Pac. 215; *Purvines v. Harrison*, 151 Ill. 219, 37 N. E. 705.

A mistake of law occurs when a party knows the state of facts, but is ignorant of the legal consequences. *Mowatt v. Wright*, 1 Wend. 355, 19 Am. Dec. 508.

The construction of words is a matter of law. *Purvines v. Harrison*, *supra*.

IV. For what mistakes relief may be had.

a. Generally.

There are two well-defined classes of mistakes of law in contracts: First, a mistake in law as to the legal effect of the contract actually made; and, second, a mistake in law in reducing to writing the contract, whereby it does not carry out or effectuate the intention of the parties. In the former, the contract actually entered into will seldom, if ever, be relieved against unless there are other equitable legal features calling for the interposition of the court; but in the second class, the mistake is not in the contract, but terms are used or omitted which give the instrument a legal effect not intended by the parties, and different from the contract actually made; and here equity always grants relief unless barred on some other ground. *Richmond v. Ogden Street R. Co.* 44 Or. 48, 74 Pac. 333.

And errors in a contract, whether arising from mistake, surprise, or fraud, requiring a reformation are reducible to two general classes: First, cases where the contract by its terms includes subject-matter

which was not intended by the parties to come within its operation; and, second, those contracts wherein, by means of the mistake, surprise, or fraud, some part of the subject-matter intended to be included within the contract has been omitted. *Allen v. Kitchen*, 16 Idaho, 133, — L.R.A. (N.S.)—, 100 Pac. 1052.

And a court of chancery may supply the defects of a conveyance or other instrument, not only such as arise from omissions and mistakes in the body of the instrument, but also those which arise from error in the execution. *Somerville v. Trueman*, 4 Harr. & McH. 43, 1 Am. Dec. 389; *Smith v. Watson*, 88 Iowa, 73, 55 N. W. 68.

And to warrant the correction of a written instrument for mistakes, it makes no difference whether the defect be in a statutory or a common-law requisite, or whether the parties failed to make the instrument in the form they intended, or misapprehended its legal effect. *Beardsley v. Knight*, 10 Vt. 185, 33 Am. Dec. 193.

If, notwithstanding a mistake in an instrument, however, the intent remains clear, the mistake will be disregarded, even at law; and there is no occasion to seek a correction of the instrument by the aid of equitable principles. *Criss v. English*, 26 Md. 553.

And a mistake of law with reference to a contract for the purchase of real estate, against which relief will be granted by equity, must be gross and palpable, and such as would warrant the belief that undue advantage was taken of the party, owing either to his imbecility of mind, or the exercise of some improper influence over him by the party with whom he deals, or by some other person with his knowledge, consent, or procurement. *Dill v. Shaban*, 25 Ala. 694, 60 Am. Dec. 540.

So, where the execution of a deed is complete, a court of equity will not grant relief unless on consideration of a fair, just, and valid agreement, in pursuance whereof the deed was intended to be executed. *Somerville v. Trueman*, *supra*.

And the mistake which equity will relieve against must be something induced

that the note be declared to have been procured by fraud, and to be null and void, and that he recover of the plaintiff \$158, freight paid for its use, and the commission earned by him, and lost without fault on his part.

Objection was made to this amendment, and the presiding judge passed an order declaring that the plea alleging fraud was *res judicata*, having been passed upon at a former term of the court, on a demurrer to the pleas in the case; and that the allegations in reference to accident and mistakes were not sufficient in law to constitute any valid defense against the note sued on. A verdict was directed for the plaintiff, and the defendant excepted.

by ignorance, misapprehension or misunderstanding of the truth, but without negligence, and resulting in injury to him who sets it up. *Lott v. Kaiser*, 61 Tex. 665.

Nor will a court of equity interfere by way of reformation of a contract, where the instrument is such as the parties themselves designed it to be. *Showman v. Miller*, 6 Md. 479; *McElderry v. Shipley*, 2 Md. 25, 56 Am. Dec. 703; *Robertson v. Walker*, 51 Ala. 484; *Kelly v. Turner*, 74 Ala. 513; *Dunham v. New Britain*, 55 Conn. 378, 11 Atl. 354; *Hackemack v. Wiebrock*, 172 Ill. 98, 49 N. E. 984; *Nelson v. Davis*, 40 Ind. 366; *Armstrong v. Short*, 95 Ind. 326; *Sanford v. Nyman*, 23 Mich. 326; *Bradford v. Bradford*, 54 N. H. 463; *Beers v. Hendrickson*, 6 Robt. 53; *Mills v. Kampfe*, 135 App. Div. 748, 119 N. Y. Supp. 903; *Fehlberg v. Cosine*, 16 R. I. 162, 13 Atl. 110; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98; *Langley v. Brown*, 2 Atk. 195.

Or where it appears to conform to the agreement upon which it is based. *Rowe v. Horton*, 65 Tex. 89.

There being no charge of fraud. *Fehlberg v. Cosine*, *supra*.

In such case the mistake is a mistake of law as to the legal effect of the terms of the instrument, and for such a mistake, except in peculiar cases, no relief can be granted. *Nelson v. Davis*, *supra*.

If the parties voluntarily chose to express themselves in the language of the contract, they must be bound by it. *Showman v. Miller*, 6 Md. 479; *William Cramp & Sons Ship & Engine Bldg. Co. v. Sloan*, 21 Fed. 561.

And the intention of the parties to make the instrument conform to the original agreement must have continued in the minds of the parties concurrently, down to the time of the execution of the instrument. *Keedy v. Nally*, 63 Md. 311; *Nebraska Loan & T. Co. v. Ignowski*, 54 Neb. 398, 74 N. W. 852; *Bradford v. Bradford*, 54 N. H. 463.

A mistake in the execution of a writing will not be corrected in equity unless it appears that the writing did not contain the intention of the parties thereto at the time 28 L.R.A.(N.S.)

Messrs. G. A. Meritt and Samuel H. Sibley for plaintiff in error.

Messrs. Joseph B. Park and Noel P. Park for defendant in error.

Lumpkin, J., delivered the opinion of the court:

1, 2. "If, upon demurrer, the court has decided upon the merits of the cause, the judgment may be pleaded in bar of another suit for the same cause." Civil Code 1895, § 3744. "If, in rendering its judgment upon a demurrer to a petition, the court does not decide upon the merits of the case, a judgment sustaining the demurrer and dismissing the action is not a bar to another proceeding for the same cause." *Papworth v. Fitzgerald*, 111 Ga. 54, 36 S. E.

it was made. *Jarrell v. Jarrell*, 27 W. Va. 743; *Turner v. Kelly*, 70 Ala. 85.

And when a writing embodies the contract actually made between the parties, the fact that they acted under a mistake of law, equity, or fact does not authorize a reformation of the contract. *Delaware Ins. Co. v. Hill* (Tex. Civ. App.) 127 S. W. 283; *Douglas v. Grant*, 12 Ill. App. 273.

And a note signed by a guardian binds him personally, and where its terms are such as the parties intended to use, parol evidence showing an understanding that it was to bind his ward only is inadmissible. *Andrus v. Blazzard*, 23 Utah, 233, 54 L.R.A. 354, 63 Pac. 888.

So, where the parties to a contract contemplated certain things during the first negotiation, the written contract, made later on, cannot be reformed to express such negotiations, where it never got beyond negotiation, and never ripened into a mutual agreement. *Marshall v. Westrope*, 98 Iowa, 324, 67 N. W. 257.

Nor will chancery add to a contract a term or stipulation unless it is shown that the parties intended it should be inserted. *Guilmartin v. Urquahart*, 82 Ala. 570, 1 So. 897; *Clark v. Hart*, 57 Ala. 390.

And there can be no reformation of an agreement where the only agreement was the one signed by the parties, since, if that fails to express the intention of the parties, there never was a contract entered into, and hence nothing to reform or to reform to. *Marshall v. Westrope*, 98 Iowa, 324, 67 N. W. 257; *St. Anthony Falls Water-Power Co. v. Merriman*, 35 Minn. 42, 27 N. W. 199.

And when parties instruct a draftsman to prepare a quitclaim deed for their execution, and he draws a deed containing language which amounts in law to a covenant of title in fee, and they sign the deed, knowing that such language is in it, they will be held to have been mistaken in the legal effect of the language used, and of the legal consequences of retaining such language in the deed. *Purvines v. Harrison*, 151 Ill. 219, 37 N. E. 705.

So, the fact that the parties to a contract

311. This ruling was made in regard to the plaintiff's petition, but the same principle would govern in regard to a judgment upon a demurrer to a plea. If the judgment determines that the defense set up by the plea is not good in law, this is an adjudication on the merits; and if substantially the same plea is offered again, it is *res judicata*. But if a plea is dismissed, not for lack of merit in the defense, but merely because the allegations are too general and wanting in specification, this is not an adjudication on the merits; and if a plea fully and distinctly alleging a good defense is offered, the matter is not *res judicata*. The difference between the result of a ruling on a declaration and a ruling on a plea is that, if a declaration is once

dismissed for any cause, the case is out of court, and there is nothing to amend by; but the striking of one of several pleas does not take the case out of court, and there is still an opportunity for amendment, subject to the restrictions prescribed by law in that regard, and the power of the court to impose terms, in proper cases. Civil Code 1895, §§ 5097, 5057, 5068, 5101. An examination of the statement of facts preceding this opinion will show that the original allegation of fraud was stricken because it was not set forth "as required by law" (which we understand to mean, without sufficient specification), and that the amendment offered was very different. Whether this amendment amounted to a good plea of fraud, or not, we express no opinion. The

omitted certain provisions from it on the supposition that it was not necessary to put them in negatives any idea of accidental omission, and presents a case against which chancery will not relieve. *Clark v. Hart*, supra; *Rector v. Collins*, 46 Ark. 167, 55 Am. Rep. 571; *Shafer v. Davis*, 13 Ill. 395; *Meade v. Norfolk & W. R. Co.* 89 Va. 296, 15 S. E. 497.

And chancery will not reform a written contract by the insertion of a stipulation which was designedly omitted from the writing, performance thereof being trusted to the honor or promise of the other party to the contract. (*Betts v. Gunn*, 31 Ala. 219; *Ligon v. Rogers*, 12 Ga. 281; *Brintnall v. Briggs*, 87 Iowa, 538, 54 N. W. 531; *Andrew v. Spurr*, 8 Allen, 412; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418; *Henderson v. Stokes*, 42 N. J. Eq. 586, 8 Atl. 718; *Roberts v. Elmore*, 3 Ohio Dec. Reprint, 208; *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 246, 10 S. E. 239; *Braun v. Wisconsin Rendering Co.* 92 Wis. 245, 66 N. W. 196.

And when a petition in equity seeks by parol evidence to reform a written contract by supplying a verbal stipulation omitted by agreement, without fraud, at the time of executing such contract, such verbal stipulation being contradictory to the written contract, the insufficiency of the petition may be alleged by demurrer without answer. *Roberts v. Elmore*, supra.

Nor does the law require that the parties to a contract shall stand upon the same footing as to knowledge or information; when one has full and equal opportunity with the other to ascertain the facts, and no fraud appears, he must abide by the contract, although he ignorantly or negligently makes a bad bargain; each is entitled to the benefit of his own sagacity. *Stettheimer v. Killip*, 75 N. Y. 282; *McShane v. Hazlehurst*, 50 Md. 107.

And a written instrument cannot be set aside for mistake if it was read over to the party attacking it, before execution, and no provision was omitted which he supposed to be inserted, though he failed to think of some contingency concerning which, had he thought of it, some provision would have

been made which is not contained in such deed. *Taylor v. Buttrick*, 165 Mass. 547, 52 Am. St. Rep. 530, 43 N. E. 507; *Powe v. Culver*, 81 Conn. 49, 69 Atl. 1050; *Wise v. Brooks*, 69 Miss. 891, 13 So. 836; *Whittemore v. Farrington*, 76 N. Y. 452.

The real question is, What did the parties intend at the time, uninformed as they were? *Wise v. Brooks*, supra; *First Nat. Bank v. Gough*, 61 Ind. 147.

And where one who, under a verbal agreement for the conveyance of lands, is entitled to insist upon a good title and a deed with covenants, pays the consideration, and is tendered a deed without covenants, which he, after demand and refusal of a deed conforming to the agreement, accepts, believing the title to be clear, and goes into possession, and continues to occupy and improve the premises, and an encumbrance unknown at the time to either party is thereafter discovered, in the absence of fraud, no legal liability rests upon the grantor, and the grantee is entitled to no equitable relief, and the acceptance of the deed cannot be set aside on the ground of mistake. *Whittemore v. Farrington*, 76 N. Y. 452.

And a party contracting in writing to sell a lot of land, and to convey and release the same to the vendee upon a good and sufficient deed, binds himself to give a good title to such land; and when he has given such a deed in pursuance of the agreement, he cannot complain that its covenants protect the vendee from certain liens which it was verbally understood he should be liable for, and the contract will not be reformed, where no fraud or mutual mistake is shown. *Story v. Conger*, 36 N. Y. 673, 93 Am. Dec. 546.

Nor will a deed in which the grantee assumes to pay a specific mortgage be reformed on the ground of mutual mistake, so as to provide for the assumption of a second mortgage, the existence of which was unknown to the grantee, and forgotten by the grantor at the time the deed was made. *Moore v. Graves*, 97 Iowa, 4, 65 N. W. 1008.

And a written instrument executed by parties between whom there is no special relation of trust or confidence will not be

judge, in passing on its merits, might hold it to be a good plea, or he might hold that it made one of those not infrequent cases where the parties say one thing orally and another in the written contract, and fail to show any sufficient reason why they signed it as written. A man cannot talk one way as to a contract, deliberately and knowingly sign it in writing another way, and expect the courts to relieve him of the results of his folly. As to this plea we say nothing, as the trial judge has not passed on the point. What we hold is that the matter was not *res judicata* by reason of the decision on the demurrer.

3. The presiding judge held that the allegation in reference to accident and mistake constituted no valid defense. In this

reformed so as to omit a particular clause, on the ground that the same was inserted through the mutual mistake of the parties, when the party against whom the reformation is sought knew of the insertion of the clause at the time of the execution, and the party seeking the reformation might have known such fact, had he read the instrument. *Metropolitan Loan Assn. v. Esche*, 75 Cal. 513, 17 Pac. 675.

So, to reform an instrument for mistake, it must appear by clear and satisfactory evidence that the mistake related to a matter essential and material. *Mills v. Kampfe*, 135 App. Div. 748, 119 N. Y. Supp. 903; *Burns v. Caskey*, 100 Mich. 94, 58 N. W. 642; *Daggett v. Ayer*, 65 N. H. 82, 18 Atl. 169; *Deare v. Carr*, 3 N. J. Eq. 513.

And it must be shown that the party seeking the reformation would be prejudiced by a failure to reform. *Conaway v. Gore*, 24 Kan. 389.

A party who seeks the annulment of his contract on the ground of error must establish error as to the nature of the contract, or as to the substance of the object of the contract, or as to the substantial qualities of such contract. *Prescott v. Cooper*, 37 La. Ann. 553.

Nor will a contract be reformed which must be construed and carried into effect before reformation exactly as it would be after it had been reformed. *Rue v. Meirs*, 43 N. J. Eq. 377, 2 Atl. 369; *Grael v. Soeller*, 52 Hun, 375, 5 N. Y. Supp. 254; *British & American Mortg. Co. v. Long*, 113 N. C. 123, 18 S. E. 165.

And if omitting to name the grantor in the premises of a deed be a mere clerical error, not affecting the title, the aid of the chancellor is not needed to correct it. *Carr v. Williams*, 10 Ohio, 305, 36 Am. Dec. 87.

Nor will equity relieve against a mistake in a written instrument unless the mistake is perfectly distinct from the sense of the instrument. *Jarrell v. Jarrell*, 27 W. Va. 743.

So, to justify the reformation of a writ-
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we are unable to agree with him. "Mere ignorance of the law on the part of the party himself, where the facts are all known, and there is no misplaced confidence, and no artifice or deception or fraudulent practice is used by the other party, either to induce the mistake of law or to prevent its correction, will not authorize the intervention of equity." Civil Code 1895, § 3978. But "an honest mistake of the law as to the effect of an instrument, on the part of both contracting parties, when such mistake operates as a gross injustice to one, and gives an unconscientious advantage to the other, may be relieved in equity." Civil Code 1895, § 3979. The distinction between ignorance of what the law is, and mutual mistake as to the effect of an in-

ten instrument, the complainant is bound to establish the mutual agreement of all parties to the instrument to the precise contract alleged to have been in fact the original agreement, and that the written instrument failed to express the common agreement because of accident or of mutual mistake of all the parties, or by mistake on one side, induced by fraud on the other. *Simpkins v. Taylor*, 81 Hun, 467, 31 N. Y. Supp. 169; *Whittemore v. Farrington*, 76 N. Y. 452; *Gaffney Mercantile Co. v. Hopkins*, 21 Mont. 13, 52 Pac. 561; *Gunter v. Thomas*, 36 N. C. (1 Ired. Eq.) 199.

And this is so, although the court may believe that the complainant has been hardly dealt with. *Gunter v. Thomas*, supra.

To entitle a party to a decree of a court of equity, reforming a written instrument, he must show a plain mistake, clearly made out by satisfactory proofs. *Berringer v. Schaefer*, 52 How. Pr. 69; *Mead v. Westchester F. Ins. Co.* 64 N. Y. 453; *Stettheimer v. Killip*, 75 N. Y. 282; *Turner v. Kelly*, 70 Ala. 85; *Smith v. Watson*, 88 Iowa, 73, 55 N. W. 68; *Young v. Coleman*, 43 Mo. 179; *Zentmyer v. Mittower*, 5 Pa. 403; *Kinney v. Consolidated Virginia Min. Co.* 4 Sawy. 382, Fed. Cas. No. 7,827.

It must be made clearly to appear that something has been inserted contrary to the intention and agreement of the parties, or that something has been omitted which it was intended should be inserted. *Barnes v. Bartlett*, 47 Ind. 98; *Heavenridge v. Mondy*, 49 Ind. 434; *Breja v. Pryne*, 94 Iowa, 755, 64 N. W. 669.

And it must be shown that the intention and agreement of both parties to the contract were, by mistake, misrepresented by the terms thereof. *Nelson v. Davis*, 40 Ind. 366; *Mead v. Westchester F. Ins. Co.* 64 N. Y. 453; *Seward v. Spurgeon*, 9 Wash. 74, 37 Pac. 303.

And where no fraud or inequitable conduct is proved, and no mistake, mutual or otherwise, appears, no case is made out for the reformation or rescission of a contract. *Husted v. Van Ness*, 1 App. Div. 120, 36 N. Y. Supp. 1043; *Miller v. Carpenter*, 68

strument, may not always appear to be very clearly defined; but it is well settled that there is a distinction. *Culbreath v. Culbreath*, 7 Ga. 64, 50 Am. Dec. 375; *Adair v. McDonald*, 42 Ga. 506; *Ham v. Parkerson*, 68 Ga. 830. It was alleged in the proposed amendment that facts existed which would have authorized the defendant to plead failure of consideration to the original note; that, under the statement of the agent of the plaintiffs, a new note was given, the result of which would be to destroy that plea (*Lunsford v. Malsby*, 101 Ga. 39, 28 S. E. 496); that this was only intended for a security until the settlement agreed on should be consummated; that the agent, for the purpose of giving him "a showing" for his protection, wrote, signed in the name

of the plaintiff, by himself as agent, and delivered to defendant, a paper which read: "I agree to receipt J. G. Dolvin for note given me to-day, April 11, 1901, for \$934.18, note due January 1st, 1902;" that this was intended by both parties to signify an agreement on the part of the plaintiff to receipt for and cancel the obligation represented by the new note, upon compliance with the agreement to deliver up the unsold harrows and account for those sold; that it was drawn by the agent and accepted by the defendant, who was unlearned in the law; and that the use of inapt words to accomplish that result, and the fact that the paper may not have had that effect, was due to a mutual mistake. It was alleged that there was a mutual mistake as to

App. Div. 346, 74 N. Y. Supp. 231; *Comer v. Himes*, 49 Ind. 482; *White v. Port Huron & M. R. Co.* 13 Mich. 356.

• And a bill filed to correct a mistake in a written instrument and to reform the contract should aver expressly that the instrument, as it is, differs from the intention of the parties, and state particularly wherein it differs. *Wall v. Arrington*, 13 Ga. 88; *Coles v. Bowne*, 10 Paige, 526; *Electric Goods Mfg. Co. v. Koltonski*, 171 Fed. 550.

Nor will the court revoke a conveyance and divest an estate if there was no mistake, but only an instrument not so carefully drawn as it might have been. *Lee v. Frick*, 2 W. N. C. 11.

And a bond will not be reformed merely because it has become less effectual than it was expected to prove, where it was drawn precisely as the parties wanted it, and for many years had completely answered its purpose. *Middletown v. Newport Hospital*, 16 R. I. 319, 1 L.R.A. 191, 15 Atl. 800.

And the death of one of the parties to an agreement, and the consequent insufficiency of a security selected by them, intended to be valid and complete, but which was not so, will not give the right to equity to interfere. *Hunt v. Rhodes*, 1 Pet. 1, 7 L. ed. 27.

Nor will relief be granted in equity with reference to a contract where no word was inserted in it nor omitted from it not intentionally inserted or omitted, but there had been a miscarriage in an attempt to limit personal liability, and it cannot be ascertained exactly what the precise intentions of the parties were. *Dennis v. Dennis*, 4 Rich. Eq. 307.

And where no fraud or mistake is charged, and an error of judgment occurred, by which the chances that certain things would happen were overrated, this does not constitute a ground for the interference of a court of equity. *Bispham v. Price*, 15 How. 162, 14 L. ed. 644.

But there is no absolute requirement as to what an instrument must contain to be susceptible of reformation. It is not re-

quired to be certain and complete in any respect; it is only necessary that there be an honest attempt to reduce the contract to writing. *House v. McMullen*, 9 Cal. App. 664, 100 Pac. 344.

Under the Massachusetts statute of 1856, chap. 38, a court of equity has jurisdiction to reform a deed made before its passage. *Canedy v. Marcy*, 13 Gray, 373.

b. Rule that ignorance or mistake of law does not excuse.

1. General statement of.

The rule has been strongly asserted that equity will not relieve from an act done under mistake of law, unmixed with matters of fact, unless there is some additional ground for equitable relief. *McDaniels v. Bank of Rutland*, 29 Vt. 230, 70 Am. Dec. 406; *Mellish v. Robertson*, 25 Vt. 603; *Iladen v. Ware*, 15 Ala. 149; *Clark v. Hart*, 57 Ala. 390; *Steinfeld v. Zeckendorf*, 10 Ariz. 221, 86 Pac. 7; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833; *Oswald v. Sproehle*, 16 Ill. App. 368; *Goltra v. Sasack*, 53 Ill. 456; *Ruffner v. McConnel*, 17 Ill. 212, 63 Am. Dec. 362; *Shafer v. Davis*, 13 Ill. 395; *Oiler v. Gard*, 23 Ind. 212; *Allen v. Anderson*, 44 Ind. 395; *Pierson v. Armstrong*, 1 Iowa, 282, 63 Am. Dec. 440; *Casady v. Woodbury County*, 13 Iowa, 113; *Stover v. Poole*, 67 Me. 217; *Carpenter v. Jones*, 44 Md. 625; *Gist v. Drakely*, 2 Gilt, 330, 41 Am. Dec. 426; *Sparks v. Pittman*, 51 Miss. 511; *Price v. Estill*, 87 Mo. 378; *St. Louis v. Priest*, 88 Mo. 612; *Kleimann v. Gieselmann*, 114 Mo. 437, 35 Am. St. Rep. 761, 21 S. W. 796; *Hayes v. Stiger*, 29 N. J. Eq. 196; *Champlin v. Laytin*, 18 Wend. 407, 31 Am. Dec. 382; *Mowatt v. Wright*, 1 Wend. 355, 19 Am. Dec. 508; *Terry v. Moore*, 12 Misc. 641, 67 N. Y. S. R. 499, 33 N. Y. Supp. 846; *Kent v. Manchester*, 29 Barb. 595; *Dupre v. Thompson*, 4 Barb. 279; *Lyon v. Richmond*, 2 Johns. Ch. 51; *Morehead Bkg. Co. v. Morehead*, 124 N. C. 622, 32 S. E. 967, affirming on motion for rehearing 122 N. C. 318, 30 S. E. 331; *Gross*

the effect of this instrument, or, if not, that then there was a deliberate trick of the agent, to destroy the defendant's legal defense to the first note, and give him a meaningless paper under the guise of a protection against the last note. It has been held that this paper was not ambiguous, and could not be explained by parol. *American Harrow Co. v. Dolvin*, 119 Ga. 186, 45 S. E. 983. But we can well understand how there might have been a mutual mistake in regard to its effect. To receive a note, and at the same time give not an actual receipt for it, but an agreement to receipt for it, is unusual. What the parties may have meant, we do not say; but the plea of mutual mistake as to its effect was sufficient to withstand the objection urged against it in its

entirety, in the nature of a general demurrer. In so far as the plea sought to allege that the original contract and note were not what they plainly purported to be, it was insufficient. Nor was it a sufficient plea as to other instruments beside the particular one pleaded, and as to which a mutual mistake of law was alleged. A mere general reference to "other blank forms" required to be signed is no proper plea of mutual mistake as to such instruments as may have thus been signed. No objection, however, appears to have been raised, or ruling made, as to any special part of the plea, but only to the whole. Let it be borne in mind also that for a plea of mutual mistake of law to prove a successful defense, the mistake must have been mutual as to the effect of the in-

v. Leber, 47 Pa. 520; *Good v. Herr*, 7 Watts & S. 253, 42 Am. Dec. 236; *Norman v. Norman*, 26 S. C. 41, 11 S. E. 1096; *Talley v. Courtney*, 1 Heisk. 715; *Farnsworth v. Dinsmore*, 2 Swan. 38; *Lott v. Kaiser*, 61 Tex. 665; *Emerson v. Navarro*, 31 Tex. 334, 98 Am. Dec. 534; *Scott v. Slaughter*, 35 Tex. Civ. App. 524, 80 S. W. 643; *Deseret Nat. Bank v. Dinwoodey*, 17 Utah, 43, 53 Pac. 215; *Proctor v. Thrall*, 22 Vt. 262; *Brown v. Armistead*, 6 Rand. (Va.) 594; *Mackintosh v. Renton*, 3 Wash. Terr. 431, 19 Pac. 144; *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811; *Beard v. Beard*, 25 W. Va. 486, 52 Am. Rep. 219; *Harner v. Price*, 17 W. Va. 523; *Rochester v. Alfred Bank*, 13 Wis. 433, 80 Am. Dec. 746; *Bank of United States v. Daniel*, 12 Pet. 32, 9 L. ed. 989; *Sims v. Lyle*, 4 Wash. C. C. 301, Fed. Cas. No. 12,891; *Sims v. Lyle*, 4 Wash. C. C. 320, Fed. Cas. No. 12,892; *Allen v. Galloway*, 30 Fed. 466; *Taylor v. Holmes*, 14 Fed. 498, affirmed in 127 U. S. 489, 32 L. ed. 179, 8 Sup. Ct. Rep. 1192; *Re Dunham*, 9 Phila. 471, Fed. Cas. No. 4,146; *Midland G. W. R. Co. v. Johnson*, 6 H. L. Cas. 798; *Bilbie v. Lumley*, 2 East, 469; *Cockerell v. Cholmeley*, 1 Russ. & M. 418; *Stewart v. Kennedy*, L. R. 15 App. Cas. 108.

And that a mere mistake of law, without other circumstances, constitutes no ground for the reformation of written contracts. *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85, 25 L. ed. 52; *Griswold v. Hazard*, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999; *Hunt v. Rhodes*, 1 Pet. 1, 7 L. ed. 27; *Stephenson v. Atlas Coal Co.* 147 Ala. 432, 41 So. 301; *Wintermute v. Snyder*, 3 N. J. Eq. 489; *Sparks v. White*, 7 Humph. 86; *Deseret Nat. Bank v. Dinwoodey*, supra.

Except in a few cases of peculiar character. *Hunt v. Rhodes*, supra.

Under this rule, courts of equity do not correct mistakes in law unless other equitable elements occur, such as surprise, undue influence, bad faith, fraud, imposition, and the like. *Sandlin v. Ward*, 94 N. C. 490; *Morehead Bkg. Co. v. Morehead*, supra; *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Williams v. Rhodes*, 81 Ill. 571; *Oiler* 28 L.R.A.(N.S.)

v. Gard; *Stover v. Poole*; *Kent v. Manchester*; *Champlin v. Layton*; *Terry v. Moore*; *Deseret Nat. Bank v. Dinwoodey*; *McDaniels v. Bank of Rutland*; *Brown v. Armistead*; and *Rochester v. Alfred Bank*,—supra.

Parties to contracts are assumed to know the liabilities imposed on them by the law. *Gist v. Drakely*, supra.

And ignorance of the law will not excuse, in a civil case, a wrong done or a right withheld. *Lawrence v. Beaubien*, 2 Bail. L. 623, 23 Am. Dec. 155; *Rochester & K. F. Land Co. v. Davis*, 79 Hun, 69, 29 N. Y. Supp. 1148.

And it does not affect contracts, or excuse a party from the legal consequences of particular acts. *Rankin v. Mortimere*, 7 Watts, 372; *Goltra v. Sanasack*, supra; *Dailey v. Jessup*, 72 Mo. 144.

And when a party with knowledge of all the material facts, and without any special circumstances giving rise to an equity in his behalf, enters into a transaction affecting his interests, rights, and liabilities, under ignorance or error with respect to the rules of law controlling the case, courts will not relieve him from the consequences of his mistake. *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Campbell v. Carter*, 14 Ill. 286.

Nor is ignorance of the law, and a consequent mistake as to title, founded upon such ignorance, ground to rescind agreements, or to set aside the solemn acts of the parties. *Farnsworth v. Dinsmore*, supra; *Trigg v. Read*, 5 Humph. 529, 42 Am. Dec. 447.

Unless there be imposition, misrepresentation, undue influence, misplaced confidence, or suspicion. *Trigg v. Read*, supra.

And the fact that, through some error or misconception on the part of a vendee, his written order was for a larger quantity of goods than he wished, will not, in the absence of fraud, justify a reformation of the order, or constitute a defense in an action for the purchase price of the goods. *J. A. Coates & Sons v. Buck*, 93 Wis. 128, 67 N. W. 23.

So, where a conveyance was such as the parties intended it should be, and the gran-

strument. Mere general statements of omissions avail nothing. "An allegation of fraud, any more than an allegation of mistake, can not be used as a mere cover to bring in an oral agreement, contemporaneous with the note, and in variance with its terms." *Mansfield v. Barber*, 59 Ga. 854; *Smith v. Brooks*, 65 Ga. 356, 360.

4. It is a rule of law that ratification involves knowledge of the facts on the part of the person ratifying, at the time when the ratification is made. But it is also a rule that if an agent exceeds his authority, the principal cannot ratify in part and repudiate in part; he must adopt either the whole or none. Civil Code 1895, § 3021; *Hodnett v. Tatum*, 9 Ga. 70; *Howard v. Cassels*, 105 Ga. 412, 70 Am. St. Rep. 44,

31 S. E. 562; *McLean v. Clark*, 47 Ga. 28. It was alleged in the proposed amendment that the agent had authority to do what he did; but if not, that his acts were ratified; that the settlement, the giving of the new note, and the signing of the paper, were all parts of one transaction; and that the principal could not sue on the note so secured, claim that the defense to the old note had been thereby waived, and thus retain the note, continue to press the suit, and adopt the settlement by which it was obtained only so far as was favorable to him, and reject the balance. If the agent in fact did the acts alleged in the plea, and thus obtained the note, and this was in excess of his authority, upon discovery of the facts, the principal could ratify the whole trans-

tee may, in good conscience, retain the property, a court of chancery will generally refuse its interference, although the grantor may have been mistaken as to the extent of his title. *Stedwell v. Anderson*, 21 Conn. 139.

And the fact that a person is unlearned and ignorant of legal proceedings affords no ground of relief in equity, unless it also appears that he relied for information upon persons against whom relief is sought, and such persons misrepresented the state of facts. *Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146.

And a party who has committed a tortious act in consequence of a mistake of law will not be relieved from the consequences of it by a court of equity, where the other party was not in fault. *Pettes v. Bank of Whitehall*, 17 Vt. 435.

Nor will contracts made on the faith of the law as enunciated in a decision of a court of last resort, in the absence of fraud, misrepresentation, or want of knowledge of all the facts, be set aside because of a subsequent decision by the same court, overruling the former one, since a mistake of law is no ground for relief. *Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co.* 118 Mich. 109, 76 N. W. 395; *Kenyon v. Welty*, 20 Cal. 637, 81 Am. Dec. 137.

And a court of equity will not reform a written instrument by supplying the expression of an intention of the parties, omitted through mistake of law, and not of fact. *Allen v. Anderson*, 44 Ind. 395.

And the word "mistake," used in a statute conferring jurisdiction in equity in cases of mistake, if not in terms limited to mistakes of fact, may be presumed to have been used as it is generally understood in equity. *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 556.

So, where accounting officers of the government have jurisdiction of a claim, their adjustment, in the absence of fraud or mistake of fact, cannot be attacked after payment, and the money recovered back because of their mistake of law. *Mullett v. United States*, 21 Ct. Cl. 485.

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In applying the maxim that ignorance of law does not excuse, however, the courts have, in cases of particular hardship, distinguished between ignorance of the existence of a law, and of its legal effect; and held that parties who entered into a contract under mutual mistake as to the legal effect of a law will be relieved in a court of equity. *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303.

Mistake of law differs from ignorance of the law in that the former is capable of proof, and the latter not. The former acts after reasoning, and the latter without reasoning. *Lawrence v. Beaubien*, supra.

And refusal to charge that the omission of the word "heirs" from a deed was done in ignorance of law, and not from a mistake of law, is not improper, since the request calls for an expression of opinion as to the sufficiency of the testimony. *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976.

And a contract for the sale of lands, made under the mistaken idea that the legislative power would pass laws which would greatly enhance the value of the land, which expectation was the only inducement to entering into the contract, will be relieved from, in equity, if such laws are not passed, and no fault is imputable to the parties to the contract. *Miles v. Stevens*, 3 Pa. St. 21, 45 Am. Dec. 627.

In *Schlesinger v. United States*, 1 Ct. Cl. 16, however, it was said by Casey, Ch. J., that the distinction attempted to be drawn between ignorance and mistake of law, and holding that money paid in ignorance is irrevocable, while that paid under mistake or misconstruction may be sued for and recovered back, is a refinement too subtle to be applied to the everyday business of life.

The rule of this subdivision would seem to be the common-law rule, and it is retained up to the present time in some of the states the courts of which are regarded as of high authority. But the weight of modern judicial opinion seems to lead to the general adoption of a somewhat conflicting rule, which will be hereinafter considered.

action or reject it. Even the suit on the note, if in ignorance of the facts, would perhaps not alone destroy the principal's right to act on discovery of them. But the principal cannot, after knowledge, ratify only so far as to retain the new note and continue to insist on its collection, with whatever advantages it might give, and yet repudiate as unauthorized all the rest of the agent's acts in the same transaction in which the note was obtained. Of course, we do not mean to intimate that there was any fraud or mistake on the part of the agent, but merely to hold that the company cannot, after knowledge of the facts, adopt his acts in part, if he exceeded his authority, and reject the balance. It would be in no worse position by ratification than if

the agent had original authority to act for it, and the same contentions would be open to it; but if it ratifies, it is in no better position, and cannot say that he was without authority in part.

In *Central R. Co. v. James*, 117 Ga. 834, 45 S. E. 224 it was said: "Where the owner of goods does not attend to their shipment in person, but procures another to act in his behalf, who does so without disclosing the name of his principal, the latter is bound by the terms of the contract which his agent makes with the carrier, to the same extent as though the contract was made by the principal in person, irrespective of the question whether the agent did or did not go outside of the authority with which he was vested. This is true for the all-suffi-

2. Construction of instrument.

Mutual mistake as to the construction of a contract will not entitle either party to relief in equity. *Midland G. W. R. Co. v. Johnson*, 6 H. L. Cas. 798; *Sibert v. McAvoy*, 15 Ill. 106.

And equity will not take cognizance of an action brought nominally to reform an instrument, but really to obtain a judicial construction which shall make its meaning certain. *Husted v. Van Ness*, 1 App. Div. 120, 36 N. Y. Supp. 1043.

Nor can a written contract be set aside merely because one of the parties to it put an erroneous construction on the words in which it was expressed. *Wilding v. Sanderson*, [1897] 2 Ch. 534; *Oswald v. Sproehnle*, 16 Ill. App. 368.

The misconstruction of a contract as written is a mistake of law, and not of fact. *Sibert v. McAvoy*, supra.

And that a party to a contract thought the contract meant what the law says it does not mean is not the kind of a mistake that affords a basis for reformation of the instrument, or relief from its terms as the parties wrote them. *Cochran v. Pew*, 159 Pa. 185, 28 Atl. 219.

So, where an executor and a legatee honestly misconstrue a will, and have a settlement in full, based on such misconstruction, the settlement will not be opened merely because of such misconstruction. *Keitt v. Andrews*, 4 Rich. Eq. 349.

And an agreement between two persons forming a partnership for the transaction of a general book and stationery business, one of them to be guaranteed \$2,000 per annum, the same to come out of his half of the profits, but should one half the profits not amount to \$2,000 in the year, he should not be held for any deficiency in the salary account, running a year from date, is a copartnership agreement, and the supposition of the second party that the tract guaranteed him a salary of \$2,000 a year, and half the profits above that sum, but that he should not be liable as partner for any losses in business, was a mistake of law, for which he was not en-

titled to relief. *Woolworth v. McPherson*, 55 Fed. 558.

So, where a deed embraced three distinct parcels of land, but excepted therefrom a street theretofore deeded to the city and embraced in the lot, the words of the exception are descriptive only, and it makes no difference whether the street was ever deeded or not; and if the ground can be identified, title does not pass under the deed, and the grantee is not entitled to have the deed reformed. *Rushton v. Hallett*, 8 Utah, 277, 30 Pac. 1014.

3. Mistake or ignorance as to legal consequences.

(a) General rules.

The general rule, subject to some modifications as well as some conflict in cases in which the mistake will result in a failure to effectuate the intention of the parties, to effectuate which is regarded by many of the cases as the primary object of equitable jurisdiction,—appears to be that where an instrument speaks the true agreement between the parties, equity will not reform it because one or both of them may have mistaken its legal consequences. *Moore v. Tate*, 114 Ala. 582, 21 So. 820; *Trapp v. Moore*, 21 Ala. 693; *Orr v. Echols*, 119 Ala. 340, 24 So. 357; *Larkins v. Bidde*, 21 Ala. 252; *Ohlander v. Dexter*, 97 Ala. 476, 12 So. 51; *Rector v. Collins*, 46 Ark. 167, 55 Am. Rep. 571; *Freed v. Brown*, 41 Ark. 495; *Parsons v. Fairbanks*, 22 Cal. 343; *Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142; *Calverly v. Harper*, 40 Ill. App. 96; *Wood v. Price*, 46 Ill. 439; *Coffing v. Taylor*, 16 Ill. 457; *Sibert v. McAvoy*, 15 Ill. 106; *Gordere v. Downing*, 18 Ill. 492; *Heavenridge v. Mondy*, 49 Ind. 434; *Easter v. Severin*, 78 Ind. 540; *Oiler v. Gard*, 23 Ind. 212; *Marshall v. Westrope*, 98 Iowa, 324, 67 N. W. 257; *Corning v. Grohe*, 65 Iowa, 328, 21 N. W. 662; *Gerald v. Elley*, 45 Iowa, 322; *Fisher v. May*, 2 Bibb, 448, 5 Am. Dec. 626; *Overstreet v. Mouser*, 14 Ky. L. Rep. 480; *Taylor v. Buttrick*, 165 Mass. 547, 52 Am. St. Rep. 530, 43 N. E.

cient reason that the principal cannot take advantage of the contract made in his behalf without fully ratifying the act of his agent and becoming bound thereby." In *Southern R. Co. v. Parramore*, 119 Ga. 692, 46 S. E. 822, this statement was quoted approvingly. In *Supreme Conclave K. of D. v. O'Connell*, 107 Ga. 101, 32 S. E. 948, it was said: "It is a well-recognized principle of law that a principal can take no benefit from a contract into which his agent has fraudulently induced a third party to enter; for the principal cannot in part ratify and in part repudiate the act of his agent in effecting the contract." See also *Atlas Tack Co. v. Exchange Bank*, 111 Ga. 703, 36 S. E. 939; *Lamar v. Pearre*, 90 Ga. 378, 17 S. E. 92 (5); *Lewis v. Equitable Mortg.*

507; *Holmes v. Hall*, 8 Mich. 66, 77 Am. Dec. 444; *Renard v. Clink*, 91 Mich. 1, 30 Am.-St. Rep. 458, 50 N. W. 652; *Miller v. Brooks*, 109 Mich. 174, 66 N. W. 1092; *St. Anthony Falls Water-Power Co. v. Merri-man*, 35 Minn. 42, 27 N. W. 199; *Paine v. Smith*, 33 Minn. 495, 24 N. W. 305; *Corri-gan v. Jones*, 100 Mo. 276, 13 S. W. 401; *Durand v. Bacht*, 13 N. J. Eq. 201; *Rochester & K. F. Land Co. v. Davis*, 79 Hun, 69, 29 N. Y. Supp. 1148; *Fellows v. Heermans*, 4 Lans. 230; *Pitcher v. Hennessey*, 48 N. Y. 415; *Arthur v. Arthur*, 10 Barb. 9; *Wemple v. Hauenstein*, 19 App. Div. 552, 46 N. Y. Supp. 288; *Kent v. Manchester*, 29 Barb. 595; *Garnar v. Bird*, 57 Barb. 277; *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616; *McAninch v. Laughlin*, 13 Pa. 371; *Strickland v. Farmers' Bank*, 6 Pa. 41; *Porter v. Jefferies*, 40 S. C. 32, 18 S. E. 229; *Dow v. Ker*, Speers, Eq. 413; *Talley v. Courtney*, 1 Heisk. 715; *Boyce v. Stanton*, 15 Lea, 346; *Lott v. Kaiser*, 61 Tex. 665; *Andrus v. Blazzard*, 23 Utah, 233, 54 L.R.A. 354, 63 Pac. 888; *Neff v. Rains*, 33 Wis. 689; *Hunt v. Rhodes*, 1 Pet. 1, 7 L. ed. 27; *Re Railway Time Tables Pub. Co.* L. R. 42 Ch. Div. 98.

In the absence of fraud or mistake of fact. *Parsons v. Fairbanks and Gordere v. Downing*, supra.

And this is especially true when the rights of creditors intervene. *Holmes v. Hall*, supra.

Under this rule, ignorance of a party's legal right at the time he makes a contract is no ground for avoiding it. *Hutton v. Edgerton*, 6 S. C. 485; *Broadwell v. Broadwell*, 6 Ill. 599.

And a mistake on the part of a person executing an instrument, as to its legal effect, or that it has an effect different from that intended, cannot avail to avoid that construction of the instrument which the language used, and the rules of law, as applied thereto, require. *Moorman v. Collier*, 32 Iowa, 138.

Nor will a mistake in the legal meaning of words used in a deed or other contract, or in the proper construction of the words 28 L.R.A.(N.S.)

Co. 94 Ga. 573, 21 S. E. 224 (2). In *De Vaughn v. McLeroy*, 82 Ga. 700, 10 S. E. 214, it is said that "to bind a person by a ratification of an illegal or void act, it must be shown that such person had full knowledge, at the time of the alleged ratification, of the facts which make such act illegal or void." But on page 701 of 82 Ga., it is said: "It is true, if the award involves the interest of T. E. B. McLeroy in the land which his heirs are now suing for, that his suit for the money awarded to him in the adjustment of his money demand against his guardian, and the transfer of the judgment which he obtained, would also be a ratification of the award upon his interest in the land; because it is a plain, elementary principle of law, sustained by all au-

employed, or as to the legal effect of those words, where no fraud, undue influence, or imposition has been used, afford any equitable ground for a reformation of the instrument, such mistake being one of law. *Fowler v. Black*, 136 Ill. 363, 11 L.R.A. 670, 26 N. E. 596.

And a company entering into a contract cannot claim a reformation of the contract on the ground that there was a mutual mistake in a reservation clause therein, where it appears that the original reservation clause was drawn by the counsel for the company, or was entirely satisfactory to him, and that the only mistake therein was one of law as to the effect of the reservation. *Western U. Teleg. Co. v. Shepard*, 49 App. Div. 345, 63 N. Y. Supp. 435.

Nor will relief from a contract be given by equity on application of a party who knew just what his bargain was, and just how much of it was set out in the contract, and that part of it was omitted, and knew exactly what he was doing, though it is possible he did not fully understand the legal effect of his acts. *Roemer v. Conlon*, 45 N. J. Eq. 234, 19 Atl. 664.

And if an agreement or written instrument expresses the thought and intention which the parties had at the time and in the act concluding it, no relief, affirmative or defensive, will be granted with respect to it, upon the assumption that their intention and thought would have been different if they had not been mistaken as to the legal meaning and effect of the terms and provisions by which such intention is embodied and expressed. *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892.

And where the facts are known to both parties to a contract, and each acts on his own judgment, the court will not rescind it because it may or does turn out that they or either of them were mistaken as to the legal effect of the facts or the rights or obligations of the parties thereunder, and particularly when such mistake can in no way injuriously affect the rights of the party complaining under the contract, or prevent him from obtaining and

thority, that he could not ratify what was advantageous to him, and repudiate what was against his interests." See also *Harrell v. Terrell*, 125 Ga. 379, 54 S. E. 116. In *Smith v. Hodson*, 4 T. R. 211, it was held, that "if a bankrupt, on the eve of his bankruptcy . . . fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in trover; but if they bring assumpsit, they affirm the contract, and then the creditor may set off his debt." In *Peters v. Ballistier*, 3 Pick. 495, 505, it was held that where assumpsit was brought for the proceeds of a sale, if insisted on, it ratified the sale; but if the plaintiff discovered his error, dismissed the action of assumpsit, and brought an action of trover

receiving all the benefit contemplated by it, and to which he is entitled under it. *Seeley v. Reed*, 25 Fed. 361.

So, an erroneous opinion as to the legal effect and operation of a conveyance is a mistake of law, which furnishes no ground for a reformation of the deed. *Kelly v. Turner*, 74 Ala. 513.

And where the parties to a contract adopt a security which is to be used to effectuate their intention, if the security should fail, from ignorance of the law, or from any other cause, to operate as the parties intended, the courts cannot substitute any other security for the one adopted. *Lanning v. Carpenter*, 48 N. Y. 408.

And where the evidence in a case discloses simply a mistake of law in a grantor in supposing his deed could be delivered after his death, and not a mistake of fact, in having a clause inserted therein, that it was not to be delivered until his death, a court of equity will not reform the deed by striking out the clause. *Griffin v. Miller*, 188 Mo. 327, 87 S. W. 455.

(b) Application to particular cases.

(1) Deeds, mortgages, leases, etc.

Within the rule that ignorance or mistake of law does not excuse, a mistake of the parties as to the effect and validity of a deed is a mistake of law, which will not authorize a reformation of the instrument. *Morton v. Morris*, 27 Tex. Civ. App. 262, 66 S. W. 94; *Kopp v. Gunther*, 95 Cal. 63, 30 Pac. 301; *Lawrence v. Lawrence*, 181 Ill. 248, 54 N. E. 918; *Toops v. Snyder*, 70 Ind. 554; *Wetmore v. Holsman*, 14 Abb. Pr. 311, 23 How. Pr. 202.

And a mistake upon the part of the parties in supposing that the making of certain deeds would not impair or destroy a life estate of one of the parties is a mistake as to the legal effect and force of the deeds, and one which cannot be corrected in equity. *Allen v. Anderson*, 44 Ind. 395.

And the placing of words limiting an estate conveyed in a deed in the habendum in-

for the property, this did not amount to a ratification. In the case before us, apparently the principal must have known of the taking of the original note, and that the agent had it for settlement. It received the new note which the agent obtained, and brought suit on it. For other cases on the subject of ratification by suit, see also *Ingraham v. Barber*, 72 Ga. 158; *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947; *Thomas v. Bagley*, 119 Ga. 780, 47 S. E. 177; *Franklin v. Ezell*, 1 Sneed, 497; *Beidman v. Goodell*, 56 Iowa, 592, 9 N. W. 900; *Partridge v. White*, 59 Me. 564; *Reinhard, Agency*, § 123, and note; *D. M. Osborn Co. v. Jordan*, 52 Neb. 465, 72 N. W. 479; *Eadie v. Ashbaugh*, 44 Iowa, 519; *Plano Mfg. Co. v. Millage*, 14 S. D. 331,

stead of in the premises thereof is a mistake in law of the draftsman and the parties, and not a mistake of fact of the draftsman. *Condor v. Secrest*, 149 N. C. 201, 62 S. E. 921.

Nor can a person who takes a deed, relying upon a recital in it of the number of acres conveyed as a guaranty of the quantity, thereby mistaking the legal effect of the instrument, obtain relief in equity upon that ground. *Martin v. Hamlin*, 18 Mich. 355, 100 Am. Dec. 181.

And parol evidence is inadmissible to show that a grantor, in describing the boundaries of land sold in a deed, supposed that the words used would have an effect different from that which the law affixes to them. *Farley v. Bryant*, 32 Me. 474.

So, where a purchaser of certain real property caused the conveyance thereof to be made to his wife, under the impression that, in the event of her death, it would descend to him, such mistake does not entitle him, on the death of his wife, to a reformation of the deed, as against the children of himself and wife. *Dever v. Dever*, 19 Ky. L. Rep. 1988, 44 S. W. 986.

And the use of the words "their bodily heirs" in a deed to the grantor's daughter and her husband, under the impression that all of the children of the daughter, though by other husbands, would take, is a mistake of law, and cannot be corrected in equity, where the grantor knew that the word "their" was used before he signed the deed, but insisted that he knew the legal effect thereof, and that it expressed his meaning. *Atherton v. Roche*, 192 Ill. 252, 55 L.R.A. 591, 61 N. E. 357.

In the above case, *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892, *infra*, IV. c, 2, and *Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925, *infra*, IV. c, 1, were distinguished on the ground that in both those cases words were inserted in the deeds sought to be reformed without the procurement, knowledge, or consent of the grantees, which limited the title to a life estate in the grantees.

So, a mistake as to the law of descents, where the intention in making a deed was

85 N. W. 594; *Joslin v. Miller*, 14 Neb. 91, 15 N. W. 214; *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210, 13 N. W. 202; *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614; 1 Clark & S. Agency, § 142 (a). In *Johnston v. Milwaukee & W. Invest. Co.* 49 Neb. 68, 68 N. W. 383 (8), it was held as follows: "In the case at bar, plaintiff commenced an action of replevin to recover of the defendants certain cattle, the possession of which had been acquired by defendants through an alleged unauthorized sale of the cattle to them by an agent of plaintiff. The defendants' answer was a general denial. After the commencement of the action, but before trial, the plaintiff gained knowledge that it had received the benefit of a portion of the proceeds of the unauthorized sale. Held, that it should

then have returned to the defendants so much of the proceeds of the sale as had been applied to its benefit, or tendered such return, and its failure to do so would be a ratification of the sale, which related back to its inception, and which could be proved on the trial by defendants under the general denial, and without the filing on their part of a supplemental answer setting up such ratification." *Farmers' & M. Bank v. Farmers' & M. Nat. Bank*, 49 Neb. 379, 68 N. W. 488. The present case differs from that of *Graham v. Williams*, 114 Ga. 716, 40 S. E. 790, in which it was held that a plaintiff must have a cause of action when he brings suit, and that if the defendant has a complete defense at the time suit is brought, he cannot be deprived thereof by a third party ratifying a deed which, at

to vest the estate descending in the grantee, affords no ground for relief in equity. *Thompson v. Thompson*, 18 Ohio St. 73.

And where lands were conveyed by a father to his daughter and her husband, and afterwards the husband died and the widow joined with the children in disposing of the property, supposing that she owned a half interest therein, equity will afford her no relief upon her discovery that, as survivor of her husband, she was entitled to the whole land, since her mistake as to her rights was a mistake of law. *Zollman v. Moore*, 21 Gratt. 313.

So, where the consent of the owner of land to the laying out or altering of a highway across his lands is given under a mistake of law, no relief in equity can be given him. *Marble v. Whitney*, 28 N. Y. 297.

And where a loan was made and an absolute deed was agreed upon as security, and it did not appear that either party understood the legal distinction between a deed and a mortgage, or knew that a contemporaneous agreement for a defeasance might make an apparently absolute deed a mortgage, and a deed and defeasance agreement were executed, the lender is not entitled to have the instrument reformed so as to make it an absolute deed. *Ackerman v. Begrish* (N. J. Eq.) 50 Atl. 673.

So, although, in the absence of direct proof of intention, equity will intend a merger or the contrary, from the interests of a party taking a deed being in one direction or the other, it cannot prevent a merger contrary to his interest, where he clearly intended to do the acts which legally effect a merger, although he may have done them under an erroneous view of their legal consequences. *Loomer v. Wheelwright*, 3 Sandf. Ch. 135.

And where a complainant alleged that he was induced to execute certain deeds by the false representations of the defendants and through his own ignorance of the fact that the lands had been owned by his mother, and devised by her to him, and the evi-

dence failed to substantiate the bill, he could not be allowed to change his position, and claim relief on the ground that, although he voluntarily executed the deeds to the defendants, he did so under a mistake as to the extent of his interest in the lands conveyed. *Pasman v. Montague*, 30 N. J. Eq. 385.

And where grantors had contracted to sell a building to grantees, with the land on which it stood, and the deed was drawn without including a right of way across a piece of ground in front of the buildings, long used in connection therewith by the grantors before the conveyance, and by the grantees afterwards, with their acquiescence, and which was of little value for any other purpose, the deed will not be reformed in equity at the grantees' instance, so as to include such grant, although they supposed at the time of delivery that it was included in the grant by legal effect. *Mullin v. Eaton* (N. H.) 19 Atl. 371.

A deed absolute in form, however, if given to secure the payment of a debt, will be treated in equity as a mortgage; and the facts and circumstances attending its execution may be shown by parol evidence. *Ahern v. McCarthy*, 107 Cal. 382, 40 Pac. 482.

But to convert a deed absolute on its face into a mortgage, it must be alleged and proved that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage taken of the bargainor. *Briant v. Corpening*, 62 N. C. (Phill. Eq.) 325.

So, a stranger who voluntarily pays money due on a mortgage, and fails to take an assignment thereof, but allows it to be canceled and discharged, cannot afterwards come into equity, and, in the absence of fraud, accident, or mistake of fact, have the mortgage reinstated, and himself substituted in the place of the mortgagee. *Guy v. DuUprey*, 16 Cal. 196, 76 Am. Dec. 518; *Bentley v. Whittemore*, 18 N. J. Eq. 366.

And where a person purchases land sub-

the commencement of the suit, was without binding force for want of such ratification. It also differs from *Baldwin Fertilizer Co. v. Thompson*, 106 Ga. 480, 32 S. E. 591, where the principal only received notes to the possession of which it was legally entitled regardless of the agreement of the agent.

If anything said in this opinion apparently is not in accord with what was said when the case was here before, it will readily be explained by noticing the difference in the questions then and now involved, and the points then and now decided. It was then sought to introduce parol evidence, on the ground that the paper given by the agent was ambiguous. This evidence was admitted, and the judge charged on the basis of it, including a charge on the sub-

ject of ratification. The rulings were that the evidence was erroneously admitted, and that the charge based on it was therefore also error. There was some discussion as to the evidence of ratification, and other evidence, but this is to be construed in reference to the questions involved. Here a plea was rejected, on objection in the nature of a demurrer, which plea alleged original authority, or, if none, ratification. We rule nothing as to the facts as they may appear from the evidence. This decision is based on the pleadings. As the error in the rulings in regard to the pleas was fundamental, it is needless to discuss further points in the trial.

Judgment reversed.

All the Justices concur.

ject to two mortgages, and, after paying them, cancels them on the record, and in consequence the land is sold under the lien of a judgment subsequent to the mortgages, but prior to the deed, of which he was ignorant, he will not be relieved in equity on the ground that he was ignorant of the legal effect of the cancelation. *Garwood v. Eldridge*, 2 N. J. Eq. 145, 34 Am. Dec. 195.

And if a mortgage on lands is paid off by the purchaser of the equity of redemption, and canceled in effect and on the record by the purchaser while under the misapprehension that his title is good, he cannot, upon the discovery that his title is not good, have the canceling set aside and the mortgage declared in force, on the ground that had he then known of the defect in his title, he would have taken an assignment of the mortgage to protect his title; the mistake must be a mistake as to matter of fact, and not as to a question of law. *Bentley v. Whittemore*, supra.

And a complaint alleging that a conveyance to mortgagees in satisfaction of the mortgage debt was made upon the mistaken belief that the mortgages and notes secured thereby were valid, shows merely a mistake of law, against which equity will not relieve. *Kyes v. Merrill Furniture Co.* 92 Wis. 32, 65 N. W. 735.

And where a mortgagee bid in property for a much larger sum than the amount due by the decree of sale, under the advice of counsel that he would not be required to pay over any surplus to the mortgagor, and being advised that he is entitled to retain such surplus, because he is already the owner of the property so sold, he is not entitled to be relieved from his bid on the alleged ground that he acted under a mistake. *Shear v. Robinson*, 18 Fla. 379.

So, where a mortgage bore interest at 8 per cent during its currency, and this was regularly paid, and the mortgage was not paid when it was due, and in ignorance upon the part of both parties that only 6

per cent interest accrued after it became due, the mortgagor continued to pay 8 per cent, the excess cannot be recovered back, as money paid under mistake, nor can it be applied in reduction of the principal in a redemption action. *Stewart v. Ferguson*, 31 Ont. Rep. 112.

Nor is the intention of a mortgagee, or his understanding of the effect of an assignment of a mortgage, material in an action involving such assignment, in the absence of any allegation that any fraud was practised upon him to induce him to make it. *Dixon v. Clayville*, 44 Md. 573.

And where an instrument in writing accurately expressed the intent and meaning of the parties to the agreement, the fact that they thought it was a mortgage, when it was in fact a conditional sale, does not change its character or effect, or furnish ground for a reformation. *Hershey v. Luce*, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6.

And where two mortgages were foreclosed by advertisement, and the holders of the mortgages purchased at the sale, and included in their bid attorneys' fees, which they believed to be authorized by the terms of the mortgages, but which were not, and no redemption was made, and the owner brought action to recover the amount of such attorneys' fees, as a part of the surplus, and the lots had depreciated in value one half between the time of the sale and the beginning of the action, the purchasers were not entitled to have the foreclosure sale set aside and a resale ordered, or to defeat the action by tendering a deed of the lots upon being paid the amount due on the mortgages. *Truesdale v. Sidle*, 65 Minn. 315, 67 N. W. 1004.

Nor does a mistake of law by one of the parties to a contract, in believing that a prior mortgage deed gave an indefeasible legal title, when in other respects the deed was fairly executed, entitle the person making the mistake to relief in a court of equity. *Rankin v. Mortimere*, 7 Watts, 372.

And where a person paid a mortgage under a mistaken supposition that he was the owner of the property, or that, as executor of his deceased wife, he was bound to pay it, she having executed the mortgage in her lifetime, his mistake is nothing but a misapprehension of the law, against which equity does not relieve. *Peters v. Florence*, 38 Pa. 194.

Attention is here called to the fact that apparently a majority of the cases have taken the position that equity will reinstate a mortgage released in ignorance of an intervening lien, as being the result of combined mistake of law and of fact, and as a circumvention of the intentions of the parties. These cases will be found in *infra*, IV. c, 3, (c), (2).

So, executors who execute a mortgage containing their personal covenant, supposing that they are binding only their testator's estate, make a mistake as to the proper construction of a written instrument, against which mistake a court of equity will not give relief. *Porter v. Jefferies*, 40 S. C. 92, 18 S. E. 229.

And executors having represented all the land embraced in a mortgage given by them to be the land of their testator, whereas a portion of it was not, cannot, when sued for the breach of their personal warranty, claim that the mortgagee is estopped by the representations of his attorney at the time of the execution of the mortgage, to the effect that their covenant did not bind them personally, especially where such attorney was the attorney for all the parties to the instrument. *Ibid*.

And a person who has been made defendant in a foreclosure suit as a subsequent purchaser, and believing that he had title to the premises, has agreed, in consideration of an extension of time, personally to pay the decree, cannot avoid liability on his undertaking by showing that his title to the premises has proved defective, and that he made the agreement upon the belief that his title was good. *Tenney v. Hand*, 32 Mich. 63.

So, a mutual mistake of law as to the validity of a consolidated lease under which money was voluntarily paid, in and of itself affords no ground for recovering back the money. *Scott v. Slaughter*, 35 Tex. Civ. App. 524, 80 S. W. 643.

And where a society desiring a lodge room agreed to construct the same as a second story of an existing building, under an agreement with the owner of the building that the society should be the owner of the second story in fee during the life of the building, and, to carry out this intention, one of the members of the lodge informed it that he had been advised that the proper instrument to be executed for the purpose was a lease for ninety-nine years, which was accordingly executed, both parties fully understanding the language used in the instrument, the mistake being as to its effect, there can be no reformation, the mistake being one purely of law. *Tilton v. 28 L.R.A.(N.S.)*

Fairmount Lodge. No. 590, A. F. & A. M. 244 Ill. 617, 91 N. E. 644.

And where a lease of a dwelling house, with the furniture therein, was executed, a schedule whereof was to be made and attached to the lease upon the lessee taking possession, and in the negotiations prior to its execution the lessor agreed to supply certain deficiencies in the furniture, and have the house completely furnished by the beginning of the term, but the lease contained no covenants as to additions to the furniture, and the lessor then again promised to complete the furniture, and persuaded the lessee to sign the lease without the provision in it, after which the lessor refused to perform the promise, the facts do not bring the case within the jurisdiction of a court of equity to reform or cancel the instrument. *Wilson v. Deen*, 74 N. Y. 531.

So, where an owner, under threat of payment of principal, agreed to reduce a ground rent from 6 to 5 per cent, and both of the parties were ignorant at the time of the decision of the supreme court that such a ground rent as was in question was an irredeemable one, a bill will not lie by the owner of the ground rent to cancel the agreement for mistake. *Norris v. Crowe*, 206 Pa. 438, 98 Am. St. Rep. 783, 55 Atl. 1125.

And inadequacy of consideration and weakness of mind of the plaintiff are immaterial averments in a complaint to reform a lease on the ground of mistake of the lessor, known or suspected by the lessee, and no findings need be made thereon. *Wilson v. Moriarty*, 88 Cal. 207, 26 Pac. 85.

Nor will a bill in equity lie to cancel an agreement to reduce a ground rent, as made in mistake of law, where the plaintiff has a complete remedy at law by an action to recover the ground rent, as provided for in the original agreement. *Norris v. Crowe, supra*.

But where a lessee, after accepting a lease of land and water rights, discovers that another person lays claim to the water rights, and the lessor thereupon insists that he is entitled to the rent, but promises to do whatever his contract calls upon him to do, and, if the contract requires it, to stand between the lessee and the other claimant, the rent which the lessee is afterwards forced to pay to such claimant when the proprietorship of the water rights has been established may be recovered from the lessor. *Bedell v. Wilder*, 65 Vt. 406, 36 Am. St. Rep. 871, 26 Atl. 589.

(2) Bonds, common contracts, and other miscellaneous matters.

If the obligees of a joint bond given by two or more agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief against the legal consequences, although the release was under a

manifest misapprehension of the legal effect of it in relation to the other obligors. *Hunt v. Rhodes*, 1 Pet. 1, 7 L. ed. 27.

And a release of one obligor will discharge a co-obligor, although executed upon the trial of an action against the latter, to render the obligor competent as a witness, and under a mistake as to the legal effect of the release; and the co-obligor may at once take advantage of the fact by plea, and equity will not intervene to relieve the plaintiff from the consequences of his act. *Bell v. Steel*, 2 Humph. 148.

So, a bond given to an officer for the release of attached property, which was intended as a delivery bond, but which bound the obligor to pay the judgment rendered against the attachment defendant, is binding upon the obligor for the payment of the judgment. *Moorman v. Collier*, 32 Iowa, 138.

And where, when a person signed a bond to stay execution, he inquired of the justice of the peace who took it, what was its legal import and effect, and to what extent he would be liable upon it, and was informed in reply that it was only to secure costs, he cannot have the bond reformed so as to impose liability for costs only, since his mistake as to the legal effect of his act cannot deprive the plaintiff, for whose benefit the bond was given, of his right. *McMinn v. Patton*, 92 N. C. 371.

So, where a bond is given to dissolve a garnishment, the surety cannot set up by plea in defense that he supposed when he signed the bond that he would be liable for only so much money as the garnishee had in his hands, or as he might become possessed of, belonging to the defendants, such ignorance or mistake of law being neither induced nor participated in by the other party, and there being no fraud, deception, artifice, or misplaced confidence influencing his action. *Nevin v. Fouche*, 77 Ga. 47.

And where, pending an action commenced by attachment, the defendant directed a scrivener to prepare a delivery bond, and the bond as drawn was conditioned to pay whatever judgments might be rendered against the defendant, and was signed by him in ignorance of its legal effect, such ignorance does not afford ground for equitable relief. *Glenn v. Statler*, 42 Iowa, 107.

Nor will a serious depreciation in the value of land after the time of its purchase, the vendor and vendee having bargained on equal terms, in the absence of proof of fraud, misrepresentation, or concealment of any material fact on the part of the vendor, by which the purchaser was betrayed into an unfortunate speculation, discharge the surety of the purchaser. *Pascault v. Cochran*, 34 Fed. 358.

And ignorance of the legal effect of accepting the bond of one partner for a simple contract debt due by the firm is not a ground for relief in equity. *Williams v. Hodgson*, 2 Harr. & J. 474, 3 Am. Dec. 563.

Nor is it a defense to a suit on a note that the defendant signed it jointly with a corporation of which he was a director, in 28 L.R.A. (N.S.)

the mistaken belief that it was necessary for him to sign, in order to bind the company, and that he did not intend to bind himself personally. *Maledon v. Leflore*, 62 Ark. 387, 35 S. W. 1102.

And where officers of a corporation sign a note with their individual names, adding thereto "president" and "secretary," respectively, there being nothing on the face of the note indicating a principal behind them, they are personally bound, and cannot maintain a proceeding for the reformation of the note, where their only interest in reforming the contract is to relieve themselves from liability thereon, and to show it was not their contract, but that of the corporation. *San Bernardino Nat. Bank v. Andreson* (Cal.) 32 Pac. 168.

So, a person who indorses his name on a note or bill, supposing he is binding himself as an indorser, and not as a security, commits an error of law from which he cannot have relief, when he was not led into it by the other party. *Smith v. Gorton*, 10 La. 374.

And where a person had indorsed a promissory note for accommodation of the maker, and the indorsee had signed the agreement to accept from the maker a specific sum in full of his demand on having a collateral security for that sum, and it appeared that the agent of the maker had represented to the indorsee before he signed the agreement that the maker would continue liable for the residue of the debt secured by the note, the agreement having the effect of discharging the security, the representation, being as to the legal effect of the agreement, is immaterial, and does not have the effect of avoiding it. *Lewis v. Jones*, 4 Barn. & C. 512.

So, the surrender of an old promissory note is a sufficient consideration for a new one executed by a surety, although the surety had been released from payment of the old note by the action of the insolvent principal, where both parties knew the substantial facts, but, being ignorant of the law, in good faith supposed the surety was liable for the old note. *Churchill v. Bradley*, 58 Vt. 403, 56 Am. Rep. 563, 5 Atl. 189.

And a promissory note payable a specified term after date, with interest from date at a rate higher than the legal rate, will not be reformed in chancery by adding the words, "until paid," after the words, "from date," although the parties intended it to bear interest at the higher rate after as well as before maturity, if the note was written as the parties intended to write it, and the words, "until paid," were omitted by a mistake as to the legal effect of the omission. *Hicks v. Coody*, 49 Ark. 425, 5 S. W. 714.

So, when relief is sought in one action from a purchase made by a mistake of law as to the effect of a decree rendered in another action, the ordinary rules as to mistakes of law apply, and from such mistakes courts of equity will seldom relieve. *Goode-now v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540.

And a purchaser at a foreclosure sale

cannot be reimbursed in the amount bid, though he acted under a mistake as to the effect of the decree and sale thereunder, that mistake being one of law, against which a court of equity will not relieve unless the mistake be accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence. *Ibid.*

So, a purchaser mistakenly believing that a judgment under which he purchased at sheriff's sale was older than a mortgage lien cannot thereafter be relieved of his bid upon the ground of mistake of fact, the mortgage being of record. *Norman v. Norman*, 26 S. C. 41, 11 S. E. 1096.

But where the sheriff at an execution sale led the purchaser to believe that the surplus of his bid, after satisfying the execution, would be applied to the extinguishment of a certain mortgage which was a prior lien upon the premises, and the purchaser bid enough to satisfy both liens, expecting to receive an unencumbered title to the property, and the other lien was not satisfied, the mistake is one of fact, and equity will grant relief by setting aside the sale. *Bay v. Harnett*, 58 Iowa, 344, 12 N. W. 336.

And whether a court of equity has or has not the power to vacate the satisfaction of a judgment, and open it for further process, because the purchaser, under a mistake, bid off property to which the debtor had no title, it will not permit such a sale to prejudice a party in a case over which it has unquestioned jurisdiction. *Hollister v. Dillon*, 4 Ohio St. 198.

And equity will relieve against a mistake in the quantity of land sold at a judicial sale where the mistake is such that relief would have been granted had the sale been a private one. *Miller v. Craig*, 83 Ky. 623, 4 Am. St. Rep. 179.

And where, at a judicial sale of land for the payment of the debts of a decedent, a tract of land supposed to contain 40 acres, when in fact it contained 120 acres, is sold, the heir of the decedent, all of the debts having been paid, may recover from the purchaser the excess of 88 acres, he being allowed to elect on which side he will have 40 acres laid off to him, or to take the whole tract, paying for the excess at the rate of his bid. *Ibid.*

So, where distribution had been made of the estate of an intestate among those who were supposed to be his collateral heirs at law, and all of them joined in a release to the payer, one of them cannot afterwards recover a greater amount, on the ground of their mutual mistake of the law as to who were the heirs at law of the intestate. *Good v. Herr*, 7 Watts & S. 253, 42 Am. Dec. 236.

And where a woman who was aunt of the half blood and cousin of the whole blood to a decedent, in accordance with a legal opinion misinterpreting a Delaware statute, accepted as her portion of the intestate's real estate such portion only as she was entitled to as cousin, with the heirs of the half blood excluded, while she was also en-

titled by law to a portion as aunt of the half blood, and having, under erroneous advice, conveyed away her inheritance, she made a mistake of law, and not a mistake of mixed law and fact, and will not be relieved in equity by a decree for a reconveyance, especially where the parties cannot be placed in *statu quo*. *Hamblin v. Bishop*, 41 Fed. 74.

But where a half interest in common in a lot descended to a man, and under a mistake as to the law of descent, he thought that his brother owned the lot in severalty, and they owned adjoining lots, and executed a joint mineral lease of the several tracts owned by them in severalty, including the lot in question, the lease did not convey the interest of the party who supposed he owned nothing in the lot, since it was executed under a material mistake as to the ownership; but where the lessee has transferred the lease to a third person, who knows nothing of the facts, the latter is entitled to rely on the execution of the lease by such party as passing his interest in the lot, and equity will not reform the lease in a suit against the transferee. *Harlan v. Central Phosphate Co.* (Tenn.) 62 S. W. 614.

So, where a man willed a lot of land to his wife, and subsequently, before his death, traded the lot for other lands, the wife joining in the conveyance, both being assured by the person who drew the deed, and believing, that the exchange of farms would not alter the will or affect the devise to the wife except to give her the land received in exchange, in lieu of the lot devised to her, and the testator afterwards died without having altered his will, leaving no real estate except the lands received by him in exchange, a court of equity has no power to correct their mistake as to the effect of the exchange of lots, it being a mistake of law. *Gilbert v. Gilbert*, 9 Barb. 532.

And where, under action for the settlement of a testator's estate, all the children of the testator being parties thereto, a tract of land was purchased at its full value by one of the children, who was advised by counsel and believed that he was purchasing a fee-simple title, and he took a deed and gave a mortgage for a portion of the purchase price, and went into possession, he cannot resist foreclosure of the mortgage on the ground that he was mistaken in supposing that he had purchased a fee-simple title, for whether he erred in construing the testator's will to give the testator's children an absolute estate, or in supposing that contingent remaindermen provided for in it were not necessary parties to the action under which the sale was made, it was a mistake of law, and not such as would be relieved against in the action for foreclosure. If entitled to any relief at all, it must have been in the original case still pending in which the order of sale was made. *Munro v. Long*, 35 S. C. 354, 28 Am. St. Rep. 851, 14 S. E. 824.

Nor is a mistake made either in the construction of a will, or in supposing that

the rights of contingent remaindermen would be barred by an order of sale made in a cause to which they were not parties, sufficient to warrant equitable relief. *Ibid.*

And an executor who buys lands of the estate for which he is executor of his co-executors, under the belief that the will gave authority to them to sell, cannot be relieved in equity from the consequences of his mistake, where he was not ignorant of any fact connected with the title to the premises, or connected with the authority of the vendors to sell and convey them, but relied solely upon his ignorance of the law with reference to the authority to sell. *Dill v. Shahan*, 25 Ala. 694, 60 Am. Dec. 540.

So, an estate of a deceased person is not liable to pay for mourning apparel purchased after his death by his family, and one who furnishes such apparel, believing the estate to be liable for it, expressly stipulating that the would resort only to the estate for his pay, cannot maintain an action therefor against any of the family upon an implied promise. *Jenks v. Mathews*, 31 Me. 318.

And where a man deposited a sum of money in a bank, and received a certificate of deposit, setting forth the deposit of the money by him, and stating that the same was payable to the order of himself or his wife on the return of the certificate, and the man died before the money was withdrawn, and after his death his wife presented the certificate, and drew the money, the paying teller of the bank, knowing of the death of the depositor at the time, if, in making the payment, he mistook the law, supposing he had a right to pay the wife after the death of the husband, the bank, whose agent he was, must suffer the consequences. *Second Nat. Bank v. Wrightson*, 63 Md. 81.

But where the heir at law of a shareholder in a company, the shares in which were personal estate, being ignorant of that circumstance, and supposing himself to be liable in respect to his ancestor's shares, executed a deed of indemnity to trustees of the company, he is entitled in equity to have his deed canceled, as having been obtained under a mistake of fact and law. *Broughton v. Hutt*, 3 De G. & J. 501.

And a clear mistake in making a partition and settlement of an estate, as to its liability for a supposed debt, is a ground for opening mutual releases executed by the parties, where it appears that the settlement was not a compromise or speculation; and it makes no difference that it is uncertain whether the mistake was one of law or of fact. *Gist v. Cattell*, 1 Bail. Eq. 343.

So, the payment of money into court through the ignorance and inadvertence of the parties in not knowing that, upon their doing so, the other parties to the action could take it out, does not amount to that kind of mistake against the consequences of which equity will interfere. *Great Western R. Co. v. Cripps*, 5 Hare, 91.

And when an assessment is void upon its 28 L.R.A.(N.S.)

face, because made to one who does not own the property, and the true owner, with a knowledge of the fact, but under misapprehension of, or in ignorance of, the law, pays the tax under protest, to avoid a threatened sale of the property by the tax collector, it is to be deemed a voluntary payment, and he cannot recover back the money paid in a suit against the tax collector. *Bucknell v. Story*, 46 Cal. 589, 13 Am. Rep. 220.

And where a sheriff who held an execution discovered a defect in it which he supposed rendered it void, and he therefore neglected to execute it, and judgment was rendered against him for such neglect in a court of law, a court of equity cannot relieve him from the consequences of his neglect of duty. *Pettes v. Bank of Whitehall*, 17 Vt. 435.

Nor can a subscription to the capital stock of a corporation be canceled because the subscriber, through ignorance of law, acted upon the mistaken idea that she was purchasing the stock of an existing corporation, instead of participating in the organization of a new corporation. *Williams v. Thwing Electric Co.* 160 Ill. 526, 43 N. E. 595.

And where a railroad company which had issued two kinds of stock, a first preference stock and second preference stock, afterwards issued more stock, which it represented to be preference stock, and which it sold as such, and it was declared by law to rank below either the first or second preference stock, the directors and secretary of the company are not liable to make good the misrepresentation to the purchaser of the stock, or repay him the purchase money, since the purchaser knew he was purchasing a new stock, and not the preferred stock, but thought it ranked with the preferred stock, so that he was not deceived by any misrepresentation of fact; there had merely been a common misconception of the law. *Eaglesfield v. Londonderry*, L. R. 4 Ch. Div. 693.

So, where, in the preparation of a contract, there was no agreement that a condition as to certain dividends should be inserted in it, such condition cannot be said to have been omitted by mistake, and a reformation cannot be had, because the mistake, if any, is one of law, in supposing that the condition could be enforced without its insertion in the contract. *Trotter v. Brevoort*, 60 App. Div. 562, 69 N. Y. Supp. 1028.

And a finding by a referee, on conflicting evidence, as a fact, that a parol agreement for a special rate of interest upon advances to be made by a party on account of a land purchase was omitted from a written contract concerning such advances through a mistake of law, sustains in the appellate court on an appeal from a judgment of the court below the legal conclusion that the unsuccessful party was not entitled to have the contract reformed, in the absence of a finding that the other party to the contract was guilty of inequitable conduct.

Greene v. Smith, 160 N. Y. 533, 55 N. E. 210.

But where an insurance company purchased the business, received the assets, and undertook the liabilities of another insurance company, and a creditor of the selling company canceled his security, and accepted a substituted security of the purchasing company, and the purchase was held void as *ultra vires*, the court has jurisdiction to relieve the creditor, though his mistake was a mistake of law; and he may be remitted to his original rights against the selling company, and is entitled to prove in winding-up proceedings. *Re Sax-on Life Assur. Soc.* 2 Johns. & H. 408.

So, where a debtor called a meeting of his creditors, and proposed a composition of 10s. to the pound, payable by instalments, and a deed was prepared in supposed compliance with the bankruptcy act, and certain creditors declined to assent, but subsequently, on being informed by the debtor that the deed had been executed by the required number of creditors, and had been registered, and the amount of the instalments having been remitted to them, they took the money and said nothing, and the deed was afterwards decided to be void for want of a strict compliance with the provisions of the statute, the creditors are precluded from suing the debtor for the balance of their debt, as the mistake, if any, under which they received the instalments, was one of law, and not of fact. *Kitchin v. Hawkins*, L. R. 2 C. P. 22.

But where a creditor levied execution on his debtor's goods for a debt exceeding £50, and the sheriff seized and sold them, and the debtor filed a petition for liquidation, and served notice on the sheriff before the sale, but before the expiration of fourteen days from the sale the first meeting of the creditors was held, but no resolution was passed, and the sheriff then, after the expiration of the fourteen days, paid the proceeds of the sale to the execution creditor, and afterwards a bankruptcy petition was filed by another creditor, which stated the filing of the petition for liquidation and the failure of the proceedings, and the debtor was adjudged a bankrupt under this petition, and the trustees demanded the proceeds of the sale from the execution creditor, who paid them to them believing they were legally entitled to them, it was held that the liquidation proceedings entirely came to an end on the failure of the meeting to pass a resolution, and that the debtor was not adjudged a bankrupt on the liquidation petition, and therefore the sheriff was justified in paying the proceeds of the sale to the execution creditor, and the court had jurisdiction to relieve against the mistake of law, and to order the money to be repaid by the trustees to the execution creditor. *Ex parte James*, L. R. 9 Ch. 609.

c. Rule that mistake of law may be cause for reformation.

1. Generally.

In equity, the line between mistakes of

law and mistakes in fact has not been so clearly and sharply drawn as at law. *Daniell v. Sinclair*, L. R. 6 App. Cas. 181, 18 Eng. Rul. Cas. 144; *Williamson v. Brown*, 195 Mo. 313, 93 S. W. 791.

The doctrine that a mistake or ignorance of law is no excuse for the breach or non-performance of an agreement is confined to cases of pure, unmixed mistake of law, in which there is no mistake of fact, and no trust or element of fraud entering in and conducing to the making of the contract. *King v. Doolittle*, 1 Head, 77; *Coger v. M'Gee*, 2 Bibb, 321, 5 Am. Dec. 610; *Sparks v. Pittman*, 51 Miss. 511.

Though relief will not be granted merely on account of a mistake of law, there are cases in which there are other elements, not in themselves sufficient to authorize the court to interpose, but which, combined with such a mistake, will entitle the party to relief. *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 556.

Thus, equity will relieve against a mistake of fact superinduced by mistake of law. *Gross v. Leber*, 47 Pa. 520.

And when one party induces another, without any consideration, to convey land to him, under their mistake of fact, arising from their ignorance of the law, and the property cannot in good conscience be retained, a reconveyance will be decreed upon a bill in equity therefor. *Freeman v. Curtis*, 51 Me. 140, 81 Am. Dec. 564.

So, where there is a mistake of fact, or a mistake of law and fact combined, equitable relief can be granted, especially if such relief does not result in injury to the opposite party. *Lane v. Holmes*, 55 Minn. 379, 43 Am. St. Rep. 508, 57 N. W. 132.

And where, in an agreement, there was a mutual mistake, in a sense a mistake in law, but in which there was no misconception of legal rights, but a mistake as to the effect of the instrument by including in it as a contracting party a person who was never intended to be included, equity will grant relief. *Wake v. Harrop*, 1 Hurlst. & C. 202.

And it has been held that the maxim of law, "Ignorance of the law is no excuse," has regard to the requirements of public policy that ignorance cannot be pleaded to excuse crime, but does not hold in civil cases. *Lansdown v. Lansdown*, *Moseley*, 364.

And the rule in general terms has been quite extensively adopted, that a mistake of law in a proper case may be corrected in equity, as well as a mistake of fact. *Evants v. Strode*, 11 Ohio, 480, 38 Am. Dec. 744; *Clopton v. Martin*, 11 Ala. 187; *Remington v. Higgins*, 54 Cal. 620; *Park Bros. v. Blodgett & C. Co.* 64 Conn. 28, 29 Atl. 133; *Way v. Roth*, 159 Ill. 162, 42 N. E. 321; *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 816, 33 N. W. 38; *Corrigan v. Tierney*, 100 Mo. 276, 13 S. W. 401; *Leitensdorfer v. Delphy*, 15 Mo. 160, 55 Am. Dec. 137; *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705; *Barlow v. Scott*, 24 N. Y. 40; *Hall v. Reed*, 2 Barb. Ch. 500; *Marsh*

v. McNair, 48 Hun, 117; Wheadon v. Olds, 20 Wend. 174; Lowndes v. Chisolm, 2 M'Cord, Eq. 455, 16 Am. Dec. 667; Lord v. Horr, 30 Wash. 477, 71 Pac. 23; Biggs v. Bailey, 49 W. Va. 188, 38 S. E. 409; Johnson v. Parker, 34 Wis. 596; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589; Stone v. Godfrey, 5 De G. M. & G. 76; Henkle v. Royal Exch. Assur. Co. 1 Ves. Sr. 317; Ware v. Horwood, 14 Ves. Jr. 20.

Where it can be done without impairing the rights of those who were ignorant of the existence of any such mistake when their rights accrued. Hall v. Reed; Way v. Roth; Biggs v. Bailey; and Johnson v. Parker,—supra.

And that a plain and acknowledged mistake of law is not beyond the reach of equity. Benson v. Bunting, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 992.

A mistake which is relievable in equity is some unintentional act, omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence, and such a mistake may be either of law or of fact. Allen v. Elder, 76 Ga. 674, 2 Am. St. Rep. 63.

And the word "mistake" in a bill alleging a contract different from that reduced to writing, and that it was so written by mutual mistake, is a statement of a fact, and not a conclusion of law. Smelser v. Pugh, 29 Ind. App. 614, 64 N. E. 943.

It is a principle of equity that when an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either in fact or in law, does not fulfil, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. Hunt v. Rhodes, 1 Pet. 1, 7 L. ed. 27; Rogers v. Atkinson, 1 Ga. 12; Collier v. Lanier, 1 Ga. 238; Kyner v. Boll, 182 Ill. 171, 54 N. E. 925; Stafford v. Fetters, 55 Iowa, 484, 8 N. W. 322; Worley v. Tuggle, 4 Bush, 168; Knuckles v. J. D. Hughes Lumber Co. (Ky.) 116 S. W. 1193; Dulany v. Rogers, 50 Md. 524; Newland v. First Baptist Church Soc. 137 Mich. 335, 100 N. W. 612; Leitensdorfer v. Delphy, 15 Mo. 160, 55 Am. Dec. 137; Webster v. Webster, 33 N. H. 18, 66 Am. Dec. 705; Trusdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391; McMillan v. Fish, 29 N. J. Eq. 610; Wintermute v. Snyder, 2 N. J. Eq. 489; Bacot v. Fessenden, 124 N. Y. Supp. 370; Curtis v. Leavitt, 15 N. Y. 9; Talley v. Courtney, 1 Heisk. 715; Kelley v. Ward, 94 Tex. 289, 60 S. W. 311; Dietrich v. Hutchinson, 73 Vt. 134, 87 Am. St. Rep. 698, 50 Atl. 810; White v. Campbell, 80 Va. 180; Alexander v. Newton, 2 Gratt. 966.

In Kyner v. Boll, supra, Fowler v. Black, 136 Ill. 363, 11 L.R.A. 670, 26 N. E. 596, supra, IV. b, 2, was distinguished, and it was said that the principle announced by that and similar cases should not be carried to the extent of refusing relief where the

scrivener, from ignorant presumption, and against the intention of the parties, has inserted in the deed words limiting the estate which the parties intended the grantee should take

So, a mistake which will justify the reformation of a written instrument may be one made by a scrivener who was acting as mutual agent of both parties in drafting the instrument. Meek v. Hurst, 223 Mo. 688, 122 S. W. 1022.

If parties to a contract were misled by misplaced confidence in the skill of the scrivener, it is a mistake of fact on their part, from which equity will grant relief, and not a mistake of law. Canedy v. Marcy, 13 Gray, 373.

So, the rule is general and well supported that a writing may be reformed to express the real agreement, where, by reason of mutual mistake of law, fact, or both, or such mistake on the part of one and fraud on the part of the other, the actual agreement arrived at is so written as not to express that agreement. Marshall v. Westrope, 98 Iowa, 324, 67 N. W. 257; Turpin v. Gresham, 106 Iowa, 187, 76 N. W. 680; Campbell v. Hatchett, 55 Ala. 548; Pickett v. Merchants' Nat. Bank, 32 Ark. 346; Park Bros. v. Blodgett & C. Co. 64 Conn. 28, 29 Atl. 133; Louisville & N. R. Co. v. Cox, 133 Ga. 763, 66 S. E. 1088; Webb v. Hammond, 31 Ind. App. 613, 68 N. E. 916; Worley v. Tuggle, 4 Bush, 168; McElderry v. Shipley, 2 Md. 25, 56 Am. Dec. 703; Showman v. Miller, 6 Md. 479; Smith v. Jordan, 13 Minn. 264, Gil. 246, 97 Am. Dec. 232; Williamson v. Brown, 195 Mo. 313, 93 S. W. 791; Gotthelf v. Shapiro, 136 App. Div. 1, 120 N. Y. Supp. 210; Kornegay v. Everett, 99 N. C. 30, 5 S. E. 418; Forester v. Van Aiken, 12 N. D. 175, 96 N. W. 301; Bailey v. Bailey, 8 Humph. 230; Thompson v. Phenix Ins. Co. 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019; New York L. Ins. Co. v. McMaster, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63, reversing 78 Fed. 33.

Within these rules, where there is a mistake, whether of law or of fact, in reducing an agreement to form, or in carrying it into effect, equity will grant relief. Lanning v. Carpenter, 48 N. Y. 408; Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540; Parish v. Camplin, 139 Ind. 1, 37 N. E. 607; Gump's Appeal, 65 Pa. 476; Wisconsin M. & F. Ins. Co. Bank v. Mann, 100 Wis. 596, 76 N. W. 777; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 A. & E. Ann. Cas. 773; Elliott v. Sackett, 108 U. S. 132, 27 L. ed. 678, 2 Sup. Ct. Rep. 375.

In the absence of a waiver of the right in that regard, or estoppel to the assertion of it. Rowell v. Smith and Wisconsin M. & F. Ins. Co. Bank v. Mann, supra.

And a court of equity has jurisdiction to correct mistakes both as to law and fact, by ordering a proper instrument to be executed, according to the true intent of the parties. Wyche v. Greene, 16 Ga. 57; Alexander v. Caldwell, 55 Ala. 517; Campbell v. Hatchett, 55 Ala. 548; Allis v. Hall, 76

Conn. 322, 56 Atl. 637; Cross v. Bean, 81 Me. 525, 17 Atl. 710; Nebraska Loan & T. Co. v. Ignowski, 54 Neb. 398, 74 N. W. 852; Beall v. Martin, 48 Neb. 479, 67 N. W. 433; Story v. Gammell, 68 Neb. 709, 94 N. W. 982; Kornegay v. Everett, 99 N. C. 30, 5 S. E. 418; McKay v. Simpson, 6 Ired. Eq. 452; Minot v. Tilton, 64 N. H. 371, 10 Atl. 682; Firmstone v. DeCamp, 17 N. J. Eq. 317; Brown v. Brown, 79 Hun, 44, 29 N. Y. Supp. 652; Uihlein v. Matthews, 93 App. Div. 57, 86 N. Y. Supp. 924; Pennell v. Wilson, 2 Robt. 505; Hunt v. Freeman, 1 Ohio, 490; Webster v. Harris, 16 Ohio, 490; Harvey v. United States, 13 Ct. Cl. 322; Carrell v. McMurray, 136 Fed. 661.

And this is the rule though there is no mistake as to the terms of the agreement, but, through a mistake of the scrivener, or by any other inadvertence in reducing it to writing, the instrument does not express the agreement actually made. Born v. Schrenkeisen, 110 N. Y. 55, 17 N. E. 339; Hebler v. Brown, 18 Misc. 395, 41 N. Y. Supp. 441; Baker v. Paine, 1 Ves. Sr. 456.

So, the right to a remedy in equity in case of a mistake in the making of a contract, or the reduction of the contract to writing, is the same, whether the writing was drafted by the parties or by a third person. Wisconsin M. & F. Ins. Co. Bank v. Mann, supra; Baldwin v. National Hedge & Wire Fence Co. 19 C. C. A. 575, 39 U. S. App. 162, 73 Fed. 574.

And it is immaterial, on the question of a reformation of a contract by a court of equity, to make it speak the actual agreement of the parties, how the mistake happened, whether by a misunderstanding of the meaning of the words, or otherwise. Cassidy v. Metcalf, 60 Mo. 519; Larkins v. Biddle, 21 Ala. 252; Stafford v. Fetters, 55 Iowa, 484, 8 N. W. 322.

And the right to have a mistake of this kind corrected is not affected by the absence of fraud or mistake of fact. Rider v. Powell, 28 N. Y. 310; Henkle v. Royal Exch. Assur. Co. 1 Ves. Sr. 317.

Nor is the right and power of a court of equity to reform a contract, to make it speak the actual agreement of the parties, affected by the fact that the contract was drawn by the plaintiff himself. Cassidy v. Metcalf, supra.

And a contract entered into under a mutual misconception of legal rights, amounting to a mistake of law in the contracting parties, by which the object of it cannot be accomplished, is as liable to be set aside or rescinded as a contract founded in mistake of matter of fact. Champlin v. Laytin, 1 Edw. Ch. 467.

And when it is perfectly evident that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and there has been no fair compromise of bona fide and doubtful claims, the contract may be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality. Underwood v. Brockman, 4 Dana, 309, 29 Am. Dec. 407.

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So, while everyone is usually bound as if he had a knowledge of the law, whether he has it or not, there is no rule which conclusively presumes such knowledge as a fact, where that fact is important. Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162.

And when parties have acted under a mutual mistake of law, and the party jeopardized thereby cannot be relieved without substantial injustice to the other side, equity will afford redress, especially if the party to be benefited by the mistake invokes the aid of equity to put him in a position where the mistake will become advantageous to him. Freiknecht v. Meyer, 38 N. I. Eq. 315.

So, where both parties understood the law alike, both making the same mistake, and the mistake operates to deprive one of the parties of a valuable right, and to give to the other party a material advantage not contemplated by either, a court of equity will adjust their rights as though the law relating thereto was in fact as the parties supposed it to be, if necessary to do justice between them. Benson v. Bunting, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 992.

And if a man, by the misapprehension of his counsel as to his legal liability, has bound himself further than he was legally liable, and there is no reason to believe that he intended his obligation to extend beyond his legal liability, he is relievable in equity. Fitzgerald v. Peck, 4 Litt. (Ky.) 125.

It has been held, however, that whatever exceptions there may be to the rule that equity will not relieve from mere mistakes of law are few in number, and have something peculiar in their character, and involve other elements of decision. Bank of United States v. Daniel, 12 Pet. 32, 9 L. ed. 989.

And that where mistakes of law are corrected, there has generally been also a marked disparity in the position and intelligence of the parties, so that they have not been on equal terms, and that the party obtaining the property or other advantage, persuaded or induced the other to part with it, so that there has been undue influence on the one side and undue confidence on the other. Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556.

And that to authorize a court of equity to interfere and grant relief for a mistake of law, the mistake must be so gross and palpable as to create the belief that some undue advantage was taken of the party, from imbecility of mind or the exercise of improper influence. Haden v. Ware, 15 Ala. 149.

The attending circumstances must be such as to excite the suspicion of fraud, imposition, misrepresentation, or undue influence on one side, and imbecility, credulity, or blind confidence on the other. Dailey v. Jessup, 72 Mo. 144.

And while a court of equity will sometimes grant relief where parties have contracted under a mutual mistake of the law, yet, where the means of knowledge were equal, and no undue advantage was taken, such court will not interpose its powers

when the effect of a decree would be to give to one litigant and take from another something of value, not in contemplation of the parties at the time of the contract, without any consideration being paid therefor. *Jeakins v. Frazier*, 64 Kan. 267, 67 Pac. 854, reversing 9 Kan. App. 850, 62 Pac. 354.

So, where relief is sought against the consequences of mistakes in law, the court must be satisfied that the complainant's conduct has been determined by those mistakes. *Stone v. Godfrey*, 5 De G. M. & G. 76.

Nor will the mistake of a person be permitted in equity to benefit him at the expense of those who were injured by the mistake. *Brown v. Bonner*, 8 Leigh, 1, 31 Am. Dec. 637.

And an admitted and clearly established misapprehension of the law creates a basis for the interference of courts of equity resting on discretion, to be exercised only in the most unquestionable and flagrant cases. *Marshall v. Lane*, 27 App. D. C. 276.

And ignorance of the law with a full knowledge of the facts cannot be set up as a defense, where the circumstances would otherwise create an equitable bar to a legal title. *Storrs v. Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316.

So, while a mistake of law might give jurisdiction to a court of equity in a given case, and be a ground for relief, a court of equity will not listen to the allegation that a member of the bar has made such a mistake. *Magniac v. Thomson*, 2 Wall. Jr. 209, Fed. Cas. No. 8,957.

And a mistake of the law by the attorney of one only of the parties to an agreement, or a misapprehension of the agreement by the party whose attorney he was, is not sufficient to justify a reformation of the contract. *Pennell v. Wilson*, 2 Robt. 505.

2. Mistake resulting in failure to carry out intention.

Many of the late and well-considered cases have shown a tendency to adopt the theory that the main object of equitable jurisdiction should be to effectuate the intentions of the parties to the contract in question, and that any mistake of such parties which would defeat such intentions should be corrected in equity, so as to carry them into effect, whether it be a mistake of law or a mistake of fact, and without reference to the principle that mistake or ignorance of law does not excuse. Within this theory, contracts will be reformed not only where mistakes of fact are clearly established, but also where, by mistake as to the legal effect of the language employed, the real intent of the parties is not expressed. *Conner v. Baxter*, 124 Iowa, 219, 99 N. W. 726; *Marshall v. Westrope*, 98 Iowa, 324, 67 N. W. 257; *Larkins v. Biddle*, 21 Ala. 252; *Parker v. Carter*, 91 Ark. 162, 120 S. W. 836; *Cake v. Peet*, 49 Conn. 501; *Patterson v. Bloomer*, 35 Conn. 57, 95 Am. Dec. 218; *Ward v. Allen*, 28 Ga. 74; 28 L.R.A.(N.S.)

Wyche v. Greene, 11 Ga. 159; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Maher v. Hibernia Ins. Co.* 67 N. Y. 283; *Ryder v. Ryder*, 19 R. I. 188, 32 Atl. 919; *Ramey v. Allison*, 64 Tex. 697; *Harrell v. De Normandie*, 26 Tex. 121; *Goodell v. Field*, 15 Vt. 448; *Pulaski Iron Co. v. Palmer*, 89 Va. 384, 16 S. E. 275; *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963.

And this is so although the parties knew what words were employed, and their ordinary meaning. *Maher v. Hibernia Ins. Co.* supra.

To enforce such an agreement without reformation would be to create a new contract which was never assented to understandingly, and to impose duties and liabilities which the parties never contemplated assuming. *Ramey v. Allison*, supra.

Equity will reform a contract where the parties never intended to enter into the contract set forth in the writing, the mistake being one of fact in failing to use apt words to express their intention. *Reed v. Root*, 59 Iowa, 359, 13 N. W. 323.

And when the legal effect of the terms agreed upon by the parties to be employed in a written instrument, through a misapprehension or ignorance of their import, results in a contract different from that really entered into by them, a court of equity, in the exercise of its moral jurisdiction, will reform it. *Orr v. Echols*, 119 Ala. 340, 24 So. 357; *Moore v. Tate*, 114 Ala. 582, 21 So. 820; *Conlin v. Masecar*, 80 Mich. 139, 45 N. W. 67; *Everett v. Jones*, 38 N. Y. S. R. 644, 14 N. Y. Supp. 395.

This is the rule of *DOLVIN v. AMERICAN HARROW CO.*

The rule of equity that relief will not be granted to correct mistakes of law has no application to mistakes in the language of a contract, or the choice of the form of an instrument, whereby it has an effect different from the intention of the parties. *Stafford v. Fetters*, 55 Iowa, 484, 8 N. W. 322.

And if a writing contains less or more or something different from the intention of the parties, by mistake, and this is made to appear by clear and satisfactory proof, a court of equity will reform the writing so as to make it conform to what the parties intended. *Cromwell v. Winchester*, 2 Head, 389; *Jacobs v. Parodi*, 50 Fla. 541, 39 So. 833; *Trapp v. Moore*, 21 Ala. 603; *Sibert v. McAvoy*, 15 Ill. 106; *Adams v. Wheeler*, 122 Ind. 251, 23 N. E. 760; *Bonbright v. Bonbright*, 123 Iowa, 305, 98 N. W. 784; *Nowlin v. Pyne*, 47 Iowa, 293; *Taylor v. Deverell*, 43 Kan. 469, 23 Pac. 628; *Coger v. M'Gee*, 2 Bibb, 321, 5 Am. Dec. 610; *Dulany v. Rogers*, 50 Md. 524; *Cooke v. Husbands*, 11 Md. 492; *Sparks v. Pittman*, 51 Miss. 511; *Cassidy v. Metcalf*, 66 Mo. 519; *Michigan Buggy Co. v. Woodson*, 59 Mo. App. 550; *Lansing v. Commercial Union Assur. Co.* 4 Neb. (Unof.) 140, 93 N. W. 756; *Mitchell v. Griffith* (Neb.) 126 N. W. 998; *Botsford v. McLean*, 45 Barb. 478; *Savage v. McCorkle*, 17 Or. 42, 21 Pac. 444; *Pennypacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Hearn v. Equitable Safety Ins.*

Co. 4 Cliff. 192, Fed. Cas. No. 6,300; *Cockrell v. Cholmeley*, 1 Russ. & M. 418; *Henkle v. Royal Exch. Assur. Co.* 1 Ves. Sr. 317.

And this is so even though the failure was the result of a mistake of law. *Michigan Buggy Co. v. Woodson*; *Dinwiddie v. Self*; and *Bonbright v. Bonbright*,—*supra*.

And although the failure may have resulted from a mistake as to the legal meaning and effect of the terms or language employed in the writing. *Williamson v. Brown*, 195 Mo. 313, 93 S. W. 791; *Lansing v. Commercial Union Assur. Co.* *supra*; *Farley v. Deslonde*, 69 Tex. 458, 6 S. W. 786.

And equity may reform and correct contracts, though unambiguous on their face, on clear proof that through fraud or error the written instrument has been made to express a different purpose from that which the parties had agreed on and intended to embody therein. *Ker v. Evershed*, 41 La. Ann. 15, 6 So. 566; *Sanford v. Washburn*, 2 Root, 499; *Elmore v. Austin*, 2 Root, 415; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179.

Courts of equity will not refuse redress if it is certain that a written contract conveys a different right or effectuates a different purpose from that intended by the parties, and will treat the mistake as one of fact. *Tabor v. Cilley*, 53 Vt. 487.

And equity will rectify a mistake in a written instrument upon parol testimony when the words employed do not express the intention of the parties. *Helm v. Wright*, 2 Humph. 72; *Tesson v. Atlantic Mut. Ins. Co.* 40 Mo. 33, 93 Am. Dec. 293.

The statement that equity will not relieve against a mutual mistake of the law is true only in a limited sense; that is, when the mistake is as to the legal effect of what has been agreed upon; where the error of law is in the legal meaning or effect of certain words employed in writing out the contract, equity will grant relief, for the writing then does not express what the parties meant. *Richmond v. Ogden Street R. Co.* 44 Or. 48, 74 Pac. 333; *Ryder v. Ryder*, 19 R. I. 188, 33 Atl. 919.

It applies only where the mistake is purely one of law, and the party had full knowledge of all the material facts and circumstances. *Lumber Exch. Bank v. Miller*, 18 Misc. 127, 40 N. Y. Supp. 1073.

On the question of the correction of a mistake in a written instrument by a court of equity, the inquiry is, Does the instrument contain what the parties intended it should, and understood that it did? Is it their agreement? If not, it may be reformed so as to make it the evidence of what the true bargain between the parties was, and it is wholly immaterial from what cause the defective execution of the intent of the parties originated. *Wyche v. Greene*, 16 Ga. 57, on former appeal, 11 Ga. 159.

To establish a mistake in an instrument which a court of equity will correct, it is sufficient to show that the parties had agreed to accomplish a particular object by

the instrument to be executed, and that the instrument as executed is insufficient to effect the object. *Leitensdorfer v. Delphy*, 15 Mo. 160, 55 Am. Dec. 137.

And where parties, in reducing an agreement to writing, fail, by mistake, to embody their intention in the instrument, either because they do not understand the meaning of the words used, or their legal effect, equity will grant relief by reforming the instrument; and it matters not whether such mistake be called one of law or one of fact. *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688; *Sampson v. Mudge*, 13 Fed. 260.

And if a written instrument fails to express the intention of the parties, equity will grant relief either affirmatively, by reforming or canceling the contract, or by way of defense to its enforcement. *Zieschang v. Helmke* (Tex. Civ. App.) 84 S. W. 436.

So, under this rule, relief will be granted by equity from a mutual mistake as to the legal effect of an instrument, as well as from a mistake of fact. *Lucas v. Lucas*, 30 Ga. 191, 76 Am. Dec. 642; *Adair v. McDonald*, 42 Ga. 506; *Allen v. Elder*, 76 Ga. 674, 2 Am. St. Rep. 63; *Hopwood v. McCausland*, 120 Iowa, 218, 94 N. W. 469; *Welch v. Welch*, 13 Ky. L. Rep. 639; *Kenard v. George*, 44 N. H. 440; *Evants v. Strode*, 11 Ohio, 480, 38 Am. Dec. 744; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 127.

Especially when it operates as a gross injustice to one, and gives an unconscientious advantage to the other. *Allen v. Elder*, *supra*.

A mistake in a contract in not knowing the meaning which the law attaches to the words employed cannot be said to be a mistake of law, which equity will not correct, because the parties failed to use the words intended. *Reed v. Root*, 59 Iowa, 359, 13 N. W. 323.

And where parties to a parol agreement intend to reduce it to writing, and because they are ignorant of the force of language, and misunderstand the meaning of the terms used, make a contract different from that designed, equity will grant relief by reforming the instrument, and compel the parties to execute and perform their agreement as they made it. *Pitcher v. Hennessey*, 48 N. Y. 415.

It has been held, however, that equity will not interfere to offer relief in an action to reform a deed on the ground of mistake, where the parties to such deed did not mistake its contents, but only the effect thereof. *Toops v. Snyder*, 70 Ind. 554; *Morton v. Morris*, 27 Tex. Civ. App. 262, 66 S. W. 94.

So, a deed of gift drawn by the grantor himself, which, by reason of his ignorance of the law, does not express his intention, may be reformed in equity. *Larkins v. Biddle*, 21 Ala. 252.

And equity will interpose for the relief of one who has taken a defective conveyance, and will compel the vendor and those claiming under him by act of law, although without notice, and even purchasers for a

valuable consideration, with notice, to make good the conveyance. *Mastin v. Halley*, 61 Mo. 196.

And equity will grant relief where an attempt to perform an existing contract, as by the execution of a deed, fails through misunderstanding on the part of the grantor as to the effect of the instrument by which performance is attempted, although the mistake be not mutual. *Welles v. Yates*, 44 N. Y. 525.

So, a mistake as to the ownership of land is a mistake of fact in regard to which equity will grant relief, although the mistake arose from an erroneous view of the legal effect of a deed. *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012; *Busiere v. Reilly*, 189 Mass. 518, 75 N. E. 958.

And an erroneous view of the legal effect of a deed in a chain of title is a mistake of fact, against which equity will grant relief. *Livingstone v. Murphy*, supra.

So, mistakes as to the condition of one's title, or the correctness or regularity of antecedent proceedings, are frequently relieved from where the equity is clear, being properly classed with mistakes of fact. *Ger-dine v. Menage*, 41 Minn. 417, 43 N. W. 91; *Whelen's Appeal*, 70 Pa. 410.

And even though the parties to a deed knew that it read "three fifths" instead of "four fifths," in describing the estate conveyed, it constitutes a mistake of fact, which may be corrected in equity, and not a mistake of law, where the parties really thought the deed sufficient to convey the four fifths, and the plaintiff is entitled to a reformation in that respect. *Parish v. Camplin*, 139 Ind. 1, 37 N. E. 607.

And a statement that the lien of a deed of trust on land is prior to the lien of a judgment, when it is not accompanied by mention of the circumstances upon which the priority of the one lien over the other depends, is a statement of fact, and a mistake in regard to such priority is one of fact when it is due to a misapprehension of these circumstances, within the rule that equity will correct mistakes of fact. *Smith v. Patterson*, 53 Mo. App. 66.

Nor does the principle that a written contract cannot be set aside merely because one of the parties put an erroneous construction on the words in which it was expressed apply to a case where a mistake by one of the parties as to the meaning of the words used has been induced, however innocently, by the other party. *Wilding v. Sanderson* [1897] 2 Ch. 534.

And whether a tract of land claimed by pre-emption is within a district of country reserved from the operation of the pre-emption laws is a matter of fact, which a purchaser would not be presumed to know, under the rule which presumes a knowledge of the law. *Moreland v. Atchison*, 19 Tex. 303.

To reform a contract in equity, however, it must be shown that the true intention of the parties was different from the contract as reduced to writing, and that by

some fraud or mistake the real contract between the parties was not truly reduced to writing; and proof of the parties' interpretation of the contract is not sufficient to show fraud or mistake in drawing it up. *Coffing v. Taylor*, 16 Ill. 457; *Fritzler v. Robinson*, 70 Iowa, 500, 31 N. W. 61; *Knuckles v. J. D. Hughes Lumber Co.* (Ky.) 116 S. W. 1193; *Brioso v. Pacific Mut. Ins. Co.* 4 Daly, 246.

And it is only when, through fraud or mistake, a party has executed an instrument that he believes to be in accordance with the real agreement, but which is in fact different, that equity will relieve, and even then the mistake as well as the agreement must be made out by clear proof. *Wilson v. Deen*, 74 N. Y. 531; *Zieschang v. Helmke* (Tex. Civ. App.) 84 S. W. 436.

So, it has been held that where an agreement between two parties was reduced to writing, and read over and signed by one of them, it is not sufficient, in a suit in equity by him for the reformation of such agreement, for him to allege that he supposed the terms of the written agreement were in legal effect the same as the true terms of the agreement previously entered into by the parties; such a mistake is one of law, and not of fact, and will not warrant the interference of a court of equity. *Hoover v. Reilly*, 2 Abb. (U. S.) 471, Fed. Cas. No. 6,677.

And to warrant granting relief in an action to reform a contract alleged to express a different purpose from that which the parties had agreed on, there must be clear proof of the antecedent contract, and of the error in committing it to writing. *Ker v. Evershed*, 41 La. Ann. 15, 6 So. 566; *St. Anthony Falls Water-Power Co. v. Merri-man*, 35 Minn. 42, 27 N. W. 199.

3. Application to particular cases.

(a) Deeds.

(1) Generally.

Equity has jurisdiction to and will reform a deed or other instrument by the correction of a mistake in it, where it appears that, by mutual mistake of all the parties to it, the instrument does not conform to or express their intention or agreement. *Easter v. Severin*, 78 Ind. 540; *Taylor v. Deverell*, 43 Kan. 469, 23 Pac. 628; *Nutall v. Nutall*, 26 Ky. L. Rep. 671, 82 S. W. 377; *M'Louth v. Rathbone*, 19 Ohio, 21; *Pulaski Iron Co. v. Palmer*, 89 Va. 384, 16 S. E. 275; *Elliott v. Sackett*, 108 U. S. 132, 27 L. ed. 678, 2 Sup. Ct. Rep. 375.

A misapprehension of rights under a deed, not arising from the misconstruction of the deed, is a mistake in fact, and consequently relievable in equity. *Denys v. Shuckburgh*, 4 Younge & C. Exch. 42.

And mistakes and misapprehensions in the drawer of deeds, contrary to the design of the parties, are as much a ground of equitable relief as fraud and imposition. *Chapman v. Allen, Kirby*, 399, 1 Am. Dec. 24.

While a general warranty deed without limitation, reservation, or exceptions conveys all the grantor's rights, title, and interest, both legal and equitable, in and to the property embraced therein, and while parol testimony is not admissible to vary, contradict, or explain such deed, unambiguous on its face, yet, if such deed is executed through mutual mistake as to the legal effect thereof, contrary to the plainly established intention of the parties thereto, a court of equity will grant relief against such mistake, especially where the same is attributable to the party or his agent who is seeking to take an unconscionable advantage thereof. *Biggs v. Bailey*, 49 W. Va. 188, 38 S. E. 499.

And where a deed was drawn professedly to carry out the agreement of the parties, previously entered into, and is executed under the misapprehension that it embodies the agreement, whereas, by mistake of the draftsman, either as to fact or law, it fails to fulfil that purpose, equity will correct the mistake by reforming the instrument in accordance with the contract. *Trusdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391; *Nutall v. Nutall*, supra; *Cox v. Ellsworth*, 18 Neb. 664, 53 Am. Rep. 827, 26 N. W. 460.

A deed of land, defective in some formal requisite, is treated practically in a court of chancery as an executory contract for the sale of land, the court looking in such case through the deed, at the contract of the parties lying behind it, and of which the deed is the evidence; and the relief which it furnishes is not so properly a reformation of the defective instrument as the compelling the specific performance of the contract. *Dickinson v. Glenney*, 27 Conn. 104.

And equity will interpose and grant relief to prevent a deed being used contrary to the intention expressed in it. *Reade v. Armstrong*, 7 Ir. Ch. Rep. 375, affirming 7 Ir. Ch. Rep. 266.

So, under the Massachusetts statute of 1856, chap. 38, a court of equity has jurisdiction to reform a deed of real estate upon clear, oral evidence that it was not written according to the intention of the parties, although the scrivener used the words which he intended. *Canedy v. Marcy*, 13 Gray, 373.

Precise conformity to instructions in the preparation of a deed, however, is not necessary to prevent equitable relief; substantial conformity is all that is necessary. *Hewitt's Appeal*, 55 Md. 509.

And a deed executed by persons covenanting therein that their heirs, executors, and administrators will warrant and defend the title to the premises furnishes no ground for the interposition of a court of equity to reform it because of the inadvertent omission of the word, "they," which would have made the covenant of warranty a personal one. *Ruffner v. McConnel*, 17 Ill. 212, 63 Am. Dec. 362.

Nor will equity set aside a deed because

of a mistake therein, where the evidence of the mistake is not clear, unequivocal, and convincing. *Hoover v. Gray*, 91 Ark. 246, 120 S. W. 981. See also on this subject, *infra*, VII. k, 3.

And a person who, as heir of a deceased owner of a tax sale certificate, took out a tax deed thereon, wherein the name of the deceased person was inserted as grantee, may apply to the county clerk and obtain a deed made to herself as grantee, notwithstanding the issuance of the former instrument, but she cannot maintain an equitable action to have the deed reformed by a decree substituting her own name as grantee therein. *Baker v. Lane*, 82 Kan. 715, ante, 405, 109 Pac. 182.

Nor will a court of equity interfere to cancel a deed alleged to be fraudulent, on the prayer of one having no interest in the land conveyed. *Norris v. Laberee*, 58 Me. 260.

And where a deed was made as the parties intended, without any wrongful insertions or negligent omissions, a court of equity will not, after twenty years have expired, interfere to reform it, so that it will have the legal effect expected. *Ibid*.

(2) Omissions.

A party to a deed or other written contract is entitled to have the same reformed on the ground that a material part of the agreement had been omitted by mistake. *Gooding v. McAlister*, 9 How. Pr. 123; *Murphy v. Rooney*, 45 Cal. 78; *Sibert v. McAvoy*, 15 Ill. 106; *Purvines v. Harrison*, 151 Ill. 219, 37 N. E. 705; *Knuckles v. J. D. Hughes Lumber Co. (Ky.)* 116 S. W. 1193; *Phoenix Ins. Co. v. Ryland*, 69 Md. 437, 1 L.R.A. 548, 16 Atl. 109; *Gower v. Sterner*, 2 Whart. 75; *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181, 470.

And he is entitled to have it enforced as reformed. *Murphy v. Rooney*, supra.

And a mistake in a deed with reference to the accidental omission from it of words which were intended to be inserted therein is a mistake of fact, and not one of law. *Purvines v. Harrison*, supra; *Ruffner v. McConnel*, 17 Ill. 212, 63 Am. Dec. 362.

And the omission from a deed by mutual mistake of a reversionary clause materially altering the effect of the instrument warrants a reformation of the instrument. *Hamilton County v. Owens*, 138 Ind. 183, 37 N. E. 602.

And the omission to insert in a deed a material reservation or easement to the grantor, agreed upon by the parties, will be corrected in chancery upon parol proof thereof, and of mistake in not inserting it in the conveyance. *Athey v. McHenry*, 6 B. Mon. 50.

So, where words of inheritance are omitted from a deed by the ignorance or mistake of the draftsman, a court of equity will supply them. *Springs v. Harven*, 56 N. C. (3 Jones, Eq.) 96.

Or a trust in fee may be considered as

created which a court of equity will execute according to the conscience and intention of the parties. *Trusdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391.

And equity will order the annulment of a trust and the reconveyance of the trust property where the grantor, who was *cestui que trust* for life, and the trustee, were advised by counsel, and all believed, that the deed of trust was revocable at pleasure of the grantor, who, in that belief, executed the papers, although the deed in fact contained no power of revocation. *Kilduffe v. Maitland*, 12 Pa. Co. Ct. 362.

So, where an attorney, in drawing a deed by which a father conveys a life estate to his daughter, neglects to insert in it the clause, "for her sole and separate benefit," it constitutes such a mistake as a court of equity will relieve against. *Stone v. Hale*, 17 Ala. 557, 52 Am. Dec. 185.

And where a woman employed a scrivener to draw a deed for her to convey to her son a tract of land with a reservation of a life estate in her, the conveyance being a gift, and the mother reposing great confidence in the son, and by inadvertence or mistake the words reserving the life estate were omitted, so as to convey the land absolutely in fee, and the son, in his lifetime, on discovery of the mistake, promised to correct the deed, a court of equity will reform it so as to reserve to the grantor the life estate. *Purvines v. Harrison*, *supra*.

And where a judgment under which a purchaser at a sheriff's sale purchased was entered in the minutes, but not recorded, and the execution was erroneously described in the deed, the sheriff's deed may be reformed in equity. *Vanness v. Vanness*, 1 N. J. Eq. 248.

So, where it was agreed that a vendor should have a lien on the land sold for unpaid purchase money, and the draftsman was so instructed to write the deed, and he and the parties thought it was so written, but, in matter of fact and law it was not, the deed may be reformed on the evidence of the draftsman, so as to reserve the lien, and then the lien may be enforced. *Worley v. Tuggle*, 4 Bush, 168.

And where a deed conveyed title to land, reserving to the grantor a right to cut pine trees off of such part of said lands required by the grantee for improvements, a court of equity has power, upon proper allegations and proof, to reform the deed so as to make it express the real agreement of the parties, and specify what particular lands are required for improvement. *Jacobs v. Parodi*, 50 Fla. 541, 39 So. 833.

And where a person agreed to sell and convey land to another, subject to the rights of a third person, to whom he had sold all the pine timber on said land, on condition that the third person should remove it within a specified time, which had not expired, and the insertion of a clause to that effect in the deed was omitted through mutual mistake and inadvertence, the deed

should be so reformed as to show that the conveyance was subject to the rights of the purchaser of the timber; but it would be erroneous to reform it by inserting an absolute reservation to the grantor of all the pine timber on the land at the date of the deed, without fixing any time within which it should be cut and removed. *Sawyer v. Hanson*, 48 Wis. 611, 4 N. W. 765.

So, where it was agreed that a part of the consideration for a deed was the support of the grantors by the grantees while the grantors live, and that a stipulation to this effect should be inserted in the deed, but, by mutual mistake, it was omitted, the grantors in such deed are entitled to have the same corrected in a suit against the grantee for that purpose, or against his successor, who paid no value or took with notice. *Savage v. McCorkle*, 17 Or. 42, 21 Pac. 444.

And a deed by a man to his two children, naming them, in which it was provided that he had given and granted unto his said children a certain tract of land, describing it, and appointing a named person guardian of his children, with such powers as are conferred by law, and whenever his children shall arrive at the age of twenty-one, they will be entitled to take possession of said land, and at the same time it is to be considered that the deed of gift will not take place till the death of the grantor and the death of his wife, such deed contains conclusive extrinsic evidence of the vendor's intention to convey to his children a fee-simple estate after the death of himself and wife; and where the necessary technical words to create a fee-simple estate have been inadvertently or ignorantly omitted, a court of equity will correct it. *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308.

And where a man conveyed lands to the receivers of a railroad company by deed containing a covenant that the company would build and maintain certain fences thereon, the receivers further agreeing verbally that they would give the grantor an annual free pass over the railroad, and renew the same annually during his life, and the deed was duly executed, but the receivers objected to the insertion of the fence covenant in the deed, and promised to observe it if it were struck out, which was done, and the deed delivered, and the receivers built the fences, as agreed, and issued the pass annually, but when the receivers had been relieved, and the reorganized company had taken possession of the road, they refused to keep up the fence covenant and to deliver the annual pass, the grantor was entitled to have the deed reformed in equity by inserting the covenant to build and maintain the fences, but he was entitled to no relief with relation to the annual pass, since the receivers had no power to bind their successors by such an agreement. *Martin v. New York, S. & W. R. Co.* 36 N. J. Eq. 109.

So, where, in a partition deed between tenants in common, a tract of land assigned

to one of the parties was omitted by mistake, and the parties took possession according to their deeds, the mistake should be rectified and a specific performance of the contract as to the tract omitted should be decreed. *Tilton v. Tilton*, 9 N. H. 385.

And where a person owning several pieces of land agreed to sell them and take back a mortgage for a part of the purchase price, and by mistake of the scrivener one of the lots was omitted from the deed, and the mortgage and the papers were executed and delivered without either party having discovered its omission, equity will reform the deed and mortgage, and foreclose the mortgage as reformed. *Crippen v. Baumes*, 15 Hun, 136.

(3) *Insertions wrongfully made.*

A conveyance which passes too much may be rectified and the excess deducted. *Beaumont v. Bromley*, Turn. & R. 41; *Sibert v. McAboy*, 15 Ill. 106.

And if a man, by the misapprehension of his counsel as to his legal liability, has bound himself further than he was legally liable, and there is no reason to believe that he intended his obligation should extend beyond his legal liability, he is relievable in equity. *Fitzgerald v. Peck*, 4 Litt. (Ky.) 125.

So, where, by mistake in a deed, property has been included which the parties never intended should be conveyed, and which the grantor was under no legal or moral obligation to convey, and the grantee in good conscience had no right to retain, a court of equity will interfere and correct the mistake. *Burrton Land & T. Co. v. Handy*, 54 Kan. 13, 37 Pac. 108.

And where a party employed to draw a deed, by mistake, and contrary to instructions and the intent of the parties, inserted a statement that the land conveyed was the whole of a named lot, which was not the fact, and the mistake was not observed by either of the parties at the time of executing the deed, equity will reform the deed by making it correspond with the intention of the parties. *Cook v. Preston*, 2 Root, 78.

And where a deed is of 15 feet off the east side of a lot, and it appears that a portion of the grantor's warehouse stood upon the east 15 feet of the lot, and also that it was the intention of the vendor to sell and convey, and of the purchaser to buy, only so much of said lot as lay east of the warehouse, but that both parties believed that there were 15 feet between the warehouse and the east line of the lot, the deed will be reformed in equity so as to cover only such land as lies between the warehouse and the line of the lot. *Fuchs v. Treat*, 41 Wis. 404.

So, where a grantee purchases from a grantor a fractional 80-acre tract of land, subject to the right of way of a railway company, which, under the act of Congress, was 400 feet in width, but the parties did 28 L.R.A.(N.S.)

not know the width of the right of way, and the conveyance, without conforming to the intent of the parties, included the right of way, with covenants of general warranty, the grantor was entitled to have the deed reformed so as to except therefrom the right of way to which he had no title. *Burrton Land & T. Co. v. Handy*, supra.

And where the holder of a warrant for 425 acres of land agreed to give another half the land in quantity and quality if he would make a settlement, and they afterwards ran the line of division, the latter receiving 72 acres more, on account of a difference in quality, and he claimed to the line, and both recognized it, parol evidence is admissible, against grantees of the heirs of the latter, who held under a deed conveying all their estate in the above-described 200 acres, of what took place at the execution of the deed, to show that the 72 acres were not sold, and that, by mistake or fraud in the scrivener, the deed was not so drawn as to exclude them. *Chew v. Gillespie*, 56 Pa. 308.

And where one person sold part of a tract of land to another, giving a title bond and subsequently a deed, and afterwards he conveyed the residue of the tract to a third person by deed, and the title bond to the first purchaser and the deed to the second purchaser recognized a common boundary between the tracts, but the first purchaser's deed contained a description different from that in his title bond, by which, on survey, it was found to convey part of the land embraced by the deed to the second purchaser, the first purchaser's deed being on record when the second purchaser purchased, but the grantor remaining in possession, the second purchaser, though a stranger to the deed, is entitled, if the facts otherwise warrant it, to a restraining order as to so much of the deed as went beyond the intention of the parties. *Hileman v. Wright*, 9 Ind. 126.

So, a court of equity will, upon full and satisfactory proof, reform a grant of a seaweed privilege in a deed of a farm, granting, through ignorance of the scrivener of the principles of conveyancing, a greater privilege than the parties to the original contract designed, against a purchaser of the privilege and farm from one of them, who bought under a like contract. *Allen v. Brown*, 6 R. I. 386.

And where a married woman purchased a tract of land, and the scrivener who prepared the deed of conveyance by mistake inserted her husband's name with hers in the deed, thus conveying the title to them jointly, after the husband's death equity will reform the deed at the suit of the widow, against the husband's heirs, by striking out the husband's name. *Courtright v. Courtright*, 63 Iowa, 356, 19 N. W. 255.

Nor is a purchaser of land subject to a mortgage, without an agreement to assume the same, liable therefor, though the scrivener, by mistake, and without the knowledge of either party, inserted in the deed

a stipulation that the grantee agreed to pay it; and in such case equity will reform the instrument by striking out such stipulation. *Adams v. Wheeler*, 122 Ind. 251, 23 N. E. 760.

And where an agreement for the sale of real estate provides that the sale shall be subject to a mortgage on the real estate, but does not provide that the purchaser shall either assume or agree to pay the mortgage, and the deed contains a clause by which the purchaser assumes payment of the mortgage, the purchaser is entitled to equitable relief. *Martini v. Christensen*, 60 Minn. 491, 62 N. W. 1127.

(4) *Reservations.*

Where the proof of a mutual mistake of the parties in a deed in failing to insert a reservation is clear and satisfactory, a court of equity will reform the deed so as to make it conform to the intentions of the parties. *Warrick v. Smith*, 137 Ill. 504, 27 N. E. 709; *Matteson v. Johnston*, 124 N. Y. Supp. 185.

And an action in equity will lie by the grantor to reform a deed to real estate where, by agreement, the growing and un-matured crops were to be reserved, and such reservation was left out of the deed by mutual mistake. *Marshall v. Homier*, 13 Okla. 264, 74 Pac. 368.

So, where a bargain was made for the sale of land, excepting the coal in it, and by mistake of the scrivener no reservation was inserted in the deed, the deed will be so reformed in equity as to convey the land without the coal, expressly saving all intervening rights. *Baab v. Houser*, 203 Pa. 470, 53 Atl. 344.

And where a person orally purchased from another all the minerals in certain land except lead and zinc, and the vendor altered the deed after it had been sent him for execution by limiting the interest conveyed to the iron ore, without the purchaser's knowledge, and the purchaser remained ignorant thereof until after the deed had been recorded, and the vendor, in a letter to the purchaser, after the contract, and before the deed was executed, stated that he understood the agreement to cover all minerals in the land, reserving to himself all the lead and zinc, the purchaser is entitled to a reformation of the deed. *Pulaski Iron Co. v. Palmer*, 89 Va. 384, 16 S. E. 275.

And a deed of land containing an ore bed, having a clause reserving to the grantor the right of mining on the granted premises a certain quantity of ore annually at a certain duty per ton, licenses him to enter the mine, but saves to him no title in the land or in the ore before it is mined and separated from the land, and it does not restrict the grantee from mining at the same time, even to the exhaustion of the ore; and it may be reformed in equity for variance through mutual mistake from the previous oral contract of the parties, 28 L.R.A.(N.S.)

as a reservation, and not an exception from the grant, and therefore not within the statute of frauds. *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290.

So, where a contract for the sale of land agreed upon provided for the reservation by the grantor of a right of way, but, through a mistake in the grantor's agent in selecting the proper blank form of deed, a conveyance of the land was made free of such reservation, the deed may be corrected in equity, on the ground of mutual mistake. *Dennis v. Northern P. R. Co.* 20 Wash. 320, 55 Pac. 210.

And where three adjoining landowners agreed in writing with a fourth person to convey to him a strip of land for a road, with an exception or reservation to the vendors of a right to use the road, and, by mistake of the scrivener, who was chosen by one of the grantors, the deed did not state that the strip was conveyed for a road, and omitted the exception or reservation of the grantors' right to use it, and later the grantee denied such right, the deed may be reformed in equity so as to state that the land was conveyed for use as a road, and also the grantors' right to use it. *Stines v. Hays*, 36 N. J. Eq. 369.

And where a person conveyed a right of way to a railroad company for an express money consideration, inserting a clause in the deed that the company "hereby agrees to construct a cattle and wagon pass at place designated," and it appears from the evidence that the contract was to require a crossing under the tracks of sufficient width and height to permit the passage of cattle and loaded wagons, the deed will be reformed in equity to correspond with such intention. *Owens v. Carthage & W. R. Co.* 110 Mo. App. 320, 85 S. W. 987.

So, where the owner of several adjoining lots facing a street on the north, and one of them abutting another street on the east, conveyed one of the inner lots, excepting the south 12 feet of such lot, to be used as an alley to adjoining lots, and leading east to the latter street, and both parties to this deed intended that it should secure to the purchaser a perpetual right of way over the south 12 feet of all the lots as a private alley to the street, and thereafter such strip of land was improved and used as an alley, and afterwards the grantor conveyed to a third person the corner lot, without any reservation, the third person knowing at the time of the existence of the alley, and that the first purchaser had purchased and claimed the right to its perpetual use, the first purchaser is entitled to a reformation of his deed so as to give him a right of way over the south 12 feet of the lots to the street, and to a decree requiring the purchaser of the corner lot to remove obstructions placed by him in such alley, and that the last purchaser hold his title subject to the first purchaser's deed, as reformed, but he was not entitled to have the deed to the last

purchaser reformed, that being a matter solely between the last purchaser and his grantor. *Fischer v. Laack*, 85 Wis. 280, 55 N. W. 398.

And where an owner of adjoining lots the rear of which had no connection with any street formed the plan, in selling them, of reserving an alleyway 3 feet wide across the rear of each lot, and opening on a public alley at one end, for the common use of the owners of the interior lots, and the deed given to a purchaser of one of the interior lot contained a reservation of such way, but contained no grant of a right of way over the lots intervening between such lot and the alley, which were then owned by the vendor, though such grant was intended, and the deed was duly recorded, and all the lots were sold, with the verbal understanding that the way was to be reserved, but the reservation was omitted from the deed in question through an oversight, but the purchaser, in building, left a covered way up to the second story, and it was used by the complainant and others at the time the lot was purchased by the defendant, the complainant is entitled to have the deed of her grantor reformed so as to convey the right to use the way over defendant's lot, the defendant being chargeable with notice of such right by the record of the deed as written and the use made of the way when he purchased, of which he had actual knowledge. *Haslett v. Stephany*, 55 N. J. Eq. 68, 36 Atl. 498.

And where a person granted to an adjoining owner for a limited period a right of way over her premises, and covenanted that she would not use or allow a building to be erected thereon to be used or occupied for the sale of intoxicating liquor, and subsequently the owner granting the right of way applied for a loan upon her premises, and it appeared that the adjoining owner might possibly make a claim thereto, and he thereupon executed a quitclaim deed of the premises adjoining his lot, and the deed excepted the portion of the right of way, but did not except the covenant restraining the owner from using her land for saloon purposes, the grantor in such quitclaim deed is entitled to have the deed reformed by inserting such condition. *Uiklein v. Matthews*, 93 App. Div. 57, 86 N. Y. Supp. 924.

So, where one person conveyed a lot of land on which there was a spring to another, from which spring the grantor, by means of an aqueduct, supplied his own and other premises with water, this aqueduct being of greater value to him than the price he received for the land, and by his mistake, he not intending to part with the right to use the water from the spring, the deed to the grantee contained no reservation of such right, the purchaser, at the time of purchase, having no knowledge of the existence of the spring, the grantor is entitled either to a conveyance from the grantee of the right to use the aqueduct, or

to a reconveyance of the land, on repaying the price thereof; and the grantee is entitled to elect which of these modes of relief the grantor shall have. *Brown v. Lamphear*, 35 Vt. 252.

And where land fronting on a body of water was leased, and thereafter the county board of supervisors granted the lessee the right to cultivate oysters within the limits of the front of the property, and subsequently the lessor conveyed the land to the lessee, the deed reserving all littoral and aquatic rights appurtenant to the land, though this did not deprive the lessee of his right to his oysters, the lessor was entitled to have the provision in the deed reformed in accordance with the actual intention of the parties, that the lessor should have the exclusive right to the oysters, which intention was not shown by the language used. *Barataria Canning Co. v. Ott*, 88 Miss. 771, 41 So. 378.

So, proof that a mother, who intended to give to her daughter only the reversion after her death in her real estate, the daughter so understanding, executed and delivered a deed which, by the mistake of the scrivener, first gave the daughter a fee absolute, and then attempted to cut it down by provisions in favor of the mother during life, presents a proper case for reformation of the deed, to the end that it may correctly express the real agreement and intention of the parties. *Schrieber v. Goldsmith*, 39 Misc. 381, 79 N. Y. Supp. 846.

And where a father conveyed by deed a house and lot to his married daughter, reciting only love and affection as its consideration, and not using any words which would exclude the marital rights of her husband, and an attachment against the father was afterwards levied on the property, the deed was reformed against the husband and the father and the attaching creditor, on proof that the husband bought the property and paid a part of the price with moneys belonging to his wife, who conveyed it to her father, under a verbal agreement between the three that it should be conveyed to the wife as an equitable separate estate, and that it was not so conveyed, through mistake on the part of the draftsman. *Berry v. Sowell*, 72 Ala. 14.

And where the absolute owner of land conveyed it by a deed which, after granting all his estate in the land, declared in a subsequent clause that the interest and title intended to be conveyed was only that acquired by virtue of a certain sheriff's deed, which was in fact an undivided one-half interest, and all the parties to the conveyance intended that it should embrace such one-half only, and supposed that the deed was so drawn as to effectuate such intention, although the limitation of the grant was ineffectual because inserted after and not in the granting clause, it is nevertheless conclusive as to the intention of the parties, and whether the mistake was one

of law or of fact, the deed might be reformed to accord with such intention. *Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588.

Nor does the fact that the parties to a deed did not understand the legal effect of a reservation in it afford a reason why equity should not carry out their intentions and enforce their substantial rights. *Western U. Teleg. Co. v. Manhattan R. Co.* 27 Misc. 101, 57 N. Y. Supp. 357, affirmed in 49 App. Div. 345, 63 N. Y. Supp. 435.

(5) Assumption of mortgages or other encumbrances.

Where the grantee in a deed enters into an agreement with the grantor that he will assume and pay all of the mortgages and encumbrances on the land conveyed at the time of the execution of the deed, but, by the mutual mistake of the parties, the deed does not express this contract, equity has jurisdiction to reform it so as to conform to the intention, agreement, and understanding of the parties. *Stephenson v. Elliott*, 53 Kan. 550, 36 Pac. 980.

And where the parties to a sale of real property agreed that a mortgage thereon should be assumed by the purchaser, and the deed was drawn, making the conveyance subject to the mortgage, the word "subject" being used by the mutual mistake of the parties, a reformation thereof should be ordered by equity, substituting the word "assumed" therefor. *Williams v. Everham*, 90 Iowa, 420, 57 N. W. 901.

So, where land was conveyed by deed of general warranty, except that it was recited therein that the grantee would support the grantor and wife, and give them a home on the land during their lifetime, and that the deed was made subject to a certain mortgage, the amount of which was stated at \$900, which the grantee assumed and agreed to pay, but the mortgage was in fact for a much less sum, and there was another mortgage upon the land, the aggregate amount of the two being only \$900, and the evidence shows that it was the intention of the parties to make the deed subject to the two mortgages, but that the scrivener had, by mistake, failed to specify one of them, and the mortgage not so specified was afterwards foreclosed and the land sold and afterwards redeemed by the grantor, the grantee cannot claim that such redemption inures to his benefit, on the ground that the grantor was bound to protect his title against the mortgage not named in the deed, but, upon a cross petition, the court rightly corrected the deed so as to make it express the real contract between the parties. *Zack v. Krall*, 64 Iowa, 88, 19 N. W. 858.

(6) As to interest conveyed.

A deed drawn by mistake for a different interest from that intended to be conveyed may be corrected if the mistake be clearly

proved. *Andrews v. Andrews*, 12 Ind. 348; *Macon v. Dasher*, 90 Ga. 195, 16 S. E. 75; *Nutall v. Nutall*, 26 Ky. L. Rep. 671, 82 S. W. 377; *Pinkham v. Pinkham*, 60 Neb. 600, 83 N. W. 837; *Taylor v. Luther*, 2 Sumn. 228, Fed. Cas. No. 13,796.

And where a draftsman was instructed to prepare a deed conveying a certain interest in property, and by mistake made it embrace a greater interest than the parties intended, a court of equity will, upon parol proof of such mistake, reform the deed. *Cooke v. Husbands*, 11 Md. 492.

And if a grantee in a deed gives a mortgage for the value of land granted upon other land, under a misapprehension that the grantor, as recited in the deed, owned the land in fee, when in fact he owned only a life estate therein, the grantee cannot be compelled to pay, in a suit to foreclose the mortgage, more than the value of the life estate. *Wilson v. Ott*, 173 Pa. 253, 51 Am. St. Rep. 767, 34 Atl. 23.

So, where, upon the face of a deed, it appears that the grantors intended to convey a fee, and by mistake they have failed to carry out their intention, the mistake may be corrected upon the evidence furnished by the deed itself. *Sampson v. Mudge*, 13 Fed. 260.

And where a contract was made for the sale of land in fee without conditions, and persons acting for the purchaser took a deed conveying to her and to her bodily heirs, and recorded the deed, such deed conveying only a life estate, she is entitled, on discovery of the fact, to have the deed reformed in equity so as to convey a fee. *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892.

And if parties, in drawing a deed intending to convey a life estate, place the words of limitation in the habendum instead of the premises, under the impression that it is immaterial in which part they appear, their error is a mistake of law which a court of equity will correct to effectuate the intention of the parties. *Condor v. Secrest*, 149 N. C. 201, 62 S. E. 921.

But a mistake as to the legal effect of the word "heirs" in a deed, instead of the word "children," thus conveying a fee instead of a life estate, does not justify a reformation of the deed in equity. *Fowler v. Black*, 136 Ill. 363, 11 L.R.A. 670, 26 N. E. 596.

So, where a person purchased land under an agreement that the deed should be made to himself and wife as grantees, intending to create an estate in himself and with survivorship, and the deed, by mistake, was made to his wife alone, a court of equity will reform it, making it express the real contract, notwithstanding the fact that he had heard the deed read, and supposed that it created the desired estate. *Corrigan v. Tiernay*, 100 Mo. 276, 13 S. W. 401.

And where a notary public, in drafting an instrument intended to operate as a conveyance of land, used words which gave

to it the character of a testamentary instrument, passing no present estate, when the intention of the parties was to reserve to the grantor only a life estate in the premises conveyed, such conveyance may be corrected in a court of equity, to conform to the true intention of the parties to such instrument. *Pinkham v. Pinkham*, 60 Neb. 600, 83 N. W. 837.

And where a leasehold estate was assigned to a married woman, her personal representatives and assigns, to her sole and separate use, with power, with the assent and concurrence of her husband, to sell, mortgage, or otherwise dispose of it, and with power, if she should survive her husband, to devise or bequeath it to such of her children or descendants by him as she might think proper, and for the purpose of giving the children of the husband by a former wife an equal interest with her children in the property, she and her husband conveyed it to a trustee by a deed which neither of them read at the time of its execution, and which was afterwards discovered to be so drawn as to deprive her of the full power of disposal over the property and the proceeds of its sale which she had under the previous deed, the husband and wife, on bill filed by them, are entitled to have the mistake in the deed corrected. *Tyson v. Tyson*, 31 Md. 134.

So, where a city lot was conveyed to a trustee for a named person and her children forever, and parol evidence was introduced to show that it was the intention of the parties to create an estate in fee, it is a proper case for the interposition of a court of equity to reform the deed, so as to make it convey an estate of inheritance, and thereby carry out the intention of the parties. *Cromwell v. Winchester*, 2 Head, 389.

And where a deed was executed by a father to his son, and the testimony clearly shows that the word "heirs" was omitted through the mistake of the draftsman, the agreement and intention being to convey a fee, and not because of ignorance of law that such word is necessary to convey an estate of inheritance, the mistake may be corrected and a fee declared, in an action by the heirs of the grantor to recover from the heir of the grantee. *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976.

And where one person received from another a deed of certain realty, described by reference to a former deed, and mortgaged the realty back to the vendor, describing it by metes and bounds, with full covenants of warranty, and both parties supposed they were dealing with the whole realty, and the purchaser made large expenditures on it, and it turned out that the vendor's deed to him conveyed only an undivided half of it, on a bill in equity, brought by the purchaser to compel a conveyance by the vendor of the other undivided half, it was held that there should be an abatement of the price, and the abatement of price should be applied to reduce
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the mortgage and notes secured by it. *Fullen v. Providence County Sav. Bank*, 14 R. I. 363.

In the above case, *Manson v. Thacker*, L. R. 7 Ch. Div. 620, *infra*, IV. g, 3, (a) was distinguished upon the ground that in that case the transaction had been completed and the purchase money paid after an investigation by the purchaser, in which he ought to have discovered the defect.

So, where a trustee sold land, representing the title to be good, and undertaking to warrant the title, but, by mistake or fraud in him, and mistake in the purchaser, the warranty given was a void one, the purchaser is entitled to relief in equity; and where the land consisted of three tracts lying in a row, and the title to one of these tracts failed, that tract lying between the other two, of which it was as large as one and twice as large as the other, and the best improved of all, the purchaser is entitled to demand a rescission. *Chastain v. Staley*, 23 Ga. 26.

Nor is the right of a grantor to the reformation of a deed affected by the fact that the purchaser did not know, at the time the deed was delivered to him, that it contained a greater estate than that bargained for. *Dulo v. Miller*, 112 Ala. 687, 20 So. 981.

So, where by the fraud of a vendor and the mistake of a vendee the parties to an oral sale of land signed a written contract for a special warranty deed only, instead of a full warranty deed, as agreed upon, and such a deed was in fact executed, a court of equity will reform the contract and deed so as to make them conform to the oral agreement for a full warranty deed. *Efta v. Swanson*, 109 Minn. 94, 123 N. W. 56.

And where a person purchased mortgaged land supposing he was obtaining the fee, but in reality got only the equity of redemption, the court will set aside the sale on account of the mistake, ordering him to account for rents while in possession. *Lowndes v. Chisholm*, 2 M'Cord, Eq. 455, 16 Am. Dec. 667.

And where a grantor conveys a certain interest in real estate, and then, in the same conveyance, by mistake, reserves to himself precisely the same interest he first conveys, the deed must be reformed according to the original design of the parties. *Perry v. Knight*, 85 Me. 184, 27 Atl. 96.

Nor will equity permit a trust to fail for want of a trustee; and where it can be seen from the face of the instrument creating the trust, either by its express terms or from the nature of the transaction, or the context, that the purpose of the grantor was to convey an estate in fee, a court of equity will correct and reform the deed by supplying the technical words necessary to carry out the intention of the grantor. *Moore v. Quince*, 109 N. C. 85, 13 S. E. 872.

So, where, on the death of a wife without issue, her brothers and sisters agreed with her husband to convey him a life es-

tate in land left by her, and the husband had a deed prepared which conveyed the fee, and the brothers and sisters executed the same without reading it, under the belief that it passed only a life estate, the mistake was a mutual one, and a court of equity would rectify the deed so as to make it conform to the intention of the parties. *Deischer v. Price*, 148 Ill. 383, 36 N. E. 105.

And where four sisters, being the joint owners of a tract of land, and their husbands, mutually agreed that it should be partitioned among them, and to carry this agreement into effect one of the husbands made deeds of it for several parts, and by mistake, misapprehension, and ignorance of the form in which they should be drawn, the name of each husband as grantee with his wife was inserted, and in this state they were executed, there being no intention to convey to the husbands a greater interest than they were entitled to as husbands of the owners in fee, but such deeds giving them an estate in fee, the heirs at law of a deceased sister are entitled to maintain a bill in chancery against her husband, who was in possession, claiming title under one of the deeds, to have the deed reformed and to establish title in them. *Stedwell v. Anderson*, 21 Conn. 139.

And where a man conveyed certain lands to his wife for life, with remainder to his children in fee, and jointly with his wife he subsequently attempted, by the aid of a trustee, to reconvey the same to himself in fee, and he afterwards died, devising all his property, subject to a life estate, to his children and the descendants of his deceased children, and a descendant of a deceased child sold all his interest in the testator's estate by a deed which conveyed only his interest under the will, and not that under the testator's deed, the evidence tending to show that both the purchaser and the vendor imagined that the testator had acquired the fee of the lands in question by the trustee's deed, and that the vendor intended to sell to the purchaser his interest in the land under such deed, the deed should be reformed so as to pass the grantor's entire interest. *Rousseau v. Lambert*, 10 Ky. L. Rep. 23, 7 S. W. 923.

So, when a grantor, in a conveyance of her interest in certain land was erroneously advised by her attorney that she owned but an undivided fifth of the premises conveyed, and the bargain and estimate of value forming the basis of the price related only to one undivided fifth thereof, and proceeded upon a mutual mistake of the parties at the time as to the extent of the ownership, the grantor is entitled to a reformation of such conveyance to make it conform to the agreement and truly express the intention of the parties, notwithstanding the grantee was advised before the execution of the deed that the grantor owned three fifths of the premises. *Clegborn v. Zumwalt*, 83 Cal. 155, 23 Pac. 294.

And where two persons both supposed

that one of them owned an undivided three-twentieth interest in a piece of land, and the owner of such interest deeded it to the other at a price fixed with reference to the extent of the interest, and it was afterwards found that she had owned an undivided one-fifth part instead of three-twentieth, she is entitled to a reformation of the deed, to partition, and to an accounting. *Fly v. Brooks*, 64 Ind. 50.

And a complaint in an action to reform a conveyance which, by mistake, conveyed the whole of a certain lot instead of an undivided half thereof, as intended, though averring a mutual mistake of the grantor and grantee, if it also averred that the defendant knew at the time of accepting the deed that the plaintiff also supposed that the deed described and conveyed only the undivided half of the property, the case is one justifying the reformation of the deed; and where the evidence showed and the court found that, at the time of the acceptance and record of the deed, the grantee knew that the deed conveyed the whole lot, and the grantor supposed the deed conveyed only the undivided one half of it, and that the deed conveyed the whole lot by mistake, there is no substantial or material variance between the complaint and the findings and proof which could mislead the defendant to his prejudice. *Holt v. Holt*, 120 Cal. 67, 52 Pac. 119.

(7) *As to tract or parcel conveyed.*

When, by mistake of the parties or of the draftsman of a deed, the grantor is made to convey a wrong tract of land, a court of equity will correct the mistake, and reform the deed so as to make it convey the tract intended. *Felton v. Leigh*, 48 Ark. 498, 3 S. W. 638; *Stedwell v. Anderson*, 21 Conn. 139; *Stille v. McDowell*, 2 Kan. 374, 85 Am. Dec. 590; *Burr v. Hutchinson*, 61 Me. 514; *Moore v. Crump*, 84 Miss. 612, 37 So. 109; *Johnson v. Taber*, 10 N. Y. 319; *Penfield v. New Rochelle*, 18 App. Div. 83, 45 N. Y. Supp. 460.

And protect the interests of such persons as may legally claim to hold the correct premises through and under the purchaser. *Burr v. Hutchinson*, supra.

If the right to a correction is asserted within the statutory period. *Moore v. Crump*, supra.

This is so, whether the mistake arose from a misapprehension of the facts or of the legal operation of the deed. *Stedwell v. Anderson*, supra.

And where the court corrects a conveyance of a wrong tract of land by a substitution of the intended tract, it will at the same time declare and enforce the vendor's lien upon it for the unpaid purchase price. *Felton v. Leigh*, supra.

Equity has jurisdiction of a suit to set aside a settlement and reform a deed given in pursuance thereof because of mutual mistake or fraud on the part of the grantor in including therein land to which he had

no title, though there may be a concurrent remedy at law on the covenant in the deed. *Hancock v. Cossett*, 45 Fed. 754.

(8) Description.

The correction of mistakes of description in written instruments, established by clear and satisfactory proof, so as to make them conform to the true intention of the contracting parties, is a common ground of equity jurisdiction. *Berry v. Webb*, 77 Ala. 507.

And where, through mistake or fraud, a written contract to convey does not contain the right description, the court may reform it so as to make it conform to the oral agreement. *Olson v. Erickson*, 42 Minn. 441, 44 N. W. 317; *Houston v. Faul*, 86 Ala. 232, 5 So. 423; *Pence v. Armstrong*, 95 Ind. 191; *Barry v. Rownd*, 119 Iowa, 105, 93 N. W. 67; *James v. Cutler*, 54 Wis. 172, 10 N. W. 147.

And a mistake in the legal effect of a description in a deed, or in the use of technical language, may be relieved against in equity. *Clayton v. Freet*, 10 Ohio St. 544; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Canedy v. Marcy*, 13 Gray, 373.

Thus, where parties execute a deed intending and believing it to be an agreement for the sale of land, and an indefinite and uncertain description of the land is inserted in the deed through a mistake as to the ordinary meaning of the terms used, such mistake does not invalidate the contract, and as against the vendor and subsequent purchasers with notice, an estate in the land intended to be conveyed will pass to the vendee, with the right to demand that it be reformed so as to describe the land correctly. *Knight v. Glasscock*, 51 Ark. 390, 11 S. W. 580.

And where a mistake in the description of land occurs in a series of conveyances under such circumstances as would entitle any one of the vendees to a reformation as against his immediate vendor, the equity will work back through all, and entitle the last vendee to a reformation against the original vendor. *Blackburn v. Randolph*, 33 Ark. 119.

And where a deed particularly describes certain lands in a named town, adding, "also all such other lands as I own or have any interest in in that town," and it appears that he owned and intended to convey an interest in an ore bed in that town, but wholly disconnected from the lands described, the parties supposing the language used to be sufficient for that purpose, a court of equity will so reform the deed as to make it include the ore bed. *Cake v. Peet*, 49 Conn. 501.

So, a court of equity will so reform a conveyance founded on a consideration as to correct a mistake in the description therein, though the deed is but a quitclaim, and contains no covenants. *Deford v. Mercer*, 24 Iowa, 118, 92 Am. Dec. 460.

And a mistake in the calls of a partition

deed will be corrected in equity where the proof on the subject is persuasive and convincing. *Mage v. Lane*, 11 Ky. L. Rep. 296, 12 S. W. 154.

Nor is the right to the reformation of a deed for a mistake in the description affected by the question whether it was a deed of bargain and sale or of gift. *Jones v. McNealy*, 139 Ala. 381, 101 Am. St. Rep. 38, 35 So. 1022.

And a suit by a grantee to reform a deed for mistake in the description will not be defeated by an oral agreement that the deed should operate as a mortgage. *Tillis v. Smith*, 108 Ala. 264, 19 So. 374.

A mistake in describing the boundaries of land in a deed of conveyance thereof cannot be corrected to the injury of the assignee of the grantee, however, unless such assignee purchased with notice or without value. *Farley v. Bryant*, 32 Me. 474; *Long v. Gilbert*, 133 Ga. 691, 66 S. E. 894; *Pence v. Armstrong*, *supra*.

And a bill in equity to correct an alleged misdescription of lands sold under execution, the mistake being continued in the deed to the purchaser, is in the nature of a bill for specific performance, and the relief sought will not be granted if any circumstances exist which would make it appear inequitable to grant it. *Carnall v. Wilson*, 14 Ark. 482.

And where, in a conveyance of land, a boundary is described in the language intended to be used, but under a misapprehension as to its construction and effect, a court of equity can make no correction. *Farley v. Bryant*, *supra*.

(b) Deeds of appointment or settlement.

The rules with reference to reformation applicable to deeds generally seem to apply to deeds of appointment of beneficiaries of some donation or benefit, and to deeds of settlement to heirs or other persons intended to be benefited.

Thus, where a woman had a power of appointment by deed or will, and she executed it by the execution of a deed which she retained in her own possession, and she afterwards annulled the deed by cutting off her name and seal from it, under the mistaken notion that she had provided an effectual appointment by her will, subsequently made, which did not in fact operate as an appointment, whether she mistook the contents of the will at the time she cut off her name and seal, which would be a mistake in fact, or whether she mistook the legal operation of her will, which would be a mistake in law, in either case the mistake annuls the cancellation. *Perrott v. Perrott*, 14 East. 423.

So, where parties through ignorance and mistake conveyed an estate to a named person and her heirs, when the intention was to make a provision for the children as well as herself, and to convey the land to her for life, remainder to her children, the mistake

is one which equity can correct. *Clayton v. Freet*, 10 Ohio St. 544.

And where a father intended to convey land to his married daughter and the heirs of her body, and, through mistake, conveyed it to her husband and his heirs, the deed may be reformed after the death of both grantor and grantee, upon clear and satisfactory evidence. *Mattingly v. Speak*, 4 Bush, 316.

And where the owner of estates in a province, wishing to give his son a qualification as bailiff for that province, wrote to the registrar, and asked him to find a qualification, and the registrar thereupon, without further instructions, selected out of the father's lands the smallest lot which would qualify the son, and sent to the father a deed by which he purported to convey to the son, in consideration of love and affection, and the deed was at once executed by the father and registered, and the son died soon after, without having ever heard of the transaction, and it clearly appeared that neither the father nor the registrar intended or considered the transaction to have the effect of making the son the beneficial owner, or intended any fraud or illegality, the father is entitled to have the deed set aside and to re-establish his title to the land, the letter written to the registrar excluding any defense grounded on the statute of frauds, and this conclusion is not affected by the circumstance that the legal estate was outstanding under a mortgage in fee, not known to the registrar. *Childers v. Childers*, 1 De G. & J. 482.

So, where, in contemplation of marriage, and with the consent of the intended husband, a woman, acting under advice of counsel, made a deed of settlement of all her estate, with certain exceptions, the trustees to pay her the income to her separate use for life, and after her death to convey the estate to her children, and if she left no issue, then to convey to her sisters and brother of their issue, and there was no power of revocation in the settlement, and she did not understand that her power of appointment was restricted to her brother and sisters, but believed that if she survived her husband she could dispose of her estate as she pleased, and the wife survived the husband, who died leaving no issue of the marriage, the absence of the power or revocation being a mistake, and the provisions after death of the husband being without consideration, and the beneficiaries being volunteers, the wife is entitled to relief in equity, and to have the trustees reconvey the trust estate to her. *Russell's Appeal*, 75 Pa. 269.

And where a deed of separation and settlement was made between a husband and wife, and acted upon during the life of the husband, and his wife, after his death, filed her bill, claiming dower and her distributive share of the husband's estate, the instrument of separation and settlement may be rectified upon a showing that the conveyance was not only for the support and

maintenance of the wife during coverture, but in full satisfaction of all claims whatever, by dower or distribution, on the estate of her husband, so far as it is material to the adjustment of the rights of the parties. *Parham v. Parham*, 6 Humph. 287.

So, where notes and a mortgage were executed to a wife for the purchase price of property which belonged to her husband individually, under an agreement with the maker of the notes and mortgage that they should be so drawn that if the husband died before the wife, she would be the sole owner of the property, but if she died first, he should be the sole owner, without any expense of probating the estate in either case, and the person who drew the papers was instructed to draw them in that way, but failed to do so, and the papers were signed in the presence of the husband and wife, but without being read, a reformation of the notes and mortgage to correspond with the agreement is justified. *Kropp v. Kropp*, 97 Wis. 137, 72 N. W. 381.

And where, in settlement of a claim of a married woman against an estate, a sale directed by the court is made to her of land belonging to the estate, but by mistake, and without her consent, the commissioner's deed is made out in the name of her husband, who has paid no part of the consideration, she being inexperienced in business, and until his death unaware of the mistake, the deed will be corrected in equity. *Clemons v. Holtheide*, 10 Ky. L. Rep. 166, 8 S. W. 697.

A voluntary settlement should contain a power of revocation, and if it does not, the parties who relied upon it must prove that the settlor was properly advised when he executed it, that he thoroughly understood the effect of omitting the power, and that he intended it to be excluded from the settlement; if that is not established, and the court sees from the surrounding circumstances that the settlor believed the instrument to be revocable, it will, even after the lapse of nearly twenty years and the death of the settlor, interfere to give relief against it. *Hall v. Hall*, L. R. 14 Eq. 365.

(c) Mortgages and deeds of trust.

(1) Generally.

Where a mortgage is drawn and executed which is intended to carry into execution a previous agreement, but which, by mistake of the parties or the draftsman, either as to law or fact, does not fulfil that intention, or violates it, equity will correct the mistake so as to conform to the intentions of the parties. *McMillan v. Fish*, 29 N. J. Eq. 610; *Allis v. Hall*, 76 Conn. 322, 56 Atl. 637; *Allen v. Elder*, 76 Ga. 674, 2 Am. St. Rep. 63; *Easter v. Severin*, 78 Ind. 540.

Equity will help a defectively executed mortgage, given upon a valuable consideration, and reform and enforce the same as against the mortgagor and subsequent assignees and lien holders having notice. *Le-*

banon Sav. Bank v. Hollenbeck, 29 Minn. 322, 13 N. W. 145.

And a promise made upon an agreement not to sue for the reformation and foreclosure of a mortgage is founded on a sufficient consideration. McCasland v. Aetna L. Ins. Co. 108 Ind. 130, 9 N. E. 119.

If a mortgage fails to express the intention of the parties with sufficient clearness to enable the court to carry the same into effect, equity will reform it, although the mistake consist in misapprehending or misjudging its legal effect. Horst v. Dague, 34 Ohio St. 371.

And a party to a mortgage deed in the condition of which a material omission was made through the mistake of the scrivener, and contrary to the intention of the parties, is entitled in a court of chancery to have that mistake corrected, irrespective of any claim by the adverse party of misapprehension of his part in the mortgage transaction. Wooden v. Haviland, 18 Conn. 101.

Thus, a mortgage may be properly reformed in respect to correctly describing the date of maturity of the notes described thereby. Commercial Nat. Bank v. Johnson, 16 Wash. 536, 48 Pac. 267.

And where by mistake the name of the mortgagee in a mortgage was omitted, a decree should be rendered reforming the instrument by inserting the name. Parlin v. Stone, 1 McCrary, 443, 48 Fed. 808.

And where a scrivener, in drawing a mortgage on land from a corporation, made it to the mortgagee and "his successors," equity will reform it by making it read to "his heirs." McMillan v. Fish, supra.

And if by mistake an assignment of a whole mortgage be made instead of a part thereof, the mistake may be corrected in chancery by a bill brought for that purpose against the proper parties. Langdon v. Keith, 9 Vt. 299.

So, where a mortgage was given to a husband and wife jointly, and the intent was to make the income therefrom payable to the wife during her lifetime if she survived her husband, but by mistake the mortgage did not conform to such intent, equity will decree a reformation of the mortgage. McLeod v. Free, 96 Mich. 57, 55 N. W. 685.

And a complaint to reform a mortgage given by a husband and wife, which shows that by mistake of the scrivener a term in the description of the land, and the year in the date, were written differently from the term and the date intended by the mortgagors, sufficiently sets forth a cause of action against the widow and heirs of the husband for a reformation of the mortgage to conform it to the intention of the parties. Jones v. Sweet, 77 Ind. 187.

And if a husband and wife, to secure their joint note, execute a mortgage which was intended to include all their title to certain lands, but, laboring under the mistaken belief that she owned such land, he joined in the mortgage only so far as to release his estate as tenant by the curtesy, whereas in fact he owned part of the land in fee simple, 28 L.R.A.(N.S.)

equity will, at the instance of the mortgagee, compel them to execute a new mortgage, conveying the entire title of both; and such mortgage, when executed, will be good against all persons who acquired any title or lien after the execution of the imperfect mortgage, and with notice of its infirmity. Livingstone v. Murphy, 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012.

And where a person purchased a tract of land, part of the purchase money to be paid in cash, and the balance to be secured by mortgage on the land, and at the request of the purchaser the deed was made to his wife, and in pursuance of the agreement, the wife, at the request of her husband, executed a paper intended to be a mortgage, for the unpaid portion of the purchase money, which in law was not a mortgage, a court of equity will carry out the intention and agreement of the parties by treating the transaction as an equitable mortgage to secure the unpaid portion of the purchase money, and interest. Remington v. Higgins, 54 Cal. 620.

So, an instrument agreed upon between the parties to be executed as a mortgage, but which, by mistake and accident, was executed as an absolute deed, will be treated by chancery as a mortgage. Washburn v. Merrills, 1 Day, 139, 2 Am. Dec. 59; Cripps v. Jee, 4 Bro. Ch. 472.

And this may be decreed on parol evidence making it clear, on the written evidence and the accounts of the parties, that the agreement was not what the deed purported it to be. Cripps v. Jee, supra.

And a mortgage executed by a life tenant who was also vested with a power to mortgage the fee, which did not refer to the power, and therefore covered only the life estate, may be reformed so as to cover the fee, where both parties thereto intended and agreed that the fee of the land, and not the mere life estate, should be mortgaged, and supposed that a mortgage in the usual form would be a valid mortgage of the fee under the power. Lardner v. Williams, 98 Wis. 514, 74 N. W. 346.

So, where a mortgage of realty in a state is executed in another state before a commissioner of deeds only, which is sufficient in that state, but not so in the state in which the realty is situated, a court of chancery has jurisdiction to reform and foreclose the mortgage. McCrary v. Austell, 46 Ga. 450.

And where a mortgage provided for interest less than the legal rate, but also contained a provision that the borrower should repay all money that might be paid by the lender for taxes and assessments, etc., and the holder, about to foreclose, to avoid a plea of usury, alleged that under the actual agreement it was not intended that the borrower should pay ordinary taxes, but solely to provide for the payment by the mortgagor of any tax or assessment on the mortgage that might be imposed by legislation; and as no such legislation had been adopted, the mortgagor had not been called upon to

pay the ordinary taxes on such indebtedness, these allegations, unexcepted to, are sufficient to justify the admission of evidence of such mistake in the written contract, and authorize its reformation. *Norris v. Belcher Land Mortg. Co.* 98 Tex. 176, 82 S. W. 500, 83 S. W. 799.

So, where a note and trust deed were executed by the officers of a corporation as such, the evidence showing conclusively that the debt was due by the corporation, and the title to the property conveyed in the trust deed was in the corporation, and that the intention was to bind the corporation by execution of the note and deed, a court of equity may interpose, correct the mistake, reform the deed, foreclose the same, and enforce the lien. *Denver Brick & Mfg. Co. v. McAllister*, 6 Colo. 261.

And when a debtor executed a deed of trust to secure certain of his creditors and sureties, and included in it certain notes on which one of the beneficiaries was supposed to be bound as surety, describing them as notes on which said beneficiary was surety, under the belief that, if he was not bound, the misdescription would exclude the holder of them from any benefit under the deed, it is a case for reforming the deed in equity, upon proof of the mistake, and that the grantor intended to secure the said beneficiary, and not the notes. *Trapp v. Moore*, 21 Ala. 693.

The correction of a mistake in a mortgage after foreclosure, in such manner as to make it embrace property not described in the original mortgage, revives the right of the mortgagor to redeem. *Provost v. Rebman*, 21 Iowa, 419.

(2) Restoration of discharged mortgages.

Equity will restore a mortgage released through mistake, and give to it its original priority as a lien. *Bruse v. Nelson*, 35 Iowa, 157.

And if the holder of a mortgage takes a new mortgage as a substitute for a former one, and releases the latter in ignorance of an intervening lien upon the mortgaged premises, equity will, in the absence of such special disqualifying circumstance, restore the lien of the mortgage. *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923; *Bruse v. Nelson*, *supra*; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *McKenzie v. McKenzie*, 52 Vt. 271.

And where the holder of two mortgages was paid the amount due on one of them, but, by mistake, he released the other instead, upon a bill filed by his administrator after his death, for foreclosure of the released mortgage, equity will intervene and grant relief against the mistake. *Bond v. Dorsey*, 65 Md. 314, 4 Atl. 279.

So, where a subsequent mortgagee of land, ignorant of a prior deed, made subject to a senior and bona fide mortgage, relying upon his mortgage, pays the sum due on the senior mortgage for his own benefit, and allows it to be discharged and its registration

canceled, the cancelation and discharge may be annulled, and he may be subrogated to the rights of the senior mortgagee. *Cobb v. Dyer*, 69 Me. 494.

And equity may annul the cancelation of the record of a mortgage against a grantee whose deed is made subject to the mortgage, where the cancelation was made in ignorance of the existence of such deed. *Ibid.*

And this is so though the deed was duly recorded, if the junior mortgagee, who paid and caused the senior mortgage to be canceled, was not guilty of culpable neglect in the premises. *Ibid.*

The fact that the mortgage was released in ignorance of the existence of the intervening lien is deemed such a mistake of fact as to entitle the party to relief, although the intervening lien was of record at the time. *Geib v. Reynolds*, *supra*.

And where a person sold real estate to another, and executed a conveyance thereof, taking back a mortgage for the price, and, the request of the grantee, on the statement that title had not been transferred by the prior deed, he afterwards executed a quitclaim and release, without consideration, thereby in legal effect, but contrary to his intention, discharging his mortgage, he is entitled to relief limiting the operation of the latter deed to the conveyance of the premises, the defendant having acquired his title with knowledge of the plaintiff's equity. *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 816, 33 N. W. 38.

So, a mortgagee, having purchased the mortgaged property at a sale, and satisfied his mortgage, after which the sale is set aside, is entitled to have the mortgage set up again and supported in equity. *Zylstra v. Keith*, 2 Desauss, Eq. 140.

And where a holder of a mortgage has foreclosed the same, and, under a mistake as to the correctness of the proceedings, and the consequent validity of the foreclosure, has paid prior encumbrances which he was equitably entitled to have kept alive for his protection, equity will relieve him from the mistake, except as against innocent grantees and purchasers without notice, and allow him to be subrogated to the rights of the holders of such prior encumbrances. *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91.

And where, on the death of a mortgagor, the mortgagee secured a release of the widow's right of dower in the premises, and also a deed from the mortgagor's father, under the belief that the property descended to the latter, and canceled the mortgage, no consideration being paid for such cancelation, the mortgagee is entitled, as against the heirs of the mortgagor, to a decree for the re-establishment and foreclosure of his mortgage. *Swedesboro Loan & Bldg. Asso. v. Gans*, 65 N. J. Eq. 132, 55 Atl. 82.

So, where the owner of premises conveyed to him subject to a mortgage, in ignorance of the lien thereon of a judgment against a former owner, subsequent to the mortgage, takes up the mortgage and causes the same to be satisfied of record, he is entitled in equity to have the same reinstated as a lien

prior and paramount to the lien of the judgment. *Barnes v. Mott*, 64 N. Y. 397, 21 Am. Rep. 625.

Nor does the fact that the holder of the mortgage, as executor of the mortgagee, was privy to a settlement between the mortgagor and the legatees of the deceased mortgagee, deprive him of the right to be relieved from such settlement, where, at the time of the settlement, he did not know his own title thereto. *Turner v. Turner*, 2 Rep. in Ch. 154.

And where, at the time of the execution of a mortgage, the mortgagor was in possession of the mortgaged premises under a contract with the mortgagee for the purchase thereof, and the mortgage was given as security for notes indorsed by the mortgagee for the accommodation of the mortgagor, which notes were taken up by the mortgagee, and paid and held by him, after which he delivered to the mortgagor a warranty deed of the premises, covenanting against all encumbrances, a court is justified, in the exercise of its equitable powers, to direct that the deed be modified so as to preserve the lien of the mortgage for the protection of the notes in the hands of the mortgagee. *Judd v. Seekins*, 62 N. Y. 271.

And where business men of intelligence met to settle transactions between a decedent and his creditor, and it was agreed that the creditor should take decedent's entire landed estate and certain other property in satisfaction of all his claims secured by mortgage, paying decedent's widow a sum in cash, and the transaction was consummated by the creditor having a deed of the land executed by the widow in favor of the creditor's wife, for debts due by him to her, and surrendering the mortgages, and all the parties to the transaction overlooked for the time the fact that decedent's children had an interest in the land, the mistake is one of law, and the grantee is entitled to have the mortgages reinstated and to be subrogated to the creditor's rights under the mortgages, and to foreclose the same as against the children's interests in the land. *Hutchinson v. Fuller*, 67 S. C. 280, 45 S. E. 164.

The question, considered from the standpoint of remedies, of keeping alive or reinstating an encumbrance, is treated *infra*, VII. c. 5.

(3) *Mortgages and bills of sale of chattels.*

If a chattel mortgage fails to express the intention of the parties, it should be reformed in some tribunal having jurisdiction to grant such relief, before attempting to foreclose it. *Weisl v. James*, 120 N. Y. Supp. 47.

And where there was an agreement for a loan to be secured by a mortgage of the entire personal property of a firm, including its printing presses and other machines, cameras, lenses, and type, but, in the description of the property in the mortgage, the 28 L.R.A.(N.S.)

words used were "fixtures and furniture," which were not, as the parties supposed, broad enough to include those articles, the mistake, though in one sense a mistake of law, will be corrected in equity. *Ryder v. Ryder*, 19 R. I. 188, 32 Atl. 919.

The makers of a chattel mortgage are proper parties defendant in an action brought to reform the mortgage, and to enforce the same by a judgment against a third party for the proceeds of the sale of property included in the mortgage. *John T. Stewart Estate v. Falkenberg*, 82 Kan. 576, 109 Pac. 170.

(d) *Leases.*

A lease which, by reason of the ignorance and mistake of the scrivener, fails to conform to the oral agreement made by the parties, will be reformed if the evidence clearly shows what the agreement was. *Silbar v. Ryder*, 63 Wis. 106, 23 N. W. 106; *Hoard v. Stone*, 58 Mich. 578, 26 N. W. 141.

And equity will reform a lease where it is clearly and satisfactorily shown that the instrument fails to express the mutual understanding of the parties when given a legal construction, though in language selected by themselves. *Brown v. Ward*, 119 Iowa, 604, 93 N. W. 587; *Powell v. Smith*, L. R. 14 Eq. 85.

And where one person entered into an agreement for the lease of a fishery from another, and, at the time of entering into the agreement, both parties believed that the proposed lessor was the owner of the fishery, but it was afterwards discovered that the proposed lessee was the true owner thereof, and there was no fraud on either side, the proposed lessee is entitled to have the agreement set aside, subject to equitable terms. *Cooper v. Phibbs*, 15 Week. Rep. 1053.

So, if a lease is drawn of all of a building, but before it is signed by the lessor, the parties agree verbally that it shall only cover the building as it then is, and that the lessor may erect and use a second story, the lessee cannot recover in ejectment a second story afterwards erected, but a court of equity will prevent such fraudulent use of the lease, and reform it so as to make it correspond with the verbal agreement of the parties. *Murray v. Dake*, 46 Cal. 644.

And where in an action to enjoin the defendant from tearing down and removing certain buildings and improvements on premises leased to him by the plaintiff, the defendant pleaded that, during the negotiations for the lease, it was distinctly understood and agreed that the improvements mentioned were the property of the defendant, and that he was to have the right to remove them on the expiration of the lease, and that such right should be one of the conditions of the lease, and that, by accident or mistake, this condition was omitted, and that when the lease was presented to defendant to sign, he objected because of such omission, and the plaintiff then agreed with him that such omission should make no dif-

ference, and, relying on this agreement and the good faith and honesty of the plaintiff, the defendant executed the lease,—evidence to this effect is properly admitted on the trial. *Isenhoot v. Chamberlain*, 59 Cal. 630.

So, where a written contract for a lease which was intended to be for the term of ninety-nine years, renewable forever, contained no statement of the term for which the lease was to be made, the mistake may be established by parol proof; and the lessee is entitled to have the contract reformed by the insertion of the words, "for the term of ninety-nine years, renewable forever," or words of like import, and when so reformed, to have the agreement specifically executed. *Popplein v. Foley*, 61 Md. 381.

And a person giving a lease of a house, signed by him only, may give evidence on a bill to carry the agreement into execution, that the understanding was that the tenant should pay the rent clear of taxes, and that the agreement therefor was omitted by mistake, for the purpose of giving the lessor the benefit thereof by way of objection to specific performance. *Joynes v. Statham*, 3 Atk. 388.

And where a person leased certain buildings to another with the mutual understanding that, in case the buildings were destroyed, the lessee should be released from further liability for rent, and they were advised that the language used in the lease properly expressed their agreement, which, as a matter of law, it did not, and the buildings were destroyed by a tornado, and the lessor's assignee sued for rent accruing after such destruction, no recovery can be had therefor. *Reed v. Root*, 59 Iowa, 359, 13 N. W. 323.

In the above case, *Moorman v. Collier*, 32 Iowa, 138, *infra*, IV. c, 3, (f), was distinguished upon the ground that that was an action at law, and no equitable defense was pleaded; and *Glenn v. Statler*, 42 Iowa, 107, *infra*, IV. c, 3, (f), was distinguished upon the ground that in that case there was a conflict in the evidence as to the character of the bond that was prepared and executed; and *Gerald v. Elley*, 45 Iowa, 322, *supra*, IV. b, 3 (a), was distinguished upon the ground that in that case there was no contract that the encumbrances should be exempted from the operations of the deed.

Where a lease is made pursuant to an agreement between two persons, and the lease is executed according to the express terms of the agreement, however, parol evidence is not admissible to show that the lease, though in strict conformity with the terms of the written agreement, was contrary to its spirit, there being something outside the contract agreed upon between the parties, and omitted from the lease. *Davies v. Fitton*, 2 Drury & War. 225.

And where a written lease for a term of three years recited that the agreed rent was \$1,500 for the term, payable in two equal instalments of \$750 each at the end of the first and second years of the term, a bill to reform it so as to make it show that the

agreed rent was \$500 for each year, though payable as specified, thereby giving him a landlord's statutory lien and remedy against the crop for each year's rent, will not lie, the supposed legal effect of the change in the contract being conclusive against the existence of the alleged mistake, since the contract as thus reformed would be inharmonious and inconsistent, if not impossible of legal effect and operation. *Campbell v. Hatchett*, 55 Ala. 548.

Whether a lease should be reformed for mistake is exclusively a question for the court. *Loukowski v. Pryor*, 46 Colo. 584, 106 Pac. 7.

(e) *Contracts with reference to lands.*

Courts of equity have the power and jurisdiction so to reform an executory contract for the sale of real estate as to require and compel it to speak the truth in the matter of description and other things, where it is clearly established that the instrument on its face speaks falsely. *Allen v. Kitchen*, 16 Idaho, 133, — L.R.A.(N.S.) —, 100 Pac. 1052.

And a mutual mistake as to the subject-matter of the contract is sufficient to avoid it. *Mochlenpali v. Mayhew*, 138 Wis. 561, 119 N. W. 826.

And a complaint in an action to reform a contract for the sale of land, that a certain provision was omitted from the writing by mistake, and such provision was one of the terms of the contract between the parties, and that another provision was inserted by mistake, it being in fact a part of another contract, sufficiently alleges an agreement to the terms and provisions of the contract as sought to be reformed. *House v. McMullen*, 9 Cal. App. 664, 100 Pac. 344.

So, where it unmistakably appears that both parties to a contract for the sale of real estate understood that it expressed only a sale of the vendor's interest in the premises, the contract will be reformed to express the true object of the parties, though there is a reference in the contract to the life estate of the life tenant, coupled with language that the vendor was to deliver a deed of the undivided one-quarter interest in the premises, which might justify the conclusion that the vendor had contracted to sell an undivided one quarter of the premises, and not merely his interest. *Bacot v. Fessenden*, 64 Misc. 422; 119 N. Y. Supp. 464.

And the vendee in a contract for the sale of land, purporting to bind the vendor to a conveyance simply of his interest, is entitled to a reformation of the contract to meet the real intention of the parties to embrace the entire property, including the interest of a cotenant which he had no power to convey, he, at the time of the contract, expecting to obtain such power. *Conner v. Baxter*, 124 Iowa, 219, 99 N. W. 726.

And where a contract for the purchase of land was agreed to be drawn that the grantees should forfeit a specified sum only for

default on their part, and that in case of default by the grantor, he should forfeit the land, but the contract as signed provided that if either party failed to perform, the grantees should pay to the grantor the specified sum, the grantees are entitled to have the contract so reformed as to provide for such forfeiture by them only in case of their own default. *Smith v. Watson*, 88 Iowa, 73, 55 N. W. 68.

And where one party sold real estate to another, the contract being that the buyer should pay the taxes after the year in which the sale was made, but, by mistake in writing the bond for a deed, the scrivener omitted that part referring to the taxes, and upon the purchaser failing to pay the taxes, the seller was compelled to do so, for the purpose of making his security for deferred payments, upon reformation of the contract, the seller was entitled to repayment of the taxes, with lawful interest. *Hale v. Young*, 24 Neb. 464, 39 N. W. 406.

So, where, at the time of executing a negotiable note, the maker also executed a title bond, agreeing to convey to the payee an undivided one-half interest in certain mining claims, and that the payee should have a lien on these claims for the payment of the note, inserting a special condition that "this bond shall be and remain a special lien upon and for the payment" of the note, but, by mistake, the words, "the said property above described" were omitted after the words, "lien upon," as between an indorsee of the note and the maker, and against subsequent purchasers or encumbrancers of the premises with full notice of the payee's and indorsee's right, the bond will be reformed so as to express the meaning of the parties thereto. *Smith v. Brunk*, 14 Colo. 75, 23 Pac. 325.

And where the owners of a tract of mineral land negotiated a sale thereof, but the transaction was suspended because third persons gave notice that they claimed an interest in the minerals, and to clear their title and consummate the sale, the vendors procured deeds from such persons, paying them a large sum of money therefor, and formerly the two claimants had held their interests in common, but, before execution of the deeds, had, by arrangement, partitioned the same, but the deeds described the entire tract, and conveyed an undivided one-half of the minerals therein, it was the evident intent of the parties to sell and purchase the entire interest of the claimants, and the deeds should be reformed to conform to such intent, on the ground of mutual mistake. *Brown v. Cranberry Iron & Coal Co.* 28 C. C. A. 567, 42 U. S. App. 675, 84 Fed. 930, affirming 82 Fed. 351.

So, where a mutual mistake is made in reducing a contract for the exchange of lands to writing, a court of equity will reform the contract, and enforce it as reformed. *Hallam v. Corlett*, 71 Iowa, 446, 32 N. W. 449.

And a written contract reciting an agreement between two persons by which one agreed to sell lots described by number in a 28 L.R.A.(N.S.)

named block, known by a certain name, and the other agreed to sell him a certain numbered house on the corner of named streets, may be reformed in equity by substituting the word "exchange" for the word "sell," and inserting a more particular description of the property. *House v. McMullen*, 9 Cal. App. 664, 100 Pac. 344.

Nor will a bill in equity for the specific performance of a contract for the sale of lands be enforced where the defendant shows that by mistake, and without fault, he entered into an agreement very different from that which he thought he was making, and engaged to do something far more onerous than that which he supposed he was undertaking, and where the plaintiff, being cognizant of the mistake, did not disclose it. *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550.

(f) Bonds.

Where, by mistake or unskilfulness of the drawer, a bond is not according to the understanding of the parties, and thereby a party thereto is disabled to recover, equity, on account of the mistake, will grant relief. *Huson v. Pitman*, 3 N. C. (2 Hayw.) 331; *Olmsted v. Olmsted*, 38 Conn. 309.

And it will reform the instrument, as well against sureties as principals. *Olmsted v. Olmsted*, supra.

And bonds apparently absolute may be shown by evidence to be merely counter securities. *Todd v. Rivers*, 1 Desauss. Eq. 155.

So, where, through mistake, a principal named in a bond executed by a surety delivers it without signing the same, a court of equity may reform the instrument, and require the principal to sign it. *Ætna Indemnity Co. v. Baltimore, S. P. & C. R. Co.* 112 Md. 389, 76 Atl. 251.

And where one person agreed to be bound in a bond as surety to another, and signed and sealed accordingly, but, by the neglect of the clerk, his name was not inserted, and the party for whom he was surety showed him the condition and his name and seal, and demanded payment, and threatened to sue him unless he gave fresh security, which he agreed to do, but refused after finding the mistake, and that he was not bound by law, equity will compel him to do so. *Crosby v. Middleton*, Prec. in Ch. 309.

And a court of equity may insert the penalty in a bond where the sum was omitted by mistake, and the extent of the liability of those who executed the instrument can be definitely ascertained. *State ex rel. Frank v. Frank*, 51 Mo. 98.

So, a bond making the obligors liable jointly only will be reformed in equity where it was drawn up by a tradesman ignorant of the nature of a bond, and was intended to be a joint and several bond. *Simpson v. Vaughan*, 2 Atk. 31.

And a joint bond may be held to be several against creditors in the administration of assets, where the evidence was full

as to the intention that each partner should be severally bound, and the bonds were filled up as joint bonds through mistakes and ignorance of the parties. *Burn v. Burn*, 3 Ves. Jr. 573.

So, where a joint and several bond was given for duties at the customhouse, and afterwards a joint judgment was obtained against all the obligors, both principal and sureties, and then one of the sureties died and the survivors became insolvent, the United States is entitled to maintain a suit in equity for the recovery of the debt out of the assets of the deceased judgment debtor whose estate was also insolvent, in virtue of its general priority in cases of insolvency. *United States v. Cushman*, 2 Sumn. 426, Fed. Cas. No. 14,908.

And when a bond is executed by one member of a firm, all of the members intending the instrument should bind them, the obligee has no remedy against the firm at law, but, on the ground of mistake, may charge them in equity. *McNaughten v. Partridge*, 11 Ohio, 223, 38 Am. Dec. 731.

And where, on the appointment of a guardian by a court of probate, a bond was taken, payable to the judge of probate and his successors in office, conditioned that the guardian should faithfully discharge the duties of guardian according to law, and render a true account of his guardianship to the judge of probate or to the wards, when arriving at full age, which bond was executed jointly by the guardian as principal, and the father of the guardian and grandfather of the wards as sureties, and the guardian wasted the estate, and failed to account, and a successor was appointed, in a bill in equity by the successor and wards against the executrix of the surety of the defaulting guardian, it will be presumed that it was the intention of both the principal and the surety and the judge of probate that the bond should be obligatory on the sureties of the obligors, and therefore joint and several, and should be treated accordingly. *Olmsted v. Olmsted*, 38 Conn. 309.

So, where a declaration of trust recited that a bond of indemnity was to be given, and it was clear that it was intended that the bond should contain a condition as to the payment of certain amounts when adjusted, but it did not so state, a reformation of the instrument upon the ground of mutual mistake is proper. *Darmour v. Chapman*, 2 App. Div. 112, 37 N. Y. Supp. 674.

And where a bond was given in order to procure a discharge from a *ne exeat* conditioned to abide and perform the orders and decrees of the court, and the word "perform" was inserted by mutual mistake as to the legal effect of the instrument, a suit upon it to compel a surety to pay the amount of the decree may be enjoined. *Griswold v. Hazard*, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999.

And where a bond for the delivery of personal property levied on by execution was executed by a judgment debtor and by

the real owner as his surety, without intention on the part of the latter to concede his right, a recital that the property was that of the judgment debtor was rectified in equity at the instance of the owner. *Helm v. Wright*, 2 Humph. 72.

And where a bond was filed with the clerk of the proper court, and treated throughout the proceedings upon the estate of a deceased person as that of the executor of the estate, and it appeared that the intention of the parties was to execute a bond for the benefit of that estate, but they failed to express such intention, through inadvertence or mistake, not having named the estate in the bond, equity will reform the bond so as to make it conform to the intention of the parties, and the sureties will be held liable on the bond thus reformed. *Foley v. Hamilton*, 89 Iowa, 686, 57 N. W. 439.

And a mistake in the recital as to the amount for which an attachment issued may be explained and corrected by parol in an action on the attachment bond. *Palmer v. Vance*, 13 Cal. 553.

A clearly established misapprehension of the law by a surety on a bond creates a basis for the interference of a court of equity, resting on discretion, to be exercised only, however, in an unquestionable case, to relieve the surety on the bond from a liability he did not intend to assume. *Griswold v. Hazard*, supra.

And where two are bound by a bond, and the obligee releases one, supposing, by a mistake of law, that the other will remain bound, he will not be relieved in equity upon the mere ground of his mistake the law. *Harman v. Cam*, 4 Vin. Abr. 387; 1 Story, Eq. Jur. 13th ed. 123.

And where a bond was given by a surety as the parties intended it to be, but, by a subsequent event, the surety became discharged at law, he will not be charged in equity. *Huson v. Pitman*, 3 N. C. (2 Hayw.) 331.

Nor can a mistake, upon the part of a person executing to an officer a bond for the release of attached property, as to its legal effect, it being intended as a delivery bond, but only binding the obligor to pay the judgment rendered against the attachment defendant, avail to avoid that construction of the instrument which the language used and rules of law applied thereto require. *Moorman v. Collier*, 32 Iowa, 138.

And ignorance of the legal effect of a delivery bond conditioned to pay whatever judgment might be rendered against the defendant does not afford ground for equitable relief. *Glenn v. Statler*, 42 Iowa, 107.

And where a county treasurer who had given no bond to cover school funds, as required, was in default, and the sureties on his general bond, erroneously supposing themselves liable for school funds, under threat of suit, in settlement with the board of supervisors, made payment of an amount which they knew was less than the entire default, knowing, too, that the board was

ignorant of the fact that it was less, on ascertaining that the general bond was not a security for the school funds, they cannot, on the ground of mistake or coercion, recover from the county the amount paid by them in excess of the default as to the general funds. *Pass v. Grenada County*, 71 Miss. 426, 14 So. 447.

(g) Negotiable instruments.

Mistakes in the execution of negotiable paper may always be corrected, unless the rights of third parties have intervened. *German Nat. Bank v. Butchers' Hide & Tallow Co.* 97 Ky. 34, 29 S. W. 882.

And where it is clearly established that a note was by mutual mistake executed for a smaller or different sum than intended, equity will, as between the parties, decree reformation in accordance with the transaction as it was actually agreed upon. *Fuller v. Hawkins*, 60 Ark. 304, 30 S. W. 34; *Gould v. Emerson*, 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065.

So, a court of equity may supply an omission in a promissory note, fixing the rate of interest so as to make it correspond with the intention of the parties. *Hathaway v. Brady*, 23 Cal. 121.

And where, from a note given on a sale of lands, the words "with interest" were omitted by mistake, the court has equity jurisdiction to correct the mistake, and decree the payment of interest that is overdue. *Gump's Appeal*, 65 Pa. 476.

And where a note is filled up with the name of the payee, the date, amount, and time of payment, and it is provided in a subsequent clause that failure to pay interest as therein agreed makes the note wholly due and payable, and the holder may then proceed to collect principal and interest, and in the mortgage by which the note is secured it is described as payable five years from date, with 10 per cent interest per annum annually, the note will bear interest from date, notwithstanding the printed words, "with interest after maturity," were not erased, according to agreement, at the time the note was filled up. *Stanton v. Caffee*, 58 Wis. 261, 16 N. W. 601.

So, the chancellor will relieve against a note for current money of the state, where it appears that the contract was for the current paper or bank notes, and that there is a difference in the value of the two kinds of money. *Burdett v. Simms*, 3 J. J. Marsh. 190.

And a note for a stated sum, which may be discharged in current bank notes, may be reformed in equity to read "payable in current bank notes," on admission in the answer that such was the contract. *Talley v. Courtney*, 1 Heisk. 715.

And where a renewed bill of exchange was drawn out with a blank for the drawer's name by an agent of the holder, who, by mistake, inserted above the place where the drawer's name was afterwards inserted, the name of the holder, and the signature 28 L.R.A.(N.S.)

of the drawer and acceptor were afterwards added, and the bill indorsed by the holder, the holder cannot prove the real contract in an action on the instrument at law, because of the established jurisdiction in equity to correct mistakes in documents; but if the action had been simply for the reformation of the instrument, so as to render it such an instrument as the parties agreed should be given, the holder would be entitled to have it rectified. *Druiff v. Parker*, L. R. 5 Eq. 131.

So, where the word "dollars" was omitted from a bill single by mistake, so that a party was deprived of the specific security intended to be given thereby, he will be granted relief in equity. *Newcomer v. Kline*, 11 Gill & J. 457, 37 Am. Dec. 74.

And where a note was made payable for \$1,000, and the consideration of the mortgage given to secure it was stated to be 1,000, the word "dollars" being omitted therefrom, the word will be supplied in an action brought to reform and foreclose the mortgage, agreeably to the understanding and meaning of the parties. *Palmer v. Carey*, 63 Wis. 426, 21 N. W. 793, 23 N. W. 586.

And where, in writing, a note was made payable in instalments of \$8 per month, with interest, in accordance with the intention of the parties, but the note contained a printed promise to pay the principal five years after date, it will be reformed in equity so as to make it conform to the makers' intentions. *Turpin v. Gresham*, 106 Iowa, 187, 76 N. W. 680.

So, where the president and secretary of an incorporated company, in making a promissory note of the company for securing a debt owing by the company, by mutual mistake of the parties, executed the same so as to make it their own instead of the corporate obligation, a court of equity will reform the note so as to make the undertaking the obligation of the company. *Fisher v. Barnett*, 56 Ill. App. 649; *Lee v. Percival*, 85 Iowa, 639, 52 N. W. 543.

And a court of equity may reform a note if, in the execution thereof, the word "for," by the mutual mistake of the parties, was omitted after the signature of the president of the corporation for which the note was made. *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291, 53 N. E. 391.

So, a note signed by an individual name, followed by the word "president," and upon which the name of a corporation appears above the line on which are written the place and date of execution, but nowhere else, is not conclusively presumed to be the personal obligation of the signer, but it may be shown by parol evidence to be the contract of the corporation. *Second Nat. Bank v. Midland Steel Co.* 155 Ind. 581, 52 L.R.A. 307, 58 N. E. 833.

And though the language of a note executed by township trustees imports a personal obligation, it may be shown by parol evidence, on an issue of reformation, that the intention of both the makers and the payee was to execute an instrument binding

only on the township, and that though the language used was that which they intended, it did not express their true purpose; and in such case the trustees, when sued individually, were entitled to have the notes reformed so as to bind the township. *Western Wheeled Scraper Co. v. Stickleman*, 122 Iowa, 396, 98 N. W. 139.

So, where it was the intention of all the parties concerned that certain promissory notes given by trustees should be payable out of the trust estate only, but, owing to a mutual mistake in the legal effect of the phraseology of the notes, they were so drawn as to render the trustees personally liable, the notes should be reformed in equity so as to express the true intention. *Richmond v. Ogden Street R. Co.* 44 Or. 48, 74 Pac. 333.

And where, in the settlement of partnership accounts, it was found that one partner had withdrawn from the funds of the firm a certain sum in excess of the amount withdrawn by the other, and through a mutual and innocent mistake the former gave to the latter a promissory note for such sum, instead of one half of it, a court of equity will grant relief against the mistake. *Gould v. Emerson*, 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065.

So, an administratrix of the estate of her deceased husband may bring suit against the maker and indorser of promissory notes made payable to her individually, alleging that the notes were thus made payable by mistake of all the parties, and that they should have been made payable to her as administratrix of her husband, and praying reform of the notes so as to be thus payable. *Jackson v. McCalla*, 133 Ga. 749, 66 S. E. 918.

And where a negotiable note payable at and discounted by a particular bank was repeatedly renewed, the several renewals being made payable in the same way until the last renewal, which was made payable at "said bank," the word said being by mistake substituted for the name of the bank, it being manifest that, in contemplation of all the parties, the word "said" meant the bank named in the previous renewals, they will be so read by the court; or, if they be not so read, the mistake, being pleaded and proved, would be corrected, if the rights of no third persons were involved. *German Nat. Bank v. Butchers' Hide & Tallow Co.* 97 Ky. 34, 29 S. W. 882.

And if a mistake is made in a seed grain note which is intended to be secured by a crop growing on certain land, the mortgagor may, on discovering the mistake, execute a new note without releasing the lien on the crop, because, if he did not do so voluntarily, he might be compelled by a court of equity in a suit to reform the original note to conform to the actual agreement of the parties. *Miller v. McCarty*, 47 Minn. 321, 28 Am. St. Rep. 375, 50 N. W. 235.

So, equity will grant relief from an indorsement which, through mistake as to

the legal effect of the words used, binds the indorser to pay the note, when the true contract and intention was to write only such an indorsement as would convey the title without rendering the indorser liable. *Clayton v. Bussey*, 30 Ga. 946, 76 Am. Dec. 680.

And that a promissory note was given without consideration, although it was obtained from the maker by the holder by a representation that the maker was indebted to the holder in the sum mentioned in the note, whereas in truth no such sum of money or part thereof was ever due from the maker to the holder, was a sufficient defense to an action on the note, without an allegation that the representation was made fraudulently. *Forman v. Wright*, 11 C. B. 481.

Parol evidence is inadmissible, however, to vary or explain an unconditional indorsement of notes, but is competent for the purpose of reforming the contract of indorsement. *Van Vleet v. Sledge*, 45 Fed. 743.

And an entry in the books of the indorser of promissory notes, claimed to have been a written memorandum of a verbal agreement in regard to the indorsement, cannot be reformed to show that the indorsement was conditional, where it was, without mistake, made to appear that the notes were unconditional. *Ibid.*

But where the alteration of an instrument is prompted by honest motives, with a purpose of correcting it to correspond with what the parties in good faith believed to be the true engagement of the parties at the time of its execution, the act does not destroy the legal efficiency of the instrument, and recovery may be had on it when restored, and a court of equity has jurisdiction of a suit to restore the original conditions of a note alleged to have been changed under misapprehension of the rights of the parties, and to recover thereon, when the suit involves a discovery which is in some degree necessary to show the agreement and the mistake. *Wallace v. Tice*, 32 Or. 283, 51 Pac. 733.

(h) Insurance policies.

A policy of insurance which, by reason of mutual mistake of the parties, does not embody their real intention, may be reformed in equity. *Delaware Ins. Co. v. Hill* (Tex. Civ. App.) 127 S. W. 283; *Bishop v. Clay F. & M. Ins. Co.* 49 Conn. 167; *Phenix Ins. Co. v. Hilliard* (Fla.) 52 So. 799; *Niagara F. Ins. Co. v. Jordan* (Ga.) 68 S. E. 611; *Welch v. Welch*, 13 Ky. L. Rep. 639; *Phenix F. Ins. Co. v. Gurnee*, 1 Paige, 278, 19 Am. Dec. 431; *Western Assur. Co. v. Ward*, 21 C. C. A. 378, 41 U. S. App. 443, 75 Fed. 338; *Abraham v. North German Ins. Co.* 40 Fed. 717; *Glover v. Mutual Commercial Marine Ins. Co.* 2 Curt. C. C. 277, Fed. Cas. No. 10,498.

And the chancellor may, either upon the application of the insured, during his life, or upon the application of the beneficiary,

after his death, correct the mistake. *Welch v. Welch*, supra; *Scott v. Provident Mut. Relief Asso.* 63 N. H. 556, 4 Atl. 792.

And a court of equity may enforce the contract when so reformed, in order to do complete justice to the parties in the controversy. *Phenix Ins. Co. v. Hilliard*, supra.

Courts of equity possess the power to correct mistakes in policies of insurance, even to the extent of changing the most material clauses. *Hearn v. Equitable Safety Ins. Co.* 4 Cliff. 192, Fed. Cas. No. 6,300.

An insurance policy, like any other written contract, may be impeached by either party thereto for fraud or mistake. *Slobodisky v. Phenix Ins. Co.* 52 Neb. 395, 72 N. W. 483; *National F. Ins. Co. v. Crane*, 16 Md. 260, 77 Am. Dec. 289.

Or if anything is omitted which it was the duty of the company to insert or indorse on the instrument. *National F. Ins. Co. v. Crane*, supra.

And an error in reducing a contract of insurance to writing may be corrected by the court. *Lippincott v. Insurance Co.* 3 La. 546, 23 Am. Dec. 467; *Hill v. Millville Mut. M. & F. Ins. Co.* 39 N. J. Eq. 66.

And a mistake by the parties to a policy of fire insurance, as to the effect of the language used, authorizes a reformation of the contract, although there is no direct allegation of a mistake of fact. *Maher v. Hibernia Ins. Co.* 67 N. Y. 283.

So, where a policy of insurance is sought to be reformed for mistake, parol evidence showing the real agreement is not objectionable, as contradicting the terms of the instrument. *Delaware Ins. Co. v. Hill* (Tex. Civ. App.) 127 S. W. 283.

Or as contravening any principle of statute or common law. *Henshaw v. Clark*, 2 Root, 1; *Slobodisky v. Phenix Ins. Co.* supra.

And this may be done where the court exercises the functions of law and equity at the same time, there being proper pleadings on the trial of the action thereon in which the mistake is shown. *Delaware Ins. Co. v. Hill*, supra.

So, if a party fails through mistake to obtain such an insurance policy as he is entitled to by an existing valid contract, equity will relieve him, though the mistake arose from ignorance of law. *Oliver v. Mutual Commercial Marine Ins. Co.* supra; *McIntosh v. North State F. Ins. Co.* 152 N. C. 50, 67 S. E. 45.

And where the agent of an insurance company wrote up a policy upon terms not agreed upon with the insured, the remedy of the insured, upon discovering the fact, is not limited to a return of the policy and the demanding of a rescission. *Clem v. German Ins. Co.* 29 Mo. App. 666.

And where a policy of insurance is sought to be reformed for mistake by showing that the real agreement between the parties was different from the policy, it is not material that the parol agreement was 28 L.R.A.(N.S.)

made some weeks prior to the issuance of the policy. *Delaware Ins. Co. v. Hill*, supra.

But a statement made by a deceased beneficiary in an insurance policy issued two years before, as to his understanding of the terms of the policy, is not admissible to show mistake in it. *Bowers v. New York L. Ins. Co.* 68 Fed. 785.

So, an insurance policy may be reformed for mistake after, as well as before, loss, if the assured has not been guilty of laches. *Delaware Ins. Co. v. Hill*, supra; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77; *Delaware State F. & M. Ins. Co. v. Gillett*, 54 Md. 219; *McIntosh v. North State F. Ins. Co.* supra; *Brugger v. State Invest. & Ins. Co.* 5 Sawy. 304, Fed. Cas. No. 2,051; *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85, 25 L. ed. 52.

And if the mistake is satisfactorily shown, either from the application or oral testimony. *Brugger v. State Invest. & Ins. Co.* supra.

So, a policy of insurance may be corrected as to a mistake in the date of the expiration thereof. *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199.

And where a life insurance policy was by mistake made payable to the agent who secured the policy, instead of the wife of the person insured, contrary to the agreement and instructions, the money received by the administrator after the death of the insured will be ordered to be paid to the widow, agreeably to the original instructions for filling up the policy. *Henshaw v. Clark*, supra.

Nor is evidence that, through a mistake as to the legal import of the language used in a policy of insurance, the policy was made to run in the name of one not the owner of the property insured, insufficient to sustain a decree of reformation of the policy. *Lansing v. Commercial Union Assur. Co.* 4 Neb. (Unof.) 140, 93 N. W. 756.

And a mutual benefit certificate may be reformed after the death of the member to make the benefit payable to his administrator, where, by mutual misapprehension of the legal effect of the language used, it failed to make the benefit so payable, as the parties intended. *Eastman v. Provident Mut. Relief Asso.* 65 N. H. 176, 5 L.R.A. 712, 23 Am. St. Rep. 29, 18 Atl. 745.

So, where a mortgagee applied for insurance through an agent employed by a local agent of an insurance company, intending to procure an insurance of his mortgage interest, and so stating to the agent, but the agent drew the application as for an insurance on the property itself, in the name of the mortgagor, and as his property, the amount to be payable in case of loss to the mortgagee, and the policy was drawn accordingly, in the belief that such was the proper legal mode of effecting an insurance on the mortgage interest, the mistake may be corrected by a court of chancery, although it was one of law, and

not of fact. *Woodbury Sav. Bank & Bldg. Asso. v. Charter Oak F. & M. Ins. Co.* 31 Conn. 517; *Sias v. Roger Williams Ins. Co.* 8 Fed. 183.

And in such case, the mortgagee's right to reform the policy in equity is not affected by the fact that the agent had been instructed by the company not to take applications for insurance upon mortgage interests, the mortgagee having no knowledge of such limitation of the powers of the agent. *Woodbury Sav. Bank & Bldg. Asso. v. Charter Oak F. & M. Ins. Co.* supra.

And where the owners of a warehouse, being indebted to a person, agreed to insure the warehouse against fire, for his benefit, and accordingly agreed with an insurance company for such insurance in their names, with loss payable to the creditor, but by mistake the creditor's name was written in the policy as the assured and owner of the property, and a loss occurred within the period of the risk, the creditor is entitled to have the contract reformed according to the true understanding and purpose of the parties thereto. *Spare v. Home Mut. Ins. Co.* 9 Sawy. 142, 17 Fed. 568.

So, equity will reform a policy of marine insurance not containing a stipulation allowing a second port for loading a return cargo, when the antecedent correspondence of the parties shows that the insured intended to secure such protection, and that the insurer knew such to be his intention. *Hearn v. Equitable Safety Ins. Co.* 4 Cliff. 192, Fed. Cas. No. 6,300, affirmed in 20 Wall. 494, 22 L. ed. 398; *National Traders Bank v. Ocean Ins. Co.* 62 Me. 519.

And where an insurance policy insures eight boxes of indigo instead of eighteen boxes, and omits to state the route of the vessel having the goods on board, it will be reformed so as to correct the statements. *Brioso v. Pacific Mut. Ins. Co.* 4 Daly, 246.

And where the correspondence between the parties constituted a preliminary agreement to insure a vessel to the port of loading in Cuba, a policy insuring the vessel to port of discharge in Cuba is not in accordance with the agreement, and may be reformed. *Equitable Safety Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. ed. 398, affirming 4 Cliff. 192, Fed. Cas. No. 6,300.

But courts of admiralty have jurisdiction over marine policies of insurance as maritime contracts, but not over contracts leading to policies, and they cannot reform a policy by an antecedent contract; that is within the jurisdiction of courts of equity. *Andrews v. Essex F. & M. Ins. Co.* 3 Mason, 10, Fed. Cas. No. 374.

And a clause in a marine insurance policy, permitting the vessel to stop at various ports for the purpose of procuring a return cargo, is not a part of the contract, to be inserted in the policy, but is a mere representation of fact, such clause not altering the nature of the insurance or liability of the underwriters; and where 28 L.R.A.(N.S.)

such a clause is omitted, the policy cannot be reformed by its insertion. *Ibid.*

Nor does a slip signed by the agent of insurers, and presented by a clerk of the insurers' insurance broker, form a contract or constitute a binding agreement between the parties until the policy is signed and the premium paid; and where the insurers issue a policy of marine insurance on a cargo which suffers loss, and file a bill for reformation of the policy, so as to make it conformable to the real contract, in proof of which they produce in evidence such slip, they cannot recover. *Mackenzie v. Coulson*, L. R. 8 Eq. 368.

And where a vessel was insured to a port in Cuba, and thence to a port of advice and discharge in Europe, a bill to reform the policy by inserting a clause allowing the vessel to go to a second port in Cuba cannot be sustained after loss, on the sole ground of a usage that vessels making a voyage to Cuba should visit one port to discharge their cargo, and another to take a return cargo. *Hearne v. New England Mut. M. Ins. Co.* 20 Wall. 488, 22 L. ed. 395.

So, where a contract of insurance is agreed to, whatever it, by fair interpretation, includes, the underwriters are bound to insert in the policy; and if they omit to do so, the insured has a right to insist upon strict conformity with the original agreement. *Hearn v. Equitable Safety Ins. Co.* 4 Cliff. 192, Fed. Cas. No. 6,300; *Esch Bros. v. Home Ins. Co.* 78 Iowa, 334, 16 Am. St. Rep. 443, 43 N. W. 229.

And where the insured persons and the insurer agree that the policy of insurance shall be issued to protect them according to their respective interests, and the policy is not so issued, it may be reformed so as to show the real interests of the parties in all the property insured, and, as reformed, it may be enforced. *Phenix Ins. Co. v. Hilliard* (Fla.) 52 So. 799.

And where a member of a partnership applied for insurance upon the partnership property and in the name of the firm, and the officers of the insurance company so understood the application, but, by mistake, issued a policy in the name of the individual partner alone, a court of equity will reform the policy so as to make it conform to the intention of the parties. *Keith v. Globe Ins. Co.* 52 Ill. 518, 4 Am. Rep. 624.

And where the interest insured is described in the policy of insurance as that of a mortgagee, when in fact it was a mechanics' lien, the parties supposing that the description in the policy covered a mechanics' lien, the insured may show the mistake as one of fact in an action thereon, conducted as a proceeding in chancery, and recover on the instrument as corrected. *Stout v. City F. Ins. Co.* 12 Iowa, 371, 79 Am. Dec. 539.

And where insurance upon a mechanics' lien interest in real estate is applied for, and a policy is issued in which the interest

of the assured is described as that of a mortgagee, both parties believing that the description embraces the interest of a mechanics' lien, the contract will be so reformed in equity as to make it express the real intent of the parties. *Longhurst v. Star Ins. Co.* 19 Iowa, 364.

So, a bill will lie to reform an insurance policy issued to protect a mortgagee's interest, where, by a mutual mistake, the name of the occupant and supposed owner of the premises was inserted as such in the policy, neither party having actual notice or knowledge of an adverse title growing out of an execution sale to set aside which a suit was then being prosecuted by such occupant, the insurance agent being informed that the title to the property was in dispute. *Balen v. Hanover F. Ins. Co.* 67 Mich. 179, 34 N. W. 654.

And where a mortgagee applies to a general agent of an insurance corporation to obtain insurance upon his interest as mortgagee, and his application and the consideration for the insurance are accepted, whereupon he requests the agent to write the policy so as to effect his purpose, and relies upon him to determine what form is necessary under the law of insurance for that purpose, the agent is bound to write the policy so as to insure the mortgagee's interest in his own name; and if the agent adopts a wrong form, the policy may, after loss, be reformed in equity so as to express the intention of the parties, notwithstanding the rules of the company forbid the issuance of policies to mortgagees. *Esch Bros. v. Home Ins. Co.* supra.

So, where a policy of insurance which has been drawn up by the agent of the insurer, and merely accepted by the insured, does not represent the intention of both parties, because of the fault or negligence of the agent, it may be reformed so as to express the contract as it was intended to be made. *Williams v. North German Ins. Co.* 24 Fed. 625; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77; *Fitchner v. Fidelity Mut. Fire Asso.* 103 Iowa, 276, 72 N. W. 530; *Delaware State F. & M. Ins. Co. v. Gillett*, 54 Md. 219.

And if an insurance agent makes a mistake in declaring the interest of the insured, equity will require it to be corrected and the policy to be reformed. *Oliver v. Mutual Commercial Marine Ins. Co.* 2 Curt. C. C. 277, Fed. Cas. No. 10,498; *Bailey v. American Cent. Ins. Co.* 4 McCrary. 221, 13 Fed. 250; *German F. Ins. Co. v. Gueck*, 130 Ill. 345, 6 L.R.A. 835, 23 N. E. 112, affirming 31 Ill. App. 151; *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212; *Maher v. Hibernia Ins. Co.* 67 N. Y. 283; *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige, 278, 19 Am. Dec. 431.

And where, in a written application for a policy of insurance, the applicant committed a mistake in describing the encumbrance upon his property, in consequence of the representations of the agent of the company who drew up the applica-

tion, and the property insured was afterwards destroyed by fire, a court of chancery has power to reform the contract and grant relief. *Harris v. Columbiana County Mut. Ins. Co.* 18 Ohio, 116, 51 Am. Dec. 448.

And where an insurance agent was applied to for insurance on goods kept in two separate buildings, and he was unable to supply it, and applied to an agent of other companies for it, and, in the preparation of the policy, by mistake of the two agents, the policy did not read as it was agreed between them that it should, but was just the kind of policy which the applicants had applied for, whatever rights the insurance company might have had if it had acted promptly in the matter, and informed the insured persons, instead of the agent, of the mistake, it could not, after the insured persons had relied upon the policy and suffered loss under it, escape liability on account of the mistake. *St. Paul F. & M. Ins. Co. v. Shaver*, 76 Iowa, 282, 41 N. W. 19.

So, although a party insured accepts a policy with knowledge of the language used in describing the property insured, if, at the time, he points out a mistake therein, but is prevented from having the same corrected, or is thrown off his guard and dissuaded therefrom by the acts or declarations of the insurer, he may show the mistake in an action upon the policy, and the insurer is estopped from setting up the letter of the contract in bar of the action, and from claiming that the situation of the property does not agree therewith. *Maher v. Hibernia Ins. Co.* supra.

And an insured person, if without negligence, is entitled to have his policy reformed so as to increase the amount of concurrent insurance allowed, where the company's agent knew, when the application was made, that the insured was actually arranging for other insurance, and had definitely fixed its amount, which, by the agent's mistake, was understated in the application, and such right is not dependent upon the authority of the agent to contract with reference to insurance, since the company is estopped to avail itself of the agent's mistake. *Fitchner v. Fidelity Mut. Fire Asso.* supra.

And where it appears that an insurance policy against loss by fire was issued to secure a mortgage of the insured property, but, by mistake, was made in the name of the owner of the property, instead of the mortgagee, who was the contracting party for the insurance, and the property was destroyed by fire during the term of the policy, equity will not permit the insurance company to set up its mistake in an action by the owner, to defeat the claim of insurance under the contract, and the contract will be reformed and judgment given against the insurance company, in favor of the mortgagee, for the amount of his mortgage. *Fink v. Queen Ins. Co.* 24 Fed. 318.

And where an agent having power to effect insurance without consulting the home

office was fully apprised of the ignorance of the person insured, who was an illiterate German woman, unable to read or write the English language, and knew all about the nature and extent of her title, a policy issued by him on her property will not be void because she was not the absolute and unconditional owner, although it contained a stipulation that it should be void in that event. *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 2 L.R.A. 64, 9 S. W. 720.

So, if the incorporation of other terms in an insurance policy than those agreed upon between the insured and the agent who wrote the policy was purposely done, thereby raising the inference of fraud, or from mistake, and the fact was not discovered until just before the loss, the insured is entitled to have the instrument reformed so as to express the real contract. *Clem v. German Ins. Co.* 29 Mo. App. 666; *Thomason v. Capital Ins. Co.* 92 Iowa, 72, 61 N. W. 843.

And to correct error in a policy of insurance, recourse may be had to the original memorandum of application for insurance, and its indorsements, showing its acceptance by the company. *Lippincott v. Insurance Co.* 3 La. 546, 23 Am. Dec. 467.

And where an agent of an insurance company, having full authority to enter into contracts of insurance for his principal, entered into a contract for insurance on property to the extent of \$3,000 in several companies represented by him, a policy for a part of the sum being in the defendant company, this policy providing that it should be void if the assured should obtain additional insurance without the written consent of the company, in an action on the policy, wherein the additional insurance obtained under the contract was relied on as a defense, that the plaintiff relied on the agent to write the policy in accordance with the contract, and failed to read the policy to see if he had done so, was not such negligence as to bar him of the right to have the policy reformed so as to express the real contract. *Barnes v. Hekla F. Ins. Co.* 75 Iowa, 11, 9 Am. St. Rep. 450, 39 N. W. 122.

So, relief from a settlement and compromise of a claim for insurance will be granted where the insured acted without any real consideration, in ignorance of the rights and obligations of the parties, while the insurer had full knowledge thereof and of his ignorance, and induced him to act by false and fraudulent misrepresentations, although his mistake was in respect to his legal rights. *Titus v. Rochester German Ins. Co.* 97 Ky. 567, 28 L.R.A. 478, 53 Am. St. Rep. 426, 31 S. W. 127.

And where a member of a benefit association contracts for and pays the amount necessary to obtain a certificate for only \$1,000, but, by the mistake and inadvertence of both parties, or by the mistake of the association, with knowledge on the part of the member, a certificate for \$2,000 is issued and accepted, the association is en-

titled to a reformation in an action by the beneficiary upon the certificate. *Gray v. Supreme Lodge K. H.* 118 Ind. 293, 20 N. E. 833.

The power of courts of equity to correct mistakes in policies of insurance, however, should be exercised with great caution, and only when the proof is entirely satisfactory. *Hearn v. Equitable Safety Ins. Co.* 4 Cliff. 192, Fed. Cas. No. 6,300; *Graves v. Boston M. Ins. Co.* 2 Cranch, 419, 2 L. ed. 324.

Where an insurance policy differs from the parol contract on which it is founded, and it is sought to reform the policy, proof of the parol contract must be so clear as to place the matter beyond doubt, or, at least, beyond reasonable controversy. *Bishop v. Clay F. & M. Ins. Co.* 49 Conn. 167; *Blake Opera House Co. v. Home Ins. Co.* 73 Wis. 667, 41 N. W. 968.

A policy of insurance is prima facie presumed to embody the real intention of the parties, and evidence to overcome such presumption and reform a mistake must be clear and convincing. *Delaware Ins. Co. v. Hill* (Tex. Civ. App.) 127 S. W. 283.

And if an assured person accepts a policy without dissent, it is presumed he knows its contents; and the burden is on him in a proceeding to reform it for mistake to prove that he did not know its contents when it was accepted, as by showing that when he received it he put it away without inspection, or that he relied on the insurer's knowledge, and supposed he had drawn it correctly. *Ibid.*

And a policy of insurance on a building owned by a wife, providing for nonliability of the insurer if the title of the insured is not absolute, will not be reformed and enforced on the ground of mistake in issuing the same in the name of the husband, if the latter, with whom the contract was made, said nothing as to the title, but left it to be inferred that he was the owner. *Schmid v. Virginia F. & M. Ins. Co.* (Tenn.) 37 S. W. 1013.

So, where an insurance policy insured buildings stated to be situated on a named section, when they were situated upon another section, and the section named was named by mistake, no recovery can be had for a loss to the buildings on the intended section without a reformation of the policy. *Collins v. St. Paul F. & M. Ins. Co.* 44 Minn. 440, 46 N. W. 906.

Nor is the mere fact that an insured person did not know that his policy contained a certain provision a ground for reformation. *McCormick v. Orient Ins. Co.* 86 Cal. 260, 24 Pac. 1003.

And a policy of fire insurance will not be reformed so as to be upon the property as a whole, instead of being upon separate articles thereof in specified amounts, upon the testimony of the insured and his wife that such a mistake had been made, which was not only vague and uncertain, but which was flatly contradicted by the agent of the insurance company, who informed the insured at the time that, under the

rules of the company, the policy must specify a separate amount upon each item, and that he read that portion of the policy to plaintiff as he wrote it. *Epstein v. State Ins. Co.* 21 Or. 179, 27 Pac. 1045.

And a policy of insurance insuring the owner of property against loss by fire on a building in process of erection by a contractor will not be reformed so as to insure the contractor also, where, although it was agreed in the building contract that the owner should insure the building so as to protect the contractor's interest, the agent who issued the policy did not know of such agreement, and was not requested, and did not undertake or intend, to write the insurance in that way. *Santa Clara Female Academy v. Delaware Ins. Co.* 93 Wis. 57, 66 N. W. 1140.

So, where a policy of insurance insured property in a certain section of a store, which section, for the purpose of insurance, was considered as a separate building, it is not in the power of a court of equity to reform the policy by specifying another section in the building as the one in which the property was located. *Bryce v. Lorillard F. Ins. Co.* 55 N. Y. 240, 14 Am. Rep. 249.

And evidence in an action on the policy to recover for the loss, that, for the purpose of insurance, each section was considered as a separate building, is properly received, and no recovery on the policy can be had. *Ibid.*

In the above case, *Coles v. Bowne*, 10 Paige, 526, *infra*, IV. f, 1, was distinguished upon the ground that there the chancellor refused to enforce a contract for the purchase of land, resting in parol, on the ground that the vendee did not understand and intend it as the vendors did. And *Welles v. Yates*, 44 N. Y. 525, *infra*, IV. f, 1, was distinguished upon the ground that in that case the conveyance was reformed on the ground of the fraud of the assignee of the contract, and on the ground that it was an erroneous performance of a contract as to the terms of which there was no dispute.

Nor can a policy of insurance be reformed to cover the interests of children of the insured person merely because the insured supposed he was insuring their interests as well as his own, when nothing was said at the time of the insurance as to the nature and extent of the interest insured. *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 2 L.R.A. 64, 9 S. W. 720.

And an insurance policy cannot be reformed in equity on the ground that the statement of the existence of an encumbrance on the property and of the real interest of the parties intended to be insured was omitted by the inadvertence and mistake of agents of the parties, to whom these matters were known. *Farmville Ins. & Bkg. Co. v. Butler*, 55 Md. 233.

And where a man owned two buildings, one of which was a dwelling, and the other was used as a dwelling and a paint shop, and he applied to an insurance agent for

insurance "on my house," and the agent thereupon made out a policy upon the dwelling, charging one half per cent premium, which was a smaller rate than was chargeable on the other building, the fact does not show an intent upon the part of the owner to insure the building used as a paint shop and dwelling, and does not justify a reformation of the policy so as to cover that building. *Mead v. Westchester F. Ins. Co.* 64 N. Y. 453.

To warrant a reformation of an insurance policy, it must be shown that the contract as written was not what both parties to it intended it should be, and it must point out the mistake, and show that it was mutual, and a mistake of fact, and not of law; and a mere averment that an old condition in the policy was to have been erased and a new one inserted in its place does not show mutual mistake which will be reformed in equity. *Phenix Ins. Co. v. Rogers*, 11 Ind. App. 72, 38 N. E. 865.

And where it was claimed that a provision orally agreed upon has been omitted from the policy, it must be clearly and satisfactorily proved that before the policy was issued there was a distinct agreement that it should contain such provision, and that, through inadvertence or mistake, the stipulation was omitted. If the testimony is conflicting, or of such undecisive character as to raise a substantial doubt in the minds of the court, the contract as written must stand. *Harrison v. Hartford F. Ins. Co.* 30 Fed. 862.

Nor can insurance policies be reformed where an insurance company issued two policies on the same property by mistake caused by a variance in the descriptions, since there was no meeting of minds, and the company did not consent to insure the same property twice. *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149.

So, if an insurance agent declared the interest of the insured in the wrong person, but did not do it by mistake, but through a fraudulent design, equity will not relieve the principal. *Oliver v. Mutual Commercial Marine Ins. Co.* 2 Curt. C. C. 277, Fed. Cas. No. 10,498.

And where an insurance company issued an accident policy to a person, by the terms of which death resulting from intentional injuries inflicted by another person was excepted from its benefits, and afterwards the insured was killed by an assassin, and upon suit brought by the beneficiary in the policy, to have it reformed by striking out the exception, evidence of the subagent of the insurance company, who solicited the insurance, that when he issued the policy he knew that the insured was engaged in a dangerous business, and was likely to be assassinated, and wanted a policy to protect his family in that event, and the agent told him the policy issued to him would cover the case of his being assassinated, but that he did not intend to make any different contract from that contained in the usual form of policy, and that his representations to the insured were due to ig-

norance of the terms of the policy, or misunderstanding of their effect,—is insufficient to justify the reformation of the contract. *Travelers' Ins. Co. v. Henderson*, 16 C. C. A. 390, 32 U. S. App. 536, 69 Fed. 762.

(1) Other miscellaneous acts and contracts.

The same general rules would appear to apply to the reformation for mistake of other miscellaneous acts and contracts in general.

Thus, one who becomes a purchaser of property in ignorance of liabilities he is incurring will not be held to a strict compliance unless some rule of law requires it. *Hunting v. Walter*, 33 Md. 60.

And where one person purchased of another the capital stock and assets of a corporation upon agreed terms, and the papers were hastily read over to the purchaser before signing, and he did not notice that the sum mentioned in the agreement was greatly in excess of what he had agreed to pay, and that certain deductions or allowances agreed upon had not been made, it is a proper case for relief in the administration of the principles of equity. *Humphreys v. Hurtt*, 5 Thomp. & C. 433.

And where a party unconditionally assumes a liability contingent as to its eventual amount, as in the case of the stock mortgages of a bank, he is bound thereby, although he erroneously believed that such liability would be nothing, or less than it proved to be; such error affects the accidental, and not the substantial, quality of the object, and cannot affect the contract, unless induced by the fraud or false representations of the other party. *Prescott v. Cooper*, 37 La. Ann. 553.

So, where the purchaser of property and other persons bind themselves jointly to reimburse the seller the amount of notes given to him for the purchase price, if not paid at maturity, each will be bound for his proportion of the loss only; and where the purchaser, supposing himself bound for the whole, makes a contract for the payment of the whole claim, in such belief, he is entitled to relief. *Barthlet v. Andry*, 14 La. 30.

And where two parties agreed orally for the performance of work for a specified sum, and that the architect should draw up a written contract for signature, which contract, through an error of the draftsman, named a larger sum, the contract will be reformed on a showing of the mistake, although the plaintiff had failed to examine it and discover the error before signing, his negligence in failing to do so in no wise affecting or altering the defendant's condition. *Paisley v. Casey*, 41 N. Y. S. R. 339, 18 N. Y. Supp. 102.

So, where the owner of a patent for clay shingles agreed to give a manufacturer a license for certain states, the licensee to pay royalties upon at least 3,000 squares of patented shingles each year, and the

license was drawn up to read 30,000 squares per annum, instead of 3,000, the instrument itself evidences a clerical error known to be such by the licensor at the time of executing the contract, and a reformation thereof should be decreed. *Trenton Terra Cotta Co. v. Clay Shingle Co.* 80 Fed. 46.

But an assignment of all a patentee's interest in a patent will not be reformed on the ground of mistake, so as to assign merely his rights on one county, where the allegations of the bill are indefinite, and the proofs to support the same are not clear and satisfactory. *Baldwin v. National Hedge & Wire-Fence Co.* 67 Fed. 853.

So, one who has been induced to enter into a contract to perform public work by fraudulently underestimating the amount of work to be done, and concealing from him the plans and specifications in accordance with which he is to do the work, or by mutual mistake based on the erroneous estimate of the public engineer of the amount of work to be done, may, in the absence of laches or neglect on his part, maintain an action for the cancelation of the contract and recovery of whatever money may be incidentally necessary to afford full relief, if defendant can be put substantially into his original position. *Long v. Athol*, 196 Mass. 497, 17 L.R.A.(N.S.) 96, 82 N. E. 665.

And in such case the contractor is not precluded from securing a cancelation in case the estimate is not even approximately correct, by the fact that the contract stipulates that the estimate is approximate only, and that he is satisfied therewith, and has judged for himself as to all conditions affecting the cost of performance. *Ibid.*

And where two people contracted with reference to certain work to be done, and the agreement was that it was to be for a specific price per square yard, and one of the parties drew up the agreement in writing and read it to the other, placing the expression "running yard" in the agreement instead of "square yard," but read it "square yard," whether he made a mistake in inserting it and reading it, or deliberately read the same so as to induce the other to sign it, the contract will be reformed to conform to the intention of the parties. *Basserman v. Staten Island Belt Line R. Co.* 25 Jones & S. 521, 8 N. Y. Supp. 548.

Nor can a municipal corporation avoid cancelation of a contract for public work based on the estimate of its engineer, on the theory that it did not represent the estimate to be true, and did nothing to prevent full investigation by the contractors. *Long v. Athol*, supra.

And that work already done on a public contract shows that the original estimate is not correct, so that a new contract cannot be secured on as advantageous terms, will not prevent a cancelation of the contract for mutual mistake as to the amount of work required, on the theory

that the public cannot be put *in statu quo*. Ibid.

And a municipal corporation which has induced a contractor to undertake public work by mutual mistake as to the amount to be done is placed *in statu quo*, so as to warrant cancelation of the contract, by being required to pay merely the full value of the labor and materials already furnished. Ibid.

So, a court of equity has jurisdiction to correct a contract for the sale of standing timber by adding thereto the description of certain lands which were covered by the oral negotiations for the sale of the timber, but which were, by mutual mistake of the parties, omitted from the written contract, though before the omission was discovered a payment had been made on the contract, and the purchaser had proceeded to lumber the lands not in dispute. *Metropolitan Lumber Co. v. Lake Superior Ship Canal, R. & Iron Co.* 101 Mich. 577, 60 N. W. 278.

And where all the preliminary negotiations for paving a street with asphalt on the foundation of a wooden block pavement, such foundation to be brought to subgrade with additional concrete, proceeded on the theory that the amount of concrete needed therefor was not ascertainable prior to letting the contract, that compensation therefor should be fixed separate and apart from that for laying the asphalt, and in a way to obviate payment for more than required, that the resolutions, proposals, and specifications were in harmony with such a course, and the bids were executed with the definite understanding of all parties that separate prices be paid for laying the asphalt and for raising the foundation with concrete, but, in the preparation of the contract subsequently executed, the intention of the parties as thus manifested was not expressed, the contract should be reformed in equity to give effect to what was intended, though one of the parties thereto was a city. *Fullerton v. Des Moines* (Iowa), 126 N. W. 159.

And where, on the sale of a quantity of timber, the vendor represented to the agent of the purchaser that he owned and controlled a large amount of timber land which had not theretofore been cut over, and from which he proposed to and did sell to the purchaser the timber, the writing should have stated that all of the timber in question was to be furnished from trees cut from the virgin forest, and will be reformed to that effect. *Knuckles v. J. D. Hughes Lumber Co.* (Ky.) 116 S. W. 1193.

So, where corn was sold by the bushel, a mistake in the contract of sale, in omitting an agreement that the corn should be measured in the crib at the rate of a specified number of inches to the bushel, as was the custom in that neighborhood, will be inserted in equity. *Reid v. Cook*, 88 Iowa. 717, 54 N. W. 353.

And where the parties to a contract for the sale and purchase of iron intended to contract for a certain number of tons gross 28 L.R.A.(N.S.)

weight, at a specified price per ton, but, in reducing the contract to writing, the term "tons" only was used, without anything appearing on the face of the contract to show that any other than statute tons of 2,000 pounds avoirdupois were intended, in a suit at law upon the contract, the parties would be precluded from showing that tons gross weight were intended, but the party injured might file a bill in chancery to reform the written contract so as to make it conform to the actual understanding and intent of the parties thereto. *Many v. Beekman Iron Co.* 9 Paige, 188.

So, where an agreement to pay a sum of money in gold is reduced to writing, but by mistake the word "gold" is not written in the contract, the instrument may be reformed to correspond to the real contract. *Gammage v. Moore*, 42 Tex. 170.

And the chancellor will relieve against the legal effect of a covenant to pay current money of Kentucky, on proof that the covenant was executed under a mutual mistake, each party supposing that current money of Kentucky imported whatever medium should be in fact current at the time of payment. *Bryan v. Masterson*, 4 J. J. Marsh. 225.

And where a mortgage account has been settled on the footing of compound interest with half yearly rests, both parties wrongly understanding the mortgage deed to require the same, the settled account may be reopened in equity. *Daniell v. Sinclair*, L. R. 6 App. Cas. 181, 18 Eng. Rul. Cas. 144.

And if a release is given for a particular purpose, and it is understood by the parties that its operation is to be limited to that purpose, but it turns out that the terms of the release are more extensive than was intended, a court of equity will interfere and confine it to that which was in the contemplation of the parties at the time it was executed. *Lyall v. Edwards*, 6 Hurlst. & N. 337.

So, if a father gives a sum of money by way of advancement to his daughter, requesting that she give him some writing which will evidence the fact, and make her chargeable in the distribution of his estate, and they, through mutual mistake as to the legal effect of the language used, made a promissory note from her to him, she is in equity entitled, upon parol evidence of these facts, to have the writing reformed so as to express the real purpose of its execution. *Hausbrandt v. Hoffer*, 117 Iowa. 103, 94 Am. St. Rep. 289, 90 N. W. 494.

And while at law a recovery cannot be had of purchase money the receipt of which is recited in a deed, in equity this obstacle is removed, where the recital results from inadvertence, and was inserted under a mistake as to its legal effect, without any intention of the parties that it should bar a recovery of the purchase money. *Shaw v. Williams*, 100 N. C. 272, 6 S. E. 196.

And a person who was treasurer for two churches which were in negotiation for

uniting, and who gave a receipt as treasurer of one of them, may show that he gave the receipt mistakenly, supposing that the union would be completed, and that the money for which the receipt was given belonged to the other church. *Russell v. First Presby. Church*, 65 Pa. 9.

And where a mortgagor and mortgagee entered into a contract by which the mortgagee took an assignment of a contract as collateral security for the mortgage debt, upon which he was to apply whatever amount he was able to collect on the contract, and the contract was reformed because of a mistake in drafting it, and the reformation reduced the amount due the assignor thereon, and the mortgagee, as part of the consideration of the assignment, surrendered to the assignor certain notes and mortgages held as collateral and additional security for the mortgage debt, he has the right to demand of the mortgagor an amount sufficient to meet the balance of his claim, if any, remaining after exhausting his securities aside from the contract, and applying the proceeds on the debt, not exceeding the amount of the mortgagor's indebtedness on the contract before its reformation. *Burns v. Caskey*, 100 Mich. 94, 58 N. W. 642.

So, where an administrator sold land of his intestate, supposing that it was the fee that he was selling, and the purchaser supposing it was the fee that he was buying, and nothing passed by the sale but an equity of redemption, it is a case of mixed and mutual mistake of law and fact, entitling the purchaser to relief in equity. *Griffith v. Townley*, 69 Mo. 13, 33 Am. Rep. 476.

And where in a proceeding in a probate court by an administrator to sell lands of his intestate to pay debts, a mistake occurred in the return of the appraisement, by which it appeared that one parcel of land to be sold had been appraised with an adjoining tract of surface, whereas in fact such parcel had been appraised with a tract of coal land, and the mistake was afterwards carried into the deeds by which the administrator conveyed to different purchasers, and the result of the mistakes was such that the parcel so appraised was conveyed to the purchaser of the adjoining tract of surface, who had neither bought nor paid for it, instead of the purchaser of the coal tract, who had done both, a court having general jurisdiction in equity is authorized to correct the mistake in both the proceedings in the probate court and in the deed, and parol evidence is admissible on the issue respecting the mistake. *Gill v. Pelkey*, 54 Ohio St. 348, 43 N. E. 991.

And if a widow renounced her right under her husband's will, with the idea that she was entitled to one half of the property in her own right, and it afterwards appeared she was in error as to the extent of her claim, the renunciation will not bind her. *Tanner v. Robert*, 5 Mart. N. S. 255.

So, a writing reciting an agreement between the parties thereto by which one

agreed to sell the other property described, and the other agreed to sell and convey to the former certain other property, the latter agreeing to assign a certain mortgage, though imperfectly expressed, contains all the elements of a contract, within the meaning of a statute making parties capable of contracting, their consent, a lawful object, and a sufficient consideration essential to every contract, and hence it was susceptible of reformation on the ground of mistake. *House v. McMullen*, 9 Cal. App. 664, 100 Pac. 344.

And a bill in chancery to have reformed a written contract upon which a judgment at law has been rendered, so that, as reformed, it will not support such judgment, and asking for a perpetual injunction against the judgment, which bases the complainant's right to relief upon the fact that the contract upon which the judgment was rendered had the form as written in consequence of a mutual mistake of the parties, and the agreement really entered into was materially different from that evidenced by the writing, contains equity, such fact constituting a purely equitable defense which the complainant could not have availed himself of in a suit at law, making it against conscience to execute the judgment. *Stevens v. Hertzler*, 114 Ala. 563, 22 So. 121.

And where, under writs, a sheriff entered into possession of an opera company's personal chattels, and afterwards, on the winding-up petition, a provisional official liquidator was appointed, subject to the rights of the sheriff, and the play was then being performed, and the sheriff took the money at the door, out of which he paid the execution creditors and retained his own charges, and paid the balance to the liquidator, and afterwards, on being ordered to withdraw, he did so without having sold any of the goods seized, and was afterwards ordered to pay the liquidator the amount which he had paid the creditors, the court will compel the liquidator to repay the sheriff the amount so paid, since it will not allow the liquidator, as its officer, to profit by the sheriff's mistake. *Re Opera* [1891] 2 Ch. 154.

(j) *Omission of seal.*

The omission of a necessary seal from an agreement which, by its terms, purports to be a sealed instrument, is a mistake apparent upon the face of the instrument, which a court of chancery will correct. *Henkleman v. Peterson*, 154 Ill. 419, 40 N. E. 359; *Potter v. Frank* (Me.) 76 Atl. 489; *Bullock v. Whipp*, 15 R. I. 195, 2 Atl. 309.

And where a grantor, by inadvertence or mistake, fails to place a seal upon his deed, equity will require him to perfect it so that it will comply with his intention at the time of giving it. *Harding v. Jewell*, 73 Me. 426; *Gaylord v. Pelland*, 169 Mass. 356, 47 N. E. 1019.

A paper purporting to be a deed, which is

duly signed, witnessed, and acknowledged, but which has no seal affixed to it, furnishes sufficient evidence on its face that the signer intended to seal it and omitted to do so by mistake, and a court of chancery will rectify such an omission; and if the original paper is lost, its existence and contents may be shown by secondary evidence. *Colchester v. Culver*, 29 Vt. 111.

So, where a person signed but did not seal a paper purporting to be a mortgage of land as security for a note, and the mortgagee sold the land under a power contained in the mortgage for enough to pay the note, but the purchaser refused to pay the money, because the mortgage was not under seal, the mortgagee is entitled to maintain a bill in equity against the mortgagor and the purchaser to reform the mortgage; and where a bill for that purpose is taken as confessed, the mortgagor may be decreed to affix its seal to the mortgage, and the instrument directed to have, as against the parties to the suit, full force and effect as the mortgagor's deed from the time it was first delivered to the mortgagee. *Springfield Five Cents Sav. Bank v. South Cong. Soc.* 127 Mass. 516.

And where it was the intention of both the mortgagor and mortgagee to make a mortgage a good, valid, and legal mortgage, and they failed to do so by omitting to attach a scroll to the signature of the mortgagor, in consequence of a mutual mistake of the law upon the subject, the mortgagee is entitled to have the mortgage reformed so as to speak the intention of the parties, and when so reformed it may be foreclosed; and a proceeding for that purpose is not subject to objection that because the instrument was not under seal, it would be barred by the statute of limitations. *Allen v. Elder*, 76 Ga. 674, 2 Am. St. Rep. 63.

So, if, in the execution of an instrument intended as a bond, the seal be omitted by mistake, chancery will supply the defect. *Montville v. Haughton*, 7 Conn. 543.

And if the signers of a constable's bond at the time of signing neglected to affix their seals to the same, but intended to do so, a court of chancery will decree that the bonds be treated as if sealed. *Rutland v. Paige*, 24 Vt. 181.

And where township bonds were given and signed by authorized commissioners, but seals on them were omitted by oversight and mistake, and the town set up the want of seals in defense in an action at law afterward brought against it by one who had purchased such bonds for value, in good faith, and without observing the omission, to recover interest on the bonds, a court of equity, at his suit, will decree that the bonds be held as valid as if actually sealed before being issued, and will restrain the setting up of the want of seals in the action at law. *Bernards Twp. v. Stebbins*, 109 U. S. 347, 27 L. ed. 958, 3 Sup. Ct. Rep. 252.

So, an injunction bond purporting by its terms to be a sealed instrument may be

corrected as against sureties by adding seals to their signatures, omitted by mistake, and should be so corrected, where its recitals show that it was the intent of the parties that it should be sealed and made sufficient. *Henkleman v. Peterson*, *supra*.

And where a will made a joint and several appointment of executors, and they were jointly appointed by the probate court, and accepted the trust, and gave a joint and several bond, they thereby assumed a joint as well as a several liability, and where seals were omitted from the bond through mistake, they may be compelled by chancery to affix them. *Probate Ct. v. May*, 52 Vt. 182.

So, that a contract is not attested in such a manner as is necessary to pass the title to realty is no objection to its reformation, where it embraces both real and personal property. *Thompson v. Marshall*, 36 Ala. 504, 76 Am. Dec. 328.

And where the proceedings are regular leading up to a sheriff's deed, and the deed is defective for want of a seal, it may be corrected in equity. *Gilbreath v. Dilday*, 152 Ill. 207, 38 N. E. 572.

And where a father made a promissory note in favor of one of his daughters, but by mistake failed to seal it, and delivered it in escrow for his daughter, and afterwards made similar provisions for other daughters, and the daughter whose note was not sealed survived the father, and died intestate, and her husband, as administrator, demanded the amount of the note, payment of which was refused, a court of equity will supply the seal, and enforce the note against the administrators of the maker, the consideration of love, affection, and parental duty being sufficient to authorize such action. *Conover v. Brown*, 49 N. J. Eq. 156, 23 Atl. 507.

d. Mistake as to one's own legal rights, interests, or relations.

The rule that equity will not interfere to cancel a contract made through mistake of law applies to a mistake as to the general law, and not to a case where a party is mistaken as to the effect of existing circumstances in relation to his private rights. *Toland v. Corey*, 6 Utah, 392, 24 Pac. 190; *Marshall v. Lane*, 27 App. D. C. 276; *Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833; *Cook v. Sumner Spinning & Mfg. Co.* 1 Sneed, 698; *Waggoner v. Waggoner* (Va.) — L.R.A.(N.S.) —, 68 S. E. 990; *Cooper v. Phibbs*, 15 Week. Rep. 1053, 22 Eng. Rul. Cas. 870.

And a mistake by a party as to his antecedent existing legal rights, as distinct from a mistake as to the legal import of the act done, furnishes a ground for equitable relief from the consequences of the mistake in cases in which the mistake can be rectified without injury to the rights of others. *Re McFarlin* (Del.) 75 Atl. 281; *Wyche v. Greene*, 16 Ga. 57.

In such case the mistake is really one of fact. *Marshall v. Lane*, 27 App. D. C. 276.

And a representation concerning a man's private rights, though it may involve matters of law, is, as a whole, deemed to be a statement of fact, of which equity will take cognizance. *Motherway v. Wail*, 168 Mass. 333, 47 N. E. 135.

And when a person is ignorant or mistaken with respect to his own antecedent and existing rights, interests, or assets, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or assets, equity will grant relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact. *Renard v. Clink*, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692.

And where parties have presupposed facts or rights to exist as the basis of their contracts which did not exist, such contracts, made in mutual mistake, will be relieved against in equity, the principle being that where a party has been misled to his injury, and he has no opportunity of satisfying himself of the truth of matters, or has been prevented from taking the steps necessary to verify the assertion, he is entitled to relief. *Watts v. Cummins*, 59 Pa. 84.

So, the maxim that ignorance of the law is no excuse for the breach or nonperformance of any agreement has no application to special or private acts of the legislature, which are designed to operate only upon particular persons, or to regulate private concerns. *Cook v. Sumner Spinning & Mfg. Co. supra*.

And where a release is so general in its terms as to release the rights of a party of which he was in ignorance, and which were not in contemplation of the parties to the bargain at the time it was made, the instrument will be restored in equity to serve the purposes of the bargain, and the release confined to the right intended to be released. *Blair v. Chicago & A. R. Co.* 89 Mo. 383, 1 S. W. 350.

So, where one delivers chattels to another as indemnity for suretyship, the law regards such delivery as a pledge merely; and that the property was transferred by an absolute bill of sale does not alter the case in a court of equity, even though the contract stipulates that the pledge shall be irredeemable; and where the party acts upon the misapprehension that he has no title to the property, a court of equity will relieve him from the legal effect of instruments which surrender such unsuspected title. *Morgan v. Dod*, 3 Colo. 551.

And where persons conveyed to another half of the real estate left by the latter's wife, because they supposed he was entitled to inherit it as her husband, and by law he was not so entitled, but the grantors were entitled to it, the grantors are entitled to relief against the mistake; but a lease executed by the grantee after the conveyance to him, the lessees being without notice of the grantors' rights, 28 L.R.A.(N.S.)

should be allowed to stand. *Keauhulihia v. Puahiki*, 4 Haw. 279.

And where a husband and wife entered into a marriage settlement by which property belonging to her was conveyed to a trustee for the joint use of herself and husband and such children as she might have, and at her death to go to her children, both of them believing that such deed was necessary to prevent the husband's marital rights from attaching, and both being ignorant of the law then existing, which secured to her all her property, equity has jurisdiction of a bill to set aside and cancel the marriage settlement, and a verdict and judgment canceling and setting it aside is binding on the parties and their privies until set aside in some of the modes provided by law. *Gefken v. Graef*, 77 Ga. 340.

So, to hold an indorser who has been discharged liable on a promise to pay the debt, it must appear that when he made the promise, he was under no mistake or misapprehension as to either the law or the facts, and that he knew he was fully discharged by reason of the facts and the law applicable to them. *Williams v. Union Bank*, 9 Heisk. 443.

Where a deed purports to convey all the interest and title of the grantor, it will be given effect accordingly, however, although he actually held a greater interest than either he or the grantee, at the time of the conveyance, supposed he owned. A party must know enough about his title not, by his want of knowledge of it, to mislead a purchaser, to his detriment. *Thomas v. Chicago*, 55 Ill. 403.

And where a woman having with her brother a joint estate in a tract of land, under her father's will, but believing that she had only a life interest in a moiety, with remainder to her brother, conveyed to him in fee her interest in one half of the tract after division, and took from him a conveyance of his interest in the other half, for the term of her natural life, there is no ground for reforming these deeds, and after her death one half of the part taken by her in the division remains the absolute property of the brother, and the other half passes under her will to her devisee. *Cunningham v. Cunningham*, 20 S. C. 317.

e. Mistake as to legal rights, as affecting compromises and settlements.

Where parties deal with each other with the knowledge and in view of the fact that something is uncertain as to the amount or condition of the subject-matter of their dealing, and the contract relating thereto is in the form intended, there is no ground for correcting a mistake in a court of equity, if it should finally turn out that one has intervened. *Kinney v. Consolidated Virginia Min. Co.* 4 Sawy. 382, Fed. Cas. No. 7,827; *Underwood v. Brockman*, 4 Dana, 309, 29 Am. Dec. 407; *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 556;

Kowalke v. Milwaukee Electric R. & Light Co. 103 Wis. 472, 74 Am. St. Rep. 877, 79 N. W. 762; *Pickering v. Pickering*, 2 Beav. 31.

In such case, a court of equity will endeavor to support the conclusions or agreements to which the parties may fairly come at the time, and that, notwithstanding the subsequent discovery of common error. *Pickering v. Pickering*, supra.

Nor can a contract or payment made for the purpose of avoiding litigation be rescinded for error of law. *Urquhart v. Gove*, 4 Rob. (La.) 207.

Compromise of doubtful rights or voluntary settlements between parties, when characterized by good faith and a full disclosure of all the facts, are favored by the courts, and such settlements will not be disturbed for any ordinary mistake, either of law or fact, in the absence of conduct otherwise inequitable, since their very object is to settle all such possible errors without judicial controversy. *Wells v. Neff*, 14 Or. 66, 12 Pac. 84, 88; *Underwood v. Brockman*, supra; *Perkins v. Gay*, 3 Serg. & R. 327, 8 Am. Dec. 653.

And though equity generally relieves against a plain mistake, it does not interfere for misconception alone, to overturn an agreement made to prevent a domestic feud; these agreements partake largely in their nature of the compromise of a doubtful right, which is a sufficient consideration. *Lies v. Stub*, 6 Watts, 48.

And where parties have made settlements of controversies, whereby the rights of third parties are acknowledged and considerable sums paid over to them, they cannot be allowed to come into equity and overturn them afterwards without the fullest proof of ignorance of facts, fraud, or imposition. *Brown v. Rowles*, 21 Md. 11.

And a court of equity will endeavor to support arrangements by which family differences have been compromised, especially where these differences relate to questions of legitimacy, even though arising upon grounds which might not be considered satisfactory if the transaction had occurred between strangers. *Westby v. Westby*, 2 Drury & War. 502.

A compromise of a doubtful claim will not be set aside in equity except for fraudulent misrepresentation or concealment of facts, or for such imposition as amounts to unfair and unconscientious dealing. *Mills v. Lee*, 6 T. B. Mon. 91, 17 Am. Dec. 118.

And concealment of facts which a party is not bound to disclose is not ground for avoiding a compromise, and one party to a controversy concerning land is not bound to disclose to his adversary defects in his own title. *Ibid.*

And where a person enters into a contract for the purpose of avoiding litigation, based on full confidence in a statement made to him that "illegitimate children could claim the succession of their mother as forced heirs," he acts under error of law, for which the contract cannot be rescinded. *Lyles v. Martin*, 5 La. 113.

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So, an agreement of compromise, fairly entered into, will not be set aside merely upon the ground that the party seeking relief was mistaken in the law. *Lewis v. Cooper*, *Cooke* (Tenn.) 467; *Underwood v. Brockman*, supra; *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 230.

And a person purchasing a title to real estate, believed by himself and by his grantor to be doubtful, cannot recover back the consideration therefor by showing that such title was in fact void; his recovery would be limited to a case where the parties, believing the title purchased to be good, were laboring under a mistake of fact. *Granger v. Olcott*, 1 Lans. 169.

Nor will a court of equity inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made. *Naylor v. Winch*, 1 Sim. & Stu. 555.

And where there is no actual fraud in a settlement of an estate among members of a family, and no confidential relation between the parties, or ignorance of the facts upon the part of any of them, inadequacy of consideration will not avoid the contract. *Hughes's Estate*, 6 Pa. Co. Ct. 168.

And an agreement in settlement of a family dispute, containing in itself an amicable adjustment of conflicting claims and interests, and founded in mutual promises imposing a like duty upon each of the parties that each shall collate and account for all that he had received, constitutes a mutual promise, which is a good consideration to uphold the agreement, and it will not be set aside because of ignorance of law, and a consequent mistake as to title. *Farnsworth v. Dinsmore*, 2 Swan, 38.

So, where several creditors have agreed with their debtor to compromise their claims against him at a stipulated rate, each agreeing to compromise upon consideration of the like agreement of the others, no one of them can avoid or rescind such agreement on his part, upon the ground that it was made through mistake, forgetfulness, or ignorance as to the amount or situation of his claim, or the manner in which it was secured. *Johnson v. Parker*, 34 Wis. 596.

And it is not necessary in such case that the creditors should have convened, or that a formal promise should have been made by each to all the others to abide by the settlement; it is sufficient that they have communicated with each other through the debtor by accepting his proposition in writing, made in the same form to each, from which it appears that the consideration for the promise of each was the like promise made by the others. *Ibid.*

And where persons interested have a knowledge of all the facts, and take advice, whether they got proper advice or not, and the money is divided and the business settled, the settlement will not be reopened on the ground that some of the parties have by mistake received a share or more than a share, and that the complain-

ant acquiesced in the receipt of it by mistake. *Rogers v. Ingham*, L. R. 3 Ch. Div. 351.

So, where one, with full knowledge of all the facts constituting his title to land, purchases it of another, or compromises a controversy in reference to it, and acts on the presumption that he has no title, the mistake, if one is made, is of law, and not of fact, and not correctable in equity. *Hadley v. Ware*, 15 Ala. 149; *Neale v. Neale*, 1 Keen, 672; *Stewart v. Stewart*, 6 Clark & F. 911.

And where a question upon the construction of a will, whether the personal estate was wholly or partially disposed of, was not decided, an agreement upon the subject will be upheld, though the instrument that was prepared was not executed, it being established as clear, fair, and reasonable, not within the statute of frauds, concluded with full knowledge of the circumstances, and not waived. *Gibbons v. Caunt*, 4 Ves. Jr. 840.

And where parties to a pending action have, for the purpose of compromising the same, entered into an agreement under seal, embracing mutual releases and a stipulation, which was carried into effect, for the entry of a judgment for a merely nominal sum, they being then ignorant of a material matter, the court has not the power, after the discovery of such matter, to reform the agreement on motion, relieving one of the parties in part from the release which he had made, but leaving the other party bound by the corresponding release on his part. *Gerdtzen v. Cockrell*, 50 Minn. 546, 52 N. W. 930.

Nor can a person who compromised a litigation on the authority of a judicial decision recede from his agreement on the ground that he misapprehended the decision, and that there was really no question to be the subject of the compromise. *Ex parte Lucy*, 4 De G. M. & G. 356.

And where parties submit matters in issue between them to arbitration, and an award is rendered and made the judgment of the court, without objection on the part of the losing party, a bill will not lie at his instance to set aside the judgment, upon the ground that he could have prevented the award from becoming the judgment of the court by filing exceptions, but was ignorant of his right to do so. *Thurmond v. Clark*, 47 Ga. 500.

So, nullity of the title, in the execution of which a compromise was made, can only be invoked as a cause of rescission when the title was falsely supposed to be valid through error of fact, not through error of law. *Dugas v. Donaldsonville*, 33 La. Ann. 668.

And where two judgment creditors entered into an agreement for the division between them of a fund arising out of a surety's sale of property of a common debtor, it not being sufficient to satisfy both, the fact that one acted on the belief that the other had a valid mechanics' lien on the property, which proved not to be the case, 28 L.R.A.(N.S.)

is not such a mistake of law as will cause the agreement to be set aside. *DeGive v. Healey*, 60 Ga. 391.

Nor can payment of the amount due on an instrument by one who indorsed it, which is made and accepted in the mistaken belief of both parties that such indorser was legally liable, where the matter was equally open to the inquiry and judgment of both parties, be recovered back, whether the mistake is to be considered one of fact or of law. *Alton v. First Nat. Bank*, 157 Mass. 341, 18 L.R.A. 144, 34 Am. St. Rep. 285, 32 N. E. 228.

And a verbal agreement between the attorneys for the respective parties in a pending suit, that judgment may pass for one of the parties, with a certain amount of costs, supposed by them to be equivalent to certain claims relinquished by the opposite party, with relief from the litigation, is in effect a compromise of a litigated suit, and is final and conclusive between the parties, no fraud being shown, even though entered into under a mistake of law. *Montgomery v. Ellis*, 6 How. Pr. 326.

Equity, in a proper case, however, will relieve against an agreement of compromise, made under a mistake of law by the party seeking relief. *Jones v. Munroe*, 32 Ga. 181.

And while compromises made under mistake of law are upheld in equity, if the parties are not on equal terms, and one misleads the other, and obtains property thereby against right and equity, as well as against law, he will be compelled to restore it. *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 556.

So, a compromise must be set aside for an obvious mistake of plain law when there was no other motive for it, and therefore nothing reasonably or intrinsically doubtful to be compromised, and the rule is the same whether the compromise is evidence of fraud, surprise, or imbecility. *Underwood v. Brockman*, 4 Dana, 309, 29 Am. Dec. 407.

And the rule that courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of the facts, though done under a mistake of law, is relaxed in all cases of compromises of doubtful, and perhaps in all cases of doubted, rights, and especially in all cases of family arrangement, where there is a total ignorance of title, founded on the mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence, or surprise. *Dupre v. Thompson*, 4 Barb. 279.

And that a party whose mind was impaired by disease was assailed from time to time with a charge that he had assumed an illegal authority, and made to believe that he had incurred a heavy responsibility, and was thus induced to compromise a fraudulent claim, is sufficient ground for granting him relief against the compromise and claim. *Underwood v. Brockman*, *supra*.

So, where a contract was made for the

purchase of land of administrators of an estate, and a compromise was made under a mutual mistake that a forthcoming bond had been executed and forfeited by a party to the contract, with the force and effect of a judgment against the land, the money paid, with interest, should be refunded, and the note given therefor should be surrendered. *Nabours v. Cocke*, 24 Miss. 44.

And if a compromise of a doubtful right be obtained from a person through the misrepresentation of another, and in consequence of the influence of the testimony of the latter, and the persuasion of arbitrators to whom the matter had been referred, it is not binding if the party benefited by the compromise knew of such misrepresentation, and availed himself unduly of its influence. *Hoge v. Hoge*, 1 Watts, 163, 26 Am. Dec. 52.

And the effect of a deed made for the purpose of carrying into effect a family arrangement may be varied, where it contained a declaration of right inconsistent with the actual rights of the parties, and there was no evidence that the inconsistency was known to or contemplated by the parties or their solicitors, or that their actual rights were intended to be altered. *Ashhurst v. Mill*, 7 Hare, 502.

Nor can a transaction be considered as a family arrangement where the doubts existing as to the rights alleged to be compromised are not presented to the mind of the party interested. *Harvey v. Cooke*, 4 Russ. Ch. 34.

Parol evidence is admissible to make out a case for the reformation of a settlement, but the jurisdiction in such cases is to be cautiously exercised. *Barrow v. Barrow*, 18 Beav. 529.

f. Mutuality, as affecting ignorance or mistake of law.

1. General rules.

If both parties to a contract make an honest mistake of law as to its effect, or are ignorant of a matter of law and enter into the contract for a particular object, the result of which would by law be different from what they mutually intended, the court will interfere to prevent the enforcement of the contract, and relieve the parties from the unexpected consequences of it. *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303; *Hearst v. Pujol*, 44 Cal. 230; *Loudermilk v. Loudermilk*, 98 Ga. 780, 25 S. E. 927; *Taylor v. Holmes*, 14 Fed. 498, affirmed in 127 U. S. 489, 32 L. ed. 179, 8 Sup. Ct. Rep. 1192; *Lansdowne v. Lansdowne*, 2 Jac. & W. 205.

This is the rule of *DOLVIN v. AMERICAN HARROW CO.*

And a mistake of law on the part of both contracting parties, owing to which the object of their contract cannot be attained, is sufficient ground for setting aside such contract. *Champlin v. Laytin*, 18 Wend. 407, 31 Am. Dec. 382.

And an agreement may be decreed to be

delivered up upon the ground of surprise, neither party understanding the effect of it. *Willan v. Willan*, 16 Ves. Jr. 72.

A mutual mistake of the parties to a contract is sufficient to justify the reformation thereof. *Wood v. Michaud*, 63 Minn. 478, 65 N. W. 963; *Linton v. Unexcelled Fire-works Co.* 128 N. Y. 672, 28 N. E. 580, reversing 37 N. Y. S. R. 173, 13 N. Y. Supp. 495; *Wheadon v. Olds*, 20 Wend. 174; *Jones v. Warren*, 134 N. C. 390, 46 S. E. 740; *MacVeagh v. Burns*, 2 S. D. 83, 48 N. W. 835.

And equity has jurisdiction to reform written instruments where there has been an actual agreement but the contract, executed through mutual mistake, does not express the real intention of the parties. *Hand v. Cox* (Ala.) 51 So. 519; *Mulgrew-Boyce Co. v. Freeborn County* (Minn.) 127 N. W. 396.

So, though one party's mistake will not entitle him to correct a written instrument, when there is a mutual mistake, or mistake on one side and either fraud, undue influence, or like cause on the other, giving rise to the first party's mistake, the court will grant relief. *Jones v. Warren*, *supra*.

And in cases of mutual mistake going to the essence of a contract, it is not necessary that there should be any element of fraud to warrant the interposition of a court of equity. Relief will be granted on the ground of mutual mistake as to the existence of the thing which constituted the basis of the contract. *King v. Doolittle*, 1 Head, 77.

The general principle that where parties have contracted in ignorance of mistake of a fact essential in the inducement to the formation of a contract, which mistake injuriously affects the rights and interests of one of the parties under it, a court of equity will grant relief against the consequences of the mistake, applies not only to cases where there has been a studied suppression or concealment of material facts by one of the parties which would amount to a fraud, but also to many cases of innocent ignorance and mistake on both sides. *O'Connell v. Duke*, 29 Tex. 299, 94 Am. Dec. 282; *Farenholt v. Perry*, 29 Tex. 316; *Taylor v. Fleet*, 4 Barb. 95.

Mutual mistake for which a contract may be reformed in equity is a mistake common to all the parties to a written contract or instrument, and usually a mistake concerning the contents or the legal effect of the contract or instrument. *Page v. Higgins*, 150 Mass. 27, 5 L.R.A. 152, 22 N. E. 63.

It is a mistake reciprocal and common to both parties where each alike labors under the same misconception in respect to the terms of the written instrument. *Botsford v. McLean*, 45 Barb. 478.

It is a mistake which involves both parties, so that the contract, as written, fails to carry out the intention or understanding of either. *Jenkins v. Lefaiver*, 29 N. Y. S. R. 886, 9 N. Y. Supp. 19.

And relief from a mistake of law with reference to a contract will be given in

equity where it was a mutual mistake of both parties to the contract, and was to be attributed to the agent of the party now endeavoring to take advantage of it. *Green v. Morris & E. R. Co.* 12 N. J. Eq. 165.

And the mutual mistake for which a deed may be reformed relates to the time of making the agreement for the conveyance, and not to the execution and delivery of the deed, which merely carried the agreement into effect. *Cleghorn v. Zumwalt*, 83 Cal. 155, 23 Pac. 294.

To be correctable in equity, however, a mistake of law in an instrument not induced by fraud or circumvention must have been mutual. *Harvey v. United States*, 13 Ct. Cl. 322; *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63, reversing 78 Fed. 33; *Durham v. Fire & M. Ins. Co.* 10 Sawy. 526, 22 Fed. 468; *Parker v. Carter*, 91 Ark. 162, 120 S. W. 836; *Houser v. Austin*, 2 Idaho, 204, 10 Pac. 37; *Sutherland v. Sutherland*, 69 Ill. 481; *Douglas v. Grant*, 12 Ill. App. 273; *Phenix Ins. Co. v. Rogers*, 11 Ind. App. 72, 38 N. E. 865; *Schoonover v. Dougherty*, 65 Ind. 463; *Baldwin v. Kerlin*, 46 Ind. 426; *Wachendorf v. Lancaster*, 61 Iowa, 509, 14 N. W. 316, 16 N. W. 533; *Williams v. Hamilton*, 104 Iowa, 423, 65 Am. St. Rep. 475, 73 N. W. 1029; *Conaway v. Gore*, 24 Kan. 389; *Stockhoff v. Brannin*, 14 Ky. L. Rep. 717; *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550; *Burns v. Caskey*, 100 Mich. 94, 58 N. W. 642; *Steinberg v. Phoenix Ins. Co.* 49 Mo. App. 255; *Adkins v. Tomlinson*, 121 Mo. 487, 26 S. W. 573; *Bartlett v. Brown*, 121 Mo. 353, 25 S. W. 1108; *Meek v. Hurst*, 223 Mo. 688, 122 S. W. 1022; *Henderson v. Beasley*, 137 Mo. 199, 38 S. W. 950; *Ramsey v. Smith*, 32 N. J. Eq. 28; *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099; *Lesser v. Demarest* (N. J. Eq.) 72 Atl. 14; *Lanier v. Wyman*, 5 Robt. 147; *Devereux v. Sun Fire Office*, 51 Hun, 147, 4 N. Y. Supp. 655; *Allison Bros. Co. v. Allison*, 144 N. Y. 21, 38 N. E. 956; *Berringer v. Schaefer*, 52 How. Pr. 69; *Mills v. Kampfe*, 135 App. Div. 748, 119 N. Y. Supp. 903; *Kent v. Manchester*, 29 Barb. 595; *Nevius v. Dunlap*, 33 N. Y. 676; *Whittemore v. Farrington*, 76 N. Y. 452; *Brisco v. Pacific Mut. Ins. Co.* 4 Daly, 246; *Coles v. Bowne*, 10 Paige, 526; *Evarts v. Steger*, 5 Or. 147; *Thornton v. Krimbel*, 28 Or. 271, 42 Pac. 995; *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616; *Robinson v. Braiden*, 44 W. Va. 183, 28 S. E. 798; *Biggs v. Bailey*, 49 W. Va. 188, 38 S. E. 499; *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N. W. 264; *De Voin v. De Voin*, 76 Wis. 66, 44 N. W. 839; *Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826; *Spare v. Home Mut. Ins. Co.* 19 Fed. 14; *Mortimer v. Shortall*, 2 Drury & War. 363.

And to justify a court of equity in reforming a written instrument for an alleged mistake, it must be distinctly alleged and conclusively proved that the mistake was mutual, or that it was the mistake of one party superinduced by the fraud or some inequitable conduct of the other. *Thornton* 28 L.R.A.(N.S.)

v. Krimbel; *Williams v. Hamilton*; and *Chute v. Quincy*,—*supra*; *Martini v. Christensen*, 60 Minn. 491, 62 N. W. 1127; *Welles v. Yates*, 44 N. Y. 525; *Story v. Conger*, 36 N. Y. 673, 93 Am. Dec. 546; *Bryce v. Lorillard F. Ins. Co.* 55 N. Y. 240, 14 Am. Rep. 249; *Paine v. Jones*, 75 N. Y. 593; *Moran v. McLarty*, 11 Hun, 68, affirmed in 75 N. Y. 25; *Brown v. Brown*, 79 Hun, 44, 29 N. Y. Supp. 652; *Avery v. Equitable Life Assur. Soc.* 117 N. Y. 451, 23 N. E. 3; *O'Donnell v. Harmon*, 3 Daly, 424; *McMinn v. Patton*, 92 N. C. 371; *Kennerty v. Etiwan Phosphate Co.* 21 S. C. 226, 53 Am. Rep. 669.

And the plaintiff must show that the alleged mistake was that of both, or all, if more than two, of the parties to the contract. *Evarts v. Steger*, *supra*; *Hertzler v. Stevens*, 119 Ala. 333, 24 So. 521; *Parker v. Carter*, *supra*; *Varner v. Turner*, 83 Ark. 131, 102 S. W. 1111; *McGuigan v. Gaines*, 71 Ark. 614, 77 S. W. 52; *Bell v. Americus, P. & L. R. Co.* 76 Ga. 754; *Schoonover v. Dougherty*, *supra*; *Page v. Higgins*, 150 Mass. 27, 5 L.R.A. 152, 22 N. E. 63; *Burns v. Caskey*, 100 Mich. 94, 58 N. W. 642; *Tesson v. Atlantic Mut. Ins. Co.* 40 Mo. 33, 93 Am. Dec. 293; *Nevius v. Dunlap*; *Paine v. Jones*; and *Devereux v. Sun Fire Office*,—*supra*; *Miaghan v. Hartford F. Ins. Co.* 12 Hun, 321; *Berringer v. Schaefer*, *supra*; *Moran v. McLarty*, 11 Hun, 68; *Bryce v. Lorillard F. Ins. Co.* *supra*; *Diman v. Providence, W. & B. R. Co.* 5 R. I. 130; *Deseret Nat. Bank v. Dinwoodey*, 17 Utah, 43, 53 Pac. 215; *Fishack v. Ball*, 34 W. Va. 644, 12 S. E. 856; *Bradford v. Romney*, 30 Beav. 431.

So that by correcting the writing, as requested, the court will make it express the contract designed to be entered into by both. *Diman v. Providence, W. & B. R. Co.* *supra*.

To constitute a mutual mistake which will authorize reformation of an instrument, the minds of the parties must have met in a common intent. *Potter v. Frank* (Me.) 76 Atl. 489; *Douglas v. Grant* and *Lanier v. Wyman*, *supra*.

And both must have done what neither of them intended, *Sutherland v. Sutherland*, 69 Ill. 481; *Douglas v. Grant*; *Varner v. Turner*; *McGuigan v. Gaines*; and *Houser v. Austin*,—*supra*; *Dulany v. Rogers*, 50 Md. 524; *Devereux v. Sun Fire Office* and *Miaghan v. Hartford F. Ins. Co.* *supra*.

The intention of the parties, to express and carry out which a written agreement between them will be reformed, must be the intention of both parties as to something upon which their minds actually met. *Santa Clara Female Academy v. Delaware Ins. Co.* 93 Wis. 57, 66 N. W. 1140; *Henderson v. Stokes*, 42 N. J. Eq. 586, 8 Atl. 718.

Where the minds of the parties to a contract never met, one understanding one thing and another another, the court will not reform, but will rescind, the contract. *Rowley v. Flannelly*, 30 N. J. Eq. 612.

An instrument will not be reformed in equity where it expresses exactly what was intended by one party, but contains impor-

tant insertions that the other party, the one who executed it, did not know were in it, of which want of knowledge the first party had no information or suspicion or any agency in producing. *Kennerty v. Etiwan Phosphate Co. supra*; *Eames Vacuum Brake Co. v. Prosser*, 88 Hun, 343, 34 N. Y. Supp. 398.

And the fact that a different agreement was intended by both parties must be established by evidence uncontrovertible, clear, and convincing. *Allison Bros. Co. v. Allison and Hertzler v. Stevens, supra*; *Denny v. Barber*, 72 Ark. 546, 81 S. W. 1055; *Ezell v. Humphrey*, 90 Ark. 24, 117 S. W. 758; *Tesson v. Atlantic Mut. Ins. Co. supra*; *Henderson v. Beasley*, 137 Mo. 199, 38 S. W. 950; *Slobodisky v. Phenix Ins. Co.* 52 Neb. 395, 72 N. W. 483; *Henderson v. Stokes*, 42 N. J. Eq. 586, 8 Atl. 718; *Lesser v. Demarest (N. J. Eq.)* 72 Atl. 14; *Bradford v. Romney, supra*.

A contract cannot be reformed without conclusive evidence of an intention on the part of both parties at the time of its execution to enter into some other contract. *Fowler v. Fowler*, 4 De G. & J. 250.

The mistake should be made to appear beyond reasonable controversy. *Parker v. Carter*, 91 Ark. 162, 120 S. W. 836; *McKnight v. Witherington (Ark.)* 127 S. W. 727; *Turner v. Todd*, 85 Ark. 62, 107 S. W. 181.

And it must be established to the satisfaction of the court. *Kent v. Manchester*, 29 Barb. 595.

So, a mistake of one party is not ground for reforming a contract. *Harvey v. United States*, 13 Ct. Cl. 322; *Ruffner v. McConnel*, 17 Ill. 212, 63 Am. Dec. 362; *Sutherland v. Sutherland, supra*; *Douglas v. Grant*, 12 Ill. App. 273; *Baldwin v. Kerlin*, 46 Ind. 426; *Stockhoff v. Brannin*, 14 Ky. L. Rep. 717; *Dulany v. Rogers, supra*; *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 816, 33 N. W. 38; *Bancharel v. Patterson*, 64 Minn. 454, 07 N. W. 356; *Benn v. Pritchett*, 163 Mo. 560, 63 S. W. 1103; *Steinberg v. Phoenix Ins. Co.* 49 Mo. App. 255; *Ranney v. McMullen*, 5 Abb. N. C. 246; *Moran v. McLarty*, 11 Hun, 68; *White v. Richmond & D. R. Co.* 110 N. C. 456, 15 S. E. 197; *Jones v. Warren*, 134 N. C. 390, 46 S. E. 740; *Archer v. California Lumber Co.* 24 Or. 341, 33 Pac. 526; *MacVeagh v. Burns*, 2 S. D. 83, 48 Pac. 835; *Fallon v. Robins*, 16 Ir. Ch. Rep. 422; *Mortimer v. Shortall*, 2 Drury & War. 363; *Stewart v. Kennedy*, L. R. 15 App. Cas. 108.

Unless the other party induced him to act under such mistake. *Benn v. Pritchett*, 163 Mo. 560, 63 S. W. 1103.

And where two parties entered into a contract, and error is claimed by one party to exist on an important point, which is claimed to be correct by the other party, it cannot be amended as against the party correctly understanding it; he acting in good faith and supposing that the other understood the contract as he did. *Welles v. Yates*, 44 N. Y. 525.

Courts will not make contracts for par-

ties under the guise of reforming a unilateral undertaking. *Louisville & N. R. Co. v. Cox*, 133 Ga. 763, 66 S. E. 1088; *Stewart v. Dunn*, 77 App. Div. 631, 79 N. Y. Supp. 123; *Borden v. Richmond & D. R. Co.* 113 N. C. 570, 37 Am. St. Rep. 632, 18 S. E. 392.

And a party to a contract cannot avoid it on the ground that he made a mistake, where there had been no misrepresentation, and there is no ambiguity in the terms of the contract, and the other contractor has no notice of such mistake and acts in perfect good faith. *Borden v. Richmond & D. R. Co. supra*.

A court of equity may not reform a written agreement on the ground of mistake, so as to impose on one of the parties obligations which he did not intend to assume. *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63, reversing 78 Fed. 33.

Though a mistake on one side only may be ground for rescinding an agreement. *Sutherland v. Sutherland*, 69 Ill. 481; *Douglas v. Grant, supra*; *Dulany v. Rogers*, 50 Md. 524; *Bancharel v. Patterson, supra*.

But equity cannot give affirmative relief by way of reformation for a mistake of one of the parties to a contract, not induced by fraud or mistake of the other. *Bigelow v. Wilson*, 99 Iowa, 456, 68 N. W. 798; *Greene v. Smith*, 160 N. Y. 533, 55 N. E. 210; *White v. Richmond & D. R. Co.* 110 N. C. 456, 15 S. E. 197.

To justify the reformation or cancellation of a document because one of the parties was mistaken as to its legal effect, it must appear that some relation of trust or confidence existed between the parties, or that there was fraud or misrepresentation, or that the means of knowledge as to the terms and conditions of the contract were not equally open and accessible to both parties. *Archer v. California Lumber Co.* 24 Or. 341, 33 Pac. 526.

And the mistake of the scrivener who drew a deed will not constitute a mutual mistake as a ground for the reformation of the deed, unless he acted for both parties. *Benn v. Pritchett, supra*.

And where a party accepts a mortgage believing that all the land agreed to be conveyed by the mortgage is included in the description, the mortgagor is estopped to assert that he intentionally brought about or silently acquiesced in the discrepancy between the instrument and the agreement, so that the mistake was not mutual. *Keister v. Myers*, 115 Ind. 312, 17 N. E. 161.

So, where it appears that the contract, as executed, is just the contract one of the parties intended to make and the one he understood the other intended to make, the court has no power to reform it. *Paine v. Jones*, 75 N. Y. 593.

And a party seeking to reform or rescind a contract for mistake has the burden of proving by clear and satisfactory evidence that the other party knew of his mistake, and, in the absence of such proof, there can be no reformation or rescission. *Grant*

Marble Co. v. Abbot, 142 Wis. 279, 124 N. W. 264.

Nor will equity reform a written contract by inserting a condition therein, except upon proof that the parties intended at the time of executing the contract to insert it, and that it was omitted by fraud, accident, or mistake. Bell v. Americus, P. & L. R. Co. 76 Ga. 754.

And it must be shown what the agreement of the parties was and wherein the writing fails to embody it. Durham v. Fire & M. Ins. Co. 10 Sawy. 526, 22 Fed. 468.

And a written instrument will not be reformed in equity unless it be shown that the parties to it had agreed on a certain contract, and the writing, by mistake in drawing, does not express such contract. Wilson v. Watkins, 48 S. C. 341, 26 S. E. 663.

To justify the reformation of an instrument there must be a mutual mistake, or its equivalent, in law, accompanied with an enforceable contract of the tenor sought to be established. Moehlenpah v. Mayhew, 138 Wis. 561, 119 N. W. 826.

And where a contract is contained in several papers, and one party is not even aware of the existence of a clause in which an alleged omission occurs, and the other party is aware of the existence of the clause and of an unfilled blank therein, and leaves it in that condition, apparently by design, it cannot be considered that either party or that both parties intended that the omitted word should be supplied before the execution of the contract, but through mistake neglected to have it done. Clark v. Higgins, 132 Mass. 586.

The rule that, to reform an agreement between parties, it is essential that mutual mistake or fraud on the part of one of the parties be shown, however, is not necessarily applicable to a case where the mistake occurs merely in the reduction of the agreement to writing. Brown v. Brown, 79 Hun, 44, 29 N. Y. Supp. 652; Rider v. Powell, 28 N. Y. 310.

And it is only where an action is to reform the agreement itself that it is necessary to allege in the pleading and proof on the trial that the mistake was mutual. Born v. Schrenkeisen, 110 N. Y. 55, 17 N. E. 339.

Nor does the rule that a court of equity will not interfere to rectify an instrument unless it is proved that the mistake was common to both parties, apply to the case of a contract which has been executed between parties in the relation of vendor and purchaser, whom it is in the power of the court to replace in their original position. Harris v. Pepperell, L. R. 5 Eq. 1; Benson v. Markoe, 37 Minn. 30, 5 Am. St. Rep. 816, 33 N. W. 38.

In Harris v. Pepperell, supra, Bradford v. Romney, 30 Beav. 431, supra, was distinguished upon the ground that in that case there had been a settlement on marriage, and the marriage had taken place and children had been born, and that it was im-

possible to undo the marriage and remit the parties to the same position they were in before.

2. Application in particular cases.

Where a contract is entered into in good faith, by which it is mutually understood and intended, for an adequate consideration, that one party shall part with and the other acquire a valid title to property, and it turns out that at the time of the contract, by the operation of some settled principle of law of which they were alike ignorant, the supposed title is wholly valueless, or does not in legal contemplation exist, the mistake is not a mere mistake of law, it involves in some measure a mistake of fact as well as of law, and a court of equity will replace the parties in *statu quo*. King v. Doolittle, 1 Head, 77.

But where a party, previous to executing a written agreement, has full opportunity to examine it so as to know its contents, yet voluntarily signs without making such examination, he cannot claim a reformation of the agreement simply upon evidence that it contains obligations of which he was not cognizant and to which he did not intend to agree; there must be clear evidence of a mutual mistake or of fraud to authorize a reformation. Moran v. McLarty, 75 N. Y. 25.

So, a mistake in a conveyance as to the subject-matter conveyed, superinduced by ignorance of the true description of the land which the grantor intended to sell, and the grantee intended to buy, when participated in by both parties, is a mutual mistake of fact, which equity will correct. American Asso. v. Williams, 93 C. C. A. 1, 166 Fed. 17.

And allegations of a bill in equity to reform a written contract on the ground of mistake, that the terms of the contract were agreed upon, that they were to be put in writing by the plaintiff, and that both plaintiff and defendant executed the writing under the mistaken impression that it did conform to the prior verbal agreement, show a mutual mistake, and are not subject to the objection that the bill states merely a case of unilateral mistake in making a proposition. Providence Steam Engine Co. v. Hathaway Mfg. Co. 79 Fed. 512.

And where a person purchases another's interest in a partnership business, agreeing to pay the debts of the firm, and pays them on the basis of an inventory, made by himself, of the firm's assets and liabilities, in which there was a mistake, by reason of which he paid \$500 too much, the mistake, though not mutual, was a good consideration for a promise upon the part of the other party to the contract to repay the excess, and the written agreement was no impediment to showing such moral consideration by parol evidence. De Voin v. De Voin, 76 Wis. 66, 44 N. W. 830.

So, where a mistake in a deed was a mixed mistake of law and fact, brought about by the ignorance of the person who

drew the deed, who in doing so was acting for both parties, the mistake is mutual, and a court of equity will correct the deed to conform to the intentions of the parties. *Williamson v. Brown*, 195 Mo. 313, 93 S. W. 791; *Warrick v. Smith*, 137 Ill. 504, 27 N. E. 709.

And where a person purchased land from the agent of two executors of an estate which owned the land, whose power of attorney recited that they had a right to sell the land, when in fact there were three executors and this land was not mentioned in the will, if the title thus acquired was not a good legal title it was a mistake of law on the part of the purchaser and on the part of the parties from whom he purchased, no actual fraud appearing upon the part of either, and the title will be held to be good. *Ware v. Barlow*, 81 Ga. 1, 6 S. E. 465.

So, a person paying part of the purchase money of land is not precluded from recovering it, where there was a misunderstanding between the parties as to the kind of title to be conveyed, and the money was paid under a mistaken belief by one party that the other understood the contract as he did. *Porter v. Citizens' Bank*, 73 Mo. App. 513.

And where a right of way through a lane became extinguished by the purchase of the servient estate by the owner of the dominant one, and the purchaser afterwards sold the dominant estate, conveying it by warranty deed with its privileges and appurtenances, but did not in express terms grant the right of way, and both parties were ignorant of the legal principle under which the right of way had become extinguished, and both supposed that it still existed, and the consideration paid by the grantee covered a right of way and would not have been paid for the land alone, a court of equity will correct the mistake in the deed so that it will cover the right of way. *Blakeman v. Blakeman*, 39 Conn. 320.

So, a mistake by one party to a deed at the date of the conveyance, which is known or suspected by the other party, without reference to prior mutual mistake in the agreement, is ground for a reformation of the deed if no rights of third parties are involved. *Cleghorn v. Zumwalt*, 83 Cal. 155, 23 Pac. 294.

And where the evidence shows clearly that none of the parties to a deed understood that a railroad right of way was included in it, but it was so included by mistake of law or fact of all the parties, the deed will be reformed to express the real contract. *Pierce v. Houghton*, 122 Iowa, 477, 98 N. W. 306.

And where a deed contained covenants of seisin of the premises, and that they were free from encumbrances, and that the grantor had lawful authority to sell, and warranting to defend against any lawful claims of any persons whomsoever claiming through or under them, the concluding words "claiming through or under us," be-
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ing written while the others were printed, might be reformed so as to make the written qualification apply to all the preceding covenants, the circumstances of the case and the situation of the parties indicating that such was the intention. *Crum v. Loud*, 23 Iowa, 219.

So, where a deed was made of a lot with a dwelling house, under the supposition on the part of both parties that it secured the purchaser the right to the use of a sewer, and the deed did not convey such right, the purchaser's acceptance of the deed was made under a mistake as to its effect, and did not conclude him. *Butterfield v. McNamara*, 54 Conn. 94, 6 Atl. 188.

And where, under a mistake of law, a conveyance by a guardian was made to include an interest of his wards of which he and the grantee were alike ignorant, equity will relieve the wards of the consequences of his mistake. *Baker v. Massey*, 50 Iowa, 399.

And where a guardian invested funds of her two wards in land, taking the deed in her own name, and on settlement the wards took a deed for equal portions of the land from the guardian and gave her a release, and more was due to one ward than to the other, the guardian is not interested, and a mutual mistake on her part need not be shown in order to have the deed corrected so as to give each ward her proper proportion of the land. *Scott v. Queen*, 94 N. C. 462.

And where, at the time a deed was made, both parties supposed that the interest of the grantor in the land was a contingent remainder in one fourth, and both parties understood that a grandmother had made her election to take a child's part, whereas the fact that her declaration to that effect had not been filed in her lifetime was not known to them, and for that reason the grantor's interest was an undivided half, the minds of the parties never met on the sale of a half interest, and hence equity will set aside a deed thus made in pursuance of a mutual mistake. *Castleman v. Castleman*, 184 Mo. 432, 83 S. W. 758.

So, where a parcel of land offered for sale was fenced, and both parties were upon the ground and saw the inclosed land, which was described to the purchaser as two lots, it having been so described in the mortgages which the vendor had purchased, who had afterwards taken a deed containing a like description, when in fact one half of one of the lots was owned and occupied by an adjoining proprietor, the mistake was a mutual one, which could be corrected in equity. *Conlin v. Masecar*, 80 Mich. 139, 45 N. W. 67.

And where one purchases and pays full consideration for land held by his vendor by title bond, and it is agreed that the latter shall cause a conveyance to be made to the purchaser, but without his knowledge and consent the vendor causes the conveyance to be made to the purchaser's son, a reformation of the deed cannot be defeated

on the ground that the mistake is not mutual. *Roszell v. Roszell*, 109 Ind. 354, 10 N. E. 114.

So, a mutual mistake is sufficiently shown by a complaint in an action for the reformation of a mortgage alleging that the mortgagors agreed to convey the whole of a certain tract of land as security for the debt, and that both parties intended that the entire tract should be included in the mortgage, but that by mistake of the scrivener the description written in the mortgage covered only a part of the tract. *Keister v. Myers*, 115 Ind. 312, 17 N. E. 161.

And a mortgage executed under the belief by both mortgagor and mortgagee that a certain building which was regarded as the principal security was upon the mortgaged property, but which by mistake had been built upon adjoining lots not owned by the mortgagor, will be corrected so as to cover the lots upon which such building was placed, as against a grantee through conveyances of the property who shared the common mistake, and who, to protect himself and with full knowledge of the original mistake, bought the lots upon which the building stood at their ground value. *Way v. Roth*, 159 Ill. 162, 42 N. E. 321.

So, where a person agreed to pay a specified sum for property, assuming a mortgage and paying taxes as a part of the price, and the mortgage and the taxes due just made up the sum agreed upon, and there was a year's interest unpaid on the mortgage, which made the aggregate more than the amount agreed upon, there having been no fraud on the part of the seller, the mistake as to the amount to be paid is a mutual one, entitling the purchaser to recover the overpayment in an action to reform the contract. *Ragsdale v. Turner*, 141 Iowa, 604, 120 N. W. 109.

And where, in an action by a grantee of one parcel of land covered by a mortgage, to have it reformed by correcting the description of a second parcel, which was claimed was intended to be covered by it, the mortgagee denied the allegations of the petition on the ground of not having any information on the subject sufficient to authorize a belief, the answer is not conclusive against the plaintiff to take the case out of the list of cases of mutual mistake. *Manatt v. Starr*, 72 Iowa, 677, 34 N. W. 784.

So, where both the maker and payee of a promissory note intended that it should bear no interest, and ignorantly supposed that this would result from an omission to insert in the note any reference to the subject of interest, equity will, at the instance of the maker when sued upon the note by a third person, to whom the payee had indorsed it, correct such mistake when it appears that the holder took the note as a donation, paying nothing for it, and that at the time of taking it he had full knowledge of the fact that the original parties to it intended that it should not bear interest. *Loudermilk v. Loudermilk*, 98 Ga. 780, 25 S. E. 927.

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And where a negotiable note was transferred and the parties agreed that the note should be taken without recourse to the party transferring it, and they mistakenly supposed that the form of assignment of the note adopted by them would have that effect, being ignorant of the provisions of the law of commercial paper, which makes the indorser liable in case of default of the maker of the note, equity will reform the contract of indorsement so as to make it conform to their intention. *Stafford v. Feters*, 55 Iowa, 484, 8 N. W. 322.

In the above case *Glenn v. Statler*, 42 Iowa, 107, and *Moorman v. Collier*, 32 Iowa, 138, supra, IV, b. 3 (b), (2), were distinguished on the ground that in those cases the mistake was not in expressing the contract, but as to its legal effect.

So, where it was intended to assign an insurance policy to a particular person, and by mistake of an agent a nonexistent person was named as assignee, and a renewal policy carried the same error, the company having no acquaintance either with the party to whom the policy was to be assigned or the nonexistent person named, the assignment contains a mutual mistake rightfully to be reformed in equity. *Thomason v. Capital Ins. Co.* 92 Iowa, 72, 61 N. W. 843.

And a mutual mistake between the parties to an official bond as to the time when it shall take effect and be in force may be corrected in equity. *Lewiston v. Gagne*, 89 Me. 395, 56 Am. St. Rep. 432, 36 Atl. 629.

On an issue as to reformation of a written instrument, however, an honest difference of understanding as to what the contract was, is fatal to relief. *Hertzler v. Stevens*, 119 Ala. 333, 24 So. 521; *Loftus v. Fischer*, 106 Cal. 616, 39 Pac. 1064.

And where a party to a contract prays for reformation of it on the ground of mistake, and the testimony given by each party is flatly contradicted by the other, the complainant must fail unless the other evidence supports his claim. *Goerke Co. v. Diskon* (N. J. Eq.) 75 Atl. 780.

And where each party to a deed misunderstood the understanding of the other in regard to land which was agreed to be conveyed, this is a common mistake as to the subject-matter of the contract, and it is not a mutual mistake in inserting in the deed the description of the land. *Page v. Higgins*, 150 Mass. 27, 5 L.R.A. 152, 22 N. E. 63.

So, where a person conveys a part of a piece of land to another, and afterwards, having retained possession of that with his other land, conveyed the whole to another person without making any reservation, his application to have the deed reformed by inserting therein an exception of the lot first sold will be denied, in the absence of proof that the mistake was mutual. *Morris v. Penrose*, 38 N. J. Eq. 629.

And where land is devised to several persons in fee in undivided shares, a subsequent conveyance by the deviser to one of the devisees of a part of the same land will

not revoke or be deemed a satisfaction of the devise to the grantee, but he is entitled to the land conveyed by deed and to a share of the land remaining under the will, and this although it appears that there was a mutual mistake as to the effect of the deed, both parties supposing that the land conveyed would be in lieu of the share of the grantee by the will. *Arthur v. Arthur*, 10 Barb. 9.

So, a complaint to reform a deed of conveyance of land on the ground of a mistake in the omission therefrom of words of inheritance, whereby an estate for life was created, when it was the intention of the parties to create an estate in fee simple, is bad on demurrer if it contains no averment to the effect that, at the time of the execution of the deed, the grantor and grantee were both ignorant of its precise contents, or of the omission therefrom of the alleged words of inheritance. *Nicholson v. Caress*, 59 Ind. 39.

And where owners of land deeded it, reserving the coal and minerals therein, but never procured them, and afterwards the then owners of the land demised the coal under it to certain persons, and still later the then owner of the land demised the coal under another part to another person, and after this the successors of the original owner became aware of the reservation in the first deed and brought action to establish their right to the minerals,—it was held that the last lease could not be rectified, as there was no common mistake; and that it could not be set aside, as the lessee was not prepared to give up possession of the property comprised in it. *Sutherland v. Heathcote* [1892] 1 Ch. 475, 17 Eng. Rul. Cas. 785.

So, where, without any previous agreement, a creditor prepared a mortgage including part only of the debtor's lands, and the debtor executed it, reformation thereof on the ground of mutual mistake, to include the remainder of the land, cannot be had though they intended that it should include all the land and believed that it did, neither of them having knowledge of the intent or belief of the other. *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259.

And a mortgagee who has received in good faith a mortgage executed by his debtor and his wife, of property the record title to which was in the husband, is not liable to have his mortgage invalidated as to a portion of the premises, on a claim by the wife of the mortgagor that she held such portion by an unrecorded deed from her husband, and that the same was included in the mortgage by a mistake of her husband, for which mistake it is not claimed the mortgagee was in any way responsible. *Shepard v. Shepard*, 36 Mich. 173.

So, a court of equity will not reform a warranty deed to conform to the alleged intention of the parties, that it was to be a mortgage, on the ground that there was a mistake, in the absence of fraud, unless it clearly appears that the mistake was a

mutual one. *Forester v. Van Auken*, 12 N. D. 175, 96 N. W. 301.

In order to establish that a deed, absolute on its face, is in fact only a mortgage, it must be shown either by direct evidence, or by the circumstances of the case, that it was the intention and understanding of the grantor and the grantee that it should so operate; it is not enough that one of the parties so considered it; both must concur, otherwise the deed will be treated according to its import, unless tainted by fraud, or the result of accident or mutual mistake. *Reeder v. Gorsuch*, 55 Kan. 553, 40 Pac. 897.

So, if a party could have learned that his contract with another was to wainscot six stories of a building instead of five stories, and, without attempting to do so, through mistake, he estimated the cost of doing the work upon the basis of five stories, there is not a mutual mistake authorizing reformation. *Grant Marble Co. v. Abbott*, 142 Wis. 279, 124 N. W. 264.

And where a party made a contract with another to separate ore for him at a specified price per ton, and carried the contract partially into effect by separating ore under it for several months without any knowledge of the alleged ignorance of the other party that 2,000 pounds was a ton, instead of 2,240 pounds as he supposed, the latter denying that he intended to contract with reference to anything but the 2,000-pound ton, equity will not reform the contract so as to require the party to separate ore at the stipulated rate for each gross ton, since this would be making a new contract for them. *Hall v. Reed*, 2 Barb. Ch. 500.

In the above case *Many v. Beekman Iron Co.* 9 Paige, 188, supra, IV. c. 3 (i), was distinguished upon the ground that that case was based upon the fact that both parties had really agreed and intended to contract for the sale and purchase of the iron at the rate of 2,240 pounds to the ton, and not for iron to be delivered and paid for as statute tons.

So, where a bill brought to recover on a policy of insurance stated that the several owners of a certain warehouse applied to the defendant for insurance against fire on their interest in said property, with loss, if any, payable to one of them, and that thereupon the defendant issued its policy on the interest of that one alone, instead of all, it does not appear that the defendant ever agreed to insure the interest of but one of the owners, and therefore it is not shown that the mistake was mutual and one which equity will correct. *Durham v. Fire & Marine Ins. Co.* 10 Sawy. 526, 22 Fed. 468.

And where the owner of a house insures it against fire, the policy payable in case of loss to a mortgagee, and containing a provision that if the property should be sold the policy should be void, and afterwards the owner sold the house, and the mortgagee entered for the purpose of foreclosure and notified the insurance company, the

agent of which indorsed on the policy that it shall attach and cover the mortgagee's interest as such, the agent not knowing of the previous conveyance by the owner, and the mortgagee knowing of it but not then thinking of it,—the insurance company cannot maintain a bill in equity against the mortgagee to correct and reform the indorsement, upon the ground that it was in construction and legal effect a mutual mistake and did not express the real contract previously made between the parties. *German American Ins. Co. v. Davis*, 131 Mass. 316.

g. Mistake superinduced or accompanied by fraud or inequitable conduct.

1. General rules.

If mistake of law is occasioned by the fraudulent representation or culpable negligence of another, or if the mistake of law is not pure and simple, but is induced or accompanied by other special facts giving rise to an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party, a court of equity will interpose its aid. *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811.

And equity will reform a written instrument which, through the mistake of one party, accompanied by fraud or other inequitable conduct of the other party, does not express the true intention. *Hand v. Cox* (Ala.) 51 So. 519; *Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334; *Hayes v. Stiger*, 29 N. J. Eq. 196; *MacVeagh v. Burns*, 2 S. D. 83, 48 N. W. 835; *Kyle v. Fehley*, 81 Wis. 67, 29 Am. St. Rep. 866, 51 N. W. 257; *Rhode Island v. Massachusetts*, 15 Pet. 233, 10 L. ed. 721.

While mere ignorance of law will not ordinarily relieve a party from the performance of his written contract, where he signs and delivers the same with full knowledge of all the facts, if on account of misplaced confidence, and because of artifice and deception fraudulently practised upon him by the opposite party, a vital and material part of the contract was omitted from the writing, which purported to express the whole contract, and the party overreached was fraudulently led to believe that the contract as written was in effect the same as if the omitted portion had been inserted, equity will decree a reformation. *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706.

If a party dealing with another misleads him, and takes advantage of his ignorance of his legal rights, equity may exercise its jurisdiction to prevent imposition. *Ramey v. Allison*, 64 Tex. 697.

The rule that a court of equity will only interfere to correct a mistake in a written instrument when it has been mutual does not apply, either where the party against whom the relief is sought has acted in bad faith or disingenuously, with full apprehension that the instrument did not express what the other party desired or intended, or where confidence was reposed in him, 28 L.R.A.(N.S.)

and he was intrusted with, and assumed, the preparation of the instrument, but had in its preparation, either wilfully or negligently, omitted what had been clearly stated to him as the intention of the other party, who, relying on its correctness, and without particular examination of the document as prepared, assented to it under the supposition that it conformed to the verbal terms of the negotiation as previously agreed upon. *Brioso v. Pacific Mut. Ins. Co.* 4 Daly, 246.

Misrepresentation, whether wilful or accidental, if prejudicial, is a ground for reforming a deed or contract. *Zentmyer v. Mittower*, 5 Pa. 403; *Taymon v. Mitchell*, 1 Md. Ch. 496.

And where a contract is obtained by misrepresentation or fraudulent concealment of superior knowledge, a court of equity will intervene and rescind the contract thus obtained. *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811.

Though the means of correct information be equally open to both parties to a contract, yet if either of them does or says anything tending to impose upon the other, and he is imposed upon to his injury, the contract will not be allowed to stand. *Taymon v. Mitchell*, supra.

Mistake as to the legal effect of a written agreement, induced by misrepresentation, entitles a party to relief in equity, and the court will carry into effect the intention of the parties though the agreement fails to express it. *Tyson v. Passmore*, 2 Pa. St. 122, 44 Am. Dec. 181.

And a mistake of law, made through and because of the representations of an agent, may be corrected in equity. *Bailey v. American Cent. Ins. Co.* 4 McCrary, 221, 13 Fed. 250.

So, if a person is ignorant of a matter of law involved in a transaction, and another, knowing of such ignorance, takes advantage of such circumstance to make a contract, the court will relieve from the contract on account of the fraud. *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303.

And a clerical mistake by one party in reducing the terms agreed upon to writing, which is either shared in or known to be a mistake by the other party at the time of executing the contract, is sufficient ground for decreeing a reformation. *Trenton Terra Cotta Co. v. Clay Shingle Co.* 80 Fed. 46. ✓

And cancelation of an instrument may be awarded, under a bill the gravamen of which is fraudulent representation and undue influence though it does not by name denominate the transaction as being one produced by mistake, on proof of mistake on one side, and knowledge thereof by the other and taking advantage of it. *Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826. ✓

So, the mistake of a grantor, if known to the grantee, who conceals the truth from the grantor in order to secure a conveyance of land from him which he knows the grantor never intended or agreed to convey, is a case of a mistake of one party, accompanied by fraud or inequitable conduct of

the other party, and is good ground for a reformation of the instrument. *Crookston Improv. Co. v. Marshall*, 57 Minn. 333, 47 Am. St. Rep. 612, 59 N. W. 294.

And a court of equity will reform a deed or written contract, where, through fraud or mistake of fact, it fails to express the intention of the parties, though it is in the very language agreed upon. *Smith v. Jordan*, 13 Minn. 264, Gil. 246, 97 Am. Dec. 232.

Every mere false assertion of value, when no warranty is intended, however, will not constitute a ground of relief to a purchaser, if the assertion is a mere matter of opinion in which parties may differ, or if the seller indulges in the common language of puffing, not amounting to a warranty. *Taymon v. Mitchell*, supra.

And a misrepresentation as to the legal effects of a contract, or the rights of the parties under it, instrumental in procuring its execution, is not a ground for canceling it as fraudulently obtained. *Catlin v. Fletcher*, 9, Minn. 85, Gil. 75; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203.

Unless the person deceived was unable to judge of its true construction. See *Berry v. Whitney*, 40 Mich. 72, infra, IV. g, 2 (a).

And opinions hazarded as to the effect of legal documents, where the parties stand on an equal footing, are not admissible in evidence for the purpose of reforming or rescinding a contract, since the parties are not presumed to be misled, where each had equal means of information. *Zentmyer v. Mittower*, 5 Pa. 403.

Nor will a representation of what the law will or will not permit to be done ordinarily amount to such fraud as a court of equity will take cognizance of, but is to be regarded rather as the expression of an opinion than the assertion of a fact. *Abbott v. Treat*, 78 Me. 121, 3 Atl. 44; *Fish v. Cleland*, 33 Ill. 243; *Platt v. Scott*, 6 Blackf. 389, 39 Am. Dec. 436; *Ramey v. Allison*, 64 Tex. 697.

So, no representation, promise, or agreement made or opinion expressed in the previous parol negotiations as to the terms or legal effect of the resulting written agreement can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice which concealed its terms and prevented the complainant from reading or understanding it. *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63, reversing 78 Fed. 33.

And if the subject of a contract is in its nature uncertain, and if all that is known about it is matter of inference from something else, and if the parties making it and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it will not be presumed that representations made by one would have much or any influence upon the other. *Clapham v. Shillito*, 7 Beav. 146.

Nor do ordinary mistakes on the part of

a purchaser, relative to the qualities of property purchased, caused by the communications of the seller, call for interposition of a court of equity. *Taylor v. Fleet*, Barb. 95.

And a mistake as to the legal effect of an agreement will not avail a party to it, unless led into it by fraud or the representations of the other party. *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Townsend v. Cowles*, 31 Ala. 428; *Leszynsky v. Ross*, 35 Misc. 652, 72 N. Y. Supp. 352.

So, unless the grantee in a deed makes statements inducing mistake or misapprehension on the part of the grantor, or, with knowledge of such mistake, keeps silent, he is not guilty of fraud furnishing ground for cancelation. *Stewart v. Dunn*, 77 App. Div. 631, 79 N. Y. Supp. 123.

And if a party to whom representations with reference to a contract were made himself resorted to the proper means of verification before he entered into the contract, and relied upon the result of his own investigations and inquiry, and not upon the representations made to him by the other party, or if the means of investigation and verification were at hand, and the attention of the party receiving the representations was drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result which upon due inquiry he ought to have obtained. *Clapham v. Shillito*, supra.

Nor is the mere fact that a person is of a weak understanding, whether produced by old age, accident, or disease, if there be no fraud or surprise, an adequate ground for relief against his contracts. *Nace v. Boyer*, 30 Pa. 99; *Graham v. Pancoast*, 30 Pac. 89.

And that the execution of a written contract was procured by the oral promise of the other party that he would not enforce it, and that he is proceeding to enforce it, is no ground for canceling the contract as fraudulently obtained. *Catlin v. Fletcher*, 9 Minn. 85, Gil. 75.

Nor will a misrepresentation avoid a contract, if it be of such a nature that he to whom it was made had no right to rely upon it, since courts of equity will not aid one who refuses to exercise his own sense and discretion when it is incumbent on him to do so. *Zentmyer v. Mittower*, supra.

And a misrepresentation which is not acted on cannot serve as a ground for a suit in equity for reformation. *Boyce v. Watson*, 20 Ga. 517.

So, misrepresentation, whether wilful or accidental, to be a ground for reforming a deed or contract, must be of some material fact which the party might have placed confidence in, and not an opinion, unless there be peculiar circumstances of contrivance or abuse of confidence reposed; and it must be shown that the complaining party acted on the misrepresentation, or a mistake induced by the party seeking to bind him by the written evidence. *Zentmyer v. Mittower*, supra.

And a person cannot obtain relief in equity on the sole ground that a bargain he had made was an unconscionable one, which would not have been made but for his ignorance, without proof tending to show that his alleged mistake was caused by the fraud of the opposite party. *Schiels v. Hickey*, 26 Mo. App. 194.

And where, by mistake of the scrivener, greater privileges with reference to seaweed were granted than were bargained for, but the purchase was induced by the fraudulent misrepresentations of the vendor as to the productiveness and value of the seaweed privilege really bargained for, and especially where it appears that the mistake in the grant merely makes the privilege granted equal in productiveness and value to the privilege contracted for as it was represented, the court will not interfere with such a providential adjustment of equities, but will dismiss the complaint. *Allen v. Brown*, 6 R. I. 386.

So, to entitle a person to rescind a contract on the ground of mistake or fraud as established by the evidence, he must plead a case of fraud and mistake, or fraud or mistake. *Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826.

And where the complaint in an action sets forth facts which, being denied by defendant, raise issues as to unfairness, surprise, and undue advantage by means of which an instrument was obtained, a court of equity will not let the defendant take advantage of it, though the complaint does not allege fraud in terms. *Bean v. Western North Carolina R. Co.* 107 N. C. 731, 12 S. E. 600.

And the defendant in an action to reform mortgage notes cannot complain that his error in drawing up the same for an amount more than was agreed on, as shown by the evidence, was not charged as a fraud on his part, and that the action was restricted, by the complaint and issue submitted without objection, to an inquiry whether there was a mutual mistake. *Jones v. Warren*, 134 N. C. 390, 46 S. E. 740.

2. Fraud.

(a) General rules as to.

Relief against mistake in law will be given where there is actual or legal fraud by one who seeks to obtain the execution of an agreement to benefit himself or those for whom he acts. *Whelen's Appeal*, 70 Pa. 410.

Misrepresentation and fraud in corruptly deceiving one as to matter of law amounts to fraud in a legal sense, and furnishes ground for interference of equity. *Moreland v. Atchison*, 19 Tex. 303; *Townsend v. Cowles*, 31 Ala. 428; *Nelson v. Betts*, 21 Mo. App. 219.

And a mistake of law by one of two parties to a written agreement, if accompanied and induced by fraud of the other party, may in a proper case authorize a

reformation, or a refusal to enforce the contract. *Williams v. Hamilton*, 104 Iowa, 423, 65 Am. St. Rep. 475, 73 N. W. 1029; *Broadwell v. Broadwell*, 6 Ill. 599.

And where, by the fraud of a party to a contract, the real contract is not reduced to writing, the defrauded party may have the contract reformed. *Grant Marble Co. v. Abbott*, 142 Wis. 279, 124 N. W. 264.

So, a court of equity will decree a rescission of a contract obtained by the fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a material matter by such misrepresentation or conduct, to his injury or prejudice. *Seeley v. Reed*, 25 Fed. 361; *Townsend v. Cowles*, supra.

And fraudulent representations as to the legal effect of an instrument will avoid it, even though made to one who has actually read it, if he was unable to judge of its true construction. *Berry v. Whitney*, 40 Mich. 72.

And where an assertion is made by one man to another, as to the effect of an instrument which the former desires to obtain from the latter, which is false and fraudulently made, and which is the procuring cause of the execution of that instrument, the party defrauded is entitled to relief in equity; and the granting of such relief is not subject to the objection that the false and fraudulent statement was only an assertion of what the law is. *Chestnut Hill Reservoir Co. v. Chase*, 14 Conn. 123.

So, if any peculiar fiduciary relation exists between parties, of which one knowingly avails himself, so as to mislead the other by a misrepresentation of the legal effect of a contract between them, or if he knowingly takes advantage of the other's actual ignorance of the law, it amounts to a fraud which is correctable in equity. *Townsend v. Cowles*, supra.

Nor can one by falsehood and lies deceive an illiterate man, and impose upon him a writing for one thing when it really is another, and then come into a court of justice, and expect to receive the benefit of his fraud. *Decker v. Hardin*, 5 N. J. L. 579.

And if a party was induced by the fraud or misrepresentation of the other party to a contract to execute it without reading it, the contract executed being materially different from what he had a right to believe he was executing, he may have an action to rescind on the ground of fraud; but if he brings an action to rescind or cancel on the sole ground that the other party has failed to perform, he must stand on the contract as he executed it. *Quimby v. Shearer*, 56 Minn. 534, 58 N. W. 155.

Undue concealment which amounts to fraud from which a court of equity will relieve, when there is no peculiar relation of trust and confidence between the parties, is the nondisclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has not

merely a conscientious right, but a legal one, to know. *Fish v. Cleland*, 33 Ill. 243.

So, when stipulations are kept out of a contract by fraud such contract will be reformed in equity and specifically enforced. *Cubberly v. Cubberly*, 39 N. J. Eq. 514.

And a person whose duty it is to prepare a written contract according to a previous agreement, but who prepares one materially changing the terms of the previous agreement, and delivers it as in accordance therewith, commits a fraud entitling the other to relief. *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 33 Am. Rep. 607; *Gewin v. Shields* (Ala.) 52 So. 887.

And where one party to a contract is induced to and does execute it upon the faith of the representation that it is drawn in accordance with the understanding of the parties, when in fact it is not so drawn, he may have relief upon the ground of fraud, if nothing further appears to deprive him of it. *Rochester & K. F. Land Co. v. Davis*, 79 Hun, 69, 29 N. Y. Supp. 1148.

And when a grantor fails to observe the contract pursuant to which a deed is made, the grantee, who has not assented to the terms of the deed, or been advised at the time of its delivery of the defective execution of the contract, may seek a remedy in an action for the reformation of the deed, founded upon the charge of fraud on the part of the grantor. *Brown v. Brown*, 79 Hun, 44, 29 N. Y. Supp. 652.

So, if a party is intrusted to reduce a contract to writing, he is bound to do it truly; and any variation from it, either by omitting some of its terms, or by inserting provisions not embraced in it, if not known to the other party and distinctly assented to by him, is a fraud which equity will correct. *Botsford v. McLean*, 45 Barb. 478.

And where an important part of an actual bargain is omitted at the request of one of the parties, on his solemn assurance that it shall be performed though not inserted, and he afterwards refuses to perform, the other party is entitled to prove such facts, and to relief in equity. *Lauchner v. Rex*, 20 Pa. 464.

So, chancery will decree a return of the purchase money for insufficiency of title, even after the purchase has been carried completely into execution by delivery of the deed and payment of the money, and whether the deed is with or without covenants, provided there has been a fraudulent representation as to the title. *Moreland v. Atchison*, 19 Tex. 303.

And the law of constructive notice can never be so applied as to relieve a party from responsibility for misstatements and frauds. *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 230.

Where a written instrument is alleged to have been given because of a misrepresentation, however, the gist of the inquiry is not whether the person making the statement knew it to be false, but whether the statement made as true was believed to be true, and therefore, if false, deceived the

party to whom it was made. *Joice v. Taylor*, 6 Gill & J. 54, 25 Am. Dec. 325.

And a misrepresentation, in order to affect the validity of a contract, must relate to some matter of inducement in the making of the contract, where the purchaser relies on the superior knowledge and information of the seller, but not where the purchaser has equal means of information, and may rely upon his own judgment founded upon actual examination. *Hill v. Bush*, 19 Ark. 522.

And fraudulent representations as to the legal effect of an instrument, which will avoid it, must be contemporaneous with the execution of the instrument, and must consist in obtaining the assent of the party defrauded by inducing a false impression as to its legal or literal nature and operation. *Berry v. Whitney*, 40 Mich. 72.

So, a person who claims to have been drawn into a purchase by fraud must exercise care and diligence to discover the fraud, and must be prompt in repudiating his contract on the ground of such fraud. *Upton v. Tribilcock*, 13 Nat. Bankr. Reg. 171.

If the fact with reference to which a mistake in a contract is alleged be unknown to the parties, or if each has equal or adequate means of information in regard to it, and the parties have acted with good faith, equity will not interfere. *Wood v. Patterson*, 4 Md. Ch. 335.

And where fraud is relied upon to secure the reformation of an instrument, it must be averred. *Showman v. Miller*, 6 Md. 479; *Daughtrey v. Knolle*, 44 Tex. 450.

And one seeking to secure the annulment of a contract, or to prevent its performance, upon the ground that he has been induced to enter into it by fraudulent misrepresentations of the other party or his agent, has the burden of establishing the allegations of his bill by clear and conclusive proof. *McShane v. Hazlehurst*, 50 Md. 107.

Nor will cancelation for fraud be decreed in a suit to reform a deed to defendants so as to include plaintiffs as grantees, where the grantor devised all the property described in the deed by will duly probated after a contest by one plaintiff, and the time has elapsed in which the others can question its validity. *Bonneville v. Dum* (Tex. Civ. App.) 128 S. W. 1179.

So, the Michigan statute (How. Stat. §§ 8722, 8726) referring to the fraudulent concealment of a cause of action is applicable to a concealment of law, as well as of fact, entitling the victim of the fraud to an action notwithstanding the statute of limitations. *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651.

(b) *Application to particular cases.*

Where a party has been induced to enter into a contract of sale by the fraudulent misrepresentations, by the other party or his agent, of material facts upon which he relied and had a right to rely, a court of equity will grant him relief by refusing to

decree a specific performance, or by annulling the contract after it has been carried into execution by delivery of deeds to the purchaser. *McShane v. Hazlehurst*, 50 Md. 107.

So, where the vendor of a lot of land secretly intended to sell only a part of the lot, but succeeded in making the vendee understand that he was buying the whole of it, and only a part of the lot was included in the deed of conveyance, for which the vendee paid the vendor the whole consideration intended by him to be given for the whole lot, the court will decree that the vendor execute to the vendee a conveyance of the whole. *Wiswall v. Hall*, 3 Paige, 313; *Winans v. Huyck*, 71 Iowa, 459, 32 N. W. 422.

And where a grantor pointed out to a grantee land that was inclosed by a fence, and sold and conveyed the same as one lot and a portion of another, when there was in fact a part of a third lot owned by the grantor included within the inclosure, equity will reform the deed so as to embrace all of the land pointed out and represented as being inclosed by the fence, whether the misdescription was the result of mutual mistake or of intentional misstatement on the part of the grantor. *Ezell v. Peyton*, 134 Mo. 484, 36 S. W. 35.

And where the terms of a deed are agreed upon, and the parties employ a conveyancer, and state such terms to him, and the grantor afterwards, without the knowledge of the grantee, gives other directions as to the terms to be inserted, which are followed, and the grantee accepts the deed, supposing it to be drawn as agreed on, a court of equity will reform it, the proceeding being a fraud upon the grantee. *Bergen v. Ebey*, 88 Ill. 269.

So, equity will relieve on the ground of fraud when, between the parties to a conveyance absolute in terms there was an agreement that the grantees would hold the property conveyed in trust for the grantor during his life, the fraud consisting in the violated promise, on the presumption that but for such promise the grantor would have inserted in the deed the substance of the parol agreement. *Lott v. Kaiser*, 61 Tex. 665.

And if the grantee of land had a deed for the same prepared for execution, and a mistake occurred in making a conveyance of the fee, instead of a life estate, and he knew of such mistake, and induced the grantors to execute the deed, under a mistake as to its terms, without informing them of the fact, his conduct is such a fraud on the grantors as, coupled with the mistake he led the grantors into, will authorize a decree reforming the deed. *Deischer v. Price*, 148 Ill. 383, 36 N. E. 105.

So, where the grantee in a deed represented she was seeking only a life estate in certain land, and presented to the grantor, who was her daughter, a deed to be executed therefor, and the latter made the deed under the belief that she was conveying a life estate, when in fact it conveyed an

absolute estate in fee simple, equity will set aside the conveyance, whether the transaction was one of mutual mistake, or of fraudulent misrepresentation on the part of the grantee. *Summers v. Coleman*, 80 Mo. 488.

And where the executor of the will of a woman who died leaving property told the deceased's husband that there was nothing left for him in her will, and procured from him a deed of the property for an inadequate sum, when in fact her real estate descended to him irrespective of the will, the deed may properly be set aside as fraudulent. *Motherway v. Wall*, 168 Mass. 333, 47 N. E. 135.

And where one person contracted to sell and convey to another certain premises, subject to certain mortgages thereon, and the latter assigned the contract to a third person, and the vendor executed a deed to the third person containing a clause by the terms of which the grantee assumed and agreed to pay said mortgages; which deed the grantee accepted and put on record in ignorance of the fact that that clause was contained therein, and supposing that the deed in that particular followed the terms of the contract; and such clause was also inserted without the knowledge or consent of the original grantor,—an action is maintainable to reform the deed by striking out such clause, on the ground that the insertion thereof was a fraud on the grantee. *Kilmer v. Smith*, 77 N. Y. 226, 33 Am. Rep. 613. ✓

And where it was agreed that certain land should be conveyed by one person to another for a certain consideration, and, in order to describe it in the conveyance, the parties agreed to measure the width of the same, and to do so the grantor furnished a tape-line which was used by them, the length of which was fraudulently misrepresented by the grantor, by reason of which the deed did not embrace all the land which it was agreed and understood should be conveyed, and the grantee was thereby misled and induced to believe that the land was properly described, and to pay the consideration agreed to be paid therefor, a reformation of the deed in equity is warranted. *Taylor v. Deverell*, 43 Kan. 469, 23 Pac. 628.

So, an aged German woman unacquainted with business forms, who agreed to convey land subject to a lease, and was subsequently induced by the false representations of the grantee to execute a warranty deed making no mention of such lease, is entitled to have the deed reformed in equity so as to conform it to the agreement of the parties. *Kyle v. Fehley*, 81 Wis. 67, 29 Am. St. Rep. 866, 51 N. W. 257.

And the offer of the grantee in such case to prove that he proposed to reconvey the land in dispute is properly rejected as immaterial. *Ibid.*

And where an ignorant old man was induced to execute a deed surrendering to his children a large fund to which he was entitled, by being informed by them of the opinion of a lawyer whom they had em-

ployed and in whom he had great confidence, which opinion was that he had no right, and by the false representation of one of his children as to what they had agreed to give him, and as to the purpose for which the deed was to be used, a court of equity will disregard such conveyance as being against conscience, and decree the fund as if the conveyance did not exist. *Powell v. Cobb*, 56 N. C. (3 Jones, Eq.) 456.

So, where it is charged that by mistake of the plaintiff a deed does not contain a reservation in his favor, to which under the prior contract between the parties he was entitled, and that the defendant knew all the facts, relief may be given on the ground of fraud on the part of the defendant, though fraud is not charged in words. *Welles v. Yates*, 44 N. Y. 525.

And where a person contracting to convey a piece of land intended to reserve a strip of a certain width, but through inadvertence signed a contract with a reservation of a smaller strip, and the vendee knew of the mistake, but did not inform the vendor of it, and attempted to obtain the benefit of it, the act of the vendee was fraudulent, and the contract should be reformed on the ground of fraud. *Gillett v. Borden*, 6 Lans. 219.

And where a piece of land was contracted for which had never been surveyed, but which was supposed to contain about a certain number of acres, and afterwards, upon a survey being made, it was found to be considerably larger, and the vendor then measured off just the quantity that the whole piece had previously been supposed to be, and deeded it to the purchaser, the purchaser's right to a specific performance of the contract of sale is unaffected by her acceptance, through mistake, of the deed thus fraudulently imposed upon her. *Place v. Johnson*, 20 Minn. 219, Gil. 198.

So, where a husband and wife by separate deeds conveyed lands owned by them, and took back a mortgage to themselves jointly for the purchase money, and on foreclosure thereof the property was bid in for the wife, but the deed was given to her husband alone, who retained it unrecorded for four years representing to the wife that the deed was taken in her name, and the fact that it was not in her name was not discovered by her until after her husband's death, a finding of fraud warranting reformation of the deed is warranted; and the statute of limitations is not a bar to the action. *Dunworth v. Dunworth*, 37 N. Y. S. R. 905, 13 N. Y. Supp. 489.

And where a man who was a brother of the testatrix in question, while a visitor at her house, induced her to execute to him a deed of certain property by falsely representing to her that the instrument would not deprive her of the right to dispose of the property as she might desire during her lifetime; and the testatrix was ignorant of the law and of the character of the conveyance; and the brother recorded the instrument during testatrix's lifetime, in violation of his express agreement not to do so,— 28 L.R.A.(N.S.)

his misrepresentations were misrepresentations of fact, constituting actionable fraud and justifying a vacation of the deed. *Busiere v. Reilly*, 189 Mass. 518, 75 N. E. 958.

So, where the owner of land lays it off into town lots with streets, etc., for their use, and sells lots accordingly, it is a dedication of these ways to the use of the purchasers; and the plan exhibited is evidence of the existence and location of the streets; and a reference in a deed to such plan is an assertion of a positive fact, which, if material, enters into the consideration, and, if false, is a ground of relief, where its falsity was unknown to the purchaser, and he took no covenant to protect himself. *McCall v. Davis*, 56 Pa. 431, 94 Am. Dec. 92.

And where a vendor, under a misapprehension of his legal rights, sold a lot of land which, by the terms of the conveyances of adjoining lots to prior purchasers, had been constructively dedicated for the purposes of a public street, and represented that the lot would not be taken for a street without paying to the vendee the full value thereof, but without communicating the facts upon which the legal question as to the rights of the prior purchasers depended, the vendee is entitled to relief against a bond and mortgage given by him for the purchase money, the lot being in fact worth nothing at the time of his purchase. *Champlin v. Laytin*, 6 Paige, 189.

So, where a lot of land is sold upon proclamation by the sheriff that it is sold to pay the purchase money, it being understood by the bystanders to mean to satisfy the vendor's lien, and being so meant by the sheriff, but it turns out to be a mistake, no deed having been executed and filed in compliance with the statute, the sale will be rescinded at the instance of the bidder, and a resale ordered. *Horton v. Moyers*, 25 Ga. 89.

A deed will not be reformed for fraud of the grantee in taking unfair advantage of the grantor by accepting a deed with knowledge that it contained a mistake in the description of the property, of which the grantor was ignorant, however, if the grantor had every opportunity to inform himself as to the proper description, and neglected to do so. *Cherry v. Brizzolara*, 89 Ark. 309, 21 L.R.A.(N.S.) 508, 116 S. W. 668.

And for a deficit in the quantity of acres named in a deed, if not provided for by an express warranty of quantity, an action will only lie in case of actual misrepresentation as to quantity, acted upon by the vendee; and the specific acts of fraud or misrepresentation must be alleged and proved in an action to recover for such deficiency. *Daugherty v. Knolle*, 44 Tex. 450.

And where a person loaned a sum of money, and received for security a warranty deed of land from the borrower, who, being called upon for repayment, negotiated a loan from another person, and agreed to give him the same security, and all parties met, and the last lender furnished the money with which to pay the previous lender, and

presented him with and requested him to sign a deed of warranty from the previous lender to him, thus saving the expense of two deeds, assuring him that that was the correct way to do business, and that the bond for reconveyance, executed by the lender to the borrower, would clear the former lender from any claim, the deed was not obtained by fraudulent representations of the former lender, and will not be set aside in an action for covenant broken. *Grant v. Grant*, 56 Me. 573.

And where the owners of land contracted with another to convey it to him or order, and the latter, by showing a purchaser another and better tract of land, representing it to be the one he was buying, induced the purchaser to contract with him to purchase the land in question, and the original owners at his request deeded the land direct to the latter purchaser, the transaction was a sale by the original owners to their vendee, and another sale by him to the latter purchaser, the first vendee not being the agent of the owners, and they not being responsible for his fraud; and such fraud affords no ground for rescission as between the purchaser and the original owners. *Reeves v. McCracken* (Tex.) 128 S. W. 895.

So, where one of the owners of a remainder in real estate, in negotiating a purchase of a life estate therein, falsely represented that a sale of the property could not be made unless all consented thereto, and that one of the owners in remainder refused to sell, the representation that one of the owners refused to sell, if untrue, was only a representation in regard to the seller's chance of a sale, or the probability of her getting a better price than that for which the property was offered by him; and such a misrepresentation is not alone sufficient ground for setting aside the contract. *Fish v. Cleland*, 33 Ill. 243.

And that a grantor was induced to deliver a conveyance from a misconception of the legal effect of the articles in, and perhaps of the deed itself, touching his remedy for enforcing payment of the purchase money, which misconception did not originate in the misrepresentation of the grantee, but of another and disinterested person, is not admissible in evidence for the purpose of correcting the deed. *Zentmyer v. Mittower*, 5 Pa. 403.

But where a person offered his entailed estate for sale at a certain price, by letter containing a particular stipulation that the sale was made subject to the ratification of the court, this amounting to an absolute sale, the fact that the agent of the other party gave him a draft of the offer, to copy and sign as his own letter, representing that the effect of writing the letter would be merely to give the seller a little hold upon the purchaser; and that the seller was not aware of any mode of selling an entailed estate except under a statute under which the court judged of the sufficiency of the price,—raises an issue of essential error induced by the agent of the other party. *Stewart v. Kennedy*, L. R. 15 App. Cas. 108. 28 L.R.A.(N.S.)

Likewise, when a mortgage is obtained by the misrepresentation of the mortgagee, it is void; and it is immaterial, as to its legal effect upon the instrument, whether the mortgagee at the time he made the misrepresentation knew it to be false or not; if he made the statement of facts, knowing it to be false, it would be a legal fraud; and though he did not know that it was false, yet if he undertook to state it to be true, without a knowledge of its truth or falsehood, and it operated as a deception of the other party to whom it was made, and thereby induced the mortgage, it would avoid it. *Joice v. Taylor*, 6 Gill & J. 54, 25 Am. Dec. 325.

And where a mortgage does not cover all the premises owned by the mortgagor which he, by false and fraudulent representations, induced the mortgagee to believe were included therein when the latter made a loan and accepted it as security therefor, a court of equity will, as against the mortgagor or his voluntary grantee, reform the mortgage and enforce it against the part of the premises not originally embraced therein. *De Peyster v. Hasbrouck*, 11 N. Y. 582.

And a mortgage executed to secure a security debt of the mortgagor's testator, which was barred by the statute, and for payment of which no promise had been made during the life of the obligation, is not binding upon the legatee giving the mortgage, where she acted under the mistaken belief and upon the representation of the mortgagee that the property was already in lien to secure the same debt. *Blakemore v. Blakemore*, 19 Ky. L. Rep. 1619, 44 S. W. 96.

So, the only fraud necessary to sustain a judgment reforming a lease for mistake is such as may be inferred from the failure of the lessee to correct a mistake of the lessor, known or suspected by the lessee at the time of the execution of the lease. *Wilson v. Moriarty*, 88 Cal. 207, 26 Pac. 85.

And where, when a person executed a lease, she did not understand it to be a lease for ten years, with a privilege of renewal, but understood it to be for a single term of five years, and the lessee well knew that she so understood it, and fraudulently induced her to misunderstand it, the lease will be reformed in equity. *Ibid.*

But a lessee is not entitled to have a lease of land described as a named ranch, giving it a particular name, reformed so as to include certain land therein, where he was guilty of bad faith in inducing the lessor to include more land in the lease than he had a right to lease, and did not identify the boundaries of the ranch described. *St. Dennis v. Harras* (Or.) 105 Pac. 246.

So, where purchasers of goods were trusted to draw notes for the purchase price, and they drew them and delivered them, knowing that two of them which ran for the longest period did not bear interest, it is a clear case of fraud entitling the vendor to have the notes reformed. *Botsford v. McLean*, 45 Barb. 478.

And where a note payable to a bank,

given for the indebtedness of an incorporated company, was, by direction of the president and cashier of the bank, signed by the officers of such company, followed by the official designation of each officer, and the bank officials at the time represented to such signers that they were not personally liable, and the note was executed and accepted as the obligation of the company alone, equity will reform the note to correspond with the intention of the parties, and such intention may be shown by parol evidence. *Lawrence County Bank v. Arndt*, 69 Ark. 406, 65 S. W. 1052.

So, where a person gave a note for a share in a tract of oil land, and claimed that the note was invalid because of misrepresentations as to the value of the land, if he was induced to subscribe by representations of the agent of the owners of the land, believed to be true by well-informed men, he cannot allege that he was deceived and defrauded by such representations; but if the representations were made by such agent, knowing them to be false, and they were made by fraud of the owners, for the purpose of obtaining the note, and the note was given in consequence thereof, no recovery can be had on the note. *Watts v. Cummins*, 59 Pa. 84.

And where partners gave two notes to a person, and afterwards both of them died, and at the time of the death of the survivor both notes were barred by the statute of limitations, and after such death the holder, knowing the notes were barred, fraudulently or under a mistake of the law represented to the administratrix of the survivor that the notes were unpaid and valid and in full force against the estates, and succeeded in securing her bond for half the amount, while this was a misrepresentation of the law, still, it is a case in which equity will relieve the administratrix, and the defense may be made at law by a plea under the statute, setting out the facts. *Brown v. Rice*, 26 Gratt. 467.

So, when a release is given to one joint debtor, although under a misapprehension of its operating to discharge the codebtor, a court of equity will not relieve against it, unless there was fraud or unfair practice. *Joy v. Wurtz*, 2 Wash. (C. C.) 206, Fed. Cas. No. 7,555.

And mere ignorance of a party to a note, at the time the note was executed, that it was unlawful to contract for the payment of interest at the rate of 10 per cent per annum, in the absence of proof of fraud or misrepresentation, furnishes no ground to equity to reform the contract. *Ottenheimer v. Cook*, 10 Heisk. 309.

So, the taking of a bond for discharge upon *no exeat*, which makes the surety liable for any amount adjudged to be due in the action, which was executed by the surety in the belief that it was a bond only to secure defendant's appearance, under an agreement with defendant that the bond was to secure the amount adjudged due, of which agreement the surety was ignorant, is a fraud upon the surety. *Griswold v. Hazard*, 28 L.R.A.(N.S.)

141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999.

And where a contract was made between a landowner and another for the cutting of timber on the landowner's land, in consideration that half the lumber manufactured therefrom should be delivered to the landowner; and at the same time an executory contract was made for the sale of the land to the same person for a price representing the value of the land without timber, it being understood that the timber was reserved to the vendor by the contract first mentioned; and afterwards a purchaser who had succeeded to the rights of the former purchaser under both contracts paid up the purchase money of the land, and a deed was delivered, which by mistake on the part of the vendor contained no reservation of any interest in the timber, the purchaser being aware of the vendor's mistake, and receiving the deed knowing that the vendor supposed that the timber was reserved,—the vendor is entitled to a reformation of the deed on the ground of fraud, and to damages for the removal of timber by the purchaser claiming the same under the deed. *Welles v. Yates*, 44 N. Y. 525.

And where a life insurance company by its authorized agent falsely and fraudulently represented to the executor of the assured, whose mental faculties were at the time impaired by age, financial disasters, and domestic affliction, that sufficient evidence had been discovered to avoid the policy, and that the company would contest and defeat its collection, and thereby procured a settlement of the claim, and a surrender of the policy by paying an amount grossly unjust to the estate of the assured,—such settlement may be set aside in equity, and the balance due on the policy recovered. *McLean v. Equitable L. Assur. Soc.* 100 Ind. 127, 50 Am. Rep. 779.

So, where a bond for title incorrectly describes land to be conveyed, a certain number of feet being given in the description, when enough land to include designated buildings was contracted for, and the vendor assured the vendee that the designated number of feet included the buildings, which it did not, the purchaser is entitled to a correction of the bond, and the mistake may be established by parol evidence. *Goff v. Jones*, 70 Tex. 572, 8 Am. St. Rep. 619, 8 S. W. 525.

And where a man was induced to marry a widow upon the hope and confidence of having the interest she had in the estate of her former husband, without which he never would have married her, and the widow had voluntarily disposed of the property, equity will set aside the deed. *Howard v. Hooker*, 2 Rep. in Ch. 81.

3. Inequitable conduct.

(a) General rules as to.

While it is a general rule that for a mistake of law, pure and simple, there is ~~no~~

remedy or relief, yet where the surrounding circumstances are of such a nature that the adverse party is seeking to avail himself of the opportunities afforded by the mistake, and attempting to enforce an inequitable advantage without consideration, and the other party is not blamable, equitable relief can in such case be afforded to the party so mistaken, if the other party is not thereby injured; and such mistake need not be mutual. *Lane v. Holmes*, 55 Minn. 379, 43 Am. St. Rep. 508, 57 N. W. 132; *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 816, 33 N. W. 38; *Sands v. Sands*, 112 Ill. 225; *Smith v. Patterson*, 53 Mo. App. 66; *Whelen's Appeal*, 70 Pa. 410; *Hunt v. Moore*, 2 Pa. St. 105; *Sparks v. White*, 7 Humph. 86.

Equity will, if possible, restore both parties to the same condition as before, where they have acted under a mistake of law, though there was no actual fraud, if one was unduly influenced and misled by the other to do that which he would not have done but for such influence, and he has in consequence conveyed property to the other without any consideration, or purchased what was already legally his own. *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 556.

And if a man is clearly under mistake in point of law, which mistake is produced by the representations of the other party, he can be relieved in equity as well as if the mistake were as to a matter of fact. *Drew v. Clarke, Cooke (Tenn.)* 374, 5 Am. Dec. 698; *Cooper v. Joel*, 1 DeG. F. & J. 240.

And where the plaintiff's complaint showed that her mistake as to her legal rights was induced and encouraged by the misrepresentation of the defendant, and was known to and taken advantage of by him, and that he could not in conscience retain the benefit acquired through such mistake, the complaint stated a cause of action sufficient to withstand demurrer for want of facts. *Bales v. Hunt*, 77 Ind. 355.

Equity will take cognizance of mixed questions of law and fact, such as ignorance or mistake of law admixed with misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or surprise. *Emerson v. Navarro*, 31 Tex. 334, 98 Am. Dec. 534; *Moreland v. Atchison*, 19 Tex. 303.

Or where advantage is taken of another's situation or condition. *Moreland v. Atchison*, supra.

And a mistake of fact occasioned by acting on the representations of another, which representations were in turn occasioned by a mistake of law, is sufficient ground for relief in equity from a contract entered into with the person making the representations, on the faith thereof. *Champlin v. Laytin*, 18 Wend. 407, 31 Am. Dec. 382.

And if a party to a contract is ignorant of the law, and the other party, knowing this and also knowing the law, takes advantage of his ignorance to misstate the law, and by inequitable, unfair, and de-

ceptive conduct affirms his mistake and conceals the truth, the former may have relief in equity. *Busiere v. Reilly*, 189 Mass. 518, 75 N. E. 958.

And a court of equity will relieve against misrepresentations, though innocently made, by rescinding the contract on the ground of mistake. *Holmes v. Clark*, 10 Iowa, 423.

So, where one who has had superior means of information, or professes a superior knowledge, even of the law, and thereby obtains an unconscientious advantage of another who is confessedly ignorant, and who has not been in a situation to be informed, the injured party is as much entitled to relief on the ground of fraud as if the misrepresentation were a matter of fact. *Moreland v. Atchison*, supra.

And in some instances, mistake on one side, and knowledge thereof on the other, and taking advantage of it, may be sufficient to justify the reformation of a contract, provided there is another existing contract which may be substituted. *Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826.

So, equity will relieve when the legal effect of a transaction is misunderstood, if the want of proper understanding of its effect was produced by the misleading statements of the other party to the contract. *Lott v. Kaiser*, 61 Tex. 665.

And a mistake in the execution of an instrument, as to its legal effect, induced by the act of a party, whether fraudulent or innocent, entitles the other party to its reformation, conforming it to its intended meaning and operation. *Heert v. Cruger*, 14 Misc. 508, 35 N. Y. Supp. 1063; *Evans v. Llewellyn*, 2 Bro. Ch. 150.

So, if one, through mistake of his legal rights and mistake of facts, assumes an obligation which he would not have assumed but for such mistake, a court of equity will grant relief; and this is especially so if the mistake was induced or encouraged by the representations of the party benefited, or if he withheld information which, under the circumstances, it was his duty to impart. *Wilson v. Maryland L. Ins. Co.* 60 Md. 150.

And equity may relieve against mistakes of law which relate merely to legal rights in particular transactions, where the parties do not stand in equal positions, or where the mistake is seen and taken advantage of by the one party, or where there are circumstances which excite suspicion of fraud, imposition, misrepresentation, or undue influence on one side, or imbecility, credulity, or blind confidence on the other. *Nelson v. Betts*, 21 Mo. App. 219.

So, a mistake of law—as, when an instrument has a different legal effect from what a party to it intended—may be relieved against in equity, if the mistake be that of one of the parties, who placed great trust and confidence in the other, and the confidence was betrayed. *Adair v. McDonald*, 42 Ga. 506.

And where it appears that one of the parties to a written agreement knew at the

time of its execution that it did not truly express the intention of the parties, and also knew that the other party signed it supposing the intention to be correctly expressed, a case for revision is made out. The right to revision does not depend upon the fact that he might or might not have discovered the mistake before signing. *Higgins v. Parsons*, 65 Cal. 280, 3 Pac. 881.

And though there were no such peculiar relations between the parties as to place the one who remained silent under an unusual obligation, he must be deemed to have appreciated the legal effect of the transaction, and to have known that the other was acting in ignorance of such fact. *Eldridge v. Dexter & P. R. Co.* 88 Me. 191, 33 Atl. 974.

And a deed executed by an ignorant and illiterate person in reliance upon the agent for the grantee, to whom he has intrusted its preparation, which does not express the real contract between the parties, will be reformed in equity, where it also appears that the grantor believed that the agent was his attorney, and relied entirely on him to prepare the papers properly. *Archer v. California Lumber Co.* 24 Or. 341, 33 Pac. 526.

So, a court of equity will interfere when called upon to relieve a party against his mistake, made under a combination of such adverse circumstances as to destroy his capacity to know the nature of the contract or engagement to which he became a party. *Bean v. Western North Carolina R. Co.* 107 N. C. 731, 12 S. E. 600; *Moreland v. Atchison*, 19 Tex. 303.

And a person who, having heretofore occupied a fiduciary relation to another, fraudulently suffered her to pay an obligation upon which she was not legally liable, whereby he became the beneficiary, cannot defend in a court of equity by insisting that she ought to have known the law. *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651.

So, an illiterate party to a contract is not negligent in signing a contract without informing himself as to its contents or legal effect, where he relies upon the other party properly to express the terms of their oral agreement in the writing, and upon the latter's representation that he has done so. *Williams v. Hamilton*, 104 Iowa, 423, 65 Am. St. Rep. 475, 73 N. W. 1029.

And in such case an illiterate party who relies upon the other, to the latter's knowledge, to embody their oral agreement in a written contract, may have the contract reformed so as to conform to their understanding, where it was read over to him before it was executed, and he called attention to a certain omission, but was assured by the other party that the contract covered everything agreed upon, which was not true. *Ibid.*

And when a court is endeavoring to ascertain what reliance was placed on representations in the making of a contract, it must consider them with reference to the subject-matter and the relative knowledge

of the parties; and if the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into, after representations made by the party having knowledge, without any means of verification being resorted to by the other, it may be presumed that the ignorant man relied on the statements made by the other, supposing him to be better informed. *Clapham v. Shillito*, 7 Beav. 146.

So, where one party to an agreement has knowledge of a mistake in it, and of the other party's ignorance thereof, and, with such knowledge, remains silent when he should speak, he is estopped to defeat a reformation by asserting that the mistake lacks mutuality. *Roszell v. Roszell*, 109 Ind. 354, 10 N. E. 114.

And although a mistake as to the law forms no ground for reforming a contract, yet where a party acting under a mistake of law or of fact does acts which mislead the adverse party, he is estopped as well as if he were not acting under such mistake. *Garnar v. Bird*, 57 Barb. 277.

And specific performance of a contract can only be had by one whose hands are perfectly clean and whose conscience is entirely void of offense; and if a contract has been obtained from a party in ignorance of his rights, either as to law or facts, specific performance will be refused. *Trigg v. Read*, 5 Humph. 529, 42 Am. Dec. 447.

To justify a court of equity in reforming a written contract, however, it should clearly appear that there was some relation of trust or confidence between the parties that had been abused, or that there was fraud, or fraud on one side accompanied by mistake on the other, or that the means of knowing the facts were not equally open to both parties. *Kleinsorge v. Rohse*, 25 Or. 51, 34 Pac. 874.

And equity will not reform a written contract because of mistake as to the contents of the writing on the part of the complaining party, who was able to read, and fraud of the other party, which consisted only in making false representations as to such contents, on which the complaining party relied as true because of confidence in the party making them, no fiduciary or confidential relation existing between the parties, and no sufficient excuse appearing why the complaining party did not read the contract. *Weaver v. Roberson* (Ga.) 67 S. E. 662; *Meade v. Norfolk & W. R. Co.* 89 Va. 296, 15 S. E. 497.

So, where the parties dealing with property stand upon a footing of equality, they must take the consequences of a contract deliberately entered into, and cannot have the same reformed in equity. *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Deare v. Carr*, 3 N. J. Eq. 513.

A misapprehension of the law by a party to an express contract will not authorize him to rescind it, if there have been no fraud and no misapprehension of the facts. *Jenks v. Mathews*, 31 Me. 318.

And when parties deal at arms' length, and there is no confidential or fiduciary relation between them, mere silence on the part of a purchaser of realty, or failure to disclose knowledge on his part of a peculiar value affecting the property or the title thereto, is not sufficient to set aside a sale fairly made, which is otherwise unimpeachable. *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Fritz v. Fritz*, 94 Minn. 264, 102 N. W. 705.

And where a conveyance was obtained from persons uninformed of their rights, and it was accepted and executed after the vendors had gone home and consulted friends, they ought not to be relieved. *Evans v. Llewellyn*, 2 Bro. Ch. 150.

And that a party entered into an agreement to avoid a controversy at law, that he was ignorant of the law, and was alarmed by the other party issuing against him a writ of ne exeat, when it does not appear that the other party sued out that process with any improper object, constitutes no ground for relieving him from such contract, voluntarily and deliberately entered into. *Gunter v. Thomas*, 36 N. C. (1 Ired. Eq.) 199.

Nor can a purchaser, in the absence of fraud, obtain compensation, after conveyance, for a misrepresentation, even though such misrepresentation related to the subject-matter of the conveyance. *Manson v. Thacker*, L. R. 7 Ch. Div. 620.

In the above case, *Bos v. Helsham*, L. R. 2 Exch. 72, supra, IV. g, 2, (a), was distinguished upon the ground that in that case the vendor was, in the opinion of the court, guilty of a fraud.

So, to constitute a ground for the rescission of a contract, a voluntary statement must be believed by the party to whom it is addressed. *Pennybacker v. Laidley*, supra.

And one who in honest error asserts that which is not true, for the purpose and with the effect of influencing another, who in good faith relies upon the assertion, cannot correct the mistake for his own benefit and to the injury of the party deceived. *Smith v. Cramer*, 39 Iowa, 413.

And where the evidence in an action for the reformation of a contract fairly shows that the contract expressed the intent of the parties when it was signed, a claim by the plaintiff that the other party to the contract was his attorney, in whom he placed special confidence, is immaterial and will be ignored. *Roundy v. Kent*, 75 Iowa, 662, 37 N. W. 146.

(b) Application in particular cases.

A voluntary settlement by a widow upon a clergyman and his family will be set aside in equity, when obtained by undue influence of and abused confidence in the clergyman as an agent undertaking the management of her affairs, upon principles of public policy and utility applicable to the relation of guardian and ward. *Huguenin v. Baseley*, 14 Ves. Jr. 273, 6 Eng. Rul. Cas. 834.
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And where one was a near neighbor and regarded as a particular friend to a grantor who was an old, infirm, and ignorant widow, and obtained from her a deed for a tract of land by untruly stating to her that the supreme court had decided adversely to her interest in an action for such land, the deed will be set aside in equity. *Mason v. Pelletier*, 82 N. C. 40.

And equity will interfere in the case of an immigrant who, having just arrived, meets an old citizen who professes familiarity with the land titles of the country, and proposes to sell him land to which he assures the immigrant he has perfectly good title, when he has not. *Moreland v. Atchison*, 19 Tex. 303.

And under a statute like that of South Dakota, providing that apparent consent to a contract is not real or free when obtained through mistake, including mistake of law arising from a similar misapprehension of the law by all the parties, or a mistake by one party of which the others are aware at the time of contracting, but which they do not rectify, and that a party to a contract may rescind if the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, provided he acts promptly on discovering the facts, where a widow was clearly mistaken as to her legal rights in her husband's estate at the time she signed an agreement with the other distributees to accept one sixth of the estate, and such other distributees appeared at the time to have understood that she was entitled to one third of her husband's property, she is entitled to rescind such agreement, she having acted immediately on ascertaining her rights, before any change has occurred in the situation of the parties. *Griffing v. Gislason*, 21 S. D. 56, 109 N. W. 646.

So, where a favorite son took advantage of his mother's affection, and induced her to make a conveyance of all her estate to him upon the assurance of the son that the deed was in the nature of a will, and would not take effect in her lifetime, the mother being at the time over seventy years of age and greatly weakened in body and mind, and the paper was handed to the son to be placed with her papers, and after recovery she destroyed the deed, equity will not interfere to compel her to re-execute it. *Sands v. Sands*, 112 Ill. 225.

And where the mother acted under the assurance and belief that the deed would not take effect until recorded, and the grantee agreed not to procure the same to be recorded during her life, the deed does not take effect as to the grantee, and the grantor has a right to destroy it at pleasure. *Ibid.*

So, if a father making a grant to his children was induced by the grantees to omit from the deed a clause showing that it was to take effect only after his death, and was led to believe that the oral understanding would have the same effect to protect him in his possession during his life that the omitted clause would have

had, the grantees will not be permitted to take advantage of the grantor's failure to insert the clause. *Lott v. Kaiser*, 61 Tex. 665.

And where a deaf and aged father made a deed to his son, in whom he reposed confidence, conveying a tract of land in fee, but omitting, either by the mistake or contrivance of the son, under whose direction the deed was drawn, to reserve a life estate to the grantor, an equity arises in favor of the father to have such instrument reformed in accordance with the original intention of the parties. *Day v. Day*, 84 N. C. 408.

So, where a woman by importunity and misrepresentation obtained a deed from her daughter, who at the time was only seventeen years old, and, though recently married, still lived with her mother, and the deed was made by the daughter in entire ignorance of her rights, it will not be allowed to stand. *Baldock v. Johnson*, 14 Or. 542, 13 Pac. 434.

And a deed of land obtained by a father from his daughters by misrepresentation and undue influence, whereby the fee was conveyed, instead of a life estate as the daughters intended, is reformable in equity; and a purchaser from the father with notice will be enjoined, after the death of the father, from claiming title thereunder. *Bailey v. Woodbury*, 50 Vt. 166.

And equity will set aside a deed from a single woman to her grandfather, creating an irrevocable separate use for the grantor, when it was not executed in contemplation of marriage, nor with the intent to make an irrevocable gift, but upon an assurance by the grandfather and mother that it could be revoked, and without the advice of counsel upon the point, the only purpose of execution having been accomplished. *Bristor v. Tasker*, 135 Pa. 110, 20 Am. St. Rep. 853, 19 Atl. 851.

Nor will a conveyance by an eldest son to his brothers, of his interest in the estate of their father, for an inadequate consideration, be permitted to stand, where he was ignorant of his rights, and there was an absence of full and free disclosure of all the material facts known to the brothers, the eldest son being under pecuniary pressure and without proper legal advice. *Sturge v. Sturge*, 12 Beav. 229.

And where a person died intestate, having considerable real estate, and leaving two persons his coheirresses at law, both of whom were advanced in years and illiterate; and a third person, ascertaining the heirship of the coheirresses, induced them to sign an agreement whereby, in consideration of his revealing to them the existence of the property and their title to it, of which they were unaware, they agreed to give him half of the net amount of the property, which property was in the hands of a public trustee of another country; and the title of the coheirresses was clear, and no litigation was contemplated,—the agreement will be set aside as an improvident bargain obtained by taking an unfair advantage

of the coheirresses' position. *Rees v. De Bernardy* [1896] 2 Ch. 437.

And where a daughter accepted a large legacy left her by her father, who recommended to her to release her right to her orphanage part, which she did release accordingly, the orphanage part being much more than the legacy, though she was told she might elect which she pleased to take, yet if she did not know she had a right first to inquire into the value of the personal estate and the quantity of her orphanage right before she made her election, she may avoid her release. *Pusey v. Desbourrie*, 3 P. Wms. 315, 10 Eng. Rul. Cas. 351.

So, an account between an aged tenant for life and the remainderman, who was also executor, which was settled and signed by the tenant for life under the advice of her solicitor, will be set aside on the ground of the executor not having furnished full information, and of the account being founded on an erroneous opinion of counsel as to the rights of the parties, obtained *ex parte* by the executor, and of the account being complicated in its form, and, though professing to be made in conformity with the opinion, yet containing an addition of a purchase and sale between the parties. *Pickering v. Pickering*, 2 Beav. 31, 25 Eng. Rul. Cas. 37.

And where an executor, supposing a person to be entitled to a legacy under the will of which he was the executor, paid the sum to such person out of the deceased's estate, in the presence of the legatee's husband, with his consent, when the legatee was not in truth entitled to such legacy under the will, which was known to her husband at the time of the payment, but was not disclosed to the executor, the husband of the legatee, who received the money, had no moral or conscientious right to retain it, and the executor was entitled to recover it back in an action against him for the recovery of money paid under mistake. *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264.

So, a sale of an annuity by an attorney to his client may be set aside, where the client was a widow seventy years of age, and the attorney lived in the same place, and failed to use reasonable diligence to see that she thoroughly understood the situation. *Gibson v. Jeyes*, 6 Ves. Jr. 266.

And where a woman who was unacquainted with business was dealing not at arms' length with persons who were business men aided by legal counsel, who misrepresented matters to her, and she, under the mistaken belief that her premises were subject to certain mortgages, and that she was without remedy, signed a deed for the property under protest, and acknowledged it unwillingly, equity will relieve against such deed. *Toland v. Corey*, 6 Utah, 392, 24 Pac. 190.

. And a deed for land obtained from a person who was old and infirm, but had mental capacity sufficient to make a deed, through fraud and concealment of material facts, known to the grantee, respecting the

effect of the deed and the nature of the title sought, will be set aside at the suit of the one thus defrauded, although part of the interest thus acquired was subsequently reconveyed and accepted by her while still ignorant of the facts relating to her title and the effect of such prior and subsequent deeds. *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811.

And where a banking firm advanced money to a man, and took a promissory note for it, which was signed by the man and his wife, the wife having no separate property, and the man died insolvent, and shortly after his death one of the partners in the bank went to the widow and asked her if she could pay any money on account, and on her answering that she could not, obtained her signature to a new promissory note written by him, such note is invalid in equity, it being doubtful whether or not she knew that she was not liable upon the original note. *Coward v. Hughes*, 1 Kay & J. 443.

And where a man and woman engaged to marry each other entered into an antenuptial marriage contract whereby the man gave the woman a life estate in a house and lot worth \$6,000; and the woman, in consideration thereof, relinquished all interest in the man's estate; and the man's attorney prepared the contract, the woman having no other adviser, and he undertook to explain the transaction to the woman, and her husband at the time of the contract and at his death had an estate of about \$100,000; and she had \$3,700 of personal estate which passed to the husband by virtue of the marriage; and there was no issue of the marriage; and she was not informed that her \$3,700 became the property of her husband by virtue of the marriage,—the contract was based on an inadequate consideration, and entered into under mistake of both law and fact, and she was not bound by it. *Spurlock v. Brown*, 91 Tenn. 241, 18 S. W. 868.

So, where the legal title to property stands in the name of a wife, and the property is insured in her name, and the wife dies, and the husband and children continue to occupy the property, and the insurance is renewed, making it payable, as before, to the wife, the agent doing so inadvertently forgetting for the moment her death, and taking payment of premium from the husband, the husband supposing that that was the legal method of insurance, the policy will be reformed in equity so as to make it payable to the heirs at law of the deceased wife, and recovery can be had in equity, as part of the suit for reformation, in favor of such heirs at law. *Taylor v. Glens Falls Ins. Co.* 44 Fla. 273, 32 So. 887.

And where the soliciting agent of a fire insurance company, having been previously informed by an applicant for insurance that the interest desired to be insured was that of the applicant as administratrix and of the heirs of a deceased person, by mistake wrote the application as for the administra-

trix alone, and the policy was so issued, and the applicant, being an illiterate woman and not accustomed to business, did not notice the mistake, the insurance company cannot avoid liability for such error of its agent by virtue of any clauses of limitation contained in the application; and the insured person is entitled to have the policy so reformed in equity as to cover the interests of the heirs of the deceased person. *Jamison v. State Ins. Co.* 85 Iowa, 229, 52 N. W. 185.

And where an applicant for insurance told the insurance agent that he wished to insure his life for the benefit of his wife, and the application was so filled out, but the agent, conceiving that the application made out in that way in the absence of the wife would be irregular, induced the insured to consent that the application might be rewritten and the policy made payable to himself, which was done, the agent assuring him that his wife would get the money under the second form of application as well as under the first, the chancellor had power, after his death, to correct the mistake and give the fund to the widow, as against his creditors. *Welch v. Welch*, 13 Ky. L. Rep. 639.

And where a mortgagee had insurance upon premises as mortgagee, and took another mortgage upon the same premises, and applied to the same insurance company for a renewal of the first policy, with an increase of insurance to the amount of both mortgages, and this was agreed to, and a new policy was issued containing a clause not in the first policy, to the effect that in case of loss the assured should assign to defendant all her right to receive satisfaction from any other person, and that the loss should not be payable until after the enforcement of the original security, and the insurance company should only be liable for so much as could not be collected, both mortgages containing the usual insurance clause, and it being agreed thereby that the mortgagors should pay the premiums and have the benefit of the policy on payment of the debt,—the policy is properly reformed by striking out the clause differing from the old policy, and enforced as reformed, since it was bad faith upon the part of the insurance company to change the terms of the renewal policy without notice. *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 33 Am. Rep. 607.

So, where the maker of a note secured by mortgage executed the same with the understanding, induced by representations of the payee's agent, that she was assuming no personal liability, the payee is not entitled, after foreclosing the mortgage, to enforce the note against the maker personally. *Merchants' & F. Bank v. Cleland*, 25 Ky. L. Rep. 1169, 77 S. W. 176, 719.

And an instrument in the form of a promissory note, issued by a bank, with the corporate seal on its face, is a specialty; and an indorsement in blank by the payee does not make him liable as the indorser of a negotiable note; and where the payee of such a note indorsed in blank put it in

the hands of his partner to obtain money upon it for the use of the firm, and the partner delivered the note to a money broker, who took it to a lender, and, being asked as to its value, pointed to the payee's indorsement, and assured the lender of his sufficiency, whereupon the lender discounted the note, the lender may recover back from the indorser the money paid to the broker. *Frevall v. Fitch*, 5 Whart. 325, 34 Am. Dec. 558.

So, where a grantor in a deed acts under a total misconception of his legal rights or the extent of his interest or estate in the thing granted, or where his confidence is imposed upon to his injury, and in other like cases, the lack of an adequate consideration will have a material bearing on the question whether the deed ought to stand or not. *Baldock v. Johnson*, 14 Or. 542, 13 Pac. 434.

And where the owner of a tract of land contracts in writing to sell and convey it, excepting and reserving a certain vein of coal, and subsequently executes a deed of general warranty thereof, without any reservation whatever, the grantee, by accepting the conveyance with knowledge of the error, perpetrates a fraud on the grantor, and equity will reform the deed so as to make it conform to the intentions of the parties as expressed in the contract. *Cook v. Liston*, 192 Pa. 19, 43 Atl. 389.

And where a bond was given for a lease for ninety-nine years of a tract of land granted to the lessor forever by grant which contained no words of inheritance, the grant being by virtue of a treaty between the United States and a tribe of Indians, and the lessor believed, or pretended to believe and so represented to the lessee at the time the lease was made, that he had an absolute estate in fee simple in the land, whereas he had only an estate for life, which was determined by his death, equity will enjoin an action against the lessee on the bond, and relieve against a judgment obtained thereon. *Drew v. Clarke, Cooke* (Tenn.) 374, 5 Am. Dec. 698.

And a contract for the rescission of a sale of land will not be required to be specifically performed, where the vendee had gone in under the deed and remained in possession for several years, and had been induced to rescind by doubts of the title fostered by the complainant in ignorance of the fact that the vendor was the owner of the moiety of the land as to which the title was in dispute, and the facts touching which were withheld by the complainant, the land having greatly depreciated in value between the dates of the purchase and the agreement to rescind. *Trigg v. Read*, 5 Humph. 529, 42 Am. Dec. 447.

So, where a person agrees to give up his claim to property in favor of another, such renunciation will not be enforced if at the time of making it he was ignorant of his legal rights and of the value of the property renounced,—especially if the party with whom he dealt possessed and kept back from him better information on the subject. *McCarthy v. Decaix*, 2 Russ. & M. 614, 28 L.R.A.(N.S.)

There is no such relation of trust and confidence existing between a son-in-law and his mother-in-law, however, that in dealings between them the latter should be supposed to act upon the presumption that there would be no concealment of facts from her; and a court of equity cannot afford relief on the mere ground of such concealment, in the absence of anything to show that she acted on such presumption. *Fish v. Cleland*, 33 Ill. 243.

And where a widow owned a life estate in lands of her deceased husband, and he had several children who owned the remainder, and a proposition was made to purchase the widow's life estate, the owners of the remainder were under no obligation to disclose to her that they contemplated a partition and sale of the property, nor their estimate of the value of the life estate. *Ibid.*

And where there was a controversy as to title, and a judgment was obtained for trespass on the land with reference to which the controversy existed, and one of the parties to the controversy represented to the other that by reason of the covenants contained in his deed he was liable to pay the judgment, and the other party thereupon executed a bond to him for the payment of the same, the representation is not one which would warrant a court of equity in canceling the bond. *Abbott v. Treat*, 78 Me. 121, 3 Atl. 44.

So, where a person, having arrested his debtor on a ca. sa., sets him at liberty on agreed terms, no further execution of any sort can be issued; and an agreement having been drawn and signed by the plaintiff's own attorney, a learned and able counselor of law, a court of equity will not interpose to enjoin the defendant from pleading such discharge as payment, upon allegations in a bill demurred to, that there was either a mistake common to both parties as to the effect of the agreement, or else that the plaintiff not knowing its effect while the defendant did know it, it would be a fraud in the defendant now to profit by the plaintiff's misconception or ignorance of what he was doing. *Magniac v. Thomson*, 2 Wall. Jr. 209, Fed. Cas. No. 8957.

h. Effect of character of the act or instrument on reformability.

1. Void acts or instruments.

Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce it, or, in the absence of fraud, accident, or mistake, to so modify it as to make it legal, and then enforce it. *Brazoria County v. Youngstown Bridge Co.* 25 C. C. A. 306, 52 U. S. App. 6, 80 Fed. 10.

And a court of equity has never gone so far as to hold an act valid which the statute declares invalid, merely because it was done through ignorance or mistake of the law. *Erwin v. Hamner*, 27 Ala. 296.

And reformation of an assignment to

make it conform to the laws of the state cannot be had, since if it does not conform to the laws of the state it is a mere nullity, and no contract. *Stricker v. Tinkham*, 35 Ga. 176, 89 Am. Dec. 280.

So, a nuncupative will rendered void by statute cannot be established in equity on the ground that the decedent was ignorant or mistaken as to the change of law made by the statute in this respect. *Erwin v. Hamner*, *supra*.

And the reformation of a mortgage seven months after an attempted sale, by a decree allowing a seal to be affixed, would not have the effect to give validity to a transaction originally void, and thereby to make the sale binding upon the purchaser. *Springfield Five Cents Sav. Bank v. South Congregational Soc.* 127 Mass. 516.

And where a bill in equity by a mortgagee for the reformation of the mortgage shows that the mortgage is tainted with usury, the complainant is not entitled to relief unless he offers to abate the whole interest. *Hawkins v. Pearson*, 96 Ala. 369, 11 So. 304.

And where an agreement is usurious, the fact that it recites that it was given to remove doubts as to the usurious character of a previous agreement between the parties does not authorize a reformation of such subsequent agreement for mutual mistake, so as to obviate its usurious features, in the absence of evidence of mistake in the terms of the agreement; mistake as to its effect being mistake of law only. *Bexar Bldg. & L. Asso. v. Seebe* (Tex. Civ. App.) 40 S. W. 875.

So, a person purchasing county warrants which show on their face that they were issued in violation of law and do not constitute a charge on the treasury is presumed to know the law; and if there is no fraud or misrepresentation on the part of the seller, the purchaser cannot recover from him the money paid. *Christy v. Sullivan*, 50 Cal. 337, 19 Am. Rep. 655.

And where a county judge entered into a contract for the purchase of a courthouse, which was within his power, but went beyond his authority in attempting to bind the county for a large indebtedness therefor, by negotiable securities running a series of years and paying an annual interest of 10 per cent, secured by coupons, it is not competent for the chancellor to enforce the contract so far as it is legal, ignoring the rest, since it cannot be so reformed without involving an important change in the terms of the contract. *Casady v. Woodbury County*, 13 Iowa, 113.

And where a banking association agreed to secure a party to whom it was under a legal liability, and for that purpose executed its promissory notes for the amount of the liability, in a form prohibited by law, and at the same time executed a trust deed of a portion of its effects, which on its face was declared to be collateral to the notes, but contained no reference to the original liability, in the absence of any allegation or proof of mistake in the deed, a court of

equity cannot reform it so as to enable it to stand as security for the original liability. *Leavitt v. Palmer*, 3 N. Y. 19, 51 Am. Dec. 333.

Likewise, the maxim, Ignorance of law excuses no one, is applicable to purchasers of bonds void for some defect which is a matter of law unmixed with matter of fact. *Rochester v. Alfred Bank*, 13 Wis. 433, 80 Am. Dec. 746.

And a person who, through a mistake of law, acknowledges himself under an obligation which the law does not impose upon him, is not bound thereby. *Warder v. Tucker*, 7 Mass. 449, 5 Am. Dec. 62.

And a deed which is a nullity will not be reformed so as to give it effect. *Powell v. Morisey*, 98 N. C. 426, 2 Am. St. Rep. 343, 4 S. E. 185.

So, a mistake as to the existence or identity of the subject-matter of a contract is fatal to the contract itself, because of the mutual assent necessary to its creation; but to produce this result the mistake must be one which affects the existence or identity of the thing sold. *Hecht v. Batcheller*, 147 Mass. 335, 9 Am. St. Rep. 708, 17 N. E. 651.

And a mortgage of part of a particular tract of land, specifying the quantity, but not the particular part conveyed, and not referring to any matter or thing by which it can be identified, is void for uncertainty; and, in the absence of fraud, an agreement and understanding between the parties, of the particular part intended, and an understanding as to the reasons for not describing it in the mortgage, do not authorize the reformation and enforcement of the instrument in equity. *Freed v. Brown*, 41 Ark. 495.

And a deed of settlement of land on a wife by her husband, in which no boundaries are given, and no landmarks, natural or artificial, are mentioned, will not be reformed in equity as against a subsequent purchaser for value. *Adams v. Edgerton*, 48 Ark. 419, 3 S. W. 628.

So, while if a draftsman in preparing a deed makes a mistake and omits some portion of the contract of the parties, or by mistake inserts into it some matter which was not a part of the agreement as made by the parties, rendering the agreement variant from the contract they designed and supposed they had executed, a court of equity, on a proper case, has power to reform it and enforce it as it was designed to be executed,—if, in an attempt to convey lands, the description employed is such that the premises cannot be found and identified, or if the description calls for subject-matter having no existence, the contract must be regarded as void, and courts cannot admit extraneous evidence to explain the intention of the parties. *Carter v. Barnes*, 26 Ill. 454.

And where the owner of land, being involved in debt, persuaded another to receive a deed thereof and give his negotiable promissory note therefor, assuring him that payment of such note should never be enforced,

and that as soon as a purchaser could be found the note should be given up on the reconveyance of the estate; and, being wholly innocent of any fraudulent or sinister design in the transaction, and desirous only of aiding the owner, the purchaser received the deed and gave his note,—the arrangement is fraudulent as to creditors, and neither of them can be permitted to allege such fraud as a ground of relief from it; and, as between them, the parol agreement could no more be received to destroy the effect of the deed and note, in equity than in law. *Bryant v. Mansfield*, 22 Me. 360.

Nor can parties by agreement convert a judgment into a personal mortgage or a bill of sale, or give it any greater effect than the law gives to it; and a parol agreement that a judgment shall be a lien upon all the debtor's personal property will not be enforced in equity, even as against subsequent assignees who assented to the arrangement. *Lanning v. Carpenter*, 48 N. Y. 408.

And oral evidence that an instrument purporting to be an agreement between a husband and wife was signed by both, with the understanding that they were not legally bound thereby, is admissible in equity to show that the instrument should not be given any effect. *Earle v. Rice*, 111 Mass. 17.

So, a purchaser under a decree in foreclosure may petition to be released from his purchase or that the sale be set aside, where it has been subsequently discovered that the court rendering the decree had not acquired jurisdiction of the subject-matter or of persons having interests in the property, or that, for other reasons, the estate directed to be sold would not pass. *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561.

Where, however, a person under a mistake of law was induced to enter into a contract fixing the price of a patented article manufactured under licenses alleged to be in violation of the Sherman anti-trust law, and the defendant sought to hold the complainant thereto, the complainant is entitled to sue in equity for a cancellation of the contract, though he could plead its illegality as a defense to an attempt by defendant to enforce it as to him, as such defense would not relieve him from the pains and penalties provided by that law. *Chalmers Chemical Co. v. Chadeloid Chemical Co.* 175 Fed. 995.

And equity will sustain an executed sale of a school-house site to a district by one of its directors, after large expenditures by the district in improving the property, even though such sale was unlawful while executory only. *Rich v. School Trustees*, 158 Ill. 242, 41 N. E. 924.

So, a mortgage on real estate, made by an agent for his principal, though inoperative at law for want of a formal execution in the name of the principal, is binding in equity if the attorney had authority and a failure to execute in the name of the principal resulted from accident or mistake, and will be enforced against the principal and subsequent lien creditors and subse-

quent purchasers with notice, no reformation being necessary, and it being immaterial whether the mistake in the execution was one of law or of fact. *Love v. Sierra Nevada Lake Water & Min. Co.* 32 Cal. 639, 91 Am. Dec. 602.

And where one person executed a deed of trust in favor of another to secure payment of a debt, and it was agreed between them that, in order to avoid a sale, the creditor should take the property bound, upon an agreed valuation, and the debtor delivered the property, and executed a deed to the land, which was his homestead, and afterwards refused to surrender possession, claiming that the last deed was void by reason of the failure of his wife to join in it, the creditor is entitled to have the trust deed restored, the debtor having failed to effectuate and perform his agreement to satisfy it by making a good and valid deed to the lands conveyed. *Sparks v. Pittman*, 51 Miss. 511.

And promissory notes cannot be defended against for failure of consideration for the reason that the notes were given for exclusive ferry rights which the payee held under a city ordinance which proved, upon judicial determination, not to be within the power of the city corporation, since the mistake of the vendor and vendee was with regard to the general law of the land. *Carpentier v. Minturn*, 6 Lans. 56.

So, the failure to insert the name of the trustee in a deed of trust, when in other respects the instrument is complete, although at law it makes the deed inoperative, does not wholly vitiate it; the deed will nevertheless be regarded as an equitable mortgage, and will create a lien for the benefit of the creditor, which may be enforced in equity. *McQuie v. Peay*, 58 Mo. 56.

And a deed of trust proper in form and acknowledged before the proper officer as the act and deed of the grantor, but lacking his signature, which was omitted by mistake, may be regarded as an equitable mortgage, and enforced accordingly against the lien of a judgment creditor, subsequently acquired. *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503.

And a deed, the execution of which was omitted by mistake, may be corrected in a court of equity; and it follows that the grantor can remedy the defect by a deed of correction filed for record before the levy of execution against him and a purchase thereunder, under which the creditor claims. *Ibid.*

So, where a bond executed by principal and sureties was intended by them to be a good and valid bond, but through a mistake it was rendered void at law, the bond may be set up by the court, and the sureties held liable under it on the ground that it was a clear mistake in a matter of fact. *Butler v. Durham*, 38 N. C. (3 Ired. Eq.) 589.

And where a guardian gave a bond with sureties, and he and his sureties intended to execute a guardian's bond in such form

and substance as would be good at law, though this was denied by the sureties, and the bond drawn was, through mistake or ignorance of the clerk, a nullity, this is a mistake of fact, and not of law; and the ward, for whose benefit the bond was intended to be taken, has a right to call, in a court of equity, upon those who signed as sureties, as well as upon the principal, and make them answerable for whatever may appear to be due the ward on a settlement of the guardian's accounts, to the same extent to which they would have been liable at law if the bond had been good and available. *Armistead v. Bozman*, 36 N. C. (1 Ired. Eq.) 117.

So, a mistake as to the value or quantity of property sold, or other collateral attributes, as distinct from a mistake as to the existence or identity thereof, is not sufficient to warrant the correction of the contract, if the thing delivered is existent and the identical thing in kind is delivered. *Hecht v. Batcheller*, 147 Mass. 335, 9 Am. St. Rep. 708, 17 N. E. 651.

And a mistake as to the solvency of the maker of a note sold affects its value, and not its identity, and does not furnish ground for relief in equity; and though the maker has made an assignment for the benefit of his creditors, the subject-matter remains the same as before, and the sale is valid. *Ibid.*

So, where a single woman as guardian had trust funds in possession, and afterwards conveyed her real estate to a trustee to manage for her use and benefit, paying over to her the net proceeds, who, after accepting the conveyance, died, and his sons as his administrators, in mistake of their duty as such, executed their bond to the ward for the amount due by the guardian, their mistake in the execution of the bond is relievable in equity, and the mistake may be proven, and the fact that the bond was given without consideration, and that there was nothing due to her on their individual account. *Gross v. Leber*, 47 Pa. 520.

And where the creditor of an individual partner appropriated in part payment of his claim a balance due from himself to that partner's firm, but by garnishment was compelled to pay the amount so appropriated to a creditor of the firm, a compromise settlement pending the garnishment, made in the belief that the appropriation was valid, will not be set aside on the ground of mistake, upon the appropriation being afterwards decided invalid, there being no element of deception by misrepresentation, or other fraud, or any mistake as to the facts. *Allen v. Galloway*, 30 Fed. 466.

So, an instrument may be reformed in equity, although the contract contained in it would be invalid if not in writing. *Prior v. Williams*, 3 Abb. App. Dec. 624.

2. Voluntary acts or instruments.

The absolute rule has been asserted and is well supported, that equity will not re-

lieve against defects or mistakes in a voluntary conveyance or contract, or one made without consideration; to entitle a plaintiff to relief he must stand in the position of a purchaser for value. *Doe v. Doe*, 37 N. H. 268; *Dickinson v. Glenney*, 27 Conn. 104; *Wyche v. Greene*, 16 Ga. 57; *Baker v. Pyatt*, 108 Ind. 61, 9 N. E. 112; *Anderson v. Green*, 7 J. J. Marsh. 448, 23 Am. Dec. 417; *Powell v. Morisey*, 98 N. C. 426, 2 Am. St. Rep. 343, 4 S. E. 185; *Dawson v. Dawson*, 16 N. C. (1 Dev. Eq.) 93, 18 Am. Dec. 573; *Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557; *White v. Campbell*, 80 Va. 180.

Within this rule to entitle a person to a decree reforming a contract for the conveyance of real estate, where the defect in the conveyance consisted in the want of a statutory requirement, which renders it wholly void, it must appear upon the bill and by the proof that there was an agreement to convey for a valuable consideration. *Doe v. Doe*, supra.

And equity will not correct a mistake in a voluntary deed by inserting therein the word "heirs," which was omitted by the inadvertence of the draftsman. *Powell v. Morisey*, supra.

Nor will a court of equity, in the correction of mistakes in written instruments, aid one volunteer against another. *Wyche v. Greene*, supra.

And equity will not relieve from a mistake when it was not one as to the party with whom the contract was made, but as to a third party not directly concerned with the making of the contract, but who was to be a beneficiary thereof, as a matter of gratuity on the part of the real purchaser. *Langley v. Kesler* (Or.) 110 Pac. 401.

And where land was purchased with the intent to take a deed to the grantee and his wife, making the wife a gratuitous beneficiary of the purchase by having the title conveyed so as to create an estate by the entirety, but the husband failed or neglected to carry out such proposition, and took title in his own name, the wife is not invested with an equitable right to enforce a reformation of the deed as against either the grantors or her husband. *Ibid.*

But on a transfer without consideration, if the legal conveyance be effectually made, the court will protect all equitable interests and enforce all equitable rights and duties under it as promptly and completely as if made with consideration. *Stone v. King* and *Dawson v. Dawson*, supra.

And on a bill filed to reform a voluntary deed on the ground of mistake, in which the dispute was between those claiming under the deed, the grantor being indifferent, the rule in equity that a deed will not be reformed at the instance of mere volunteers does not apply. *Adair v. McDonald*, 42 Ga. 506.

And a voluntary bond from a father to his son for the conveyance of land will in some instances be specifically enforced; and a bond given by a father to his son, who subsequently married, the assent to

such marriage being induced by the fact that the bond had been given to the son, and which bond was, subsequent to the marriage, transferred to a vendee for value, is founded upon a valuable consideration, so that it cannot be avoided by a subsequent purchaser of the land from the father with notice of the bond. *Anderson v. Green*, supra.

So, a pre-existing debt is sufficient consideration for a mortgage to entitle the mortgagee to correction of a mutual mistake therein, as against the mortgagor and a subsequent purchaser with notice. *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259.

And the existence of antecedent debts is a valuable consideration for the conveyance or assignment of property to secure the payment of the debts, and the trustee and creditors are purchasers for a valuable consideration; and in such case the trustee and creditors are not in any manner liable to the grantor in trust on account of mistake in quantity, and the grantor has no right as against them to rescission or compensation, to which his vendor may be substituted. *Western Min. & Mfg. Co. v. Peytona Cannel Coal Co.* 8 W. Va. 406.

So, a deed of conveyance founded upon a consideration to be paid to a third party therein named, and for labor expended on the premises conveyed, and for care and support of the grantor, is not an involuntary instrument, and mistakes in its execution may be corrected by a court of equity. *Pinkham v. Pinkham*, 60 Neb. 600, 83 N. W. 837.

Nor is a bond executed to the selectmen of a town and their successors in office, by a collector of town taxes, to secure the town from loss by any unfaithfulness in the official duty of the collector, regarded in chancery as a voluntary agreement not correctable in equity, but as founded upon a sufficient consideration, and not illegal or opposed to sound policy. *Montville v. Haughton*, 7 Conn. 543.

And a conveyance reciting a consideration of natural love and affection may be reformed so as to show a valuable consideration, such as the payment of an antecedent debt, on a cross bill in a cause instituted by creditors to cancel the conveyance as voluntary and fraudulent. *Orr v. Echols*, 119 Ala. 340, 24 So. 357.

So, a deed made by a father to his son in consideration of services rendered and love and affection is not purely voluntary, and may be reformed. *Baker v. Pyatt*, supra.

And a complaint to reform a deed made to the plaintiff by his father, which alleges that the consideration was love and affection and a specified sum of money, is sufficient on demurrer as showing a conveyance upon a valuable consideration. *Ibid.*

And a complaint to reform a deed made by a husband to his wife through a third person, for a past consideration of \$1,000, is sufficient on demurrer as showing a conveyance upon a valuable consideration. 28 L.R.A.(N.S.)

Comstock v. Coon, 135 Ind. 640, 35 N. E. 909.

The rule has been asserted and extensively acted upon, however, that a court of equity has jurisdiction in a proper case to reform or rectify a voluntary settlement, as well as a settlement for value. *Bonhole v. Henderson* [1895] 1 Ch. 742, appeal dismissed in [1895] 2 Ch. 202.

Under this rule, a deed of gift, when it is clearly shown that it does not conform to the intention of the donor, or was executed under a material misapprehension as to its effect, will be set aside in equity. *Meeks v. Stillwell*, 54 Ohio St. 541, 44 N. E. 267; *Mulock v. Mulock*, 31 N. J. Eq. 594; *Matteson v. Johnston*, 124 N. Y. Supp. 185.

And this is so, even in a case free from actual fraud. *Mulock v. Mulock*, supra.

And where a grantee is a volunteer, the donor who has conveyed a tract of land to her by deed may correct a mistake in such deed, if it be clearly shown, although the grantee may not have been cognizant of the mistake at the time of the conveyance. *Crockett v. Crockett*, 73 Ga. 647.

And where one person conveyed land to another for the purpose of opening a street in a city, and there was no other consideration for the conveyance but the benefit which the grantor was to derive from the opening of the street, and by subsequent events beyond the control of both parties the street could not be opened, a reconveyance of the land was decreed. *Quick v. Stuyvesant*, 2 Paige, 84.

So, the rule that a deed drawn by mistake for a different interest from that intended to be conveyed may be corrected applies to a deed of gift. *Andrews v. Andrews*, 12 Ind. 348.

And a voluntary deed of trust, executed under the supposition that it was revocable, and intended to be so, but reserving no power of revocation, and otherwise unadvised, improvident, and contrary to the intention of the parties, will be set aside in equity. *Garnsey v. Mundy*, 24 N. J. Eq. 243; *Kleeman v. Peltzer*, 17 Neb. 381, 22 N. W. 793.

And where a tenant in common of slaves voluntarily conveyed all of a particular kind which might fall to his share upon a division, and then fraudulently contrived that none of that kind should be allotted to him, a division made with this fraudulent intent is inconsistent with the rights vested in the donees, and will be remedied. *Dawson v. Dawson*, 16 N. C. (1 Dev. Eq.) 93, 18 Am. Dec. 573.

Nor is a mistake on the part of a donor in making a gift, in giving more than she intended at the time, insufficient to justify a decree of reformation. *Schrieber v. Goldsmith*, 39 Misc. 381, 79 N. Y. Supp. 846.

So, a son who occupies toward his mother a position of trust and confidence is bound, if his mother desires to make a deed of gift to him of a large part of her estate, to see that the deed in all substantial particulars conforms to her intention, and that she fully understands its nature and effect;

otherwise the deed will be set aside. *Mulock v. Mulock*, supra.

And where a father makes a gratuitous distribution of some of his lands among his sons, and a mistake is made in the description of the land in the deed to one of them, on the question of correction of the mistake it is immaterial whether any consideration was paid to the father for the deed, or whether the conveyance was made in pursuance of a prior agreement; the case stands in this regard, at least so far as the other sons are concerned, who also received a portion of the father's estate at the same time, upon substantially the same principles as if the sons inherited the whole of the lands so distributed to them, and held them as tenants in common, and were undertaking to make amicable partition, and the same mistake had occurred. *Cummings v. Freer*, 26 Mich. 128.

And a deed from a husband to his wife is supported by a meritorious consideration, being a provision for her support, and not a gratuity, and is entitled to the protection of a court of equity; and where the land is susceptible of identification, the description will be so reformed as to convey the land actually intended to be conveyed by the deed. *Partridge v. Partridge*, 220 Mo. 321, 132 Am. St. Rep. 584, 119 S. W. 415.

So, where a woman to whom her mother owed no duty that she did not owe to her other children procured from her mother, without consideration, a deed alleged to have been intended as a conveyance of certain land owned by the mother, but which did not describe the land in question, and thus failed to operate as a legal conveyance of it, she was not, after the death of her mother, entitled to a decree in equity against the other heirs of her mother, reforming the deed so as to describe the land intended to be conveyed, but the other heirs were entitled to a decree quieting in them severally such interest in the land as they were entitled to by inheritance. *Else v. Kennedy*, 67 Iowa, 376, 25 N. W. 290.

And where in a deed given in consideration of love and affection only, a mistake in the description of the premises occurs, and the grantee, on the faith of such deed, has gone into possession, made improvements, and expended money on the lands, a mortgagee of such grantee, who has taken his mortgage in good faith after such possession and improvements, may maintain a bill for the correction of the mistake against the grantor or his heirs or purchasers from them without consideration; such mortgagee has the superior equity as against such grantor and his heirs, and especially as against parties who have assumed to take a conveyance from them without consideration and for the fraudulent purpose of defeating the mortgage. *Cummings v. Freer*, supra.

So, in a voluntary conveyance, courts will not distinguish between children and grandchildren, in the exercise of their equitable powers in correcting a plain mistake in a

conveyance intended for their benefit; and this is especially so when the correction is made to render valid and effectual what would otherwise be void for informality. *Huss v. Morris*, 63 Pa. 367.

But a voluntary conveyance by a grandfather to a grandchild is not proof of his intention to place himself *in loco parentis* to the grantee, thus rendering the consideration a meritorious one and warranting a reformation of the deed. *Powell v. Morisey*, 98 N. C. 426, 2 Am. St. Rep. 343, 4 S. E. 185.

And a conveyance by an elderly man residing in the family of the grantee, by quitclaim deed, without valuable consideration, of his real estate, reserving to the grantor the use and improvement of the property during his natural life, and the right to dispose of any part thereof should it be necessary to his support, will not be reformed or set aside in equity on the ground of a mistake of the grantor as to its legal effect, without showing that he needs the avails of the property or some part of it for his support, since, until the exigency contemplated by the reservation has happened, the application for relief is premature. *Coley v. Coley*, 19 Conn. 114.

And where a father conveyed land to a married daughter in consideration of love and affection, and upon condition that, if she should die without children living at the time of her death, the land should revert to the grantor and his heirs as though no conveyance had been made; and the daughter died, leaving an infant child surviving her, who subsequently died, leaving his father heir to the property,—equity will not interfere, on a plea by the grandfather of the child against its father, that it was his intention in making the deed to his daughter that her husband should never in any event have any interest in or control over the property, and that the deed was executed by him with that understanding. *Pierson v. Armstrong*, 1 Iowa, 282, 63 Am. Dec. 440.

In the above case *Evants v. Strode*, 11 Ohio, 480, 38 Am. Dec. 744, supra, IV. c. 2, was distinguished upon the ground that in that case the decree of the court below was that the conveyance should be by deed of warranty, and the purchaser had paid his money for the land, and there was a prior contract which was to be affected by the deed.

Equity will not reform a deed of gift, however, against the intention of the donor. *Meeks v. Stillwell*, 54 Ohio St. 541, 44 N. E. 267.

And a voluntary deed, without reservation or power to alter or revoke it, of either real or personal property, cannot be disturbed by the grantor, as against him it is valid and binding, both at law and in equity. *Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557.

Nor will a court of equity set aside a voluntary conveyance on the application of the grantors, on the ground that they were ignorant as to what would be its legal ef-

fect and operation, and made a mistake in point of law. *Dupre v. Thompson*, 4 Barb. 279.

And as between a donor and one not sustaining to him any fiduciary or confidential relation, equity will not set aside a voluntary deed, however improvident its terms may be, if free from the imputation of fraud or undue influence, and if it was freely executed by the donor, with a knowledge of all the facts essential to a full and free exercise of his judgment. *Lott v. Kaiser*, 61 Tex. 665.

And a court of equity will hesitate to rectify a voluntary settlement at the instance of the settlor, merely on his own testimony as to his intention, unsupported by other evidence, such as written instructions, even though the rectification sought would bring the settlement more into harmony with recognized precedents and with what the settlor might reasonably have intended at the time. *Bonhote v. Henderson* [1895] 1 Ch. 742, appeal dismissed in [1895] 2 Ch. 202.

And a conveyance given for the purpose of putting property beyond the reach of creditors is fraudulent, and a court of equity will leave the parties where it finds them, and it will refuse the fraudulent grantor any relief founded on the idea that the grantee holds the property thus fraudulently conveyed in trust for his benefit; and no such trust will be recognized in equity for the purpose of working out a mistake to serve as the foundation for reforming a subsequent conveyance from the grantor to parties taking through the fraudulent grantee, without notice of the fraud, and holding the property fraudulently conveyed. *Kinney v. Consolidated Virginia Min. Co.* 4 Sawy. 382, Fed. Cas. No. 7,827.

So, a court of equity never lends its aid at the instance of the donee to reform a voluntary deed. *Mulock v. Mulock*, 31 N. J. Eq. 594; *Gwyer v. Spaulding*, 33 Neb. 573, 50 N. W. 681.

Courts of equity will not assist the grantee in an imperfect conveyance which is not supported by either a valuable or meritorious consideration, against either the grantor or his representatives. *Else v. Kennedy*, supra.

Nor will an error in the description of land in a voluntary conveyance be corrected in equity, unless all the parties consent. *Shears v. Westover*, 110 Mich. 505, 68 N. W. 266.

And it has been held that a voluntary deed cannot be corrected without the consent of all the parties to it. *Redding v. Rozell*, 59 Mich. 476, 26 N. W. 677.

And a voluntary settlement cannot be revoked or set aside, except upon proof of mental incapacity, mistake, fraud, or undue influence, unless it contains a power of revocation. *Taylor v. Buttrick*, 165 Mass. 547, 52 Am. St. Rep. 530, 43 N. E. 507.

Nor will equity correct a mistake in a voluntary deed, to the injury of a bona fide purchaser for value without notice. *Kilpatrick v. Strozier*, 67 Ga. 247.

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So, on a bill to correct a mistake in a voluntary deed, the evidence must be clear, unequivocal, and decisive as to the mistake. *Crockett v. Crockett*, 73 Ga. 647.

But to warrant the correction of a mistake in a voluntary deed, it is not required that the evidence must be so strong as to leave no reasonable doubt in the minds of the jury as to whether or not it was a mistake. This is the rule in criminal cases, before a jury are authorized to convict. *Ibid.*

And it is sufficient to entitle a person claiming under a deed of gift to have it reformed, if he accepted it as it was understood and intended to be drawn at the time it was executed; it is not necessary that the donee should be cognizant of the instructions given to the scrivener by the donor. *Wyche v. Greene*, 11 Ga. 159.

Where there is no actual fraud and no confidential or fiduciary relations between the parties to a contract, however, mere inadequacy of consideration is not sufficient to rescind a sale, unless it be so great as to shock the moral sense of mankind. *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39.

And an inadequacy of consideration which will warrant the rescinding of a sale must be established as of the date of the contract; none can be considered which may arise from subsequent enhancement, depreciation, or change of circumstances. *Ibid.*

And with reference to contracts of hazard, the factor of risk and hazard is such a disturbing element in the estimation of value that courts of equity, when inadequacy alone is in question, will refuse to interfere. *Ibid.*

3. Wills.

The broad rule has been asserted that equity has jurisdiction as to mistakes, as well in regard to wills as other matters. *Wood v. White*, 32 Me. 340, 52 Am. Dec. 654.

Within this rule, equity has power to correct, and will correct, a mistake in the name of a legatee in a will. *Ibid.*

And equity has jurisdiction to correct a mistake in the description of land devised by will. *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128.

And where a testator devised lot 6 in a certain block to a brother, and disposed of the remainder of his estate to others, and it appeared that he did not own lot 6, but did own lot 3 in said block, and that lot 3 was otherwise properly described in the will, it was held to have been a lawful devise of lot 3. *Patch v. White*, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 810.

So, devises concerning land must be in writing, but in case of a surrender made by a steward of a copyhold, if there be any mistake there, that is only matter of fact; and the courts at law will in that case admit an averment that there was a mistake either in the lands or uses. *Towers v. Moor*, 2 Vern. 98.

So, relief may, in a plain case of mistake in the description of land devised by will, be obtained without resort to equity. *Thomson v. Thomson*, supra.

And where a paper was executed by a person who had a perfect legal right to dispose of her property, and intended to do so, but by a mistake of the scrivener it was drawn in the form of a will, when it ought to have been a deed or declaration of trust, a court of equity has power to correct the mistake, reform the instrument, and decree it to be made such as it ought to have been made, so as effectually to carry out the intention of the parties. *Lant's Appeal*, 95 Pa. 279, 40 Am. Rep. 646.

But to authorize a correction of a mistake in the description of land devised by will in equity, the mistake must have been a clear one, or a clear omission, demonstrable from the structure and scope of the will itself. *Ibid*.

And where legacies are given upon trust to accumulate the interest and dividends, such accumulated interest and dividends will not pass by a gift over of the principal sums, unless the court is satisfied, by a reference to other clauses of the will, that the interest and dividends were omitted in the gift by a clerical mistake. *Harvey v. Cooke*, 4 Russ. Ch. 34.

The prevailing rule would seem to be, however, that a will cannot be corrected because the testator misapprehended its effect. *Arthur v. Arthur*, 10 Barb. 9.

And that equity will not entertain a bill to reform a will. *Bingel v. Volz*, 142 Ill. 214, 16 L.R.A. 321, 34 Am. St. Rep. 64, 31 N. E. 13; *Goode v. Goode*, 22 Mo. 518, 66 Am. Dec. 630; *Box v. Barrett*, L. R. 3 Eq. 244; *Newburgh v. Newburgh*, 5 Madd. Ch. 364.

No court can decree the reformation and correction of a will to make it conform to the purpose and intention of the testator not expressed in the instrument as executed by him, after the statutory limitation for the probate of a will has expired, thereby barring a contest; the only question remaining open is that of the true construction of the instrument. *Schlottman v. Hoffman*, 73 Miss. 188, 55 Am. St. Rep. 527, 18 So. 893.

And where there is no latent ambiguity in wills, extrinsic evidence cannot be received to show intentions not expressed in them. *Cunningham v. Cunningham*, 20 S. C. 317; *Meckley's Estate*, 20 Pa. 478.

Nor, as a general rule, is parol evidence admissible to supply omissions, or to control or explain the intention, or to vary the legal construction. *Arthur v. Arthur*, supra.

Within this rule, a court of equity has no power to reform a will devising real estate. *Chambers v. Watson*, 56 Iowa, 676, 10 N. W. 239.

And when a testator devises land which he does not own, accurately describing it, a bill in equity will not lie to construe the will on the ground of mistake, and to substitute another tract of land owned by the

testator, in place of the one devised. *Bingel v. Volz*, supra.

Nor can a devise of land be explained by parol proof touching the declarations of the testator, or instructions given by him for the making of his will; and parol proof cannot be admitted to explain a surrender of copyhold land, to show a mistake either in the land or the uses. *Towers v. Moor*, supra.

And canceling a former will by mistake, or on a presumption that a later will is good which proves void, will not let in the heir. *Onions v. Tyrer*, 1 P. Wms. 343.

And when an election is once made under a will, by a party bound to elect either expressly or impliedly, with full knowledge of all the facts, it binds him and those who claim under him, though made in ignorance of law. *Waggoner v. Waggoner* (Va.) 68 S. E. 990.

So, where a testator devised certain lands to his widow for her own use during her natural life, and on her death to be divided, share and share alike, between his surviving children, and a son of the testator died only a few months before him, leaving children surviving him, the testator being then too ill to change his will, the court is not authorized to let in such children on the ground of mistake. *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474.

But when one is required to make an election between the provision of a will and the provision made by the law of descent, he is entitled to know all the facts and circumstances affecting his choice, and to inquire into and ascertain all the circumstances; and if the election is made in ignorance, or under a mistake as to the real nature of the properties, or as to the nature of his own rights, such a mistake is regarded as one of fact, rather than of law; and a court of equity will permit the election to be revoked, unless rights of third persons have intervened, which would be interfered with by the revocation. *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811.

And where a testator directed that out of a certain portion of his real estate absolutely devised to his three children, his widow's life estate of one third of his whole property should be allotted by certain commissioners to be appointed by the orphans' court, and the other portion so devised to be divided among his said children; and the commissioners, intending under their apportionment to carry into effect the directions and wishes of the widow and children, erroneously and contrary to the directions of the will, made one lot subject to the widow's life estate, and assigned a lot intended by the parties for one to another of the devisees, a court of chancery may correct the error, reform the award, and make it conform to the direction of the parties, and decree that the parties shall account for rents and profits received under the erroneous award. *Baynard v. Norris*, 5 Gill, 468, 46 Am. Dec. 647.

So, where one elects to take under a

will, under a misconception of fact as to his rights under the will, the election will be disregarded, when the other parties affected by such election can be placed substantially in the same situation as if there had been no election. *Waggoner v. Waggoner*, supra.

And where a testator and his wife each owned an undivided half interest in the homestead property, and he devised the whole to her, she made no irrevocable election to take under the will, where there was no express election, and it did not appear that she knew that, in claiming the devise, she might surrender her own interest in the property, or that she intended to do so. *Ibid.*

4. Contracts with reference to homesteads.

A contract for the sale of a homestead, not containing a release of the right of homestead and the acknowledgment required by law for the transfer of a homestead, has no validity; and a court of equity has no power to reform such a contract by the insertion therein of a release of that right and an acknowledgment; it cannot give life to an instrument having no validity in itself. *Stodalka v. Novotny*, 144 Ill. 125, 33 N. E. 534.

Nor can the court specifically enforce such a contract by reforming it in accordance with the verbal contract, although the omission of such release and acknowledgment may be the result of mistake or ignorance of the officer drafting the same. *Ibid.*

And a conveyance of the homestead by a husband and wife, the certificate of acknowledgment to which is substantially defective, will not be reformed in equity on the ground that the examination and acknowledgment of the wife were in fact properly made, but that this fact was not shown by the officer's certificate, owing to ignorance or mistake on his part; nor will it be specifically enforced as an executory agreement to convey. *Cox v. Holcomb*, 87 Ala. 589, 13 Am. St. Rep. 79, 6 So. 309.

Nor will a court of equity reform a deed purporting to convey all of a wife's interest in a homestead estate, so that it will convey her life interest therein, where she fails to show by unequivocal evidence that she intended to convey only her life interest. *Frederick v. Henderson*, 94 Mo. 98, 7 S. W. 186.

And since the Georgia act of December 12, 1871, to provide for sales of property in the state to secure liens and other debts, a court of equity cannot reform an absolute deed executed under that act into a mortgage, for the purpose of protecting the wife's homestead, upon the allegation that such instrument was intended as a mortgage, was so understood by her and her husband, and that upon this understanding she gave her consent to its execution. *Barnett v. People's Bank*, 65 Ga. 51.

So, a mortgage will not be reformed so as to include the homestead of the mortgagors, 28 L.R.A.(N.S.)

though such homestead was intended to be embraced in it, if the statute of the state declares that no mortgage of a homestead by a married man shall be valid or of any effect without the signature of his wife to the same, though before suit was brought the husband had died, and the widow by her answer assented to such reformation. *O'Malley v. Ruddy*, 79 Wis. 147, 24 Am. St. Rep. 702, 48 N. W. 116.

And equity will not reform a mortgage on community property executed by a husband, in an action by the mortgagee against the wife, who has filed a declaration of homestead on such property, where the wife had no notice of the defective mortgage at the time of the filing of such declaration of homestead. *Adams v. Baker*, 24 Nev. 162, 77 Am. St. Rep. 799, 51 Pac. 252.

And where a mortgage on land of a married man, executed by him and his wife, and taken by the mortgagee as security for moneys loaned to the husband, with the understanding and belief of all parties that it was a mortgage of the homestead, was found to be of other lands only, the instrument could not be reformed as against the wife after the husband's death, when the homestead had descended or been devised to her, and it would not have been reformed, even as against the husband in his lifetime, since by the statute it would have been void without the wife's signature. *Petesich v. Hambach*, 48 Wis. 443, 4 N. W. 565.

So, if a mortgagor and mortgagee of a homestead mortgaged for money with which to pay off a prior mortgage labored under a mutual mistake in supposing that the homestead belonged to the mortgagor in fee under her husband's will, to the exclusion of the minor children, equity will not grant relief by subrogating such mortgagee to the rights of the prior mortgagee. *Kleimann v. Gieselmann*, 114 Mo. 437, 35 Am. St. Rep. 761, 21 S. W. 796.

And where a widow gave a deed of trust on premises she was occupying, to secure a debt due from her brother and son-in-law, and the lot was sold for the debt, she is entitled to show, in an action against her to try title, that she was induced to make the deed by the fraudulent representations of the agent of the creditors, who was an attorney, and that he assured her that the deed was a mere matter of form, and that she incurred no risk, since the lot was protected as her homestead, and that the creditors could not, if they would, sell it for the debt; and this would be sufficient to support a prayer for relief. *Ramey v. Allison*, 64 Tex. 697.

Where a husband and wife own land in common constituting their homestead, however, the fact that the wife was ignorant of her interest as part owner is immaterial as respects the right of a purchaser to reform a conveyance from them, where it appears that full value was paid by the purchaser, and the conveyance was executed with proper formalities to pass her interest. *Parker v. Parker*, 88 Ala. 362, 16 Am. St. Rep. 52, 6 So. 740.

And equity will correct a mutual mistake in the description in a written instrument by which a man and wife have sought to encumber their homestead. *Silliman v. Taylor*, 35 Tex. Civ. App. 490, 80 S. W. 651; *Parker v. Parker*, *supra*; *Conrad v. Schwamb*, 53 Wis. 372, 10 N. W. 395.

If the quantity of land conveyed is not thereby increased. *Witherington v. Mason*, 86 Ala. 345, 11 Am. St. Rep. 41, 5 So. 679; *Gardner v. Moore*, 75 Ala. 394, 51 Am. Rep. 454; *Snell v. Snell*, 123 Ill. 403, 5 Am. St. Rep. 526, 14 N. E. 684.

And this is so, although the homestead belonged to them as tenants in common. *Parker v. Parker*, *supra*.

In such case the deed will be treated as an executory contract by the husband to convey, which equity will enforce, after the homestead right ceases, against the husband, or against his heirs after his death intestate, though not against his widow. *Conrad v. Schwamb*, *supra*.

And a parol contract that a son who was the grantee in a deed of a homestead conveyed by his father alone was to support his parents during their life, and at their death become the owner of the land in fee, if fully performed by such son, may be specifically enforced by him against the heirs at law of the grantor. *Whitmore v. Hay*, 85 Wis. 240, 39 Am. St. Rep. 838, 55 N. W. 708.

And this is so, though a deed of a homestead made by a father alone to his son is void as a conveyance. *Ibid*.

So, where the purpose of an action and the effect of a judgment was merely to reform a deed from the defendant to the plaintiff, so as to convey an undivided half interest, instead of the whole, the effect of a decree of divorce between the plaintiff and defendant, regulating the rights of the parties in a homestead, and providing for a conveyance from the divorced husband to the divorced wife of an undivided half thereof, is not involved, and none of the rights of the parties under such decree of divorce are determined or affected by the judgment reforming the deed; and where the defendant in her answer claimed the whole of the property, she cannot complain of a judgment giving her an undivided half thereof. *Holt v. Holt*, 120 Cal. 67, 52 Pac. 119.

And if a husband and wife agreed to mortgage their homestead, and executed a mortgage which they knew did not include the whole thereof, but which they knew was accepted by the mortgagee in the belief that it included all such homestead, the mortgage may be reformed in equity so as to include all the land which was agreed to be mortgaged. *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, 44 Pac. 670.

And to entitle a mortgagee to relief, where the mortgagor has exempted a homestead from the mortgage, which was supposed by mistake to be his legal right, when in fact he was not entitled to it, he must allege and prove that all the land that was subject to the mortgage was intended to be mortgaged, and that, but for the mis-

taken belief that the homestead was not subject to the mortgage, it would have been included. *Lear v. Prather*, 89 Ky. 501, 12 S. W. 946.

So, where a man deeded his homestead farm, neither he nor the purchaser knowing its actual external limits, and the deed, through ignorance and misapprehension, included other small parcels of adjoining land, which, many years before, one of the owner's early predecessors in title had sold and conveyed, the mistake is one of fact, and, being mutual, the deed should be reformed. *Andrews v. Andrews*, 81 Me. 338, 17 Atl. 166.

And where a husband and wife executed a mortgage intending to cover 160 acres, but by mistake it was drawn to cover only 40 acres, and third persons purchased the land subject to the mortgage, understanding that it covered the whole 160 acres, and subsequently another person discovered the mistake, and procured a conveyance of a part of the land from the previous purchasers, the portion so conveyed including 40 acres which, when the mortgage was executed, was occupied by the mortgagors as a homestead, the last purchaser, who purchased with knowledge of the mistake and with intent to defraud, could not make the defense that the mortgage could not be so reformed as to cover the homestead, the wife not having actually signed the mortgage of it. *Ford v. Daniells*, 71 Mich. 77, 38 N. W. 708.

5. Contracts of married women.

The rule which, by creating an arbitrary disability, protects married women from the alienation of their real estate through the acts of coercion of their husbands, is founded on a policy which is respected by courts of chancery, and they refuse their aid when the defective deed sought to be reformed is that of a married woman and the defect arises from the omission of some statutory requisite. *Dickinson v. Glenney*, 27 Conn. 104; *Holland v. Moon*, 39 Ark. 120.

Contracts of married women, not made in the form prescribed by law, are absolutely void. *Dickinson v. Glenney*, *supra*; *Barrett v. Tewksbury*, 9 Cal. 13; *Wedel v. Herman*, 59 Cal. 507; *Williams v. Cudd*, 26 S. C. 213, 4 Am. St. Rep. 714, 2 S. E. 14.

And where there is an omission of some statutory requirement in the deed of a married woman, essential to its validity, the mistake cannot be corrected by a court of equity. *Gebb v. Rose*, 40 Md. 387; *Bowden v. Bland*, 53 Ark. 53, 22 Am. St. Rep. 179, 13 S. W. 420; *Barrett v. Tewksbury* and *Wedel v. Herman*, *supra*; *Leonis v. Lazzarovich*, 55 Cal. 52; *Moulton v. Hurd*, 20 Ill. 137, 71 Am. Dec. 257; *Hamar v. Medsker*, 60 Ind. 413; *Grapengether v. Fejervary*, 9 Iowa, 163, 74 Am. Dec. 336; *Townsley v. Chapin*, 12 Allen, 476; *Montana Nat. Bank v. Schmidt*, 6 Mont. 609, 13 Pac. 382; *Davenport v. Sovil*, 6 Ohio

St. 459; *Spencer v. Reese*, 165 Pa. 158, 30 Atl. 722.

And chancery will not regard a defective deed of a married woman as an executory contract, and look through it at the contract behind it. *Dickinson v. Glenney*, supra.

And this is so, although the woman's husband orally assented to the original deed. *Townsley v. Chapin*, supra.

Thus, the omission of a wife's name in the body of a deed is fatal to it as a conveyance of her estate, and equity will not correct the instrument or grant any relief as against her. *Heaton v. Fryberger*, 38 Iowa, 185.

And the clerk's certificate to a deed or mortgage by a married woman cannot, even under an allegation of mistake, be contradicted by showing that the instrument was not voluntarily acknowledged by the wife, or that her husband was present. *Tichenor v. Yankey*, 89 Ky. 508, 12 S. W. 947.

Nor, if the deed of a married woman has been defectively executed in that her husband did not join, will equity decree the execution of a new conveyance to protect the title; nor, if the deed be a mortgage, treat it as valid and decree foreclosure, since the deed, thus defective, is absolutely void. *Chapman v. Long*, 66 Vt. 656, 30 Atl. 3.

And where in the relinquishment of a married woman the word "inheritance" is omitted from the prescribed formula, "all her estate, interest, and inheritance," the deed does not convey her interest in the land; and upon her death intestate, her husband surviving, her children become entitled to two thirds of this land, and a court of equity cannot supply the omitted word, since that court cannot aid the defective execution of a power, where the power is created by statute,—especially where the statute power is given to married women. *Williams v. Cudd*, 26 S. C. 213, 4 Am. St. Rep. 714, 2 S. E. 14.

And where a wife, for the purpose of conveying her real estate to her husband, had executed a voluntary deed which was defective in a statutory requisite, and, after the death of both, the devisee of the husband brought a petition in chancery against the heir of the wife to compel him to convey, the petitioner's equity was not aided by the fact that the husband had expended money in repairs and improvements on the land, nor by the fact that the respondent was a mere volunteer, as he himself stood in the same position. *Dickinson v. Glenney*, supra.

So, a mortgage executed prior to the taking effect of the Ohio act of March 22, 1849, to give additional security to land titles in that state, cannot be reformed as against a widow. *Davenport v. Sovil*, supra.

And a defect in a deed of a husband and wife cannot be rectified as against the wife. *Carr v. Williams*, 10 Ohio, 305, 38 Am. Dec. 87.

And where a husband and wife joined in the execution of a mortgage which by mis-

take described the wrong tract of land, a court of chancery has no power to correct the mistake so that the relinquishment of dower upon the part of the wife shall apply to land not described in the mortgage, although such land was intended by all the parties to be described therein. *Martin v. Hargardine*, 46 Ill. 322.

And where husband and wife join in a conveyance of the wife's land, which by mistake conveys only a dower interest on the wife's part, although she intended to convey her entire estate, it cannot be made to so operate. *Bowden v. Bland*, supra.

And where the statute authorizes a husband and wife to convey the wife's realty by their joint deed, a deed purporting to convey the real estate of three married women, which was signed, sealed, and acknowledged by them and their husbands, but in which the husbands were not named as grantors of the premises, is a nullity, and cannot be validated by reformation in equity; equity will not interfere in a case of nonexecution of statutory powers. *Cannon v. Beatty*, 19 R. I. 524, 34 Atl. 1111.

So, a conveyance of a wife's land, jointly executed by her and her husband in consideration of the husband's debt, is void, and a court of equity will not reform it on account of a mistake. *Connor v. Armstrong*, 86 Ala. 262, 5 So. 449.

And where ejectment was brought by a widow to recover certain land held by a person under a defective conveyance made by her and her husband, and such person by his answer prayed for a decree reforming the deed and for specific performance, as the property at the time of the defective deed was not the plaintiff's separate property, and had not been conveyed to her in form and manner required by the statute, the deed as to her was null and void and could not be reformed, but the court should, while rendering judgment for plaintiff for possession of the premises, also award the defendant the value of permanent improvements on the land, together with the purchase money paid for it by plaintiff's grantee, minus the value of the rents and profits collected by the defendant while in possession. *Shroyer v. Nickell*, 55 Mo. 264.

Under statutes doing away with a wife's disability to contract, however, a deed or contract of a married woman may be reformed in equity, the same as those of unmarried women. *Murdoch v. Leonard*, 15 Wash. 142, 45 Pac. 751; *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, 44 Pac. 670; *Bradshaw v. Atkins*, 110 Ill. 323.

But where a deed was inoperative when executed, for want of power on the part of the grantor because of coverture, the removal of the disability cannot render such deed effectual and binding, as it was a mere nullity. *Townsley v. Chapin*, 12 Allen, 476; *Heaton v. Fryberger*, supra.

Under statutes of this class, a mistake in the description of property in a deed executed by a married woman may be corrected in equity. *Styers v. Robbins*, 76 Ind. 547; *Hamar v. Medsker*, 60 Ind. 413; *Mer-*

chants' & L. Bldg. Asso. v. Scanlan, 144 Ind. 11, 42 N. E. 1008.

And the correction may be either against her, or, after her decease, against her heirs. *Hamar v. Medsker*, supra.

And a mistake of law in thinking that a deed signed and acknowledged by the owner of land and his wife, without the wife's name appearing in the body of the deed, was sufficient to convey all their title and estate, authorizes a correction in equity, as would a mistake of fact arising from the supposition that the name did appear therein. *Radebaugh v. Scanlan*, 41 Ind. App. 109, 82 N. E. 544.

So, where a husband joins his wife in signing and acknowledging a mortgage on the wife's real estate, and by mutual mistake the husband's name is omitted from the conveying clause, the mortgagee is entitled to have the mortgage reformed. *Collins v. Cornwell*, 131 Ind. 20, 30 N. E. 796.

And the rule is the same where the names of the parties appeared only where they signed and in the certificate of acknowledgment by the notary; and in such case a deed should be reformed so as to express the mutual intention of all the parties. *Parish v. Camplin*, 139 Ind. 1, 37 N. E. 607.

And a clerical mistake in the description of land intended to be deeded or mortgaged by a married woman may be corrected in equity upon a proper showing. *Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211; *Savings & L. Soc. v. Meeks*, 66 Cal. 371, 5 Pac. 624; *Carper v. Munger*, 62 Ind. 481.

In *Savings & L. Soc. v. Meeks*, supra, *Leonis v. Lazzarovich*, 55 Cal. 52, supra, was distinguished upon the ground that that case was an attempt to reform a deed of a married woman by making it include other lands than those conveyed by it, which was beyond the power of the court, and *Barrett v. Tewksbury*, 9 Cal. 14, supra, was distinguished upon the ground that that was an action to compel a married woman to acknowledge a conveyance of her separate property, which was beyond the power of the court.

So, where a mortgage executed by a married woman has by mistake described a tract of land not owned by the mortgagor, instead of the land intended to be mortgaged, the mistake may be corrected and the mortgage enforced as to the land intended to be embraced. *Tichenor v. Yankey*, 89 Ky. 508, 12 S. W. 947.

And where, by the inadvertence of the scrivener in the preparation of a deed, and by mutual mistake of all the parties thereto at the time of the execution thereof, the description of the premises conveyed was erroneously stated as an undivided three fifths, while it was intended to convey an undivided four fifths, the deed may be reformed so as to express the mutual intentions of the parties, even though such relief be sought against a married woman. *Parish v. Camplin*, supra.

And while a conveyance of a wife's land in consideration of her husband's debt is 28 L.R.A.(N.3.)

void, and equity will not reform it on account of a mistake in the prescription of the land, if the sole consideration is the payment of a debt for necessary family supplies, for which the wife's statutory estate is liable, it may be reformed in equity so that the grantee may prosecute or defend his rights under it in a court of law; and if the consideration is partly a debt of the husband and partly a debt for which the wife's statutory estate is liable, the court will decree a reformation, but on condition that the grantee pay to the wife the amount of the husband's debt which formed part of the consideration, with interest thereon. *Connor v. Armstrong*, 86 Ala. 262, 5 So. 449.

So, where an acknowledgment of a written instrument by a married woman is properly made, but defectively certified, a party interested may have an action to correct the certificate. *Hutchinson v. Ainsworth*, 63 Cal. 286; *Wedel v. Herman*, 59 Cal. 507; *Bunnell & E. Invest. Co. v. Curtis*, 5 Idaho, 652, 51 Pac. 767.

And the notary before whom a mortgage was acknowledged is not a necessary party defendant in an action to foreclose the mortgage executed by a married woman and to reform the certificate of the notary. *Hutchinson v. Ainsworth*, 73 Cal. 452, 2 Am. St. Rep. 823, 15 Pac. 82.

But if the defect in the certificate was such that it did not show that the instrument was read or otherwise made known to the married woman, and the evidence as to whether it was read to her or not is conflicting, reformation of the certificate will be refused. *Spencer v. Reese*, 165 Pa. 158, 30 Atl. 722.

So, where a married woman agrees to reconvey property to her husband upon his request, in consideration of a conveyance of the same to her, but the husband fails to join the wife in such reconveyance, owing to the erroneous advice of counsel, equity will relieve against the legal mistake, and order a reconveyance, unless there are substantial reasons to the contrary. *Haussman v. Burnham*, 59 Conn. 117, 21 Am. St. Rep. 74, 22 Atl. 1065.

Such a reconveyance is not voluntary so as to prevent equity from enforcing it, in the absence of proof of her indebtedness, or that creditors were defrauded or prejudiced. *Ibid*.

And equity will enforce such promise, although she had made an ineffectual attempt to reconvey. *Ibid*.

So, a bond given to a woman before marriage, by her proposed husband, to leave her a sum of money, though extinguished at law by the marriage, is good in equity and binds the real assets; and it will be decreed that the wife, after her husband's death, may redeem a mortgage and hold over, though copyhold as well as freehold was included in the security. *Acton v. Peirce*, 2 Vern. 480.

And where land was conveyed to a husband and wife in such terms as to vest in them a tenancy by the entirety, but their

intention was to hold as tenants in common, and they believed the legal effect of the deed was to make them hold as tenants in common, a court of equity will, after the death of the husband, reform the deed on the ground of mistake, and vest the title to half of the land in the heirs of the husband. *Marshall v. Lane*, 27 App. D. C. 276.

But the erroneous belief of both a husband and wife on their marriage, that a particular property already stood settled, is no ground for reforming a settlement so as to make it include it. *Barrow v. Barrow*, 18 Beav. 529.

And where a marriage settlement was drawn, as the intended husband alleged, in a manner contrary to the agreement, but before the marriage he knew its contents, and executed it under protest, reserving his right to set it aside, he cannot, after the marriage, sustain a suit to rectify it. *Eaton v. Bennett*, 34 Beav. 196.

And the fact that a contract between a husband and wife for the release and relinquishment by each of all interest, present and contingent, in the real and personal estate of the other, was entered into by the wife in ignorance of a law revoking her will by her marriage, will not authorize either party to have such contract canceled; the contract will be enforced precisely as though she knew her will was revoked, or as though no will had been made. *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956.

V. Statutes of frauds as affecting parol variation.

a. The general rule.

The general rule both at law and in equity is that parol evidence is not admissible to vary a written instrument. *Wheaton v. Wheaton*, 9 Conn. 96; *Schwass v. Hershey*, 125 Ill. 653, 18 N. E. 272; *Broadwell v. Broadwell*, 6 Ill. 599; *Wolsey v. Neeley*, 46 Ill. App. 387; *Murphy v. Trigg*, 1 T. B. Mon. 73; *Watkins v. Stockett*, 6 Harr. & J. 435; *Wesley v. Thomas*, 6 Harr. & J. 24; *Kidd v. Carson*, 33 Md. 37; *Macomber v. Peckham*, 16 R. I. 485, 17 Atl. 910; *Ordeman v. Lawson*, 49 Md. 135; *Shirley v. Rice*, 79 Va. 442; *Baltzer v. Raleigh & A. Air Line R. Co.* 115 U. S. 634, 29 L. ed. 505, 6 Sup. Ct. Rep. 216; *Clinan v. Cooke*, 1 Sch. & Lef. 22, 6 Eng. Rul. Cas. 721; *Price v. Dyer*, 17 Ves. Jr. 356.

Except where fraud is charged, or in cases of trust. *Watkins v. Stockett*, supra.

The writing, in contemplation of law, contains the true agreement of the parties. *Schwass v. Hershey* and *Ordeman v. Lawson*, supra.

And a writing solemnly signed, sealed, acknowledged before a magistrate, and delivered by a person, is evidence of his intent so convincing and conclusive that generally no evidence will be received to contradict it. *Western Min. & Mfg. Co. v. Peytona Cannel Coal Co.* 8 W. Va. 406.

In the absence of fraud, accident, or mistake, the terms of a deed cannot be varied 28 L.R.A.(N.S.)

by parol evidence of what occurred between the parties, either before or during its execution; all prior contracts, written or oral, between them, being merged in the subsequent deed. *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239.

And if the instrument in question is clear and unambiguous in its terms and certain in its legal effect, parol evidence is not admissible to change or vary it, and it is immaterial what the parties to it believed as to the legal effect of the form in which they contracted. *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291, 53 N. E. 391.

And it is not competent in an action against an indorser by his immediate indorsee, upon an indorsement of a negotiable promissory note made in blank, to prove as a defense that, as part of the transaction, it was agreed between the parties, but not in writing, that the indorsement should merely have the legal effect of one expressed to be without recourse. *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647.

And a promissory note reading, "I promise to pay," and signed by an individual with the designation of "pres. and treas." of a named corporation added to his name, is the individual obligation of the person signing, and not the obligation of the corporation, and oral testimony to show that at the time the note was given and afterwards it was understood and agreed by the parties that the note was the note of the corporation is inadmissible in an action on the note. *Davis v. England*, 141 Mass. 587, 6 N. E. 731.

So, under the English statute of frauds and those statutes of the American states copied from it, parol evidence is not admissible to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud or mistake, or omitted by design, upon mutual confidence between the parties. *Taylor v. Luther*, 2 Summ. 228, Fed. Cas. No. 13,796.

And where it was a part of a grant of annuity that it should be redeemable, but the grant left out the agreement that it should be redeemable on the idea that, if inserted, the transaction would be usurious, parol evidence to this effect cannot be given, as it would contradict the deed, it not being charged that the agreement was omitted by fraud. *Irnham v. Child*, 1 Bro. Ch. 92; *Hare v. Shearwood*, 3 Bro. Ch. 168; *Portmore v. Morris*, 2 Bro. Ch. 219.

And a representation that the agreement would be void unless all the creditors signed it, upon which the signature of a written instrument was obtained, is not admissible in evidence, in an action to reform the agreement, since it would give the agreement a meaning different from that which appeared upon the face of it. *Lewis v. Jones*, 4 Barn. & C. 512.

Nor are statements of a grantor in an absolute deed, in the absence of the grantee, admissible in evidence to show that a life estate only was intended to be conveyed. *Ryder v. Ryder*, 244 Ill. 297, 91 N. E. 451.

And it cannot be shown by parol evidence that the object or purpose of a deed duly delivered to the grantee was different from that implied by its terms unless executed to secure the payment of a debt or the performance of some other act. *Finlayson v. Finlayson*, 17 Or. 347, 3 L.R.A. 801, 11 Am. St. Rep. 836, 21 Pac. 57.

And oral testimony cannot be received in equity to reform a written executory contract for the sale of land on account of a mutual mistake, and to specifically enforce it as reformed. *Macomber v. Peckham*, 16 R. I. 485, 17 Atl. 910; *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133; *Elder v. Elder*, 10 Me. 80, 25 Am. Dec. 205.

Nor is parol evidence tendered not to enforce a collateral stipulation, but to show that the transaction was conducted on a different basis from that shown on the face of the instrument, admissible. *Croome v. Le-diard*, 2 Myl. & K. 251.

So, under a statute of frauds requiring all declarations for the creation of trusts or confidences in land, except resulting trusts, to be in writing, the effect of an absolute deed cannot be changed by showing a parol agreement of the grantee to hold a life estate only, with remainder to specified persons. *Ryder v. Ryder*, supra.

And a statute like Cal. Civ. Code, § 3402, providing that a contract may be first revised and then specifically enforced, does not apply to an action on a contract for a sale of land, insufficient under a statute of frauds. *Baume v. Morse* (Cal. App.) 110 Pac. 350.

And under a statute like Cal. Code Civ. Proc. § 1856, providing that when an agreement is reduced to writing, no other evidence of the terms thereof can be shown, with immaterial exceptions, no new terms can be introduced by parol into a written contract for the sale of land, insufficient under a statute of frauds. *Ibid*.

So, evidence designed to change or vary the written contract expressed in a title bond is inadmissible. *Hancock v. Cossett*, 45 Fed. 754.

And where a vendor stipulates with the vendee that his deed shall save the rights of a tenant in possession, but the stipulation, through the fraud or mistake of the vendee, is not carried into the deed, the tenant can claim no relief in equity against the vendee, since he claims under a contract void by the statute of frauds. *Young v. Miller*, 10 Ohio, 85.

And parol evidence is not admissible to prove from conversations before and at the time of signing an agreement for a lease, that the intent of the parties was different from a memorandum, though the same was written by the lessee, and the words which were omitted in the memorandum constituted the purport of the conversation. *Rich v. Jackson*, 4 Bro. Ch. 514.

And where a mortgage is satisfied by payment and receipt indorsed, parol evidence of any agreement contradicting the receipt is not admissible. *Re Dunham*, 9 Phila. 471, Fed. Cas. No. 4146.
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There is no objection to correcting a deed by parol evidence, however, where there is anything in writing beyond the parol evidence to go by. *Mortimer v. Shortall*, 2 Drury & War. 363.

And a mistake in a written instrument may be corrected upon parol evidence, where the parol evidence was corroborated by the documents and subsequent transactions in the case. *Ibid*.

And equity will reform a deed the sole purpose of which was to effectuate the award of arbitrators, which purpose it did not accomplish, since it can reform the deed by having the award before it, without resorting to parol evidence. *Green v. Morris & E. R. Co.* 12 N. J. Eq. 165.

So, while on the question of construction of a written instrument no evidence of the intention of the parties is admissible, extrinsic evidence may be adduced to show the position of the parties, the state of the funds, and the rights and interests of the parties in them. *Bradford v. Romney*, 30 Beav. 431.

b. Rule that mistake and fraud create admissibility.

1. Generally.

The general rule that excludes parol evidence when offered to vary or control written contracts does not apply to cases where the written contract was obtained by fraud, mistake, or imposition, and the object of the evidence is to correct it. *Ring v. Aslforth*, 3 Iowa, 458; *Pierson v. McCahill*, 21 Cal. 123; *Murray v. Dake*, 46 Cal. 644.

Fraud or mistake always constitutes an exception to the general rule that parol evidence is inadmissible for the purpose of contradicting, adding to, or varying the language of a written instrument. *Isenhoot v. Chamberlain*, 59 Cal. 630; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. ed. 580.

And parol evidence is admissible in a cause in equity for relief from mistake in a written contract or other instrument to show the mistake and what the real contract was, as well as to show fraud. *Wagenblast v. Washburn*, 12 Cal. 208; *Hathaway v. Brady*, 23 Cal. 121; *Pierson v. McCahill*, supra; *Murray v. Dake*, 46 Cal. 644; *Isenhoot v. Chamberlain*, supra; *Blackburn v. Randolph*, 33 Ark. 119; *Chapman v. Allen*, Kirby, 399, 1 Am. Dec. 24; *Trout v. Goodman*, 7 Ga. 383; *Wall v. Arrington*, 13 Ga. 88; *Hunter v. Bilyeu*, 30 Ill. 228; *Schwass v. Hershey*, 125 Ill. 653, 18 N. E. 272; *Gray v. Woods*, 4 Blackf. 432; *Hileman v. Wright*, 9 Ind. 126; *Lee v. Percival*, 85 Iowa, 639, 52 N. W. 543; *Hausbrandt v. Hofer*, 117 Iowa, 103, 94 Am. St. Rep. 289, 90 N. W. 494; *Anderson v. Bacon*, 1 A. K. Marsh. 48; *Murphy v. Trigg*, 1 T. B. Mon. 76; *Nutall v. Nutall*, 26 Ky. L. Rep. 671, 82 S. W. 377; *Farley v. Bryant*, 32 Me. 474; *Moale v. Buchanan*, 11 Gill & J. 314; *Ordeman v. Lawson*, 49 Md. 135; *Popplein v. Foley*, 61 Md. 381; *Gillespie v. Moon*, 2 Johns. Ch. 596, 7 Am. Dec. 559; *Pennell v. Wilson*, 2 Robt. 505; *Forester v. Van Aiken*, 12 N. D. 175, 96 N. W. 301; *Gow-*

er v. Sterner, 2 Whart. 75; Christ v. Diefenbach, 1 Serg. & R. 464, 7 Am. Dec. 624; Zensmyer v. Mittower, 5 Pa. 403; Gump's Appeal, 65 Pa. 476; Huss v. Morris, 63 Pa. 367; Goodell v. Field, 15 Vt. 448; Barry v. Harris, 49 Vt. 392; Tabor v. Cilley, 53 Vt. 487; Western Min. & Mfg. Co. v. Peytona Cannel Coal Co. 8 W. Va. 406; Townshend v. Stangroom, 6 Ves. Jr. 329, 22 Eng. Rul. Cas. 843.

And a court of chancery, in the exercise of its moral jurisdiction, will, upon proof of fraud, mistake, or surprise, raise an equity by which the written agreement of the parties may be rectified. Wesley v. Thomas, 6 Harr. & J. 24; Chapman v. Allen; Hilman v. Wright; and Popplein v. Foley,—*supra*.

The statute of frauds does not interfere with the power of courts of equity to reform deeds or other instruments in which the parties intended to comply with the statute, and were prevented by fraud, accident, or mistake. Blackburn v. Randolph and Schwass v. Hershey, *supra*; Noel v. Gill, 84 Ky. 241, 1 S. W. 428; Bradford v. Romney, 30 Beav. 431.

And parol evidence is always admissible in case of mistake or fraud in actions in equity to rescind a contract or to reform an agreement so as to make it speak the real intentions of the parties. Isenhoot v. Chamberlain, *supra*; Park Bros. v. Blodgett & C. Co. 64 Conn. 28, 29 Atl. 133; Hausbrandt v. Hofer and Anderson v. Bacon, *supra*; Cogger v. M'Gee, 2 Bibb, 321, 5 Am. Dec. 610; Farley v. Bryant and Forester v. Van Auken, *supra*.

And it is admissible in a suit to reform a deed to show that, by reason of a mistake of the draftsman, the original deed did not convey the estate intended. Nutall v. Nutall, and Huss v. Morris, *supra*.

And that in fact the instrument embodies provisions different from those which the parties intended it to embody. Western Min. & Mfg. Co. v. Peytona Cannel Coal Co. *supra*.

So, parol evidence is admissible in equity to show mistake in a written contract as well where the party seeks affirmative relief on the ground of mistake, as where the opposing party sets it up as a defense or to rebut an equity. Barry v. Harris, *supra*; Belows v. Stone, 14 N. H. 175.

And equity will let in parol evidence of mistakes and omissions to rebut an equity, or by way of objection to a specific performance. Chapman v. Allen and Popplein v. Foley, *supra*; Berry v. Whitney, 40 Mich. 72; Townshend v. Stangroom, *supra*.

And a court of equity will receive parol evidence at the instance of a complainant to rectify a written contract, and execute it specifically as rectified, even in cases arising under the statute of frauds. Moale v. Buchanan, *supra*.

And to justify the reformation of a contract or deed on the ground of mutual mistake, it is not necessary to show the existence of a prior parol contract, and such part performance as would, in the absence of a 28 L.R.A.(N.S.)

written contract, take the case out of the statute of frauds. Conaway v. Gore, 24 Kan. 389; Moale v. Buchanan, *supra*.

Nor is there any difference in respect to the power and right of equity to relieve against mistake or fraud in a deed in writing between that class of cases required by the statute of frauds to be in writing, and those not within the statute. Wall v. Arrington, 13 Ga. 88.

While the rule is inflexible that a written instrument cannot be altered by parol proof, yet a court of chancery will rectify mistakes in fact which have occurred in drawing up the paper, when a proper case is presented and clearly proved, and then carry into effect the instrument thus corrected as if it had been written as the parties supposed it was at the time. Broadwell v. Broadwell, 6 Ill. 599.

When the question at issue is not what the terms of a written contract are, but whether the contract as written was entered into, or whether it was obtained by fraud, or is founded in surprise, accident, or mistake, these subjects of inquiry are open to parol testimony irrespective of what the writing contains, and the rules of evidence are the same in equity as law. Bush v. Merriman, 87 Mich. 260, 49 N. W. 567.

So, parol evidence is admissible to prove the mistake in an action to reform a written instrument, though it be denied in the answer. Wall v. Arrington, *supra*; Gray v. Woods, 4 Blackf. 432; Gillespie v. Moon, 2 Johns. Ch. 596, 7 Am. Dec. 559.

Parol evidence will not be admitted, however, to prove a contract entirely different from that expressed in a writing, except for fraud, mutual mistake, etc. Dellinger v. Gillespie, 118 N. C. 737, 24 S. E. 538.

And under a pleading which simply states the terms of a contract, the introduction of a written agreement respecting the subject-matter cannot be followed by oral proof of a material clause alleged to have been omitted by mistake from the writing. Pier-son v. McCahill, 21 Cal. 123.

And where the object of a suit is both the construction of a written instrument and its reformation, evidence of intention will be received on the one point and rejected when considering the other. Bradford v. Romney, *supra*.

Nor will a court of equity admit parol evidence to show that a renunciation of dower before a magistrate was intended as a release of inheritance. Westbrook v. Harbeson, 2 M'Cord, Eq. 112.

And a contract for the exchange of described property, a stated number of acres of land in a named county and state, is too vague and uncertain as to the description of the property proposed to be exchanged to be aided and the property identified by parol evidence in equity. Baldwin v. Kerlin, 46 Ind. 426.

And where an agreement for an exchange of lands and other property describes the land as 640 acres of land in Anderson county, Kansas, parol evidence cannot be given

to show what land was intended, or to permit the purchaser to select what land he pleased, since this would be to make a new and different contract for the parties. *Ibid.*

2. Application to particular cases.

While parol evidence is inadmissible to vary the terms of a written contract, it is admissible to prove a vice or mistake in it, and may be used to prove that a bill of sale, absolute on its face, was intended as a mortgage to secure an usurious loan. *Murphy v. Trigg*, 1 T. B. Mon. 73; *Lindley v. Sharp*, 7 T. B. Mon. 249.

And parol evidence may be introduced in an action on a written contract for the purpose of showing what were the words omitted, and that they were omitted by mistake. *Hathaway v. Brady*, 23 Cal. 121.

And a court of equity will, upon parol proof of fraud, mistake, or surprise, rectify and reform the written agreement of the parties, and it may consider an absolute deed as a mortgage, the statute of frauds being no defense to such an equity. *Farrell v. Bean*, 10 Md. 217.

And that an agreement by several persons to give a bond was to give a joint bond, and not a several one, may be shown by parol evidence on a bill for a specific performance of the agreement, alleging it to have been to give a several bond. *Gordon v. Hertford*, 2 Madd. Ch. 106.

So, a court of equity has power, in the absence of any statutory prohibition, to rectify a deed or written contract upon clear and satisfactory proof, by parol evidence, that it fails, either on account of fraud or mistake of fact, to express the agreement or intention of the parties. *Smith v. Jordan*, 13 Minn. 264, Gil. 246, 97 Am. Dec. 232; *Morris v. Stern*, 80 Ind. 227.

And a mistake in a deed or contract in writing may be shown, for the purposes of correction in equity, by parol proof of the declarations of the vendor, made subsequent to the sale. *Trout v. Goodman*, 7 Ga. 383.

And the mistake of a scrivener in drawing a deed, whether it be a mistake of law or of fact, whereby he fails to carry out the previous agreement of the parties, may be corrected in equity, and oral evidence is admissible to prove the intention of the parties. *Sampson v. Mudge*, 13 Fed. 260.

So, equity has jurisdiction to correct a mistake in the description of land in a conveyance, irrespective of the statute of frauds. *Judson v. Miller*, 106 Mich. 140, 63 N. W. 965.

And where a vendor by mistake conveys to a purchaser a lot of a different number from the one actually sold to him, the statute of frauds does not intervene to bar relief in equity by way of making the deed embrace the lot actually sold. *Johnson v. Johnson*, 8 Baxt. 261.

And parol evidence is admissible to show that a sheriff expressly excepted certain land from the sale of a larger tract, made by him under execution in an action of

ejectment brought by the purchaser at such sale. *Bartlett v. Judd*, 21 N. Y. 200, 78 Am. Dec. 131.

So, a mistake in a written lease under seal, in stating that a semi-annual rent of \$300 was to be paid instead of an annual rent of \$300 per year, payable semi-annually, may be shown by parol evidence. *Snyder v. May*, 19 Pa. 235.

But while a contemporaneous parol agreement that a certain debt secured by a written lease should be indulged, and that otherwise the lease should be void, might be a defense to an independent action to collect the debt, evidence of such agreement is inadmissible to avoid the lease, in the absence of anything to indicate that such stipulation was omitted by fraud, mutual mistake, or accident. *Taylor v. Hunt*, 118 N. C. 168, 24 S. E. 359.

c. Rule permitting taking from but not adding to contract.

1. Generally.

The rule has been asserted and is ably supported that, to a bill in equity to reform an instrument in writing, if the proposed reformation involves the specific enforcement of an oral agreement within the statute of frauds, or the terms sought to be added will so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer unless the defendant is estopped to plead it. *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418.

That courts of equity have no power or jurisdiction to construct or reconstruct an executory contract for the parties thereto, or to insert therein a new and essential element or matter that is required by the statute to be reduced to writing in order to make the contract valid and binding. *Allen v. Kitchen*, 16 Idaho, 133, — L.R.A. (N.S.) —, 100 Pac. 1052.

And that a court of equity has no power or jurisdiction, under the pretense of reformation or otherwise, so to construct or reconstruct an agreement for the sale of real estate as to add to the description or make a complete contract out of one which, on its face, was incomplete or insufficient to meet the requirements of the statute of frauds. *Ibid.*

And that while a deed may be set aside for fraud or duress, and a trust may arise out of a transaction which will be enforced in face of the express terms of a deed, it must be a trust arising by operation of law; the parties to a deed cannot create a trust in favor of the grantor, except by an instrument in writing, declaring the same. *Finlayson v. Finlayson*, 17 Or. 347, 3 L.R.A. 801, 11 Am. St. Rep. 836, 21 Pac. 57.

Within this rule, the fact that the failure of an instrument to convey the estate or express the obligation which it is sought to make it convey or express was occasioned by mistake or by deceit and fraud does not

alone constitute an estoppel against the other party to the contract to set up that the proposed correction will operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing; where there was no such writing, there must occur some change in the situation of the other party by reason of having been induced to enter on the execution of the agreement, or to do acts on the faith of it as if it was executed, with the knowledge and acquiescence of the other contractor, either express or implied, for which he will be left without redress if the oral agreement shall be defeated. *Glass v. Hulbert*, supra.

And where all the members of a family intended that title to a burial lot should be taken in the name of the father, but by mistake the deed was taken in the name of a son, who, after the death of the father, without knowledge of the mistake, orally promised to hold the lot for the benefit of the rest of the family, under a statute providing that no trust in land shall be created unless by an instrument in writing, equity cannot enforce the trust against the son holding the title, based on his oral declaration, though the mistake in the deed was mutual, so that it might have been corrected. *Tourtillote v. Tourtillote*, 205 Mass. 547, 91 N. E. 909.

Nor is oral testimony admissible either to expunge words from a contract or add words to it, if the effect would be to widen the scope of the written contract. *Macomber v. Peckham*, 16 R. I. 485, 17 Atl. 910; *Elder v. Elder*, 10 Me. 80, 25 Am. Dec. 205; *Webster v. Gray*, 37 Mich. 37; *Climer v. Hovey*, 15 Mich. 18.

And parol evidence will not be admitted on a bill to correct a mistake in a deed, where the design is to give it a more extended operation than that which it purports on its face to have, or where it carries a different and larger estate than the original purports to convey. *Westbrook v. Harbeson*, 2 M'Cord, Eq. 112.

But even under this rule, courts of equity have power and jurisdiction so to reform an executory contract that is valid and binding on its face as to relieve it from any statement, declaration, or description that has been inserted therein through deception, fraud, or mutual mistake, and to make its statements speak the truth, as it was intended to insert it in the instrument. *Allen v. Kitchen*, supra.

The great majority of the cases, however, go on the theory that when, because of mistake or fraud, the intention of the parties will not be carried out until there is a reformation, there either is no contract to be contradicted or modified, or, if there is one, its scope and limits are unascertained, and parol evidence is admissible and necessary, not to contradict or modify the contract, but to show what it really is; equity, in such case not denying or overruling the statute, but declaring that fraud or mistake creates obligations and confers remedial

rights which are not within the statutory prohibition. This would appear to be the foundation theory of the large class of cases which base the right of reformation of contracts upon the giving of effect to the real intention of the parties to them.

Thus, in *Zentmyer v. Mittower*, 5 Pa. 403, which seems to have furnished the foundation for the prevailing rule, in America, at least, it was held that, as an exception to the general rule, parol evidence is, under certain restrictions, admissible to control a written instrument, where either more or less has been expressed than the parties intended, or where one of them, relying upon a misrepresentation of a material fact by another interested in the transaction, has been induced to do something he otherwise would not have done, and this, whether the misrepresentation was wilful or unintentional, if, under the circumstances, it would be unconscionable in the person making it to take advantage of ignorance abused by his own mistake or falsehood.

Within this theory, where there has been a mistake or omission in a written contract, parol evidence of the agreement or intent of the parties is admissible to prove that, by mistake, something material has been omitted in the written contract, or that it contains more than was intended, or that it varies from the common intent of the parties by expressing something different in substance from what was intended by both. *Pennell v. Wilson*, 2 Robt. 505; *Gillespie v. Moore*, 2 Johns. Ch. 585, 7 Am. Dec. 559; *Caley v. Philadelphia & C. County R. Co.* 80 Pa. 370.

On the theory that equity regards that as done which is agreed to be done, a court of equity will correct mistakes in conveyances when clearly proved, though by oral evidence only; and will make the instrument such, both in form and effect, as will fulfil the intention of the parties. *Kennard v. George*, 44 N. H. 440.

No one can be compelled to convey lands unless the sale be attested by a writing: but when a contract of sale is so attested, and through fraud, omission, or mistake, the real sale, as made, is not set forth, the chancellor has power to reform the writing and enforce it, though coming within the provisions of the statute of frauds. *Worley v. Tuggle*, 4 Bush, 168.

A written agreement, while it exists, must control as to all the terms expressed in it, although those terms differ from the prior oral agreement; but if the difference was caused by mutual mistake, it is necessary to reform the contract so as to express the true agreement. *Linton v. Unexcelled Fireworks Co.* 128 N. Y. 672, 28 N. E. 580, reversing 37 N. Y. S. R. 173, 13 N. Y. Supp. 495; *Rogers v. Atkinson*, 1 Ga. 24; *Philpott v. Elliott*, 4 Md. Ch. 273.

The rule that a written instrument will be reformed for fraud or mistake only so as to give effect to a previous binding contract of the parties is not inconsistent with such reformation of an instrument, where the

executory agreement was oral and within the statute of frauds. *Petes v. Hambach*, 48 Wis. 443, 4 N. W. 565.

So, to insist upon the legal effect of a written agreement when an exception was not inserted, on the express understanding of the parties that such excepted matter was not to be embraced in the agreement, is such a fraud as will admit parol testimony to reform the deed accordingly. *Renshaw v. Gans*, 7 Pa. 117.

And the fact that a contract in writing, signed by only one of the parties, contained stipulations to be performed by the other which are within the statute of frauds, will not prevent a reformation of the instrument in equity at the suit of the latter. *Thompson v. Marshall*, 36 Ala. 504, 76 Am. Dec. 328.

So, whatever may be the rule of law on the question of the jurisdiction of courts of equity to reform instruments made in pursuance of oral agreements, when the correction sought is the addition of lands to those described, nothing having been done under the oral agreement, the jurisdiction where part performance is shown sufficient to warrant a specific performance under the oral contract is unquestioned. *Metropolitan Lumber Co. v. Lake Superior Ship Canal R. & Iron Co.* 101 Mich. 577, 60 N. W. 278.

But one of the conditions of the admissibility of parol evidence for the control of a written instrument is that the evidence of fraud must be of such a nature as distinctly to establish the fact that the action of the injured party was simply the result of the mistake or misrepresentation of one who seeks unfairly to avail himself of it. *Zentmyer v. Mittower*, supra.

And the fraud which will let in parol evidence to reform a written instrument must be fraud in the procurement of the instrument which goes to its validity, or some breach of confidence in using a paper delivered for one purpose, and fraudulently perverted to another purpose. *Towner v. Lucas*, 13 Gratt. 705.

2. Application to particular cases.

Parol evidence of mistake is admissible to qualify or contradict a written instrument. *Gump's Appeal*, 65 Pa. 476.

And it is admissible to prove that through the mistake of the scrivener a clause intended by the parties to an agreement for the sale of land was omitted. *Gower v. Sterner*, 2 Whart. 75.

So, where a deed conveyed lands particularly described, but did not convey an ore bed belonging to the grantor in the same town, proof, in an action for the reformation of the deed, of the grantor's declaration at the time, that he intended to convey his interest in the ore bed, and desired the deed to be so drawn as to convey it, is competent. *Cake v. Peet*, 49 Conn. 501.

And a vendor of lands having executed a conveyance to the purchaser, and taken his notes for the purchase money, may maintain a bill in equity to reform and

correct them by inserting an express provision for the retention of a vendor's lien, on averment and proof that such provision was omitted by mistake, without fault on his part. *Kinney v. Ensminger*, 87 Ala. 340, 6 So. 72.

And where one who has agreed to sell certain land receives the full consideration therefor, and then fraudulently gives a deed conveying only part of the land, a specific enforcement of the contract may be had in equity, even though the contract was oral. *McDonald v. Yungbluth*, 46 Fed. 836.

So, parol evidence may be adduced to show that a lease was taken with the understanding on the part of both the lessor and the lessee that the premises were to be used for a certain purpose, and that this understanding was based on a mistake as to the true facts of the case,—not to vary the effect of the contract, but to show that it never had any valid existence. *Bedell v. Wilder*, 65 Vt. 406, 36 Am. St. Rep. 871, 26 Atl. 589; *Christ v. Dffenbach*, 1 Serg. & R. 464, 7 Am. Dec. 624.

And where persons agreed in writing to grant another a lease at a specified rent for a specified term, subject to the same covenants, clauses, and agreements as were contained in an expiring lease, under which he then held the property, a claim of an additional term to the lease, that the lessee should pay a premium of £200, which, by his claim, he offered to do, does not render the statute of frauds a valid defense to the claim. *Martin v. Pycroft*, 2 De G. M. & G. 785, 22 Eng. Rul. Cas. 852.

And the power of a court of equity to correct a lease by including an option by the lessee to buy, which was omitted by mutual mistake, and then enforce the contract as reformed, is not affected by a statute which provides that oral evidence is not competent to establish contracts for the creation or transfer of any interest in lands except leases for a term not exceeding one year. *Butler v. Threlkeld*, 117 Iowa, 116, 90 N. W. 584.

So, the rule that parol evidence is not admissible to show that an individual signature was designed to bind a corporation of which the person signing was an officer has no application to actions in equity, where the signature is alleged to be the result of a mistake, the correction of which is asked. *Lee v. Percival*, 85 Iowa, 639, 52 N. W. 543.

And where by mistake a note intended to bind a corporation is so drawn as to bind the signers only, who are officers of the corporation, parol evidence is admissible in proof of the alleged mistake in an action to reform the note. *Ibid.*

And where a person sought to reform notes on the ground that they were incorrectly put into writing by the mutual mistake of himself and the other party, who drew them, he being unable to read and write, and unable to correct the error, they not having been read over to him, it cannot be objected to as an attempt to vary or

contradict a written instrument by a contemporaneous parol agreement. *Jones v. Warren*, 134 N. C. 390, 46 S. E. 740.

d. Collateral oral contracts.

Parol evidence may be used with reference to an alleged mistake in a contract, when it is not introduced to contradict a writing or control its legal effect, but is a matter collateral to the writing, the contract remaining untouched and in full force, the court in such case receiving the parol evidence not to contradict the written instrument, but to show its application and existing rights under it. *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705; *Redfield v. Gleason*, 61 Vt. 220, 15 Am. St. Rep. 889, 17 Atl. 1075.

And where a writing does not purport to contain all the stipulations of a contract, parol evidence is admissible to prove other portions thereof, not inconsistent with the writing. *Hendrix v. Academy of Music*, 73 Ga. 437.

And a subscription for the amount of stock opposite the subscriber's name, with an agreement to pay the same in quarterly instalments, naming the date of payment, for the purpose of forming a company to erect an academy of music, is on its face an incomplete agreement, being silent as to the location and nature of the structure, whether the company was to be a joint stock company or an incorporation, what amount was necessary to accomplish the object sought, and as to the mode and method of raising the necessary funds to complete and equip the buildings, and the specific purpose for which it was to be used, and the way in which its business was to be conducted. *Ibid.*

So, that a deed of conveyance different in its terms from that required by a written contract was received in full satisfaction of, or as total discharge of, such contract, may be shown by parol evidence. *Roberts v. Elmore*, 3 Ohio Dec. Reprint, 208.

And where a mistake was made not in reducing the contract to writing, but in the supposition of both parties that the boundaries of the land named in the contract would include a certain mill site, and, on discovering that it did not, the parties agreed by parol so to change the boundaries as to include the mill site, and under their direction a surveyor made a plat and report of the land, fixing new boundaries, and the purchaser objected to a conveyance according to the new boundaries, relying on the statute of frauds, the court will nevertheless specifically enforce such written contract as modified by the parties to correct the mistake. *Creigs v. Boggs*, 19 W. Va. 240.

Nor is it dangerous to the stability of titles to real property to correct deeds upon parol evidence after the lapse of many years, when such evidence, taken in connection with the subsequent deeds, tends to sustain a title, or, at least, the equitable right to it, which all parties have recog-

nized and acted upon for many years. *Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925.

If a written subscription for stock was or appeared to be complete within itself, however, the subscriber cannot go outside of it, so far as concerns the conditions upon which the subscription was made. *Hendrix v. Academy of Music*, supra.

And a verbal agreement contemporaneous with the execution of a deed and notes and mortgage on consummation of a sale of land, that, if the land, on being surveyed by the grantee, fell short of the quantity which the grantor warranted, a sum proportioned to such deficiency should be indorsed on the mortgage, is merged in the deed and other writings, which must, in the absence of fraud or mistake, be conclusively presumed to contain the whole contract. *Martin v. Hamlin*, 18 Mich. 355, 100 Am. Dec. 181.

So, either at equity or at common law, in the absence of proof of fraud or mistake, a contract cannot be controlled by evidence that it was executed on the faith of a contemporaneous or preceding oral stipulation not embraced in it, and it cannot be set aside on the ground that such oral stipulations have not been performed. *Wilson v. Deen*, 74 N. Y. 531.

And if an oral agreement accompanying a lease by which the lessor agreed to furnish the lessee with certain furniture can be held to be collateral to the lease, and not merged in it, the lessee's remedy for a breach of such agreement would be simply an action for damages for the breach; the validity and effect of the lease could not be made to depend upon its performance. *Ibid.*

Nor will parol evidence be received to engraft upon or incorporate with a valid written contract an incident occurring contemporaneously therewith, and inconsistent with its terms. *Towner v. Lucas*, 13 Gratt. 705.

And on a parol contract for the sale of land, on which the vendor executed a deed by which he conveyed a part of the land purchased to the vendee, it is not competent for the vendee to prove by parol evidence that the deed was only a part execution of the contract, and that the vendor had agreed at the time the deed was executed that he would convey the remainder at another time; such an agreement could only be relied on as an independent contract, and must either have been in writing, or there must have been a part performance. *Broughton v. Coffey*, 18 Gratt. 184.

VI. Effect of negligence accompanying mistake.

a. General rules.

Relief by way of reformation of a contract will be extended to those only who have not by their conduct, as by laches, negligence, or otherwise, put themselves in such a position as to render it unjust to change the situation. *Fritz v. Fritz*, 94 Minn. 264, 102 N. W. 705; *Ætna Indemnity Co. v. Baltimore*,

S. P. & C. R. Co. 112 Md. 389, 76 Atl. 251; Marshall v. Homier, 13 Okla. 264, 74 Pac. 268.

And relief will not be afforded in equity on the ground of mistake, where the defendant's liability or other trouble is the result of his want of proper diligence. ~~Voorhis v. Murphy~~, 26 N. J. Eq. 434; Serrell v. Rothstein, 49 N. J. Eq. 385, 24 Atl. 369; Mitchell v. Holman, 30 Or. 280, 47 Pac. 616; Grant Marble Co. v. Abbot, 142 Wis. 279, 124 N. W. 264; Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798; Pope v. Hoopes, 84 Fed. 927; Great Western Mfg. Co. v. Adams, 99 C. C. A. 615, 176 Fed. 325.

If a mistake in a contract is the result of a party's own carelessness or inattention, a court of equity will not interfere in his behalf, its policy being to grant relief to the vigilant, and to put all parties upon the exercise of a reasonable degree of diligence. Wood v. Patterson, 4 Md. Ch. 335.

In the absence of fraud the law does not relieve persons fully able and competent to protect themselves, against their contracts. Gougenheim v. Ermann, 118 La. 577, 43 So. 170.

While a court of equity may rescind and cancel a contract upon the ground of a mistake of facts material to the contract of one party only, where there has been no fraud or surprise to put the applicant for such relief off his guard, it must appear that the mistake was not in consequence of his own want of recollection, from inattention, or of his own carelessness, and that by granting him the relief no injustice will be done. Diman v. Providence, W. & B. R. Co. 5 R. I. 130.

A party coming into a court of equity and asking relief upon the ground of mistake must show that he has used due diligence and good faith to avoid the consequences of the mistake. Thomas v. Bartow, 48 N. Y. 193.

And the party complaining must have exercised at least the degree of diligence which may be fairly expected from a reasonable person. Kinney v. Consolidated Virginia Min. Co. 4 Sawy. 382, Fed. Cas. No. 7827.

One who signs a written instrument in ignorance of its contents is presumptively guilty of gross negligence, and the burden of proof rests upon him to rebut the presumption. Albrecht v. Milwaukee & S. R. Co. 87 Wis. 105, 41 Am. St. Rep. 30, 58 N. W. 72; Bishop v. Allen, 55 Vt. 423.

And ignorance, upon the part of a party to a contract, of a stipulation in it, is no ground for relief against such stipulation, where there is no evidence that he was deceived or misled by any misrepresentation or concealment of the fact, and his mistake must be ascribed solely to his own carelessness or inattention. Robertson v. Smith, 11 Tex. 211, 60 Am. Dec. 234.

And a sale by one partner of his interest in the firm business and assets to his copartner will not, in the absence of proof of fraud, be set aside on account of mere mistakes, however serious and important, if 28 L.R.A.(N.S.)

such mistakes are wholly the result of a want of reasonable care and diligence on the part of the complaining party. Pearce v. Suggs, 85 Tenn. 724, 4 S. W. 526.

Nor will equity grant relief for a mistake in a contract, though it is probable that all concerned in the concoction and execution of the deed mistook the legal effect of the words of limitation employed, where the mistake arose altogether from overweening conceit of themselves, or rash neglect in advising with skilful persons. Those who will ignorantly and rashly employ technical terms of the law must submit to the consequences of having the terms technically construed. Dennis v. Dennis, 4 Rich. Eq. 307.

And where a change of securities was voluntary, and it does not appear that any artifice was made use of to induce the party making the change to take a second mortgage, but he does so, permitting an outstanding mortgage to go in ahead, he cannot be permitted to disavow or avoid the operation, where he entered into the agreement with a full knowledge of the facts, on the ground of his ignorance of the legal consequences flowing from such facts. Hinchman v. Emans, 1 N. J. Eq. 100.

The rule that the carelessness or negligence of a person in signing a written contract estops him from afterwards asserting that the writing does not truly express the agreement of the parties, however, does not apply in an action for relief on the ground that the contract was obtained by fraud, or entered into by mutual mistake. Story v. Gammell, 68 Neb. 709, 94 N. W. 982; Colorado Invest. Loan Co. v. Beuchat (Colo.) 111 Pac. 61.

And the mere fact that a party to a contract was negligent in not making an examination of it to see if there were omissions, will not prevent relief in equity; whether or not the court will or will not correct a mistake must depend upon the circumstances of each case. Boulden v. Wood, 96 Md. 332, 53 Atl. 911; Schautz v. Keener, 87 Ind. 258.

b. Necessity that negligence be detrimental to other party.

Relief by way of reformation of a contract will not be granted where there was negligence or laches on the part of the person seeking relief, especially when the change might injuriously affect the rights or status of the other party or of innocent third persons. Fritz v. Fritz, 94 Minn. 264, 102 N. W. 705; Thomas v. Bartow, 48 N. Y. 195; Diman v. Providence, W. & B. R. Co. 5 R. I. 130.

And where money is paid under a mistake either of law or of fact, it is no defense to an action brought to recover it that the mistake arose through the plaintiff's negligence, if such negligence caused the defendant no harm. Mansfield v. Lynch, 59 Conn. 320, 12 L.R.A. 285, 22 Atl. 313.

And where the legal title to property involved in a contract has become vested in a bona fide purchaser for value while a party to the contract claiming thereunder is sleeping on his rights, the court will not inter-

fere to reform the contract. *Trusdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391.

Where a person seeks to avoid or rescind a contract on the ground of bona fide mistake, ignorance, or forgetfulness of facts material thereto, however, relief may be given him provided the rights of innocent third persons will not be prejudiced; and in such case it is not material to inquire whether he might not, by reasonable diligence, have ascertained the facts which he had forgotten, or in regard to which he was mistaken, or of which he was ignorant. *Johnson v. Parker*, 34 Wis. 596.

And where a written contract for the sale of an engine contained a clause guarantying that the engine should develop a certain horse power at a boiler pressure of 100 pounds, the fact that the seller has brought an action at law to recover the balance of the purchase price, stating the warranty as it appears in the written contract, does not preclude him from maintaining a suit in equity to reform the contract upon the ground that the pressure at which the required horse power was to be developed was by mistake stated at 100, instead of 130 pounds, since the effect of such change would not be to increase the complainant's own right, but merely to deprive the defendant of the right to maintain a cross action brought by him upon the guaranty as stated by plaintiff in his action at law. *Providence Steam-Engine Co. v. Hathaway Mfg. Co.* 79 Fed. 512.

c. Ability to ascertain real facts.

Mistake, to be available in equity for reformation of a contract or other written instrument, must not have arisen from negligence, where the means of knowledge were easily accessible. *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Kinney v. Consolidated Virginia Min. Co.* 4 Sawy. 382, Fed. Cas. No. 7,827; *Wooden v. Haviland*, 18 Conn. 101; *Davenport v. Lowry*, 78 Ga. 89; *Fitzpatrick v. Ringo*, 9 Ky. L. Rep. 503, 5 S. W. 431; *Haggerty v. McCanna*, 25 N. J. Eq. 48; *Fahie v. Pressey*, 2 Or. 23, 80 Am. Dec. 401; *Emerson v. Navarro*, 31 Tex. 334, 98 Am. Dec. 534.

Unless there has been some accident or fraud. *Fahie v. Pressey*, supra.

The mistake or ignorance with reference to a contract, from which equity will relieve, must have been such that the party concerned could not, by reasonable diligence, have gotten knowledge of it when he was put upon inquiry. *Deare v. Carr*, 3 N. J. Eq. 513.

Contra, *Monroe v. Skelton*, 36 Ind. 302.

If the fact in reference to which a party alleges he was mistaken is one of which he might have obtained knowledge by reasonable diligence, equity will suppose that he must have had knowledge; it will be imputed to him. *Taylor v. Fleet*, 4 Barb. 95.

And where a party to a contract, through his own negligence, signs it without knowing or understanding its contents and when he has an opportunity to do so, a court of 28 L.R.A.(N.S.)

equity will not reform it so as to make it express the alleged understanding of what it was to contain. *Roundy v. Kent*, 75 Iowa 662, 37 N. W. 146; *Jenkins v. Clyde Coal Co.* 82 Iowa, 618, 48 N. W. 970; *Brown v. Fagan*, 71 Mo. 563; *Banta v. Garma*, 1 Sandf. Ch. 383.

A party who is *sui juris* cannot, in the absence of fraud or imposition, deliberately sign a written contract, and then escape its obligation on the ground that he did not know its contents. *Campbell v. Van Houten*, 44 Mo. App. 231.

And a settlement of a claim for injuries to person and loss of property will not be rescinded on the ground that it was intended only to cover the loss of property, where there was no fraud, simply because the party seeking to set it aside failed to inform herself of what was contained in the agreement. *Barker v. Northern P. R. Co.* 65 Fed. 460.

And if a person enters into a contract with another between whom and himself no relation of especial trust or confidence exists, and it is reduced to writing by such other person, and the means of knowledge of the terms of the writing are equally open to both, and he signs it without reading or having it read by someone for him, he cannot avoid a liability created by the writing, even though its terms differ from the contract as agreed on verbally; and the fact that he is illiterate does not change the rule. *Hawkins v. Hawkins*, 50 Cal. 558.

So, if a party can read, it is not open to him, after executing a deed or contract, to insist that the terms of it were different from what he supposed them to be when he signed it. *Eldridge v. Dexter & P. R. Co.* 88 Me. 191, 33 Atl. 974; *Mitchell Mfg. Co. v. Kempner*, 84 Ark. 349, 105 S. W. 880; *Delinger v. Gillespie*, 118 N. C. 731, 24 S. E. 538; *Albrecht v. Milwaukee & S. R. Co.* 87 Wis. 105, 41 Am. St. Rep. 30, 58 N. W. 72.

And where a person has the capacity to read a release signed by him, and an opportunity to do so, and no fraud was practised upon him to prevent him from reading it, but he chose to rely upon what another said about it, he is estopped by his own negligence from claiming that it is not legal and binding upon him according to its terms. *Wallace v. Chicago, St. P. M. & O. R. Co.* 67 Iowa, 547, 25 N. W. 772; *Spitze v. Baltimore & O. R. Co.* 75 Md. 162, 32 Am. St. Rep. 378, 23 Atl. 307.

And where a chattel mortgage not containing any power of sale was executed in the presence of the mortgagee, and he took possession of it without examining it, he cannot, in the absence of fraud or accident, introduce parol evidence to show that it was agreed by the parties that the mortgagor should execute an instrument under which the mortgagee could make his money out of the property without going into court, and thus authorize and confirm a sale of property which had already been made by the mortgagee without authority. *Clack v. Wood*, 14 Tex. Civ. App. 400, 37 S. W. 188.

And it has been held that the fact that the person seeking reformation could not read English, or understand the contents of the paper, is no excuse. *Albrecht v. Milwaukee & S. R. Co. supra.*

But the act, of a junior partner, of signing a contract without carefully reading it, upon the assertion of a self-constituted agent that the managing partner had read it and approved of it, which was false, the contract as signed not expressing the actual agreement between the parties, is not such gross negligence as to bar the right of reformation of the contract on the ground of fraud and mistake. *Sutton v. Risser*, 104 Iowa, 631, 74 N. W. 23.

Nor is a party to a contract, to whom it was read over before it was signed, entitled to a reformation thereof. *Wolsey v. Neeley*, 46 Ill. App. 387.

And where it was alleged that a party procured to be inserted in a deed a wrong description, by retaining the deed proffered by the other party and tendering to him a deed prepared by himself, and by representing that the descriptions in the two deeds were the same, no fiduciary relation or mutual mistake being charged, it was the party's own fault if he was imposed upon, no fraud being shown. *Rushton v. Hallett*, 8 Utah, 277, 30 Pac. 1014.

Nor will relief be granted on a claim of mistake in respect to the quantity in the conveyance of land, if the purchaser, with ordinary vigilance before the completion of the contract, by viewing the premises or properly settling the terms of the description, might have guarded against the alleged mistake. *Marvin v. Bennett*, 26 Wend. 169, affirming 8 Paige, 312.

And the fact that a person who signed a bond was an illiterate German and understood English imperfectly is immaterial as to his liability, where he was not obliged to sign the instrument unless he understood it, but, having signed without asking to have it read to him, he is bound by it. *Weller's Appeal*, 103 Pa. 594.

And where a written contract for the sale of machinery contained no provision requiring the seller to set up the machinery, and the purchaser claimed that there had been such an agreement between him and the seller's representative, and testified that the contract was completed when the representative prepared the written contract and the purchaser signed it, and that he did not have his spectacles with him, and could not read the fine print, the facts do not show such fault or mistake in the making of the contract as would authorize the purchaser to vary it by parol evidence, where it appears that at the time of the execution the purchaser's son was present, who could have read it, and the purchaser held the contract for several weeks without reading it or taking steps to repudiate it. *Murray Co. v. Putman* (Tex. Civ. App.) 130 S. W. 631.

And where a person purchased from another a bond for a deed of land, and at the time of the sale the vendor, who had the bond in his possession, stated that there

was \$600, maybe a little more or a little less, due thereon, and for several months afterwards the purchaser had the bond in his possession, but made no attempt to ascertain the actual amount due thereon, though he had the data necessary to the calculation, he is not entitled to a reformation of a note given therefor, though the amount due on the bond was \$300 more than the amount stated by the vendor. *Banfield v. Banfield*, 24 Or. 571, 34 Pac. 659.

Where a man executes a contract, however, the bare fact that he did not read it or know its contents will not relieve him from it. *Quimby v. Shearer*, 56 Minn. 534, 58 N. W. 155.

And the rule that equity will not aid the negligent does not apply in its fullest sense to the correction of mistakes merely in the description of the property contracted about and as between the immediate parties to a deed; a description may be corrected though the mistake arose from negligence. *Morrison v. Collier*, 79 Ind. 417.

And a contract may be reformed for mutual mistake, though a party neglected to read it. *Smelser v. Pugh*, 29 Ind. App. 614, 64 N. E. 943.

So, where the evidence in an action to reform a deed was sufficient to satisfy the court that the deed did not express the intention of the parties and the plaintiff had been mistaken in supposing that it did, the fact of his having read the instrument would not prevent the court from finding that it was made under a mistake. *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 796.

And a contract for sale of land having provided that it should be subject to the operation of a mortgage, and the scrivener whom the grantee instructed to prepare the deed in conformity with the agreement having omitted reference to the mortgage, the deed will be reformed in equity notwithstanding the fact that the grantor merely asked, without looking to see, if the conveyance was made subject to the mortgage. *Boulden v. Wood*, 96 Md. 332, 53 Atl. 911.

So, the mistake of a lessee who could read English very imperfectly, and who relied upon the scrivener to read a lease given him before executing it, will not defeat his right to a reformation. *Silbar v. Ryder*, 63 Wis. 106, 23 N. W. 106.

And where a person buys premises subject to a mortgage and trusts the grantor to draw the conveyance, which he does, inserting a clause by which the purchaser assumes payment of the mortgage without the knowledge of the purchaser, the failure of the purchaser to examine her deed is not such negligence as to deprive her of her right to have the deed reformed by striking out the clause by which liability for the mortgage was assumed. *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40.

Nor does the failure of a party to a written contract to read it over a second time before execution, in order to verify erasures made in his presence and at his dictation, as matter of law, preclude him from obtaining a reformation of the contract, if it

is found that the mistake was not due to his negligence, but to the error of the scrivener in making the erasures. *West v. Suda*, 69 Conn. 60, 36 Atl. 1015.

And if a lease was executed under a mistake of the lessor as to its contents, known or suspected by the lessee, the lessor will not be precluded from obtaining a reformation of the lease because of inattention to the writing of the lease by the notary who took the acknowledgment of the lessor. *Wilson v. Moriarty*, 88 Cal. 207, 26 Pac. 85.

And where both parties are mistaken as to the effect of a writing, and ignorant of its misstatement of the agreement between them, the failure of one to understand, through omission to read or give sufficient attention to its contents, cannot avail as a defense to the other, equally in fault, against a suit to correct such mistake. *Kelley v. Ward*, 94 Tex. 289, 60 S. W. 311.

Nor does it lie with the grantor or his heirs, or a purchaser from them without consideration, to insist that a mortgage placed by an heir upon his share of the property in the deed, in which a mistake was made, was not taken in good faith, on the ground that the mistake was such that it might have been discovered by a careful inspection of the record, where it does not appear that any of the parties did in fact discover it until after the mortgage was given. *Cummings v. Freer*, 26 Mich. 128.

d. Obligation to disclose.

If one party to a contract is under some moral or legal duty to make disclosures to the other, and fails to do so, the misconception by the other of the facts which should have been disclosed is not such negligence as will bar the injured party from equitable relief from this mistake.

Thus, the fact that a wife relied upon her husband to prepare a deed according to their mutual understanding, and rested in the belief that it was so made, and did not ascertain or know that it did not express their intentions, does not necessarily constitute laches on her part, nor deny to her or her heirs the right to make mistake and misapprehension a ground for reformatory relief. *Brown v. Brown*, 79 Hun, 44, 29 N. Y. Supp. 652.

And where a husband, after deserting his wife, proposed to her to join him in conveying a tract of land to their children, reserving to her the rents and profits during her life, and the wife, who was unable to read, in good faith joined in the execution of the deed, but the husband procured the deed to be so written that it would convey the fee to the children without the reservation of rents and profits agreed upon, and the deed was signed by the wife upon the representation of the husband that it was prepared in accordance with the agreement, she had a right to rely on her husband's sincerity, and had a sufficient excuse for not having the deed read to her. *Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334.
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So, where the relations between a vendor and vendee are so intimate and friendly that the vendee has every confidence in the vendor, the vendee's failure to examine the deed to land purchased by him, before accepting it, does not prevent him from seeking equitable relief where the deed does not conform to the contract of sale. *McDonald v. Yungbluth*, 46 Fed. 836.

And where, by a written agreement between two persons, one agreed to convey land to the other subject to an encumbrance on it of \$9,000, and the purchaser agreed to pay the seller \$15,000 by conveying to him land, some of it subject to an encumbrance, and the seller, without any further bargain, delivered to the buyer a deed conveying the land subject to the encumbrance, and also containing a clause stating that the buyer assumes and agrees to pay the debt secured by the encumbrance as a part of the consideration of the conveyance, and the buyer, being ill, did not read the clause in the deed respecting the assumption of the debt, but discovered it afterwards, and promptly brought suit to have the deed reformed, the purchaser had the right to presume that the deed would conform to the written agreement, and was not guilty of such negligence or laches in not observing the provisions of the deed as should preclude him from relief, and he was entitled to have the deed reformed. *Elliott v. Sackett*, 108 U. S. 132, 27 L. ed. 678, 2 Sup. Ct. Rep. 375.

And where a man contracted verbally with an agent to furnish and put up certain lightning rods at a cost not to exceed \$100, and the agent presented him with a paper for his signature, which he said was the order for the work, and the man, not being able to read without spectacles, and having none at hand, requested the agent to read the paper, though several others were present, and the agent read, or pretended to read, the paper, but omitted to read anything about the price to be paid, whereupon the man put his signature to it, and it turned out that the paper contained a stipulation on his part to pay something more than \$400 for the work, the signer of the instrument was held to be not guilty of such negligence or want of diligence as to enable the other party to recover on the instrument. *Cole Bros. v. Williams*, 12 Neb. 440, 11 N. W. 875.

And where a corporation executed a deed for leasehold property which it had held under a long-term lease containing a provision for a reversion to the lessor for breach of a condition subsequent, and its deed contained a covenant of warranty, which did not except such right of reversion, and such right having been exercised, it was sued on its covenant by its grantee, its attention having been particularly drawn to the omission, and it having executed the deed after verbal assurance from its agent contrary to the plain terms of its covenant, if the deed did not express its true intent it was due to its own fault or negligence, and it was not entitled to a reformation of the same in equity on the ground of

either mistake, fraud, or accident. *Great Western Mfg. Co. v. Adams*, 99 C. C. A. 615, 176 Fed. 325.

e. Delay in seeking relief.

1. Generally.

A party injured by a mistake in a written instrument should take steps promptly to get relief in equity, and if he is guilty of laches he cannot complain if, by reason thereof, he is a sufferer. *Beard v. Hubble*, 9 Gill, 420; *Ætna Indemnity Co. v. Baltimore, S. P. & C. R. Co.* 112 Md. 389, 76 Atl. 251; *Hunt v. Stuart*, 53 Md. 225; *Yocum v. Foreman*, 14 Bush, 494; *Beers v. Hendrickson*, 6 Rebt. 53.

Relief in the way of reformation of a written instrument should not be granted where the party seeking it has unreasonably delayed bringing suit. *Snell v. Atlantic L. & M. Ins. Co.* 98 U. S. 85, 25 L. ed. 52; *Kinney v. Consolidated Virginia Min. Co.* 4 Sawy. 392, Fed. Cas. No. 7,827; *Hurto v. Grant*, 90 Iowa, 414, 57 N. W. 899; *Paulison v. Van Iderstine*, 28 N. J. Eq. 306; *Newman v. Milner*, 2 Ves. Jr. 483.

And this is especially true where the dealing is with respect to speculative property which is liable to large and constant fluctuation in value. *Kinney v. Consolidated Virginia Min. Co.* 4 Sawy. 382, Fed. Cas. No. 7,827.

Where a person desires to rescind a contract upon the ground of mistake or fraud he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Sable v. Maloney*, 48 Wis. 331, 4 N. W. 479.

The length of time which an instrument remained in a party's hands without his asserting that it contained a different contract from that actually entered into is a circumstance to be weighed as bearing upon the truth of his claim that the instrument did not conform to the contract. *Bidwell v. Astor Mut. Ins. Co.* 16 N. Y. 263.

And a mistake the only ground for which is alleged to be want of counsel and well-considered advice, which led the party into error in signing the agreement, will not be deemed a ground for relief where a great length of time elapsed before relief was sought for. *Salinas v. Stillman*, 14 C. C. A. 50, 30 U. S. App. 40, 66 Fed. 677; *White v. Campbell*, 80 Va. 180.

Nor will a vendee of land satisfying a mortgage thereon and canceling it be substituted to the place of the mortgagee, where, through his gross neglect, he has failed to discover the existence of a prior encumbrance on the land, under which it is sold. *Garwood v. Eldridge*, 2 N. J. Eq. 145, 34 Am. Dec. 195.

And where a mortgagee who holds a certificate of purchase of the mortgaged premises sells and assigns the certificate, the assignee thereof acquires all the rights of the assignor under the certificate, and the assignor cannot, after the year of redemption 28 L.R.A.(N.S.)

has expired and a deed has been issued to the assignee, maintain an action for the reformation and foreclosure of the mortgage. *Whipperman v. Dunn*, 124 Ind. 349, 24 N. E. 166, 1045.

So, where a written agreement was prepared at the instance of a party to it and read over to him before signing, and an alleged error was afterward discovered in it, but he made no effort to reform it, and omitted to claim that there was any error or mistake for about two years, when he was sued upon the contract, he cannot then contend that there is a mistake in it, in that it does not represent the true contract between the parties, where he fails to give any evidence as to the preparation of the instrument and makes no attempt to explain the manner in which the alleged mistake occurred. *Fitschen v. Thomas*, 9 Mont. 52, 22 Pac. 450.

And when a writing is in form an absolute conveyance with a right to repurchase at an early date, and the securities are surrendered and the full price of the land paid, and the grantor lies by for years without complaining or taking any steps toward redemption, and in the meantime the grantee, in apparent good faith, disposes of the premises, this makes a strong case against granting relief, and warrants denying redemption to the grantor. *Mellish v. Robertson*, 25 Vt. 603.

So, where two persons made an agreement, and one of them died over twenty years afterwards, and the other was not ignorant of what was written in the agreement, or could have been informed if he used due diligence, and the agreement was at all times accessible to him, and on one occasion he procured its production for another purpose, an application to have it reformed, made twenty-two years after it was made, is barred by the lapse of time. *Keedy v. Nally*, 63 Md. 311.

And a very strong showing is required to justify a court in reforming a deed to land in which strangers have subsequently acquired rights, after the lapse of a quarter of a century. *Varner v. Turner*, 83 Ark. 131, 102 S. W. 1111.

And more than twenty years after a mistake occurred in a deed of trust to secure creditors, it cannot be reformed against the intervening rights of others acquired in good faith. *New Orleans Canal & Bkg. Co. v. Montgomery*, 95 U. S. 16, 24 L. ed. 346.

And where a man deeded a house and lot to a trustee for the use and benefit of himself and his wife during their joint lives, and to the survivor of them, and to the children of the wife by a former husband, and to such children as might be born to them, and afterwards the wife and the trustee and one of the children died, and the grantor married again, and there was a great lapse of time between the drawing of the deed and the institution of the suit to rescind it, this, coupled with the death of the wife, the scrivener, and one of the children, and the second marriage of the grantor, demands the strongest proof of the scrivener's mistake in

drawing a deed, instead of a will, to justify the court in rescinding the deed. *Weidebusch v. Hartenstein*, 12 W. Va. 760.

So, persons desirous of opening a settlement, on the ground of error or mistake, must make haste in their application to the court. Long acquiescence amounts to a presumed ratification. *Keitt v. Andrews*, 4 Rich. Eq. 349.

And a court of equity will not direct payments, made under a mistaken construction of a doubtful clause in a settlement, to be refunded after many years of acquiescence by all the parties, and after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on a footing of that construction. *Clifton v. Cockburn*, 3 Myl. & K. 76.

That suit was not immediately commenced, on discovery of a mistake in a written instrument, however, does not bar the right to have it reformed; the complainant is justified in exhausting persuasion before resorting to litigation. *Metropolitan Lumber Co. v. Lake Superior Ship Canal R. & Iron Co.* 101 Mich. 577, 60 N. W. 278.

And this is especially the case where the complainant never gave the defendants reason to suppose he had abandoned or intended to waive his claim, and no injury resulted to the defendants from the delay, and it was admitted by the party who negotiated the contract that he understood that the omitted matter was a part of the contract. *Ibid.*

There is no rule of law fixing the period within which a man may discover that a writing does not express the contract which he supposes it to contain, and which bars him of relief, for delay in asserting his rights, other than that contained in the statute of limitations. *Bidwell v. Astor Mut. Ins. Co.* 16 N. Y. 263.

A party to a contract seeking relief from a mistake therein is not chargeable with laches if he moves, within a reasonable time after discovering the mistake, to seek relief therefrom. *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012; *De Forest v. Walters*, 153 N. Y. 229, 47 N. E. 294; *Hill v. Kuhlman*, 31 C. C. A. 87, 59 U. S. App. 82, 87 Fed. 498.

And a party having a legal title to land, but who is ignorant of his rights, does not forfeit his title by his silence, though he knows that another is about to purchase the land from a third person. *Lammot v. Bowly*, 6 Harr. & J. 500.

And lapse of time since the execution of a deed is no objection to having it reformed in equity according to the real intention of the parties making it, if that intention has been acted upon by both parties, and those claiming under the deed, until within a short time of the application. *Canedy v. Marcy*, 13 Gray, 373; *Harris v. Ivey*, 114 Ala. 363, 21 So. 422; *Schautz v. Keener*, 87 Ind. 258.

Nor is a delay of eleven months in asking for reformation of a mortgage for a mutual mistake such laches as will bar the right as against a subsequent mortgagee 28 L.R.A.(N.S.)

with knowledge of the mistake. *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259.

And where the mistake in a mortgage is in the terms of payment, delay in moving to correct the mistake, and payment by the mortgagor of an instalment, or a promise to pay, as specified in the mortgage, though under protest, asserting the mistake, furnish no ground for a denial of relief in the way of reformation, to which he is entitled. *Andrews v. Gillespie*, 47 N. Y. 487.

And where a father made a deed to his son conveying a tract of land in fee, and afterwards sought in equity to have a provision inserted reserving to himself a life estate, the relief asked for by him, being entirely of an equitable nature, is not barred by the statute of limitations until the lapse of three years from the discovery by him of the fraud upon his rights. *Day v. Day*, 84 N. C. 408.

So, where less than four years have intervened, and the plaintiff, and those under whom he claims, have been in actual possession of the land in question all the time, though under a deed erroneously describing the property, and the defendant has not been prejudiced, and no issue of laches is made either by the pleadings or the evidence, the plaintiff is not barred of his relief on the ground of want of diligence. *Long v. Gilbert*, 133 Ga. 691, 66 S. E. 894.

And if, through a mutual and innocent mistake in settling the accounts of a partnership, one partner gives to the other a promissory note for a much larger sum than that due from him, upon a bill in equity for the correction of the mistake laches is not necessarily to be inferred from the lapse of more than six years, and the payment of more than half the principal of the note, and the regular payment of interest, before discovery of the mistake. *Gould v. Emerson*, 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065.

In the absence of a statute of limitation barring the bringing of an action for the reformation and correction of a written instrument on the ground of mistake, it is an essential element of laches which will bar such an action, that a party to be charged with it should have knowledge of the matter involved, or, after notice, have failed or omitted to obtain knowledge where it might be found, or that there must have been circumstances which should have induced an inquiry from such party concerning it. *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688.

And where there is a mutual and innocent mistake on the part of both vendor and vendee as to the quantity of land named in a deed, the statute of limitations begins to run against the vendee from the discovery of the mistake, and not from the date of the deed. *Emerson v. Mavarro*, 31 Tex. 334, 98 Am. Dec. 534.

Nor does the statute of limitations begin to run against an action for the reformation of a deed until the assertion of an adverse claim against the party seeking reformation. *State v. Lorenz*, 22 Wash. 289, 60 Pac. 644;

Perrior v. Peck, 39 App. Div. 390, 57 N. Y. Supp. 377, affirmed in 167 N. Y. 582, 60 N. E. 1118.

In cases of mistake as well as of fraud, courts of equity will not consider the statute of limitations as running until after the discovery of the mistake, as laches cannot be imputed to the injured party till the discovery of the fraud or mistake has been made. *Stearns v. Page*, 7 How. 819, 12 L. ed. 928; *Gould v. Emerson*, 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065; *Perrior v. Peck*, supra; *Perry v. Williams*, 40 Misc. 57, 81 N. Y. Supp. 204.

Or when by the use of due diligence it ought to have been discovered. *Gould v. Emerson*, supra.

Lapse of time applied by courts of equity in analogy to the statute of limitations will be reckoned only from the time of the discovery of the mistake, in cases purely equitable, and not cognizable in a court of law, where in otherwise proper cases it is sought, on the ground of mistake, to reform and enforce an agreement for the conveyance of real estate, and the correcting of the mistake involves no change of possession, no disturbance of investments made by the party against whom the correction is sought, and leaves the enjoyment of the property to go on in harmony with the prior acts of the parties in interest. *Ormsby v. Longworth*, 11 Ohio St. 653.

And the statute of limitations does not begin to run against a defendant in ejectment in possession of land excepted out of a sale by the sheriff, under execution, so as to bar such defendant's right to the relief of having the sheriff's deed reformed so as to show that such land had been so excepted, until the suit is commenced. *Bartlett v. Judd*, 21 N. Y. 200, 78 Am. Dec. 131.

So, a bill to reform a contract for a mistake in it may be maintained after an action at law thereon has been defeated. *Equitable Safety Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. ed. 398, affirming 4 Cliff. 192, Fed. Cas. No. 6,300.

And a party to a contract who has sought and failed to obtain from the court a decision in his favor upon the construction of it is competent to institute an action to have the contract set aside for mistake. *Wilding v. Sanderson* [1897] 2 Ch. 534.

Nor is a surety guilty of laches in instituting a suit to have a bond canceled or reformed which, by mutual mistake, made him personally liable for the amount of a judgment, until an attempt is made to hold him personally liable for such amount on the bond. *Griswold v. Hazard*, 141 U. S. 200, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 900.

And where a mortgage is given in payment for land under a misapprehension as to the grantor's title, upon suit being brought to foreclose the mortgage, laches cannot be imputed to the mortgagor so as to bar his defense, where the mistake was not discovered by him until the foreclosure suit was brought. *Wilson v. Ott*, 173 Pa. 253, 51 Am. St. Rep. 767, 34 Atl. 23.

Nor does failure of a grantee, for seven 28 L.R.A.(N.S.)

years, to bring suit for the correction of a deed from which part of the land intended to be conveyed was, by mutual mistake, omitted, show laches where relations of mutual trust and confidence existed between the grantor and grantee, and the grantee commenced suit as soon as he discovered the mistake. *Wilson v. Wilson*, 23 Nev. 267, 45 Pac. 1009; *Pavloski v. Klassing* (Ga.) 68 S. E. 511.

And, where notes were executed by trustees, and it was the belief and intention of the parties that the trustees were not liable thereon personally, but subsequently, in an action against the trustees individually, it was determined that they were personally liable, whereupon the trustees immediately sued to reform the notes so as to render them payable from the trust estate, the fact that the trustees had not taken steps to reform the notes until after the trust funds had been disposed of is no objection to the maintenance of the suit, it having been commenced within a reasonable time after the mistake became known. *Richmond v. Ogden Street R. Co.* 44 Or. 48, 74 Pac. 333.

And where a mortgage covering the northeast quarter of a section of land was foreclosed, but, by mistake, the decree ordered the sale of the southeast quarter, and the commissioner advertised and sold the land as misdescribed, and the purchaser conveyed the east half of the land as mortgaged, and his grantee filed a bill to rectify the title and secure a release from defendants, who claimed under a deed executed by the mortgagor after the foreclosure sale, with full knowledge of the error in the commissioner's deed, the purchaser has an interest in having the mistake corrected, and as the record of the foreclosure sale, if not the decree itself, furnishes a means of determining what land was really meant, lapse of time is no bar to such correction, as all the papers must be read together. *Merrifield v. Ingersoll*, 61 Mich. 4, 27 N. W. 714.

So, courts of equity are liberal in allowing mistakes to be corrected when they are clearly established, notwithstanding the acquiescence of the party, providing no injury has resulted in the meantime to the person against whom the relief is sought or those claiming under him. *Wall v. Arrington*, 13 Ga. 88.

And the lapse of nearly three years from the making of an error in a contract to the filing of a bill to reform the contract, in the absence of a substantial change of conditions, is not sufficient to bar a party's right of reformation. *Providence Steam Engine Co. v. Hathaway Mfg. Co.* 79 Fed. 512.

And where land jointly owned was partitioned among four sisters, and by mistake it was conveyed in fee to their husbands, the fact that for more than twenty years one of the husbands was in possession and his wife never called upon him to rectify the mistake, or complained of it to him, does not bar her right or that of her representatives to have the deed reformed, where his right of possession as husband was unquestionable, and there was nothing in the

manner of his possession adapted to awaken suspicion that the deed was not what it should be, and neither she nor her sisters had knowledge of the mistake until about a year and a half before her death, shortly after which the proceeding was commenced. *Stedwell v. Anderson*, 21 Conn. 139.

Nor does the lapse of three years between the discovery of a mistake and the filing of a bill to correct it show such laches as will deprive the party of the right to relief, when it appears that the defendant was insolvent and the plaintiff made repeated efforts to have the mistake corrected without the expense of a lawsuit. *Thompson v. Marshall*, 36 Ala. 504, 76 Am. Dec. 328.

And where a husband, after deserting his wife, proposed to her to join him in conveying a tract of land to their children, reserving to her the rents and profits during her life, but procured the deed to be so written that it conveyed the fee to the children without the reservation agreed upon, and the wife surrendered her possession of the land at the request of the children's guardian, and the guardian rented the land and expended part of the rents in the improvement of the land and part of it in compensating the wife for the maintenance of the children, and had anticipated the rents and profits for several years in advance, a delay upon the part of the widow of nine years in bringing suit to have the conveyance reformed is not such laches as will bar her action. *Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334.

So, an action for the reformation of a deed on the claim that it does not contain a reservation in favor of the plaintiff, to which, under a prior contract between the parties, he was entitled, is not based upon the rescission of any contract for fraud so as to be within the rule requiring immediate disaffirmance; it seeks the performance of the contract; and while, if there has been unreasonable delay in seeking relief, it will be refused, it is within the discretion of the court, under all the circumstances, to grant or refuse it. *Welles v. Yates*, 44 N. Y. 525.

And the fact that a grantor does not begin an action against a subsequent grantee immediately upon discovery of a mistake in the deed to the prior grantee does not amount to laches, where such subsequent grantee is chargeable with knowledge of the mistake. *Dennis v. Northern P. R. Co.* 20 Wash. 320, 55 Pac. 210.

And where notes and a mortgage were given under an agreement that if the payee died before his wife she would be the sole owner of the property, and if she died first he should be the sole owner, which understanding, by mistake, was not included in the written agreement, a delay upon the part of the husband for four years before bringing an action to reform the notes and mortgage, including two years after her death, is not such laches as to bar his remedy by way of reforming the notes and mortgage, especially where the statute of limitations gives a longer period for bring-

ing such actions. *Kropp v. Kropp*, 97 Wis. 137, 72 N. W. 381.

If fraud and mistake are admitted as an exception to the running of the statute of limitations, however, they will only prevent the running of the statute until the fraud and mistake are discovered, or by the use of reasonable diligence might have been discovered by the party applying for relief. *Smith v. Fly*, 24 Tex. 345, 76 Am. Dec. 109.

And after the lapse of forty-four years equity will refuse to interfere to correct a mistake in the description in a deed, especially against an innocent purchaser, but where only nine years have intervened, and the complainant has been in actual possession all the time, though under an erroneous deed, and the defendant has not been prejudiced, relief will not be denied on the ground of want of diligence. *Wall v. Arrington*, 13 Ga. 88.

And whether the time which would bar an action of ejectment for the recovery of land, or a verbal contract for the payment of money or for damages for an injury, elapsed before the discovery of an excess in the quantity of land sold, would bar a suit in equity for the rescission of the contract or for compensation for the excess, or not, the grantor must bring his suit within a reasonable time after the discovery of the mistake. He is not entitled to the time from the sale and conveyance to the discovery of the mistake, and the additional time thereafter that would bar an action, within which to bring his suit. *Western Min. & Mfg. Co. v. Peytona Cannel Coal Co.* 8 W. Va. 406.

And where a person for whom another held the legal title to land, upon advice of counsel, procured the property to be conveyed in trust for the benefit of himself and his wife and the survivor, and on the death of both the same to be conveyed to their children or descendants *per stirpes*, the deed will not be set aside after the lapse of twenty years, during which time the disposition so made had been acquiesced in, on the ground of a mistake in not inserting a power of revocation, unless the proof of that fact is of the most satisfactory kind. *Finucan v. Kendig*, 109 Ill. 198.

So, it has been held that where the statute of limitations, making the running of the statute to depend upon discovery, is limited to actions for fraud, cases of mistake are excluded from its operation, so that the ordinary statute would run from the time of the mistake. *Exkorn v. Exkorn*, 1 App. Div. 124, 37 N. Y. Supp. 68. But see later New York cases set forth *supra* this section.

2. Application to insurance contracts.

Whether an insured person was guilty of laches in not discovering a mistake in the policy, and seeking to have it corrected before loss and suit brought thereon, is a question for the jury, there being no arbitrary rule fixing the time within which

such relief must be sought, unless it be the period of limitation applicable to such an equitable suit. *Delaware Ins. Co. v. Hill* (Tex. Civ. App.) 127 S. W. 283.

And the acceptance and retention of an insurance policy until the expiration of fifteen years, without taking any steps for reformation, deprives the person insured of the right to reformation. *Avery v. Equitable Life Assur. Soc.* 117 N. Y. 451, 23 N. E. 3.

And where an insured in a tontine life policy kept the policy for eleven years in ignorance of the fact that it did not guarantee his share in the surplus at a specified sum, but only provided for a share in the surplus based on experience, and kept it for four years more with knowledge of the fact, and until the completion of the accumulative period had demonstrated what his share of the surplus would be, on the contingent plan adopted by the insurer, he cannot sue to reform the policy so as to make it guarantee his share in the surplus at a specified sum, in accordance with a preliminary contract between himself and the soliciting agent, binding the insurer. *Langdon v. Northwestern Mut. L. Ins. Co.* (N. Y.) 92 N. E. 440.

So, where a person obtained life insurance with an ordinary life policy, the character of which plainly appeared in print, both on the margin and in the body of the policy, and he paid the premium thereon for ten years, but, when called upon for the eleventh annual premium, he alleged that he had applied for a ten-year paid-up policy, and had supposed that he had one, equity will not interfere to compel the issuance of a paid-up policy, or to rescind the contract and recover for him the premiums paid, since, by the use of reasonable diligence, he might have had knowledge of the truth. *Massey v. Cotton States L. Ins. Co.* 70 Ga. 794.

And where a son took out a policy of insurance in his own name upon his father's property, the father being privy thereto, so that, in case of loss, the proceeds thereof might be protected from garnishment by the father's creditors, the father and son, joining as plaintiffs, cannot ask that the policy be reformed so that the loss which occurred shall be payable to the father, and he cannot recover thereon, and the son cannot recover for the benefit of his father, where the policy limited the right of recovery to himself. *Baldwin v. State Ins. Co.* 60 Iowa, 497, 15 N. W. 300.

An insurance company issuing a renewal policy, and promising that the renewal policy should be on the same terms with the old one, however, is not in a position to charge the insured with neglect in not discovering that it was not the same. *Palmer v. Hartford F. Ins. Co.* 54 Conn. 488, 9 Atl. 248.

And where a policy of insurance was issued in renewal of an old policy, materially changing its terms, and this policy was renewed from time to time, and the insured person did not discover the change until 28 L.R.A.(N.S.)

after a loss, the only effect of the negligence of the insured in not discovering the change, and in not sooner seeking relief, is to make the granting of relief discretionary with the court. *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 33 Am. Rep. 607.

And where an insurance policy expired, and the assured applied for a renewal in the same terms, and a policy was given him, supposed by him to be a renewal on the same terms, and he omitted to examine the policy until after a loss of property by fire, several months later, when, on reading it, he discovered an improper variance from the former policy, materially affecting his right of recovery, the existence of which would have prevented him from accepting the policy had he known it, he will not be regarded as guilty of laches in not examining the policy and applying earlier for its correction, since he had a right to believe it to be in all essential respects like the former policy. *Palmer v. Hartford F. Ins. Co.* supra.

Nor does the mere failure of an insured person to read the application or the copy of it on the policy, or to read the policy, constitute such negligence as will deprive him of the right to a reformation of the policy to correct a mistake of the agent. *Fitchner v. Fidelity Mut. Fire Asso.* 103 Iowa, 276, 72 N. W. 530.

And an assured person who has fully, truthfully, and in good faith answered all the required questions put to him by the agent of the insurance company is not guilty of negligence in signing the application, when such agent has prepared it, without reading it, and it is immaterial whether the agent acted dishonestly or mistakenly, and it is not necessary to reform such application in order to secure a recovery on the policy. *Germania L. Ins. Co. v. Lunkenheimer*, 127 Ind. 536, 26 N. E. 1082.

Nor can lapse of time be relied upon to bar a suit in equity to reform a policy of insurance which is auxiliary to an action already commenced at law upon the policy, if the latter was brought within the time limited. *Rosenbaum v. Council Bluffs Ins. Co.* 3 L.R.A. 189, 37 Fed. 724.

The line of distinction would seem to be that an insured person must not permit himself to remain ignorant of material features of his policy which would and should be observed by reasonably careful men, but that reasonable delay in discovering changes made by the insurer which he had no reason to anticipate, or in discovering errors of the agent in making out the policy, is not laches which will bar reformation.

f. Waiver, confirmation.

1. By Acquiescence.

The general rule is that relief in the way of reformation of a written instrument should not be granted where the party seeking it has acquiesced in the written agree-

ment after becoming aware of the mistake. *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85, 25 L. ed. 52.

And a plaintiff bringing forward a document on which he founds his right cannot be allowed to say that the instrument which he himself produces to the court does not express the real agreement into which he has entered. *Druiff v. Parker*, L. R. 5 Eq. 131.

And where a bond is executed by one member of a firm, all of the members intending the instrument should bind them, and the obligee, after discovery of the mistake, pursues the individual maker of the bond, this is a ratification of the instrument which will prevent relief against the copartners in equity. *McNaughten v. Partidge*, 11 Ohio, 223, 38 Am. Dec. 731.

So, where, in case of a parol agreement as to land, a third person has been permitted to act upon his conception of the rights thereunder, not questioned, a party to the contract cannot object that he acquiesced under expectations from that person which were in part disappointed. *Stockley v. Stockley*, 1 Ves. & B. 23.

And where a ground rent was advertised and sold at public auction as irredeemable, and the purchaser bought it as irredeemable, relying on such representations, and after the purchase, the owner procured a title policy of insurance in which the ground rent was insured as irredeemable, and settlement was then made, and the money was received and afterwards invested by the original owner, the present owner has no standing in equity to have the contract of sale set aside. *Clapp v. Hoffman*, 159 Pa. 531, 28 Atl. 362.

Nor can a mutual mistake in the calls of a deed, conveying land in excess of that bargained for, be corrected at the suit of the vendor, where, after the discovery of the mistake, he received payment of the purchase money for the land thus conveyed, and yielded possession thereof to the vendee. *Wittbecker v. Walters*, 69 Tex. 470, 6 S. W. 788.

And where a deed contained a condition that it was to be held in the maker's possession till his death, and the scrivener who wrote it inserted it of his own motion, for the protection of the grantor, but read it over to the grantor before he signed it, a court of equity will not strike out the clause, where he held it for over a year without asking to have it so stricken out. *Griffin v. Miller*, 188 Mo. 327, 87 S. W. 455.

So, where land conveyed to husband and wife jointly is devised by him in severalty in different parts to his children, one portion thereof being devised to his wife for life, with remainder to two daughters, and there is also devised to the wife other property, all of which she accepts in ignorance of such joint title in the land, she is thereafter estopped from asserting any other interest in the land than was devised to her, unless, upon obtaining information of such joint interest, she renounces the will, 28 L.R.A.(N.S.)

and surrenders all interests acquired thereby. *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811.

And where a husband and wife were seized of an estate by entireties, and the husband by will directed the land to be sold, and the proceeds divided amongst his wife and children, and died, leaving his wife and a number of children, and the land was sold under an order of the orphans' court, and bought by two of the children, at the request of the widow, who received her share of the proceeds, in accordance with the will, the heirs are estopped by her acts, and if she was ignorant of her rights, she is estopped upon the principle that when one of two innocent persons must suffer, it shall be he who causes the injury. *Maple v. Kussart*, 53 Pa. 348, 91 Am. Dec. 214.

And where the name of a wife was inserted in a deed as grantee instead of that of her husband, and the draftsman of the deed testified that he did it without authority, a reformation of the deed by substituting the husband's name therein will not be ordered, where the deed was delivered to the husband for examination, and kept by him for a day before its execution, and the design was to effectuate a division of lands between the husband and the grantors therein, who were joint owners with him, and from the date of the execution of the deed to the date of the husband's death, a period of seven years, he never mentioned that any mistake was made in the deed, and exercised dominion and control over the land, and the wife claimed an undivided interest in the land, which was recognized by the husband. *Hough v. Smith*, 132 Ala. 204, 31 So. 500.

So, where a person holding a mortgage and bond given for purchase money voluntarily relinquished the mortgage, and canceled the bond, and took another mortgage for the same debt, knowing that an intervening mortgage on the same premises, previously given, was outstanding, and upon a sale of the premises, subsequently made, consented to give up his second mortgage, and both mortgagees took new mortgages in the place of their old ones, the mortgagee who had previously surrendered the purchase-money mortgage voluntarily assenting to the priority of the other's mortgage, he is not entitled to have the outstanding mortgage postponed, so as to give priority to his mortgage over it. *Hinchman v. Emans*, 1 N. J. Eq. 100.

And if a landowner has appropriated water for a mill, and leased it in connection therewith, the lessee is entitled, in the absence of actual notice, to infer that there is no restriction upon the water rights, and mere constructive notice from the record of a deed, limiting those rights, will not estop him from recovering rent which he has paid to the lessor in the belief that no such limitation existed. *Bedell v. Wilder*, 65 Vt. 406, 36 Am. St. Rep. 871, 26 Atl. 589.

And where an executor, acting on the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees, and

one of the legatees, being dissatisfied, took the opinion of counsel, which agreed with the former opinion, and the executor then divided and paid over the fund in accordance with the opinions, the dissatisfied legatee cannot, two years afterwards, file a bill against the executor and the other legatee, alleging that the will had been wrongly construed, and claiming repayment from the other legatee. *Rogers v. Ingham*, L. R. 3 Ch. Div. 351.

So, where the drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable upon the bill, in default of the acceptor's payment three months after it was due, said that he knew he was liable, and if the acceptor did not pay it, he would, he is bound by such promise. *Stevens v. Lynch*, 12 East, 38.

And where a person who had been induced to sign a promissory note, on which suit had been brought, as surety, through the agency of the principal maker and payee, by fraudulent representations that would have been for him a valid defense in a suit thereon after the note had matured, with a full knowledge of the facts constituting the fraud, but ignorant that the fraud was a defense at law, voluntarily requested the payee to extend the time of payment of the note, which was done, and upon that consideration promised to pay, he thereby waived his defense to the note. *Rindskopf v. Doman*, 28 Ohio St. 520.

So, where a person misconceives his remedy, either because the facts turn out to be different from what he supposed them to be, or the law applicable to the facts is found to be different than supposed, and he proceeds to judgment, but is unsuccessful, if a second remedy invoked is in equity, and the defendant would be seriously prejudiced by plaintiff's mistake if he were permitted to proceed the second time, the court may apply the principle of estoppel *in pais* if necessary to prevent injustice. *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1, 3 A. & E. Ann. Cas. 773.

In order to work confirmation of an instrument, however, the party alleged to confirm must know the law as well as the fact. *Cockerell v. Cholmeley*, 1 Russ. & M. 418.

And the continued possession of a lessee, and payment of rent after the time when, according to an oral agreement, left out of the lease by mistake of the scrivener, repairs were to have been made, in expectation that they would be made, does not operate as a waiver of the agreement in that respect. *Silbar v. Ryder*, 63 Wis. 106, 23 N. W. 106.

Nor does a defendant in an action for the reformation of a written instrument waive his objections to the ruling of the court allowing submission of the question of reformation by his subsequently addressing the jury on that question as one of fact that they were to determine. *Skiba v. Gustin* (Mich.) 126 N. W. 464.

So, where a deceased person left specific

bequests to different persons of his family, and without taking advice, they assumed that one of the sons took a life interest only, and during the life of that son, and till the time of filing the bill, which was twenty-four years after his death, all the persons of the family believed, and did many acts on the belief, that the title of the deceased son expired with his life, this was not such an acquiescence in a family arrangement as prevented the son's personal representatives from enforcing their claim, and the length of time was not a bar under the statute of limitations, for the will created a trust. *Bullock v. Downes*, 9 H. L. Cas. 1.

And where a wife agrees to join her husband in a deed conveying a tract of land to their children, reserving to her the rents and profits during her life, but he procures a deed without the reservation, a judgment for alimony, recovered by the wife in a suit for divorce after the execution of the deed, is no bar to an action by the wife for the reformation of the deed, since there is no question of property rights between the husband and wife. *Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334.

2. *By attempt to enforce.*

A contract cannot be rescinded for mistake as to its terms, where the party seeking to rescind completed the contract, and afterwards brought an action to reform it. *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N. W. 264.

Nor can a promissory note be reformed after judgment has been taken upon it. *Heavenridge v. Mondy*, 49 Ind. 434.

And where a person who entered into a contract brought an action upon it which he prosecuted to final judgment not only in the circuit court, but on appeal, and declared upon the contract as it was written, and admitted in the agreed case that the work was done under the contract, and a dispute arose as to the meaning of the contract with reference to the rule of measurement of the work done, it was then too late to go into equity for a correction of an alleged mistake in the contract with reference thereto. *Sibert v. McAvoy*, 15 Ill. 106.

And where an action is brought against an indorser of notes, and it is sought to reform them, it is competent for the defendants to plead and prove, as tending to show the absence of mistake, that after the notes were in default, the payee retained them, and in an individual capacity entered suit thereon in a justice's court, and prosecuted it to appeal. *Jackson v. McCalla*, 133 Ga. 749, 66 S. E. 918.

Where a defendant in a suit at law has only a purely equitable defense, which could not be made available to him in a court of law, however, he is not estopped from seeking equitable relief because of a judgment thereon in a court of law by the mere fact that he did not invoke the power of equity thereto until after the judgment at law was rendered. *Stevens v. Hertzler*, 114 Ala. 503, 22 So. 121.

And a justice's suit upon notes would not estop the person bringing it from maintaining, as administratrix, a suit in equity to reform the notes, on the plea that they were payable to her personally, when they should have been payable to her as administratrix. *Jackson v. McCalla*, supra.

Nor does the mere commencement of an action for damages for breach of a written contract, the action being afterwards dismissed without a determination on the merits, conclusively bar a subsequent action for reformation of the contract for a mistake in it. *Spurr v. Home Ins. Co.* 40 Minn. 424, 42 N. W. 206.

And the unsuccessful use of a remedy supposed to be, but in effect not, appropriate to vindicate the right of a particular matter, either because the facts turn out to be different from what the plaintiff supposed them to be, or the law applicable to the facts is found to be different than supposed, though the action proceeds to judgment, does not preclude the plaintiff from thereafter invoking the proper remedy, and neither the doctrine of election nor *res judicata* applies. *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1, 3 A. & E. Ann. Cas. 773.

And a bill to reform a contract may be sustained after an action at law thereon has been defeated. *Equitable Safety Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. ed. 398, affirming 4 Cliff. 192, Fed. Cas. No. 6,300.

VII. Remedies.

a. General rules.

Where a mistake in a written instrument is of so fundamental a character that the minds of the parties have never in fact met, or where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence upon the part of the person injured thereby, either in falling into the error, or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed *in statu quo*, a court of equity will interfere in its discretion, to prevent intolerable injustice. *Brown v. Lamphear*, 35 Vt. 252.

If the written contract is untrue, and misstates the real agreement as made and understood by both parties, in some essential particular, then the contract is a mistaken one, and the mistake may be corrected in equity. *Botsford v. McLean*, 45 Barb. 478; *Whitehead v. Brown*, 18 Ala. 682; *Trout v. Goodman*, 7 Ga. 383; *Seals v. Stocks*, 100 Ga. 13, 30 S. E. 278; *Hileman v. Wright*, 9 Ind. 126; *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33.

And the rule is the same under statutes authorizing the reformation of mistakes in deeds, grants, or other instruments, where, by fraud, mistake, or accident, they do not speak the intention of the parties. *American Asso. v. Williams*, 93 C. C. A. 1, 166 Fed. 17.

And a statute authorizing such reformation by courts of law does not deprive equity 28 L.R.A.(N.S.)

ty of jurisdiction to reform grants containing a misdescription of the land intended to be conveyed, where the errors to be corrected do not appear on the face of the instruments, and must be shown by outside evidence. *Ibid.*

And this is so whether the petitioner be in or out of possession, and the proprietors of interests adversely affected, including the state, are barred if notice is given. *Ibid.*

Where, from any defect of the common law, want of foresight of the parties, or other mistake or accident, there would be a failure of justice, it is the duty of a court of equity to supply the defect or furnish the remedy. *Quick v. Stuyvesant*, 2 Paige, 84.

And if a deed or obligation is sought to be enforced in an event not foreseen or provided for by the parties, and contrary to the original intention, a court of equity will interfere to prevent such injustice, and will direct that to be done which the parties would themselves have directed had they foreseen the event. *Ibid.*

And the mistake may be set up as a defense in an action on the contract in question, as well as in a direct suit for reformation. *Barlow v. Elliott*, 56 Mo. App. 374.

So, a court of equity, when it has reformed a contract, may enforce it, or grant such relief upon it as the complainant shows himself entitled to. *Brugger v. State Invest. Ins. Co.* 5 Sawy. 304, Fed. Cas. No. 2,051.

And where a contract is reformed by a court of equity, the rights of the parties under it must be measured by the contract as reformed. *Hale v. Young*, 24 Neb. 464, 39 N. W. 406; *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099.

The object of the correction of mistakes in equity in written instruments is to give the parties the same beneficial results that would have flowed from the agreement had the mistake never existed; and the form in which relief will be given when a mistake in a material particular is established depends upon the circumstances of the particular case. *Lestrade v. Barth*, 19 Cal. 660.

And whether an application to equity be regarded as one for the reformation of a deed, or for the establishment and declaration of a trust in respect to the property conveyed by the deed, the effect is substantially the same, and in either case the beneficial effect and operation of the deed, if different from that originally intended, may be changed or modified. *McDonnell v. Millholland*, 48 Md. 540.

And a court of equity has the right, in a proceeding to correct a mistake in a deed or contract, to consider all the equities between the parties to the controversy, and if the general equities of the whole of the dealings between them, especially in matters between husband and wife, are against the complainant, or are equal, she can very properly be refused relief in particular parts of such dealings, though, as to the one transaction, a particular equity may seem

to exist in her favor. *Redding v. Rozell*, 59 Mich. 476, 26 N. W. 677.

So, a court of equity will interfere to prevent the fraudulent use of a paper for a purpose not contemplated at the time it was made, even though there was no mistake or fraud in its execution. *Murray v. Dake*, 46 Cal. 644.

Chancery will not contravene the express provisions or the policy of the law, however, in order to reform a contract for a mistake. *Dickinson v. Glenney*, 27 Conn. 104.

And a court of equity relieves against a defective execution of a power only when the defect consists in the want of some circumstance in the manner of execution. *Cockerell v. Cholmeley*, 1 Russ. & M. 418.

And the plaintiff in a bill in equity to reform a written instrument by inserting a clause alleged to have been omitted by common mistake of the parties cannot have an issue of the question of mistake framed for a jury as a matter of right, but the court may frame such an issue at its discretion. *Stockbridge Iron Co. v. Hudson Iron Co.* 102 Mass. 45.

So, when a party asks a chancellor to restrain the inequitable use of a legal title, he must show such facts as entitle him to rescind on the ground of either mistake or fraud. *Watts v. Cummins*, 59 Pa. 84.

And the authority of a court of equity to reform a written instrument does not extend to any alteration of a contract, but only to making the contract in which a mistake has occurred correct by conforming it to what was actually agreed upon between the parties. *Garnar v. Bird*, 57 Barb. 277.

And where, in reducing an agreement to writing, a material clause has been omitted by mistake, a party seeking to avail himself of the actual contract must obtain a reformation of the writing, either by a distinct proceeding to reform it, or by specially pleading the mistake in an action in which the contract is sought to be used, and asking its correction as independent relief. *Pierson v. McCahill*, 21 Cal. 123; *Adams v. Gillig*, (N. Y.) 92 N. E. 670.

So, if an agreement was not founded on a mistake of any material fact, and if it was executed in strict conformity with itself, a court of equity will not decree another security to be given, different from that which had been agreed upon, or treat the case as if such other security had in fact been agreed upon and executed. *Hunt v. Rhodes*, 1 Pet. 1, 7 L. ed. 27.

And, where the law has declared the construction of a contract, a court of equity will not interfere to aid either of the parties merely on the ground of their own or their agents' dealings under it, for that would be to make a new contract, which can only be done by mutual consent by persons properly authorized, and in due form. *Midland G. W. R. Co. v. Johnson*, 6 H. L. Cas. 798.

Nor will important conditions, which the parties never fully assented to, be inserted in a lease by a court of equity, where there is no sufficient evidence that the alleged agreement on the defendant's part, on which

the action is based, formed part of the lease counted on. *Ladwig v. Haase*, 54 Wis. 311, 11 N. W. 485.

And a bill in equity for the reformation of the description of premises in a lease will not lie, where it appears that the effect of the reformation prayed for would be to show an eviction from a portion of the premises, and work a forfeiture of the rent due on the entire leased premises. *Morris v. Kettle*, 56 N. J. Eq. 826, 34 Atl. 376.

And if the different operation of a contract from what was expected of it, beyond what was intended, is merely a legal result from what they did intend, so that relief cannot be obtained except by annulling the very contract understandingly and intentionally made, a court of equity will not interfere, except in cases in which the contract might still operate in the manner and to the extent which the parties intended when they made it, and its further and different operation, which was not contemplated by them, be restrained. *Proctor v. Thrall*, 22 Vt. 262.

So, though equity may enforce specific performance of an agreement to make a mortgage, it will not give, to an executed agreement of the parties contemplating no further act by either, any different effect from that which the law attributes to it, and it will not reform the writing to make an agreement of a different effect from that which the parties intentionally entered into. *Stoddard v. Hart*, 23 N. Y. 556.

And where money was advanced upon the security of a mortgage, with a parol agreement that further advances should be made, and that the amount thereof should be inserted in the bond, and that the mortgage should be considered as security for what should thus be inserted, and after the mortgage was recorded a further advance was made, and the amount inserted in the bond, the mortgage could not be extended to cover such subsequent advance, even as against a grantee of the premises who took them for a precedent debt, with full notice of all the facts. *Ibid.*

And under a bill to correct a deed on the ground of mistake of the scrivener, the essence of which is that the terms of the description were so essentially mistaken that nothing short of a reformation in equity could carry out the agreement, it is inadmissible on proofs under which relief on this ground is not allowed to grant substantially the same relief on the inconsistent ground that the deed presents a case of latent ambiguity which equity ought to remove through extrinsic proof of intent. *Dart v. Barbour*, 32 Mich. 267.

So, if a party to a deed, by a mistake in it, holds a greater estate than belongs to him, and conveys it to an innocent purchaser, receiving the consideration, he may be treated as a trustee for the real owner. *Andrews v. Andrews*, 12 Ind. 348.

And a defective conveyance will in equity be treated as an agreement for a conveyance, in order to effectuate the intention of the parties, and a conveyance by an agent,

nugatory because professing to pass the title from himself, will, where there was ample authority in the agent to bind his principal, had the conveyance been in a proper form, be executed in equity as an agreement of the principal to convey. *Welsh v. Usher*, 2 Hill, Eq. 167, 29 Am. Dec. 63.

And where a conveyance was intended by both parties to vest an absolute title in the grantee, but, by mistake in drawing it, it did not do so, and the grantee in possession is attacked with reference to his title, his conveyance may be construed as a conveyance of the entire premises; and it is unnecessary that he should first procure a reformation of the deed. *Perrior v. Peck*, 39 App. Div. 390, 57 N. Y. Supp. 377, affirmed in 167 N. Y. 582, 60 N. E. 1118.

And where a deed by a husband and wife to homestead property described the land by mistake, and the grantee thereafter conveyed it to a third person, using the same description, it not appearing whether there was any mistake as between the first grantee and the second, the first grantee is the proper party to sue for reformation of the first deed. *Tillis v. Smith*, 108 Ala. 264, 19 So. 374.

So, equity never interferes to aid one creditor against another, on the ground of mistake. *Knight v. Bunn*, 42 N. C. (7 Ired. Eq.) 77.

And where a debtor conveys land to a trustee to secure the payment of debts, no definite price is fixed, and so the estimated quantity of land is not an element in the fixation of the price, and consequently excess in the actual quantity of the land cannot entitle the grantor in trust to a rescission of the conveyance, or compensation for the excess. *Western Min. & Mfg. Co. v. Peytona Cannel Coal Co.* 8 W. Va. 406.

But the right of a creditor to have a specific lien which is about to fail from mistake of a draftsman set up in a court of equity is superior to that of the general creditors of an insolvent intestate, who have no lien. *Huffman v. Fry*, 58 N. C. (5 Jones, Eq.) 415.

b. What courts have jurisdiction.

Generally, power to reform written contracts for fraud or mistake belongs to courts of equity, and cannot be exercised by common-law courts. *Ivinson v. Hutton*, 98 U. S. 79, 25 L. ed. 66; *Bush v. Merriman*, 87 Mich. 260, 49 N. W. 567; *Skiba v. Gustin* (Mich.) 126 N. W. 464; *Winnipiseogee Paper Co. v. Eaton*, 64 N. H. 234, 9 Atl. 221.

And a court of law cannot by construction make a contract express the real intention of the parties, which, by mistake, is not expressed in the words thereof. *Zohrlaut v. Mengelberg* (Wis.) 124 N. W. 247.

Where a written instrument is sought to be reformed for mistake, in an action at law, the party should move at the trial term for leave to amend his pleading by filing a bill in equity. *Winnipiseogee Paper Co. v. Eaton*, supra. 28 L.R.A.(N.S.)

Where a written instrument reciting the receipt of money on the purchase price of land sold is considered as a mere receipt for money, it is competent in an action at law to explain and modify it; but, considered as a contract for sale and purchase of real estate, it may not be corrected or reformed in an action for damages for failure to convey, to show that the agreement was for the sale of other land. *Skiba v. Gustin*, supra.

And where lands sold are described as a specified number of acres, more or less, the purchaser complaining of a deficiency must resort to a court of equity to obtain relief, on the ground of mistake; he cannot maintain an action at law for money had and received, to recover back the money paid for the number of acres in which the tract was alleged to be deficient. *Smith v. Fly*, 24 Tex. 345, 76 Am. Dec. 109.

So, a court of law like a city court may construe and enforce a written contract as it stands, but it cannot compel alteration to be made in it, since the power to reform such contracts is exclusively within the jurisdiction of courts of equity. *Fowler v. Preferred Acci. Ins. Co.* 100 Ga. 330, 28 S. E. 398.

A Federal court, however, has jurisdiction of a suit in equity to reform a policy of insurance where the action is brought in a state court by a foreign assignee of the policy, against an insurer who is a citizen of the state where the suit is brought, and thence removed to the Federal court, although the insurer and insured are citizens of the same state. *Rosenbaum v. Council Bluffs Ins. Co.* 3 L.R.A. 189, 37 Fed. 724.

And a court of law, in giving effect to the intention of the parties to a written contract, as gathered from the entire instrument, may disregard a mistake apparent on the face of the writing, when, notwithstanding the mistake, the intent remains clear from other parts of the contract. *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199.

But a mistake on the face of an instrument, however obvious, cannot be corrected or disregarded by a court of law, unless, from other parts of the instrument, there can be no doubt of the real intention of the parties. *Ibid.*

So, the right which one has to nullify an alleged ratification by him of a voidable release executed by him, by showing that when he was alleged to have so ratified it, he was not aware of his private legal right arising out of the facts, to repudiate the release, is a substantive right, and not a mere rule by which a court of chancery administers his right; and as such substantive right, it is available in avoidance of the alleged release, as well at law as in equity. *Alabama & V. R. Co. v. Jones*, 73 Miss. 110, 55 Am. St. Rep. 488, 19 So. 105.

c. The relief granted.

1. Generally.

Reformation of a deed or contract can only be had to express some material thing which the parties agreed on and meant to

put in, but left out, or by striking out or changing something they did not mean to express. *Moffett v. Jaffe*, 132 App. Div. 7, 116 N. Y. Supp. 402, reversing 61 Misc. 584, 114 N. Y. Supp. 614; *Sweet v. Marsh*, 133 App. Div. 315, 117 N. Y. Supp. 930.

A written instrument will be reformed for fraud or mistake only so as to give effect to a previous binding contract of the parties. *Petesich v. Hambach*, 48 Wis. 443, 4 N. W. 565.

The design is to give effect to the intention of the parties to the contract or instrument. *St. Anthony Falls Water-Power Co. v. Merriman*, 35 Minn. 42, 27 N. W. 199.

And a reformation of a deed will never be decreed when the effect would be to compel a conveyance from the grantor of something not originally intended to be conveyed. *Norris v. Colorado Turkey Honestone Co.* 22 Colo. 162, 43 Pac. 1024.

If, after making an agreement, however, in process of reducing it to a written form, the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere with appropriate relief, either by way of defense to its enforcement, or by cancelation or by reformation to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Hileman v. Wright*, 9 Ind. 126; *Bodwell v. Heaton*, 40 Kan. 36, 18 Pac. 901.

And the duty of a court of equity to correct a mistake in a written instrument is coextensive with the mistake, and extends not merely to the reformation of the original instrument, but also to all subsequent proceedings, papers, judgments, and decrees into which the mistake, as such, is carried. *First Nat. Bank v. Wentworth*, 28 Kan. 183.

Relief from a mistake in a contract which does not express the agreement of the parties is not effected by erasures or interlineations of the former contract, but by injunction and orders for necessary and proper releases. *Smith v. Greeley*, 14 N. H. 378.

When a written contract does not express the understanding of the parties, on account of a mistake concerning the subject-matter of it, the remedy is by rescission or cancelation of the written contract, and, in some cases, by its rectification. *Page v. Higgins*, 150 Mass. 27, 5 L.R.A. 152, 22 N. E. 63.

So, a court of equity looks not so much to the legal formalities with which a transaction is clothed as to its pith and substance; and where a contract is in form broad enough to cover many things not in terms expressed upon its face, but it is manifest that the minds of the parties never met and concurred in reference to these matters, and where fraud has been practised, equity will disregard mere technical forms, and only attach to the contract the effect which both parties had in view at the time of its execution and delivery. *Pomeroy v. Benton*, 57 Mo. 531. 28 L.R.A.(N.S.)

But equity will not interpose to effect a forfeiture of a privilege, the divesting of an estate, the taking away of a right by condition subsequent or otherwise, or the discovery of some matter which may render the act done illegal, and thereby subject the party to a penalty, but this rule does not apply to the case of reforming a mistake in a bond for the prison limits. *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33.

Nor can a court of equity reform a contract or other written instrument by making it what the court thinks the parties ought to have made it, or would have made it if better informed. *St. Anthony Falls Water-Power Co. v. Merriman*, supra.

And where a purchase of stock in a mining corporation is made on condition that the purchaser acknowledge an indebtedness of a specified sum as properly due on part of the shares, and also acknowledge an aggregate indebtedness to the seller of the stock in a specified sum, the contract is an entirety and indivisible, and cannot be reformed by striking out the acknowledgment of indebtedness upon the shares, upon the ground of mistake of law. *Loftus v. Fischer*, 106 Cal. 616, 39 Pac. 1064.

So, on the question of relief from a mistake in an instrument which fails to carry out the intention of the parties to it, it is immaterial whether the proceeding is by bill to correct the mistake, or the mistake is set up in the answer by way of defense. *Leitensdorfer v. Delphy*, 15 Mo. 160, 55 Am. Dec. 137; *Trout v. Goodman*, 7 Ga. 383; *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706; *Bodwell v. Heaton*, supra; *Rosevelt v. Dale*, 2 Cow. 129; *Gillespie v. Moon*, 2 Johns. Ch. 596, 7 Am. Dec. 559.

And this may be done by means of a decree quieting the grantee's title. *De Forest v. Walters*, 153 N. Y. 229, 47 N. E. 294; *Lucas v. Labertue*, 88 Ind. 277.

And a grantee in possession of land under a deed may, in defense of an action of ejectment in which his title is attacked, seek a reformation of his conveyance. *Perrin v. Peck*, 39 App. Div. 390, 57 N. Y. Supp. 377, affirmed in 167 N. Y. 582, 60 N. E. 1118; *Hoppough v. Struble*, 60 N. Y. 430.

And a mutual mistake on the part of the parties to a deed as to the legality of adjoining surveys called for in a deed may be set up, and, under a plea of partial consideration, relief obtained when the vendor seeks the collection of unpaid purchase money. *Moore v. Hazelwood*, 67 Tex. 624, 4 S. W. 215.

Nor need the defendants in a bill to foreclose a mortgage file a cross bill to have a mistake in the mortgage corrected; if entitled to such correction, they may be protected by the decree upon the original bill. *Ames v. New Jersey Franklinite Co.* 12 N. J. Eq. 66, 72 Am. Dec. 385.

And where a wife furnished money to her husband, with which he purchased certain city lots, taking title to the property in his own name, and afterwards the husband and wife took possession of the property,

and occupied it as their homestead, and he attempted to convey the legal title to her, but failed, because of a failure to insert in the deed the number of the block and the name of the city in which the lots were situated, and this failure was not from accident or mistake, but from a want of recollection as to the number, and the grantor instructed the notary who took the acknowledgment to insert such number afterwards, which he never did, and afterwards the husband died intestate, and his children then set up a claim to the undivided half of said lots, and the wife, who had continuously resided thereon, claimed them as her own, although she is not entitled to an action to reform the deed, she is entitled to an action to quiet her title to the property, as against the children. *Leonard v. Wills*, 24 Kan. 231.

2. Injunction.

A court of equity will enjoin the enforcement of a bid for public work, in which a mistake occurred upon the part of one party, although it could not reform such bid unless the mistake was mutual. *Moffett v. Rochester*, 82 Fed. 255.

And in a suit by a surety to cancel or reform a bond given on *exeat*, as containing a condition inserted by fraud on the surety, if the principal in the bond be dead, the proper relief is to enjoin the prosecution of any suit to make the surety liable on such condition. *Griswold v. Hazard*, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999.

And where there was an express agreement between a lessee and the agent of the lessor of buildings, that the rent should cease if the buildings leased should be casually destroyed, and that a stipulation to that effect should be inserted in the lease, but such stipulation was inadvertently omitted, and the premises were afterwards accidentally burned, the lessor may be perpetually enjoined from prosecuting any suit or proceeding for the recovery of rent which accrued subsequent to the destruction of the premises; and the lease may be decreed to be given up and canceled. *Gates v. Green*, 4 Paige, 355, 27 Am. Dec. 68; *Wood v. Hubbell*, 10 N. Y. 479.

So, where an action was brought against a person for breach of the covenants in his deed, and the action, through his mistake, was undefended, and judgment by default obtained, upon a satisfactory showing of the mistake a bill for an injunction against the enforcement of the judgment may be maintained. *Sanders v. Wagner*, 32 N. J. Eq. 506.

And where a sheriff's deed, made on sale under execution, by mistake did not include the whole premises advertised and intended to be sold, and the purchaser, supposing that the sheriff's deed included the whole, bid and paid a price accordingly, he is entitled to a decree perpetually enjoining persons claiming an interest in the property omitted from the deed from prosecuting ejectment suits brought to recover such 28 L.R.A.(N.S.)

premises, and directing them to execute to the purchaser a release of the right and title to the same. *De Riemer v. De Cantillon*, 4 Johns. Ch. 85.

And where the execution of a contract is enjoined because of a mistake in it, and the mistake is found to exist, the bill for an injunction may be so far modified as to permit the defendant to proceed with his suit at law, but he will be restrained from setting up at the trial any other construction of the contract than that adopted by the court of equity. *Firmstone v. De Camp*, 17 N. J. Eq. 317.

So, where a negotiation took place for the sale by one person to another of a British patent and certain foreign patents for the same invention, and ultimately an offer was made for sale at £500, and accepted, but it was not quite clear whether the offer and acceptance related to all the patents or to the British patent only, an action for specific performance, treating the contract as including all the patents, and for an injunction to restrain the purchaser from parting with them, cannot be maintained, where the purchaser had understood that he was negotiating for the British patent only. The proper course in such case would be to allow an amendment of the writ so as to limit the action to the alleged sale of the British patent, and then to grant an injunction restraining parting with that patent until the hearing of the action. *Preston v. Luck*, L. R. 27 Ch. Div. 497.

But where the complainant in a bill for an injunction to restrain waste claims title under a deed from the defendant, the defendant cannot, in defense of the bill, show by parol evidence that there was a mistake in the draft of his deed to the complainant; the proper course would be for the party relying on the mistake to bring a bill for a decree correcting it. *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705.

3. Reformation and enforcement.

A court of equity having jurisdiction to amend a contract thereby acquires the right, incidentally in the same suit, to give relief in damages, or by such other mode as justice may require. *Welles v. Yates*, 44 N. Y. 525; *Gooding v. M'Alister*, 9 How. Pr. 123; *Willis v. Henderson*, 5 Ill. 13, 38 Am. Dec. 120; *Mercantile Ins. Co. v. Jaynes*, 57 Ill. 199; *Schwass v. Hershey*, 125 Ill. 653, 18 N. E. 272; *Morris v. Stern*, 80 Ind. 227; *Nebraska Loan & T. Co. v. Ignowski*, 54 Neb. 398, 74 N. W. 852; *Bellows v. Stone*, 14 N. H. 175; *Bidwell v. Astor Mut. Ins. Co.* 16 N. Y. 263; *Roberts v. Elmore*, 3 Ohio Dec. Reprint, 208; *Columbus & T. R. Co. v. Steinfeld*, 42 Ohio St. 449.

And a claim for the reformation of a deed, and one for damages for breach of covenants of the deed as amended, may be joined in the same action, under a statute providing that legal and equitable remedies may be enforced in one action. *Rutler v. Barnes*, 60 Conn. 170, 12 L.R.A. 273, 21 Atl. 419.

And a complaint in an action for such reformation and enforcement contains but one cause of action. *Gooding v. M'Alister*, supra; *Hutchinson v. Ainsworth*, 73 Cal. 452, 2 Am. St. Rep. 823, 15 Pac. 82.

And where a contract is reformed, and damages are awarded for its breach as reformed, it is not necessary for the judgment to recite that the damages were given by way of equitable relief. *West v. Suda*, 69 Conn. 60, 36 Atl. 1015.

So, where a decree directs the master in chancery to correct the instrument, it is not necessary that a formal correction be made by him before the final decree. The court may treat as done what it had determined should be done. *Mercantile Ins. Co. v. Jaynes*, supra.

And where a deed was executed, purporting by mistake to convey a moiety only of a parcel of real estate, the intention of the parties having been to pass the whole, a conveyance of the other moiety by another deed is not necessary; an order declaring that the deed was, in the particular specified, executed by mistake; that it was intended to pass the entirety, and that it should be rectified accordingly; and directing a copy of the order to be indorsed on the deed,—is sufficient. *White v. White*, L. R. 15 Eq. 247.

A declaration by a court of equity that a deed ought to be rectified, followed by an order that it be rectified accordingly, is sufficient to pass the legal estate, without a conveyance. *Ibid*.

And where a parol agreement was made, in consideration of a conveyance of property, that the grantee was to care for and support and furnish a home for the grantor for half of the time during the remainder of his life, and that agreement was carried out for two years, and thereafter was not observed, the grantee having offered a fulfillment, and the grantor having himself consented to a modification thereof by occupying the home of the grantee at another place, there having been such a part performance of the agreement as to take it out of the statute of frauds, the grantor would be entitled, upon satisfying the court that the arrangement was made, to a specific performance thereof, or, if a specific performance could not be had, to such damages as he might sustain by reason of a breach thereof. *Herrick v. Starkweather*, 54 Hun, 532, 8 N. Y. Supp. 145.

So, the reformation of a mortgage may be obtained, as incidental relief, on a bill to foreclose; and if the court has properly obtained jurisdiction of a bill by an administrator to foreclose a mortgage, it may also, on proper averments and proof by the administrator, grant such incidental relief. *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257, 4 N. E. 492.

And in a suit by a mortgagee against the heirs and personal representatives of a deceased mortgagor to foreclose a mortgage on real and personal property, upon proper allegations of fact, mistakes may be cor-

rected, and the mortgage reformed as well as foreclosed. *Morris v. Stern*, 80 Ind. 227.

So, where the date and name of the payee of a note mentioned in the condition of a mortgage deed were misdescribed through mistake, the mistake may be corrected, on a bill for foreclosure stating it, not only as between the parties to the deed, but as between the mortgagor and a subsequent mortgagee with notice. *Peters v. Goodrich*, 3 Conn. 146.

And where important errors were inserted, by mistake or fraud of the defendant, in a contract, disadvantageous to the plaintiff, and the contract contained a provision for foreclosure in case of nonperformance by the plaintiff, an injunction may issue in an action to reform the contract, restraining the defendant from enforcing the forfeiture *pendente lite*, upon the plaintiff's depositing, under the order of the court, the sums accruing due under the contract, to abide the event of the action. *Humphreys v. Hurtt*, 5 Thomp. & C. 433.

And where a mortgage was given upon a life estate when it was intended to mortgage the fee, a judgment in an action to foreclose the mortgage, based on findings authorizing a reformation, which foreclosed the mortgage, and ordered a sale of the fee in all respects as though the mortgage had been reformed, but contained no provision specifically reforming it, is substantially a judgment of reformation. *Lardner v. Williams*, 98 Wis. 514, 74 N. W. 346.

So, in a proceeding for partition, a mortgagee made defendant may by counterclaim procure the reformation of his mortgage and a foreclosure thereof. *Conyers v. Mericles*, 75 Ind. 443.

And when an action at law has been commenced on a fire insurance policy, and, after the defendant has answered, it appears that a recovery cannot be had thereon, on account of a mistake of the parties to the insurance contract, equity will, at the instance of the plaintiff, stay the prosecution of the action at law, and entertain a bill to reform the policy, consolidating the two actions, and render judgment for the sum found due on the policy as reformed. *Lansing v. Commercial Union Assur. Co.* 4 Nev. (Unof.) 140, 93 N. W. 756.

So, the general rule is that either party to a contract, in a suit for specific performance thereof, may show by parol evidence that the written contract relied upon does not correctly and truly express the agreement of the parties, but that there is some material omission, insertion, or variation through mistake, surprise, or fraud. *Best v. Stow*, 2 Sandf. Ch. 298; *Hunter v. Bilyeu*, 30 Ill. 228; *Ring v. Ashworth*, 3 Iowa, 457; *Worley v. Tuggle*, 4 Bush, 168; *McCurdy v. Breathitt*, 5 T. B. Mon. 234, 17 Am. Dec. 65; *Coger v. M'Ger*, 2 Bibb, 321, 5 Am. Dec. 610; *Philpott v. Elliott*, 4 Md. Ch. 273; *Mosby v. Wall*, 23 Miss. 81, 55 Am. Dec. 71; *Columbus v. Steinfeld*, 42 Ohio St. 449; *Redfield v. Gleason*, 61 Vt. 220, 15 Am. St. Rep. 889, 17 Atl. 1075; *Creigh v. Boggs*,

19 W. Va. 240; Fishack v. Ball, 34 W. Va. 644, 12 S. E. 856; Hill v. Buckley, 17 Ves. Jr. 394.

And this may be done without a cross bill. Redfield v. Gleason, *supra*.

And equity has jurisdiction to reform a deed, and enforce specific performance of the original contract according to the real intention of the parties, where, by reason of mistake of the draftsman, the deed did not convey the estate intended to be transferred by the parties. Nutall v. Nutall, 26 Ky. L. Rep. 671, 82 S. W. 377.

And an action to recover the price of property sold and delivered under a contract in writing, in which it is made to appear that such relief cannot be adequately administered without a reformation of the writing in such a way as to make it speak the truth with respect to the contract that was actually made, is an action arising out of contract, and the equitable relief is but an incident to the main action, and is not subject to the objection that a suit for specific equitable relief is not sufficient to sustain a money judgment founded upon facts cognizable only by a court of law. Palmer Steel & I. Co. v. Heat, Light & P. Co. 160 Ind. 232, 66 N. E. 690.

So, a court of equity, having acquired jurisdiction to reform an injunction bond, is not required to remit the parties to their remedy at law for damages, but may incidentally assess such damages as are shown to have resulted from its breach. Keith v. Henkleman, 173 Ill. 137, 50 N. E. 692.

And where a woman gives a bond to her intended husband, that in case of their marriage she will convey her lands to him in fee, and they marry, and the wife dies without issue, and then the husband dies, the bond, though void in law, is good evidence of an agreement in equity; and the heir of the husband may compel a specific performance against the heir of the wife. Cannel v. Buckle, 2 P. Wms. 243.

And where a mistake is set up by way of defense against a claim for the specific execution of an agreement for the sale of land, parol evidence is admissible to establish such defense. Osborn v. Phelps, 19 Conn. 63, 99 Am. Dec. 133.

But where a suit at law is brought upon a note, and the defendant obtains a verdict in his favor, on account of a mistake in a title bond for the land for the purchase money of which the note sued upon was executed, he cannot afterwards set up that judgment as a defense to a bill filed for the purpose of reforming the title bond and specifically enforcing the contract as corrected. Mosby v. Wall, 23 Miss. 81, 55 Am. Dec. 71.

The rule has been acted upon to some extent, however, that courts of equity will not ordinarily compel the specific performance of a contract, with variations, additions, or new terms to be made and introduced into it by parol evidence. Whiteaker v. Vanschoiack, 5 Or. 113; Nurse v. Seymour, 13 Beav. 254.

And it has been held that though a de-

fendant resisting a specific performance may go into parol evidence to show that by fraud the written agreement does not express the real terms, a plaintiff cannot do so for the purpose of obtaining a specific performance with a variation. Woollam v. Hearn, 7 Ves. Jr. 211.

It has also been held that although a party to a written contract cannot have specific performance of it, with a variation upon parol evidence, still he may in the same action, upon parol evidence, have the written contract reformed and enforced. Monroe v. Skelton, 36 Ind. 302.

So, a court of equity will not make a decree in a suit for specific performance which would compel the defendant to convey, while leaving the complainant free to reject the deed tendered in compliance with the decree. Pope v. Hoopes, 84 Fed. 927.

And a court cannot reform a contract, and at once cancel it on the ground that the other party has not done what the contract as reformed required of him. Quimby v. Shearer, 56 Minn. 534, 58 N. W. 155.

But a court of equity will not refuse to decree the specific performance of an agreement, on the ground that one of the contracting parties had mistaken its legal effect. Powell v. Smith, L. R. 14 Eq. 85.

And a written agreement will not be required to be specifically performed, where there is parol evidence that one of the terms of the actual agreement was omitted. Garrard v. Grinling, 2 Swanst. 244.

Nor will a court of equity take jurisdiction to compel specific performance of a verbal agreement to make a valid contract of guaranty, where it would not reform such a contract defectively reduced to writing through mutual mistake. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 A. & E. Ann. Cas. 773.

So, where lots are conveyed with express reference to a recorded plat, evidence to control or in any way affect the plat is inadmissible in ejectment; if there is error or mistake in this respect in the description of the premises, the remedy is in chancery to rectify the deed. Jones v. Johnston, 18 How. 150, 15 L. ed. 320.

4. Reformation or rescission.

(a) Generally.

Where a deed or other contract or instrument contains a mistake which is mutual, the remedy is by bill in equity for reformation. Wirsching v. Grand Lodge, F. & A. M. 67 N. J. Eq. 711, 56 Atl. 713, 3 A. & E. Ann. Cas. 442; Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099.

And courts of equity have power to correct mistakes in deeds and other written instruments so as to make them conform to the real intention of the parties, even to the extent of making a deed include more land than is embraced in it, where it was omitted by mistake, fraud, or surprise.

Ruhling v. Hackett, 1 Nev. 360; *Durant v. Bacot*, 13 N. J. Eq. 201.

But such relief is not to be granted in case of a deed, except upon proof that it is entirely satisfactory. *Green v. Stone*, supra.

And where a conveyance of land was made by one person to another, containing a reservation of minerals to the grantor; and four years subsequently the grantee filed a bill against the grantor, alleging that the reservation was inserted by mistake common to both parties, and was recently discovered by him, and praying for the reformation of the conveyance by its omission; and the grantor denied the mistake, claiming the reservation, and he afterwards died,—although the court deemed that there had been a mistake common to both parties, of which the grantor sought to take improper advantage, yet a simple decree of rectification could not be made after a lapse of a long time and against the oath of one of the parties, but it held that the representatives of the deceased grantor were entitled to the option of having the conveyance rectified, or the whole transaction set aside. *Bloomer v. Spittle*, L. R. 13 Eq. 427.

Where the mistake in a deed or other contract is unilateral, however, the remedy is by bill for rescission. *Wirsching v. Grand Lodge, F. & A. M.* and *Green v. Stone*, supra.

When an alleged agreement was entered into with an honest misunderstanding and through a mutual mistake of the parties, there is no legal contract, and the remedy is to set it aside, and not to enforce it. *Boehm v. Yanquell*, 15 Ohio C. C. 454; *Whitaker v. Gavit*, 18 Conn. 522; *Bellows v. Stone*, 14 N. H. 175.

And where goods delivered to a buyer are not those described by the seller in the contract of sale, rescission is the sole remedy. *Kupfer v. Pellman*, 121 N. Y. Supp. 1081.

And where by mistake a grantor conveyed land which he did not intend to convey, and which the grantee did not bargain for, and the grantor does not in fact own the land the parties supposed was being conveyed, the only remedy available is rescission; but that remedy, to be effectual, should be resorted to in apt time, between the parties to the conveyance. *Brickey v. Linnertz*, 241 Ill. 187, 89 N. E. 342.

Nor are purchasers entitled to a conveyance of part, though answering the general description in the advertisement of sale, where it was not in the contemplation of either party at the time of the purchase or conveyance, the purchaser being referred to a more particular description, which did not include the part. *Calverley v. Williams*, 1 Ves. Jr. 210.

To entitle a party to a judgment reforming a written contract, it is not enough for him to show his own intention, and that he never agreed to the terms of the contract; his remedy in such case is to have the contract canceled on that ground. *Jackson v. Andrews*, 59 N. Y. 244.

And though a deed sought to be reformed

so as to include plaintiffs as grantees may have been procured from the grantor by fraud of the defendants, the grantees, in the absence of evidence tending to show that the grantor intended to include plaintiffs as grantees, the court cannot reform it so as to vest in them title to an interest in the land conveyed; a decree canceling the deed being the proper relief in such case. *Bonneville v. Dum* (Tex. Civ. App.) 128 S. W. 1179.

So, if parties to a contract for the sale of real estate undertake to complete it by a deed and a mortgage back, and the mortgage, by mistake or ignorance of the draftsman, is so defectively drawn as to be void, and thereby the intention of the parties fails of accomplishment and the contract of completion, and the party undertaking to give the mortgage refuses to remedy the defect or puts it out of his power to do so, a case for rescission in equity is presented, if all the other essential elements thereto exist. *Dietrich v. Hutchinson*, 73 Vt. 134, 87 Am. St. Rep. 698, 50 Atl. 810.

And where a father conveyed to his married daughter real estate, and received from her a mortgage in which her husband did not join, conditioned to support the father through life and to reconvey upon certain conditions, while equity cannot decree the execution of a new and perfect deed from the daughter, nor foreclose her equity, it may treat the deed from the father as void. *Chapman v. Long*, 66 Vt. 656, 30 Atl. 3.

So, where a person buys another's interest in a partnership business, and agrees to pay the debts of the firm, and pays the same on an inventory made by himself in which there was a mistake, by reason of which he paid \$500 too much, the mistake is not one for which the contract can be reformed; rescission or cancelation would be the appropriate remedy. *De Voin v. De Voin*, 76 Wis. 66, 44 N. W. 839.

And where an elderly man applied for admission to a Masonic home, of which order he had been a member, and deeded all his property to the order, on his attorney's advice that it covered only such property as might be sued for when he entered the home, and the deed was not explained to him, and he did not desire to convey a contingent legacy which he desired to pass to his children; and after he had remained at the home for some time the legacy accrued and the society claimed it, he was entitled, on paying a reasonable sum for his board, to a rescission of the deed. *Wirsching v. Grand Lodge, F. & A. M.* supra.

In case of rescission of a contract for a mistake which is unilateral, however, the whole contract is set aside and the parties are restored to their original position; and no relief can be granted in such case after the position of the parties has been so changed that their original rights cannot be restored. *Green v. Stone*, supra.

And the rule has been asserted that equity will direct the cancelation of a contract for fraud or mistake, but that it cannot alter

the contract. *Brooks v. Stolley*, 3 McLean, 523, Fed. Cas. No. 1,962; *Shelby v. Smith*, 2 A. K. Marsh. 504.

And that an executory contract for the sale of land will not be reformed by enlarging the subject-matter, upon parol testimony, upon the ground of fraud, and enforced with the variation; but it may be rescinded upon such ground. *Davis v. Ely*, 104 N. C. 16, 5 L.R.A. 810, 17 Am. St. Rep. 667, 10 S. E. 138.

And apparently, under this rule, the defendant in an action instituted by a landlord against a tenant for rent under the forcible entry and detainer laws cannot interpose an answer alleging that, in drawing up the lease, certain terms thereof were omitted by mutual mistake, and asking that the lease be reformed to express the contract of the parties. *Phillips v. Port Townsend Lodge No. 6, F. & A. M.* 8 Wash. 529, 36 Pac. 476.

And where a deed was executed in performance of two separate contracts to convey land, and mutual mistake is alleged in defense, the defendant praying to be permitted to rescind and return the purchase money as to both tracts, a rescission and return as to one tract, and a reformation as to the other, may be decreed. *Lord v. Horr*, 30 Wash. 477, 71 Pac. 23.

Equity will not entertain an action to reform a deed, however, by inserting a condition subsequent, and declaring a forfeiture for breach of such condition. *Mills v. Evansville Seminary*, 47 Wis. 354, 2 N. W. 550.

And a person cannot rescind a contract in equity on account of a mutual mistake in the language of the instrument containing it, when the other party offered to make the correction as soon as he had notice of the mistake. *Laver v. Dennett*, 109 U. S. 90, 27 L. ed. 867, 3 Sup. Ct. Rep. 73.

And where a man conveyed real estate to his daughter, and the deed contained a recital of a consideration of the sum of \$500, whereas no money consideration passed or was intended to pass, the true consideration being an oral agreement of the daughter to support and care for the father on the premises described in the deed, there being no fraud or mistake, a conclusion that there was a mistake in fact by the parties to the deed is not warranted; and if there was a parol agreement that the grantee was to care for and support and furnish a home for the grantor as a consideration of the conveyance of the premises in question, and that agreement was carried out in part, the breach does not furnish a sufficient ground for canceling and annulling the deed. *Herrick v. Starkweather*, 54 Hun, 532, 8 N. Y. Supp. 145.

(b) *Reinstatement, statu quo.*

A court of equity will not usually rescind or reform a contract for mistake, unless the parties can be put back *in statu quo*. *Grymes v. Sanders*, 93 U. S. 55, 23 28 L.R.A.(N.S.)

L. ed. 798; *Kinney v. Consolidated Virginia Min. Co.* 4 Sawy. 382, Fed. Cas. No. 7,827; *Hewitt v. Powers*, 84 Ind. 295; *Bigelow v. Wilson*, 99 Iowa, 456, 68 N. W. 798; *Conaway v. Gore*, 21 Kan. 725; *Cottrell v. Citizens' Sav. Bank*, 53 Minn. 201, 54 N. W. 1111; *Columbus & T. R. Co. v. Steinfeld*, 42 Ohio St. 449; *Crosier v. Acer*, 7 Paige. 137; *Fink v. Farmers' Bank*, 178 Pa. 154, 56 Am. St. Rep. 746, 35 Atl. 636; *Lewis v. Cooper*, *Cooke* (Tenn.) 467; *Kesler v. Zimmersehutte*, 1 Tex. 50.

If that cannot be done, it will give relief only where the clearest and strongest equity imperatively demands it. *Bigelow v. Wilson*; *Grymes v. Sanders*; and *Kinney v. Consolidated Virginia Min. Co.*,—*supra*.

It is only in special cases that equity will relieve a party from the consequences of a pure mistake of law. It will not do so when the opposite party is blameless in the premises, and the parties cannot be replaced in their former positions. *Truesdale v. Sidle*, 65 Minn. 315, 67 N. W. 1004.

And if no effort has been made to rescind a conveyance by restoring the parties to their original position, until such restoration has become impossible, relief by way of rescission cannot be granted, even though the proof of unilateral mistake is entirely satisfactory and convincing. *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099.

So, where it appears that a person complaining that a contract did not speak the actual agreement of the parties has been guilty of such breaches of the real contract as substantially to deprive the other party of all its benefits, reformation will be ordered only on condition that the parties be put as nearly as may be *in statu quo*,—as, by the return of all moneys received by the complainant under the contract. *Cassidy v. Metcalf*, 66 Mo. 519.

Nor can one have a settlement for injuries rescinded, without having offered to return the money received thereunder. *Barker v. Northern P. R. Co.* 65 Fed. 460.

And where mutual deeds are necessary to the carrying out of a contract, and the deed of one party is defectively executed, that party will not be allowed to claim under the deed of the other if he refuses to remedy the defect in his own deed upon demand; and this is so, although the facts from which the defect arises were known to both parties at the time of the execution of the deeds. *Chapman v. Long*, 66 Vt. 656, 30 Atl. 3.

So, the mistake of an agent of a railway corporation in contracting to carry cotton at a price specified, caused by a telegram from his superior officer being incorrectly transmitted, does not entitle his principal to be released from the contract or from paying damages resulting from its breach. *Borden v. Richmond & D. R. Co.* 113 N. C. 570, 37 Am. St. Rep. 632, 18 S. E. 392.

And where an agreement contains a mistake, and one of the parties attempts inequitably to avail himself of the mistake, he is not entitled to an agreement binding

other people as a condition of abandoning that agreement. *Wake v. Harrop*, 6 Hurlst. & N. 768.

Nor can a surety on the bond of a bank cashier, who, with knowledge of the facts, but mistaking their legal effect, has given his notes in settlement of a defalcation of the cashier, maintain a bill in equity to compel redelivery to him of the notes, unless he can prove that the parties have remained *in statu quo*. *Fink v. Farmers' Bank*, *supra*.

So, where a party seeks to correct a written instrument in his own favor, a court of equity should refuse its aid, unless he is willing that other mistakes therein should be corrected which would be against his interest. He who would have equity must do equity. *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754; *Hoppough v. Struble*, 60 N. Y. 430.

A party praying for the correction of a mistake must offer to do whatever ought to be done on his part toward a correction thereof. *Boyce v. Watson*, 20 Ga. 517; *Mastin v. Halley*, 61 Mo. 196.

And a defendant in a foreclosure suit is not entitled to have a mistake in the mortgage corrected, by which, through mistake of the scrivener, the mortgagee obtained a lien upon more property than was intended, since there is no reason why the creditor should be compelled to relinquish any of his security until his debt is paid. He who seeks equity must do equity, and the defendant must pay the debt, which will relieve the property and correct the mistake without the intervention of the court. *Ames v. New Jersey Franklinite Co.* 12 N. J. Eq. 66, 72 Am. Dec. 385.

So, where the owner of a vested remainder in fee devised the estate absolutely to his wife, and after his death a posthumous child was born, and the child died prior to the death of the life tenant, and after the death of the child, but before the death of the mother, the brothers of the remainderman took a deed from the widow in which she purported to convey to them a fee, and at the same time they gave her a mortgage to secure the purchase money, all the parties being under the impression at the time that the widow took a fee as heir of her son; and where, after the death of the life tenant, the brothers claimed that the fee was really in themselves as heirs at law of the ancestor from whom the estate came, and that it did not pass to the child's mother,—the widow was entitled to recover at least the value of her dower interest. *Wilson v. Ott*, 160 Pa. 433, 28 Atl. 848.

And where a part owner of a mining claim conveyed interests in it to two persons respectively, by unstamped conveyances, who afterwards conveyed the same to another person by conveyances good in form; and the first vendor afterwards conveyed his remaining interest to the last purchaser, and then filed a bill in equity against him to correct an alleged mistake in the latter conveyance, on the ground that

he conveyed more than was intended; and in order to make out the mistake it was necessary to repudiate his former unstamped conveyances,—a court of equity will not correct the mistake in order to allow him to avail himself of the advantages to result from repudiating his prior unstamped conveyances; equity requires that he should make good his prior void conveyances, and if he asks equity he must do equity. *Kinney v. Consolidated Virginia Min. Co.* *supra*.

So, upon cancelation of a contract for public work because of mutual mistake as to the amount of work to be done, the contractor may recover upon a *quantum meruit* for all that he has done; and neither the cost nor the value of extra work is material in fixing the amount to be awarded for work done in such a case. *Long v. Athol*, 196 Mass. 497, 17 L.R.A.(N.S.) 96, 82 N. E. 665.

But where a trustee of an estate held, under a will, in trust for the testator's children, without authority therefor encumbered land belonging to it with a trust deed to secure a loan made to him individually, and afterwards took credit for the amount of the loan against the children in his settlement as their guardian, in an action by the wards to cancel the trust deed because made without the authority of the will, they will not be required, as a condition of the relief sought, to refund the amount of the loan to the purchaser under the deed of trust. *Price v. Estill*, 87 Mo. 378.

And trustees who have unintentionally executed and delivered their personal obligations, instead of obligations payable out of the trust estate, are not estopped from asking for the reformation of the instruments by the fact that the trust funds have been disposed of, so that the reformed notes will be worthless. *Richmond v. Ogden Street R. Co.* 44 Or. 48, 74 Pac. 333.

So, where a bill in equity was brought for the correction of a mistake as to a boundary in a deed from the defendants to the plaintiff, which was given to correct an earlier mistake in a conveyance to them by their predecessor in title, on the ground that the land thereby rebounded was only a part of the land originally conveyed, and the mistake in question was admitted, but it was sought by answer and cross bill to condition relief upon the correction of another alleged error in the first deed, consisting of the omission of a restriction against building on the boundary line, relief may be given as to the first mistake, and denied as to the latter, since the mistakes are in different matters; the deeds in question are different, and the connection between them is merely the empirical one that they concern the same piece of land. *Slater v. Cobb*, 153 Mass. 22, 26 N. E. 410.

And where, in an action to reform a deed, defendant alleges a mutual mistake, and prays for leave to rescind and return the purchase price, no advantage can be taken

of his omission to bring the money into court, unless taken in the trial court. *Lord v. Horr*, 30 Wash. 477, 71 Pac. 23.

5. Keeping alive or reinstating encumbrances.

Where it will subserve the purposes of justice, equity will restore a mortgage released through mistake, and give to it its original priority as a lien. *Hammond v. Barker*, 61 N. H. 53.

In equity the cancelation of a mortgage on the records is only prima facie evidence of its discharge, and leaves it open to the party making such objection to prove that it was made by accident, mistake, or fraud; and on such proof being made, the mortgage will be established, even as against subsequent mortgagees without notice, if they became such anterior to the cancelation. *Robinson v. Sampson*, 23 Me. 388.

And where a person holding a mortgage on the premises of another, subject to a mortgage of a third person, in ignorance of a subsequent attachment of the premises by the third person on a different debt, releases his mortgage and takes a new one for the same consideration; and a fourth person, in ignorance of such attachment, pays the attaching creditor the amount of his mortgage, which is thereupon discharged, and takes a new mortgage from the first mortgagee for money so paid to the attaching creditor,—he will be regarded as the equitable assignee of the mortgage to the attaching creditor, and will be subrogated to the original rights of such mortgagee therein. *Hammond v. Barker*, supra.

So, where an insurance company held a mortgage on real estate belonging to a man, and after the man's death his heir borrowed money and paid the mortgage to the insurance company, and gave the lender a mortgage on the same lands to secure his money, both parties supposing that there were no other liens upon the land, but other debts of the deceased came to light, and an administrator was appointed on his estate, who filed a petition to sell the lands to pay debts, the mortgagee was entitled to be subrogated to the mortgage of the insurance company, as against the creditors, and to have the release thereof set aside for his benefit and protection. *Straman v. Rechline*, 58 Ohio St. 443, 51 N. E. 44.

And where a man and his wife made a mortgage, and duly acknowledged the same, before a notary, who duly certified the acknowledgment of the wife, but by mistake omitted to certify the acknowledgment of the husband, and the husband afterwards died intestate and insolvent, before the mistake was discovered, and the mortgagee after his death accepted a new mortgage for her debt from the heir, and released the old mortgage to enable the heir to give a first mortgage to another party for borrowed money, and an administrator on the estate of the deceased mortgagor thereafter appointed filed a petition to sell the lands to

pay the debts of the deceased mortgagor, the mortgagee is entitled to have her mortgage reformed as to the deceased mortgagor, and to have the release thereof on record set aside, but such mortgage when so reformed is subject to the lien of general creditors of the deceased on the lands, and the mortgage is a valid charge on the dower interest of the widow in such lands, and the balance due on the debt to the mortgagee after receiving her dividend as a general creditor of the administrator should be paid out of the money value of the dower of the widow, and the remainder of such money value should be paid over to the widow. *Ibid*.

So, where money is loaned under an agreement that it shall be used in the payment of a lien on real estate, and it is so used, and the agreement is that the one who so loans the money shall have a first lien on the same lands to secure his money, and through some defect in the new mortgage, or oversight as to other liens, the money cannot be made on the last mortgage, the mortgagee has the right to be subrogated to the lien which was paid by the money so loaned by him, when it can be done without placing greater burdens upon the intervening lien holders than they would have borne if the old mortgage had been released. *Ibid*.

And where a deed was delivered, through mistake, before the whole of the purchase money was paid or secured, the grantor may be permitted to protect himself against the effects of the mistake by keeping alive in the hands of a trustee an encumbrance on the premises, created by himself before the sale, although the deed contained covenants of general warranty against all encumbrances. *Neville v. Demeritt*, 2 N. J. Eq. 321.

But where a person furnishes money with which to pay off a lien on real estate, under an agreement that he is to have a first mortgage on the same lands to secure his money, and the money is so used, he cannot be subrogated to the lien which was paid with his money, as against a bona fide lien holder who acquired his lien after the release of the old lien, without notice of such agreement as to the payment. *Straman v. Rechline*, supra.

And where a debtor gave several promissory notes to his creditor, and executed a mortgage on a lot of land to secure their payment, and afterwards, after other creditors had secured judgments against him, transferred the mortgaged property to the creditor in satisfaction of the mortgage debt, the mortgagee, thus discharging the encumbrance against the lot, and taking it in satisfaction of his debt, cannot have the mortgage reinstated in equity, so as to retain his prior lien over the other judgment creditors of the mortgagor. *Campbell v. Carter*, 14 Ill. 286.

For consideration of this subject under the rule that ignorance or mistake of law does not excuse, see *Guy v. DuUprey*, 16 Cal. 196, 76 Am. Dec. 518; *Bentley v. Whit-*

temore, 18 N. J. Eq. 366; and Garwood v. Eldridge, 2 N. J. Eq. 145, 34 Am. Dec. 195; supra IV, b, 3 (b).

The question, considered from the standpoint of mistakes resulting in failure to carry out intention, of restoration of discharged mortgage, is treated supra, IV. c, 3, (c), (2).

The right to reinstatement of mortgage released or discharged by mistake is considered at length in notes to Atkisson v. Plumb, 58 L.R.A. 788, and to Errett v. Wheeler, 26 L.R.A.(N.S.) 816.

d. Contracts and instruments subject to reformation.

1. Generally.

Courts of equity will relieve against mistake in, and correct and reform all kinds of, deeds and instruments. Burgin v. Giberson, 26 N. J. Eq. 72.

Chancery will enforce contracts that are fair and certain, and will avoid those which are fraudulent or built on mistake. Shelby v. Smith, 2 A. K. Marsh. 504.

And the general jurisdiction of courts of equity to set aside or reform contracts or instruments on the ground of mistake includes both executed and executory contracts. Wyche v. Greene, 11 Ga. 159; Leitensdorfer v. Delphy, 15 Mo. 160, 55 Am. Dec. 137; Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371.

Reformation may be had with respect to written instruments operating *inter vivos*, whether they are executed contracts, such as deeds, mortgages, or leases; or executory agreements, such as bonds, insurance policies, notes, bills of exchange, etc. Gotthelf v. Shapiro, 136 App. Div. 1, 120 N. Y. Supp. 210.

And this is so whether they are within or without the statute of frauds, and whether for the conveyance of real or personal property. Wyche v. Greene, supra.

The consummation of the transaction, in ignorance of the mistake and without laches on the part of the party injured, gives the other party no immunity from making recompense, and does not deprive the court of the power to remedy the injustice. Paine v. Upton, supra.

And executed contracts may, in a proper case, be corrected in equity, either by enlarging or restricting the subject-matter. Davis v. Ely, 104 N. C. 16, 5 L.R.A. 810, 17 Am. St. Rep. 667, 10 S. E. 138.

So, a supersedeas bond may be reformed in equity in the event of a mistake made in its execution; but the reformation of such a bond which does not comply with the statute, to conform with the intent of the parties, should extend no further than to make the same a complete, statutory bond, unless there was an express agreement between the parties as to the conditions thereof. Nourse v. Weitz, 120 Iowa, 708, 95 N. W. 251.

And an instrument in writing which on its face is a guaranty of the collection of a certain bond and mortgage may, in a proper

case, be reformed by a court of equity so as to become a guaranty of the payment of the bond and mortgage. Simpkins v. Taylor, 81 Hun, 467, 31 N. Y. Supp. 169.

And where one person signed an agreement to take from another a lease of a house at a rent of £230, and by the terms of the lease on which the agreement was written the rental was erroneously stated to be £130, and a lease was afterwards executed in which the rent was erroneously stated to be £130, on the view that the lessee must have perceived the discrepancy between the amount of the rent previously stated and that reserved in the lease, it was held that the lessor was not entitled to have the lease reformed, but that the proper relief was to give the lessee the option of taking the reformed lease or rejecting it, paying in the latter case a rental for the past occupation and a mortgage on the lease created by the lessee. Garrard v. Frankel, 30 Beav. 445.

So, the omission of a defeasance clause from a deed of trust is a mistake which a court of equity will correct where its interference is invoked. Michigan Buggy Co. v. Woodson, 59 Mo. App. 550.

And a contract for the services of a teacher in a public school of a township, purporting on its face to be a contract between the teacher and the civil township, may be reformed in an action thereon against the school township, upon an allegation of mutual mistake, and enforced against the latter corporation. Sparta School Twp. v. Mendell, 138 Ind. 188, 37 N. E. 604.

But where a mortgagor conveyed the mortgaged premises to a third person by deed, containing a clause stating that the purchaser assumed and agreed to pay the mortgage, and action was brought to foreclose the mortgage, making both the mortgagor and the purchaser of the mortgaged premises parties, the purchaser alleging that she did not assume or agree to pay the mortgage and that the mortgagor, to whom she intrusted the transfer, without her knowledge or consent fraudulently inserted the clause, and she accepted the deed believing it had been drawn according to the prior agreement, and did not know that it contained the clause, her right to a reform of the deed by striking out the clause is not affected on the theory that she should have tendered an issue to the grantor as to the alleged fraud; since the action is in equity, and the grantor was a party, and a complete determination of every question could be had. Albany City Sav. Inst. v. Burdick, 87 N. Y. 40.

A court of equity will not reform a deed made by a person individually, however, so as to convert it into a deed as trustee for certain *cestuis que trust* who never received any of the purchase money nor were otherwise involved by the individual deed of their trustee. Ellis v. Hunnicutt, 71 Ga. 637.

Nor can a lease be reformed by incorporating in it a subsequent parol agreement

with reference to additional improvements upon the leased premises and an increase of monthly rental on account thereof. *Wilson v. Moriarty*, 88 Cal. 207, 26 Pac. 85.

And a court of equity will not enforce a building contract. *Mastin v. Halley*, 61 Mo. 196.

2. Judicial and official sales.

Judicial sales as a general rule are not subject to correction by reforming the deed. *Keeper v. Force*, 86 Ind. 81.

The record of a judgment at law imports absolute verity, and a court of chancery cannot examine or determine whether it expresses the judicial determination of the court in which it was pronounced, or whether it was entered up, by mistake of the clerk, different from what it ought to have been or was intended to be. *Cutter v. Kline*, 35 N. J. Eq. 534.

And where an incorrect description of lands intended to be mortgaged or otherwise transferred is carried into the judgment order of sale and sheriff's deed, the proceedings cannot be corrected either at the instance of the mortgagee or the purchaser at such sale. *Conyers v. Mericles*, 75 Ind. 443; *Miller v. Kolb*, 47 Ind. 220; *Rogers v. Abbott*, 37 Ind. 138.

And this is so, although the sheriff, at the sale, may have pointed out as the property he was selling the property that ought to have been described in the mortgage; the authority of the sheriff to sell is limited to the property actually described in the decree and order of sale. *Miller v. Kolb*, *supra*.

So, a tax sale partakes of the nature of a judicial sale: it is made by operation of law, and in it the owner of the land does not participate, and in it there can be no mutual mistake between him and the purchaser; and a deed to a purchaser for taxes which by mistake of the county auditor erroneously describes the land cannot be reformed by a suit in equity. *Keeper v. Force*, 86 Ind. 81.

And if, when proceeding to enforce a lien claim to recover against the same person as obligor and owner, the record shows a general judgment only, a court of chancery, in the absence of fraud or imposition, cannot directly or indirectly impose the debt involved therein as a lien on the lands in equity, on the ground that it ought to have been regarded as a special as well as a general judgment, and was erroneously recorded by mistake of the clerk. *Cutter v. Kline*, *supra*.

And where a purchase at a sheriff's sale was made at the request and with the consent of the defendant in execution, and for his benefit, upon an express agreement that he should be at liberty to redeem, and the purchaser was to hold such interest under the sheriff's deed as would indemnify him for the money advanced, and one intended to give and the other to receive a valid security, and it turns out to be insufficient

in law, the purchaser has, in equity, a vested lien on the property for the amount of his judgment, and the other is estopped from coming into court and setting up any defect in the title. *Vanness v. Vanness*, 1 N. J. Eq. 248.

Mistakes are corrected in equity even when they occur in the records of proceedings of courts and exist in the records themselves, however, not by reviewing the judgments of proceedings of the courts, but by restraining the parties who may take advantage of such mistakes from doing so, or by compelling them to execute proper papers for the purpose of such correction. *Loss v. Obry*, 22 N. J. Eq. 52.

And a sheriff's deed may be reformed in equity to accord with the facts, where admissible evidence shows that its recitals are wrong and should be corrected. *Bartlett v. Judd*, 21 N. Y. 200, 78 Am. Dec. 131; *Ehleringer v. Moriarty*, 10 Iowa, 78; *Stites v. Wiedner*, 35 Ohio St. 555.

So, where an incorrect description of lands intended to be mortgaged is carried into the judgment, order of sale, notice, and sheriff's deed, though such proceedings cannot be corrected either at the instance of the mortgagee or the purchaser at such sale, such mistake may be corrected by reforming the mortgage and foreclosing it as reformed. *Conyers v. Mericles*, 75 Ind. 443; *McCasland v. Aetna L. Ins. Co.* 108 Ind. 130, 9 N. E. 119.

And if a mistake in a mortgage, by leaving out a part of the lands to be mortgaged, was mutual, and was not discovered until after a decree of foreclosure had been obtained upon the mortgage and the time fixed by the decree for the payment of the mortgage had expired, and the mortgage be then ordered to be reformed, the decree of foreclosure will be opened so as to permit the mortgagor to redeem the premises by the payment of the entire sum due upon the mortgage. *Blodgett v. Hobart*, 18 Vt. 414.

The mortgage as reformed is not merged in the decree, since the original mistake infects all the subsequent proceedings, rendering them nugatory. *Davenport v. Sovil*, 6 Ohio St. 459; *Conyers v. Mericles*, *supra*.

And while a court of equity may have no jurisdiction to correct a mistake in the description of land in a levy indorsed upon an execution and in the certificate of sale, for the reason that there is a remedy at law by motion, yet when the same mistake occurs in the sheriff's deed to the purchaser and in the deed of the premises to the judgment debtor, a court of equity has jurisdiction, and may correct such mistake, in not only the deeds, but also in the levy. *Bradshaw v. Atkins*, 110 Ill. 323.

In a foreclosure case it is always a question of fact what premises are mortgaged, and in decreeing a sale the court is bound to determine what premises are to be sold, and down to the rendition of the decree the court should hear any allegation of mistake

in the description of the mortgaged premises and correct any error that may be made manifest by proof. *Eborn v. Cannon*, 32 Tex. 231.

Nor is the equity of a vendee for the correction of a deed displaced by the lien of a subsequent judgment or execution issued thereunder. *Blackburn v. Randolph*, 33 Ark. 119.

And where a sheriff, in levying an execution upon real estate, misdescribed the same and sold property in accordance with his descriptions, which did not belong to the judgment debtor, after which the judgment debtor told the purchaser that he would redeem the same from the sale, the judgment debtor cannot be compelled to correct the mistake of the officer by the execution of a deed conveying the property to a purchaser by a correct description. *Butcher v. Buchanan*, 17 Iowa, 81.

But the rule that equity will grant relief where the quantity of land deeded is materially different from the quantity contemplated or intended is not usually applied in cases of sales by trustees and other fiduciaries or officers. Where there has been such a sale and conveyance, and subsequently an excess of quantity is discovered, if upon no higher principle, at least upon that of mutuality of right between the vendor and vendee, the former as well as the latter should have redress. *Western Min. & Mfg. Co. v. Paytona Cannel Coal Co.* 8 W. Va. 406.

g. Who may assert mistake.

It would seem that anyone to whom the mistake in question was a detriment, and having at least an equitable title to the property concerned, the parties both supposing, before the mistake was known, that a legal title had been transferred, may assert the mistake, and, either by way of defense or by way of a direct proceeding in equity, apply for relief.

Thus, a grantee in a deed may maintain an action to reform the deeds in his chain of title. *Gwyer v. Spaulding*, 33 Neb. 573, 50 N. W. 681; *Weathers v. Hill*, 92 Ala. 492, 9 So. 412.

And a grantor in a deed may have a mistake therein corrected as against the heir at law of the grantee. *Savage v. McCorkle*, 17 Or. 42, 21 Pac. 444.

And a grantor in a deed seeking to rectify a mistake therein is not estopped from securing relief because the land had been previously sold under judgment and execution in his favor, unless he directed the land to be sold or received a portion of the proceeds. *Young v. Coleman*, 43 Mo. 179.

So, the mortgagor has the right, in an action brought by the assignee of the mortgage to foreclose the same, to set up and prove a mistake in the drawing of the instrument, and have the same reformed. *Andrews v. Gillespie*, 47 N. Y. 487.

And where the object of a suit is to reform a contract, and to set aside and can-

cel a sheriff's deed taken by the defendant in violation of the terms of the agreement, the deed conveying whatever interest the plaintiff had in the property, it is not necessary for the plaintiff to show the title to the land conveyed to have been in him to entitle him to relief on demand. *Monroe v. Skelton*, 36 Ind. 302.

And where public land was improperly certified to a state under a Federal land grant to the state, so that in equity the state had no title, and the state contracted with a person to sell the land to him, which contract transferred nothing, the United States may maintain a suit for the cancellation of such contract, and it may be decreed therein that the title of the purchaser be divested and that he surrender his contract for cancellation. *Williams v. United States*, 138 U. S. 517, 34 L. ed. 1028, 11 Sup. Ct. Rep. 459.

A court of equity will not interfere to cancel a deed alleged to be fraudulent, however, on the prayer of one having no interest in the land conveyed. *Norris v. Laberee*, 58 Me. 260.

And where by reason of a misdescription of land in a deed a grantee did not obtain the legal title, but was put in possession, and before the mistake was discovered the lands were sold on execution against the grantee, and the purchaser took possession, the purchaser acquired no title, either at law or in equity, and could not maintain a suit to reform the deed. *Conner v. Wells*, 91 Ind. 197.

f. Against whom relief will be granted.

1. General rules.

Relief in contracts and other written instruments will be granted as between the original parties and their privies in law, in fact, or estate. *Allen v. Elder*, 76 Ga. 674, 2 Am. St. Rep. 63; *Wyche v. Greene*, 11 Ga. 159; *Wall v. Arrington*, 13 Ga. 88; *Lowe v. Allen*, 68 Ga. 225; *Berry v. Sowell*, 72 Ala. 14; *East v. Peden*, 108 Ind. 92, 8 N. E. 772; *Sample v. Rowe*, 24 Ind. 208; *Bush v. Bush*, 33 Kan. 556, 6 Pac. 794; *Young v. Coleman*, 43 Mo. 179; *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503.

This includes personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, and judgment creditors, or purchasers from them with notice of the facts. *Wyche v. Greene*; *Wall v. Arrington*; and *Berry v. Sowell*,—*supra*; *Holabird v. Burr*, 17 Conn. 559; *Sample v. Rowe*, *supra*; *Warburton v. Lauman*, 2 G. Greene, 420; *Young v. Coleman* and *Martin v. Nixon*, *supra*; *Savage v. McCorkle*, 17 Or. 42, 21 Pac. 444.

And a mistake in the description of lands belonging to a decedent, intended to be included in a mortgage executed in his lifetime by him and his wife, may be corrected in an action for that purpose against his widow and heirs or devisees and administrator or executor. *Wilson v. Stewart*, 63 Ind. 294.

And while a mere naked power may not be reformed, when it becomes a part of the principal's contract with another by the agent acting under it, so that it cannot be revoked so as to affect the rights of such other, it may, when necessary, be reformed. *Olson v. Erickson*, 42 Minn. 441, 44 N. W. 317.

Nor will equity refuse to correct a mistake in a deed because the property embraced in it has been sold under execution, where the purchaser took with notice of the facts. *Young v. Coleman*, supra.

So, an action for reformation of a deed and for damages for breach of covenant of warranty may be brought against a remote grantor who conveyed to plaintiff's grantor with covenants sufficient to support the action, and which were the same that were contained in plaintiff's deed. *Butler v. Barnes*, 60 Conn. 170, 12 L.R.A. 273, 21 Atl. 419.

But when a purchaser of land, whose deed conveyed to him a larger quantity of land than was contemplated by the parties, has sold and conveyed the land to another for a valuable consideration without notice of the mistake as to the quantity, the right of the first vendor to a rescission of the sale and conveyance made by him is extinguished unless there be such mistake in the last sale and conveyance made under such circumstances that the vendor in that sale is entitled to a rescission, when perhaps the first vendor having such a right against the latter vendor may be substituted to his right against the purchaser from him. *Western Min. & Mfg. Co. v. Peytona Cannel Coal Co.* 8 W. Va. 406.

Nor is there any difference in principle in the reformation of an instrument to make it express the intention of the parties, whether a surety is a party to it or not. *Henkleman v. Peterson*, 154 Ill. 419, 40 N. E. 359, overruling *Trustees of Schools v. Otis*, 85 Ill. 179.

And an instrument executed by a surety may be reformed as against him where it is the subject of fraud or mutual mistake, in the same manner as if it were executed by the principal debtor. *Prior v. Williams*, 3 Abb. App. Dec. 624; *Wiser v. Blachly*, 1 Johns. Ch. 607; *State ex rel. Frank v. Frank*, 51 Mo. 98; *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33; *Butler v. Durham*, 38 N. C. (3 Ired. Eq.) 589; *Neininger v. State*, 50 Ohio St. 394, 40 Am. St. Rep. 674, 34 N. E. 633; *United States v. Cushman*, 2 Sumn. 426, Fed. Cas. No. 14,908.

And it may be reformed upon parol proof, like other written instruments, and then enforced against the surety. *Neininger v. State*, supra.

And an injunction bond may be reformed in a court of equity by adding seals thereto, against the sureties as well as against the principal, such bond by mistake and inadvertence not having been sealed at the time of its execution. *Keith v. Henkleman*, 68 Ill. App. 623, affirmed in 173 Ill. 137, 50 N. E. 692.

But a joint bond cannot, as against a

surety, be shown to have been made so by mistake instead of a joint and several bond, by evidence outside the contract itself, unless the evidence leaves no doubt that a mistake in point of fact has been committed and the instructions of the parties departed from. *Moser v. Libenguth*, 2 Rawle, 428.

So, where a partnership gave a chattel mortgage which was not recorded, and which by a mistake of the parties did not include property intended to be conveyed, and subsequently, in a suit for the dissolution of the partnership, a receiver was appointed for it, the mortgagee is entitled, as against the receiver, to have the mortgage reformed, the receiver taking the property of the firm subject to his equity. *Ryder v. Ryder*, 19 R. I. 188, 32 Atl. 919.

And where an administrator paid a claim against the decedent's estate in full, when the estate was insolvent, and the paid claim was subsequently disallowed, the liability of the administrator for the overpayment is not affected by the fact that when it was made he had no knowledge of the condition of the estate or of the mistake under which the payment was made. *Mansfield v. Lynch*, 59 Conn. 320, 12 L.R.A. 285, 22 Atl. 313.

So, a mutual mistake in the description of property mortgaged is sufficient to justify the reformation of the instrument by a court of equity, not only as against the mortgagors, but also as against purchasers under them chargeable with notice of such mistake. *Carpenter Paper Co. v. Wilcox*, 50 Neb. 659, 70 N. W. 228; *Willis v. Henderson*, 5 Ill. 13, 38 Am. Dec. 120; *Strang v. Beach*, 11 Ohio St. 283, 78 Am. Dec. 308; *Blodgett v. Hobart*, 18 Vt. 414.

And where two tenants in common divided their lands by deed of partition, and there was a mutual mistake in the deed with reference to the division line between them, and the agreed line was recognized and understood by them to be the one described in the deed so long as they were the owners, and, when they sold, the purchasers took with a like understanding and also recognized the agreed line for several years, the mistake is remediable in equity both as against the original owners and their grantees. *May v. Adams*, 58 Vt. 74, 3 Atl. 187.

So, where an agent of a town gave a memorandum of bonds to a printer, and by mistake the provision therein giving an option to redeem the bonds in ten years was omitted, and the mistake was not discovered until after they were negotiated, a holder of the bonds, who had notice of the mistake and that the town had called in the bonds for a redemption when he purchased them, may be compelled to correct the mistake. *Essex v. Day*, 52 Conn. 483, 1 Atl. 620.

A contract which fails to express a material term of the real contract which the parties mutually intended to make will not be reformed by a court of equity, however, against innocent third persons who had acquired vested rights and who cannot be placed *in statu quo*. *Berry v. Sowell*, 72

Ala. 14; *East v. Peden*, 108 Ind. 92, 8 N. E. 22; *Hoeldtke v. Horstman* (Tex. Civ. App.) 128 S. W. 642; *Johnson v. Parker*, 34 Wis. 596.

As against a bona fide purchaser for a valuable consideration without notice, a court of equity will not decree the reformation of a conveyance on the ground of mistake, because such purchaser has the legal title and an equal equity. *Early v. Owens*, 68 Ala. 171; *Davidson v. Davidson*, 42 Ark. 362; *Allen v. Elder*, 76 Ga. 674, 2 Am. St. Rep. 63; *Macon v. Dasher*, 90 Ga. 195, 16 S. E. 75; *Lowe v. Allen*, 68 Ga. 225; *Wall v. Arrington*, 13 Ga. 88; *Boardman v. Taylor*, 66 Ga. 628; *Pence v. Armstrong*, 95 Ind. 191; *Dart v. Barbour*, 32 Mich. 267; *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503; *Quick v. Stuyvesant*, 2 Paige, 84; *Ray v. Durham County*, 110 N. C. 169, 14 S. E. 646; *Farmers' & M. Bank v. Citizens' Nat. Bank* (S. D.) 125 N. W. 642; *Farley v. Deslonde*, 69 Tex. 458, 6 S. W. 786; *Robinson v. Braiden*, 44 W. Va. 183, 28 S. E. 798; *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181, 470; *Malden v. Menill*, 2 Atk. 8.

Courts of equity will interfere in cases of mistake in written instruments only as between the original parties or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts. *Adams v. Baker*, 24 Nev. 162, 77 Am. St. Rep. 799, 51 Pac. 252; *Cross v. Bean*, 81 Me. 525, 17 Atl. 710.

Nor will courts of equity reform and enlarge a mortgage executed by one who is insolvent, if the rights of third parties would be changed and injured thereby, as in a case in which if the mortgage had been larger when it was given the other creditors would have instituted proceedings in insolvency before the lien became absolute. *Tabor v. Cilley*, 53 Vt. 487.

And a mortgage cannot be reformed so as to include land which has passed since its execution into the hands of a bona fide purchaser for value without notice. *Toll v. Davenport*, 74 Mich. 386, 42 N. W. 63; *Blodgett v. Hobart*, 18 Vt. 414.

And a person who conveyed land through a third person to his wife, in ignorance of the legal effect of the conveyance, which land upon her death was conveyed by her heir to a third person, cannot maintain a bill in equity to compel the purchaser to convey the land to him, where there is nothing to show that the purchaser took the legal title otherwise than in good faith for value and without notice of any trust in favor of the husband. *Molony v. Rourke*, 100 Mass. 190.

Nor can a mortgage be reformed, and given priority over another mortgage taken in good faith for value and without notice, irrespective of the recording act. *Farmers' & M. Bank v. Citizens' National Bank*, supra.

And if a mistake is made upon a general accounting between mortgagor and mortgagee of all arrears of principal and interest,

in consequence of which a new note and mortgage are taken for less than the amount actually due according to the basis on which their calculations are made, the sum thus omitted through mistake cannot be considered a part of the mortgage debt as against a subsequent mortgagee or a purchaser of the equity of redemption whose rights intervened before the mistake was discovered and corrected. *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266.

Nor can a mortgagee have his mortgage reformed and corrected on the ground of a mistake in describing the real estate, to make the mortgage cover another and different tract of land than that described therein, as against a judgment creditor who has purchased in good faith for a valuable consideration judgments rendered against the mortgagor after the execution of the mortgage. *Flanders v. O'Brien*, 46 Ind. 284.

And where a bill is filed to reform a deed so as to change the location of a right of way over land, a subsequent mortgagee of the land is entitled to be protected from any loss caused to him by such reformation. *White v. Shaffer*, 97 Md. 359, 54 Atl. 974.

And the record of a conveyance void for insufficiency of description is not constructive notice, and will not put a stranger upon inquiry. *Cass County v. Oldham*, 75 Mo. 50.

So, where an assignment of a whole mortgage is made by mistake, instead of a part, and the assignee has conveyed for a valuable consideration to a bona fide purchaser without notice of any mistake or claim by the original mortgagee, no decree of reformation of the mortgage will be made against him to the prejudice of his interest subsequently accruing. *Langdon v. Keith*, 9 Vt. 299.

Nor can the purchaser of a promissory note before due, in good faith, for a full consideration, and in reliance upon the validity of a trust mortgage as it then read given to secure the payment of said note and of other indebtedness of the mortgagor, with a preference in favor of said note, be deprived of such preference by the reformation of the mortgage so as to eliminate the preference therefrom. *Dunham v. W. Steele Packing & Provision Co.* 100 Mich. 75, 58 N. W. 627.

So, a decree reforming a deed does not affect the rights of persons not parties to the suit. *Daggett v. Ayer*, 65 N. H. 82, 18 Atl. 169.

And a grantor cannot be compelled to correct a mistake in his deed, while the grantee, or person claiming under him, who is seeking to compel the correction, is in default in the payment of purchase money. *McFadden v. Rogers*, 70 Mo. 421.

So, in *Rhode Island v. Massachusetts*, 15 Pet. 233, 10 L. ed. 721, the rule that a court of chancery will relieve against mistake was applied to a controversy with reference to a boundary between two states, where the line had been established by commissioners acting for the states while colonies, under an alleged mistake.

2. Who are innocent purchasers for value against whom reformation cannot be had.

A mere creditor, or even a creditor having a general lien, as for example a judgment, is apparently not an innocent purchaser against whom reformation of a contract or other written instrument may not be had.

Thus, a court of equity will correct a mistake, clearly proved by parol evidence, in an agreement for the sale and purchase of real estate, whether the contest is between the vendor and purchaser or the vendor and creditors of the purchaser. *Mauzy v. Sellars*, 26 Gratt. 641.

And a mistake of the scrivener in drawing a deed, whether of law or fact, will be corrected by a court of equity even against bona fide creditors of the grantor. *Alexander v. Newton*, 2 Gratt. 266; *Marine Sav. Bank v. Norton*, 160 Mich. 614, 125 N. W. 754.

But a court of equity would be much less disposed to interfere for the reform of an instrument for a mistake of law in favor of a particular creditor against the general creditors of an insolvent estate, than in an ordinary case. *Hunt v. Rhodes*, 1 Pet. 1, 7 L. ed. 27.

And while a debtor may prefer one creditor to another provided the instrument designed to effect the object contains the requisite provisions, if, through a mistake of law, the parties select and use such an instrument as cannot effect their object without the aid of a court of equity, the court will not correct the mistake by reforming the instrument to the prejudice of the general creditors of a debtor in embarrassed circumstances. *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708.

And where creditors, by reason of a mistake in law in drawing a deed, have a legal advantage, a court of equity will not deprive them of it by rectifying the deed for the benefit of parties whose claim rests upon no stronger equity than theirs. *Ibid.*

So, a mistake in a conveyance of real property will be decreed by equity as against judgment creditors having no legal title, but only a lien. *Early v. Owens*, 68 Ala. 171.

Statutes of registration for the protection of judgment creditors against unrecorded conveyances relate only to conveyances of the legal estate in lands, and have no application to mere equitable assets or interests which are not subject to the lien of executions or judgments, and there is nothing in such statutes, which, as in favor of judgment creditors, forbids the reformation of a recorded mortgage by a court of equity so as to make it include lands which were omitted by mistake. *Bailey v. Timberlake*, 74 Ala. 221.

And the same rule applies to a lien secured by attachment. *Bush v. Bush*, 33 Kan. 556, 6 Pac. 794.

And one who obtains a judgment lien and an execution against property is not a

purchaser for value whose rights will be preferred to a vendee who, before the date of the judgment, had paid the price and received a deed intended, but which by mistake failed, to convey the property. *Morson v. Collier*, 79 Ind. 417.

Nor does a judgment creditor, whose debt was made before the making of a deed to land but whose judgment was obtained afterwards, stand on the basis of a bona fide purchaser without notice, so as to prevent the correction of a mistake in the deed as against him. *Lowe v. Allen*, 68 Ga. 225.

And the equity of a party who procures reformation of a written instrument on the ground that it fails to express the contract of the parties attaches prior, and is paramount, to the lien of a judgment obtained against the party in whom, by reason of such mistake, the legal title vests. *Stone v. Hale*, 17 Ala. 557, 52 Am. Dec. 185.

But a correction will not be had against one who, having actual notice at the time of his purchase, bought the land in question at execution sale founded on a judgment rendered in favor of a party who had no notice of the mistake at the time the judgment was recovered. *Nugent v. Priebatsch*, 61 Miss. 402.

Nor does failure to record a deed, or its attestation by but one witness, postpone it to judgments junior to it, so as to prevent its reformation for mistake. *Lowe v. Allen*, 68 Ga. 225.

And where lands were intended to be conveyed to a person in trust for the grantor, but by mistake were conveyed to such person absolutely, and a third person having a judgment against the trustee, which was a lien on his real estate, caused execution to be levied on such lands, the vendor is entitled to have the deed reformed so as to express the trust and thereby to release the lands from the apparent lien of the third person's judgment. *Sullivan v. Bruhling*, 66 Wis. 472, 29 N. W. 211.

So, where land intended to be included in a mortgage is by mistake omitted, and a judgment is subsequently rendered against the mortgagor, the lien of the judgment creditor is subject to the equity of the mortgage, and does not exceed the actual interest which the judgment debtor had in the land at the time of its rendition. *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503; *Phillips v. Roquemore*, 96 Ga. 719, 23 S. E. 855.

Nor is the priority of the lien of a mortgage, on the omitted property, corrected to include property omitted by mistake, over a judgment obtained after the mortgage was originally executed but before its reformation, affected by the fact that the judgment was founded upon a debt in the contracting of which by the debtor credit was extended to him on the faith of his apparent unencumbered ownership of the omitted property, there being no protection by the statute in such cases to others than bona fide purchasers for value without notice. *Phillips v. Roquemore*, supra.

So, where after-acquired property was intended to be included in a chattel mort-

page given by a corporation to a bank, but was left out by mistake, but both parties to the mortgage understood that it covered such property, and acted upon that understanding, the mortgage is not fraudulent as against general creditors of the corporation, and reformation should be granted. *Marine Sav. Bank v. Norton*, 160 Mich. 614, 125 N. W. 754.

It has been held, however, that a defective mortgage when reformed will not affect a lien of a judgment rendered between the date of the execution and the reformation of the mortgage. *Van Thorniley v. Peters*, 26 Ohio St. 471.

In an action to reform and foreclose a mortgage in which a mistake was made, a notice of *lis pendens* duly filed prior to the record of a deed from the mortgagors to a grantee against whom a judgment had been recovered, will save to the plaintiffs their prior lien as against such judgment, because such judgment, by the terms of the recording act, only takes precedence where the judgment debtor's title is of record. *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. 145.

And a junior mortgagee has no equity to have a mistake of the scrivener corrected in a senior mortgage, by which the senior mortgagee obtained a lien upon more property than was intended, since he is bound by the record of the senior mortgage. *Ames v. New Jersey Franklinite Co.* 12 N. J. Eq. 66, 72 Am. Dec. 385.

So, where an error in the description appears on the face of the record of a mortgage, that is sufficient notice to a subsequent purchaser to put him on his guard. *Walls v. State*, 140 Ind. 16, 38 N. E. 177.

And mistakes in the description of land may always be corrected against a party who buys with full knowledge of another's prior purchase of land from the same grantor. *Smith v. Schweigerer*, 129 Ind. 363, 28 N. E. 696.

And the fact of possession by a party of property under a claim of title which by mistake had been conveyed to another is a sufficient intimation of the right of possession to put the purchaser upon inquiry into the nature of his rights, and, failing to make it, the purchaser is in equity visited with all the consequences of the knowledge of the title. *Baynard v. Norris*, 5 Gill, 468, 46 Am. Dec. 647.

And where a bill charges the defendant with having notice of the true contract and intention of the parties to a deed when he made a levy upon property covered by the deed, he takes by the levy the land of the debtor subject to all equities, and where the deed on its face discloses the intention to make it a mortgage its record is notice to subsequent purchasers of the equity which that intention creates. *Sampson v. Mudge*, 13 Fed. 260.

And a conveyance to a purchaser, upon a condition therein expressed that it is to be void if the purchaser shall not support the father of the grantor, and as a consideration for which the grantee undertook to pay a

stipulated sum in case he should hold the land under his deed, is not such a purchase for value as will render his want of notice available against a prior equitable title. *Doe v. Doe*, 37 N. H. 268.

Where a grantor in conveying land, by mistake included his dwelling house and cleared lands adjoining it, not intending to do so, however, relief will be granted when the evidence is satisfactory that he acted under a mistake, though the grantee was not cognizant of the mistake at the time of the conveyance. *Mitchell v. Mitchell*, 40 Ga. 11.

And where one person granted to another a lease in which by error the rental was stated to be £130 instead of £230, and the lessee mortgaged it to a third person without notice of the mistake, and another person afterwards paid the mortgagee, and the lease was reassigned to the lessee, and not to the person making the payment, the claim of the person making the payment in respect to the mortgage and sums advanced by him without notice is entitled to priority over the lessor's equity to reform the lease. *Garrard v. Frankel*, 30 Beav. 445.

And where a mortgage is executed by a wife, and her husband joins therein to release his right of curtesy, and the note secured is in fact signed by both, but is in the mortgage stated to be signed by him only, and her claim of title to a part of the property is, as the records show, based upon a void execution sale against him, and it appears that both he and she and the mortgagee acted as though this property was hers, these facts are not sufficient to give notice to third persons that the husband had agreed to join in the mortgage, and the mortgage will not be reformed in equity, nor the execution of a new mortgage compelled, so as to affect the rights of persons claiming under the husband, acquired after the execution of the imperfect mortgage and without actual notice that he had agreed to join therein. *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012.

g. Necessity that injury be substantial.

The power of rescinding a sale of real estate is one of the highest attributes of a court of equity, and the public good requires that it be exercised with great caution and only in cases of extraordinary hardship; and the instances in which the power is exerted are generally cases where it is necessary in order to prevent great mischief. *Taylor v. Fleet*, 4 Barb. 95; *Conaway v. Gore*, 24 Kan. 389; *Prescott v. Cooper*, 37 La. Ann. 553; *Hoeldtke v. Horstman* (Tex. Civ. App.) 128 S. W. 642.

A mistake in a contract, to warrant relief in equity, must be material. *Marshall v. Homier*, 13 Okla. 264, 74 Pac. 368; *Burns v. Caskey*, 100 Mich. 94, 58 N. W. 642; *Daggett v. Ayer*, 65 N. H. 82, 18 Atl. 169; *Deare v. Carr*, 3 N. J. Eq. 513; *Taylor v. Fleet*, supra; *Mills v. Kampfe*, 135 App. Div. 748, 119 N. Y. Supp. 903.

And no occasion exists for the reformation of an instrument when, upon the true construction of it, its meaning and effect are as they are proposed to be made by the amendment. *Heert v. Cruger*, 14 Misc. 508, 35 N. Y. Supp. 1063.

Nor will a contract be reformed where the contract as written was of the same legal effect as the court is asked to make it. *Wolsey v. Neeley*, 46 Ill. App. 387.

And a mistake will not be corrected in equity by making a contract apply to lands which had been omitted from it, instead of to those which were mentioned in it, and to enforce the contract when corrected, where the parties have not acted upon the contract, and there are no equitable circumstances requiring such correction. *Climer v. Hovey*, 15 Mich. 18.

So, if a party, in making a conveyance of one part of a mining claim, makes a mistake against himself as to the amount conveyed, and, in another part of the same conveyance, makes a mistake in his own favor of a corresponding amount in another portion of the same mine, and the grantee obtains no more in the aggregate than he purchased and paid for, the equities are equal, and a court of equity will not reform the conveyance by correcting the mistake against the grantor, to the injury of the other party upon the entire transaction. *Kinney v. Consolidated Virginia Min. Co.* 4 Sawy. 382, Fed. Cas. No. 7827.

And where there is a mutual mistake in the land intended to be mortgaged, but land is mortgaged which is owned by the mortgagor, and there is a foreclosure sale and purchase thereunder by the mortgagee, and the amount of the bid is the amount of the debt due, and the land purchased is worth in value the amount of the bid, the debt is paid and the mortgage is extinguished, and there can be no reformation. *Ray v. Ferrell*, 127 Ind. 570, 27 N. E. 159.

Nor should a sale of land be vacated by reason of a mistake caused by the representations of the seller unless the difference between the recommended and the actual value of the property is very considerable; a mere disappointment on the part of the buyer in some unimportant particular, although he may have made it the principal inducement for his purchase, is not enough. *Taylor v. Fleet*, supra.

And if an amount is claimed to have been over paid an outgoing partner in a settlement on a dissolution of a partnership, the amount must be certain, and the error made under circumstances and be of such a character as to make it just and equitable that it should be rectified. *Hunt v. Stuart*, 53 Md. 225.

And where a discharge of a mortgage is given on real estate for less than is due, by reason of an erroneous computation of interest, it is not a matter of course for equity to interfere afterwards to correct the error. And where circumstances appeared in the case which would render it inequitable for the holder of the mortgage to col-

lect the full amount of interest, a court of equity irrespective of strict legal rights, will decline to interfere in his behalf. *Wright v. Garrison*, 40 Mich. 50.

So, a person purchasing land subject to a mortgage is not estopped by the insertion, by mistake of the scrivener, of a stipulation that the grantee agrees to pay the mortgage debt, since the mortgagee is not prejudiced thereby. *Adams v. Wheeler*, 122 Ind. 251, 23 N. E. 760.

A city has a right to treat its contract for paving as reformed to conform to the real agreement, and to allow claims for paving on such basis, so as to avoid litigation incident to reformation. *Fullerton v. Des Moines* (Iowa) 126 N. W. 159.

h. Effect of adequate remedy at law.

A court of equity will not sustain a bill for relief if, from the allegations, it appears that the complainant has an adequate remedy at law. *Blanchard v. Kenton*, 4 Bibb. 451.

And where a purchaser paid more for property under a written contract to purchase than the price agreed upon by the parties, it is not necessary to reform the contract in equity, since the purchaser could sue at law to recover the money paid through mistake, and if the contract was relied upon as a defense, could show that it did not contain the true contract. *Ragsdale v. Turner*, 141 Iowa, 604, 120 N. W. 109.

So, where a person sold his land, and it was expressly agreed that certain grain should be reserved, and should not pass with the land, and the stipulation to that effect was left out of the agreement by mistake, the vendor is entitled to recover of the purchaser for grain cut and carried away, in an action for trespass. *Lauchner v. Rex*, 20 Pa. 464.

A party is entitled to relief in equity, however, though a remedy at law exists, where, on account of a mistake in drawing up the instrument intended to secure the remedy, it is not as full, adequate, and complete as the one contemplated by the parties. *Newcomer v. Kline*, 11 Gill & J. 457, 37 Am. Dec. 74.

And though a party named as obligee in a bond may sue thereon at law, it does not follow that he has an adequate remedy at law, so that equity has no jurisdiction, since he is entitled to a security the consideration of which cannot be inquired into at law. *Montville v. Haughton*, 7 Conn. 543.

And though one who purchases property and pays more therefor than the price agreed upon by the parties could sue at law to recover money paid through mistake, he can recover such overpayments in a suit to reform the contract where no objection is made to that form of action, and the objection that the purchaser's remedy was on the deed, and not to correct a mistake in the contract, is untenable. *Ragsdale v. Turner*, 141 Iowa, 604, 120 N. W. 109.

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and for the reformation of a deed made before bringing an action for reformation, where this is the only request. *Walls v. State*, 140 Ind. 16, 38 Ind. 177; *Sparta School Twp. v. Mendell*, Ind. 188, 37 N. E. 604.

But when a bill seeks the reformation of a written contract on the ground of mistake, and also alleges another distinct ground of equitable relief, it is not necessary to allege or show a prior request for the correction of the mistake. *Miller v. Louisville & N. R. Co.* 83 Ala. 274, 3 Am. St. Rep. 722, 4 So. 842; *Sparta School Twp. v. Mendell*, supra.

And demand for the reformation of a mortgage need not be made or alleged before suit brought to reform and foreclose it. *Walls v. State*, supra.

Nor need demand for the correction of a mistake be shown in a suit to quiet title, in which the mistake is alleged as a defense. *Lucas v. Labertue*, 88 Ind. 277.

Nor is it necessary to make a previous demand for a reformation, where the facts of the case show that a demand would have been a vain and useless formality. *Weathers v. Hill*, 92 Ala. 492, 9 So. 412.

And a bill for the correction of a mistake in a deed need not allege when the complainant discovered the mistake, or that a demand or request had been made for its correction, where the defendant had instituted suit in ejectment against the complainant's tenant, thus demonstrating the uselessness of a demand. *Jones v. McNealy*, 139 Ala. 381, 101 Am. St. Rep. 38, 35 So. 1022.

J. Pleadings.

A court of equity will exercise the power of reforming instruments with caution, and only do so when a proper case is made by the pleadings. *Stricker v. Tinkham*, 35 Ga. 176, 89 Am. Dec. 280; *Burley v. Weller*, 14 W. Va. 264.

If a mistake is alleged as a ground for reformation of a contract, it must be stated with precision, and made apparent, so that the court may rectify it with a feeling of certainty that it has not committed another and perhaps greater mistake. *Stearns v. Page*, 7 How. 819, 12 L. ed. 928; *Farley v. Bryant*, 32 Me. 474; *Gamble v. Daugherty*, 71 Mo. 599.

And where fraud is relied upon to secure the reformation of an instrument, it must be averred. *Showman v. Miller*, 6 Md. 479; *Daughtrey v. Knolle*, 44 Tex. 450.

There must be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been made before. *Stearns v. Page*, supra.

And it is essential that such fraud, mistake, or surprise should be alleged in the bill, as the ground and object of the prayer for relief. *Wesley v. Thomas*, 6 Harr. & J. 24. 28 L.R.A.(N.S.)

Nor will equity reform a contract on the ground of mistake unless the allegations in the bill are sufficient to show clearly that it was really by mistake that the parties, one and all, entered into the contract. *Newell v. Stiles*, 21 Ga. 118.

It must be shown that the mistake was mutual. *Ramsey v. Smith*, 32 N. J. Eq. 28.

And the complainant must show that an unfair advantage had been gained by the defendant through the mistake, and that the mistake would affect him inequitably if allowed to stand. *Lewis v. Lewis*, 5 Or. 169.

So, where a bill alleged that a deed was given merely to secure a debt, and the answer admits that the grantors made a certain deed in writing, of such date and of such purport and effect as in the bill mentioned and set forth, the answer is not such an admission of the nature and effect of the deed as to preclude all inquiry on the subject. *Brown v. Balen*, 33 N. J. Eq. 469.

And where the defense in an action on a note was that the note was given by mistake, but the plea did not allege how the mistake occurred, evidence in general terms that the note was given by mistake, that the consideration thereof was settled and paid off before it was made and delivered, is properly excluded. *Carr v. Dickson*, 58 Ga. 144.

So, a party who files a bill to correct a mistake in a written agreement, in a case in which the court has the power to make a correction therein, must not only state in his bill the agreement as it ought to have been reduced to writing, but also the substance of the written agreement itself. *Coles v. Bowne*, 10 Paige, 526; *Wall v. Arrington*, 13 Ga. 88; *Electric Goods Mfg. Co. v. Koltonski*, 171 Fed. 550.

And he must allege that the parties agreed to the terms of the contract sought to be established. *House v. McMullen*, 9 Cal. App. 664, 100 Pac. 344.

And he must allege distinctly what the original agreement was, and point out with clearness wherein there was a mistake, and that it did not arise from gross negligence on his part. *Meier v. Kelly*, 20 Or. 86, 25 Pac. 73.

Nor can correction of a deed be obtained without showing that the complainant holds under it. *Ballentine v. Clark*, 38 Mich. 395.

And where a party avers a mistake to have been made in a deed of exchange, and sets up a verbal contract differing from the deed, which expressed the consideration to be the exchange of lands described therein, and asks a specific performance of the verbal contract, the terms of the contract must be accurately stated in the bill, and the proof must, in every essential particular, correspond with the terms of the contract thus set up. *Atlantic & G. C. Consol Coal Co. v. Maryland Coal Co.* 62 Md. 135.

So, a complaint for the reformation of a mortgage containing an erroneous description should set out the land mortgaged, the mistake which occurred, and the prayer for relief should be for the reformation of the

instrument in accordance with the correction of the mistake. *Walls v. State*, 140 Ind. 16, 38 N. E. 177.

And where, in foreclosure proceedings, objection is made to the introduction of the mortgage on the ground that the certificate is defective, the plaintiff should be permitted to amend his complaint, and prove that the acknowledgment was made in compliance with the statute, and have judgment reforming the certificate. *Hutchinson v. Ainsworth*, 63 Cal. 286.

And a complaint to correct a written contract on the ground of mistake, and to enforce it, wherein it is averred in a general and indefinite way that by the mistake, inadvertence, or neglect of the scrivener drawing it up, and without any fault of the plaintiff, the contract does not fully set forth the agreement of the parties, without showing in what respect or particulars it fails to set forth the agreement, and what words are omitted that it was agreed should be inserted, or what words are inserted contrary to the intention of the parties, is insufficient. *Baldwin v. Kerlin*, 46 Ind. 426.

So, in order to correct a deed, whether on the ground of mutual mistake, mistake of one party and fraud on the part of the other party to the contract, when it was drawn by mistake as an absolute deed, but was intended to be a mortgage or trust deed, or to establish a resulting trust arising on a verbal agreement to buy for another, or to set up a last deed, allegations of the party seeking relief to this effect are necessary to show his right to it. *Harding v. Long*, 103 N. C. 1, 14 Am. St. Rep. 775, 9 S. E. 445.

And an equitable decree confirming the title to real estate of which a defective conveyance had been made will not be granted without proof of an agreement to convey for the consideration stated in the bill, although the answer admits an agreement to convey for a different consideration, valuable in law, and an intention to make a valid conveyance, but the bill in such case may be amended by leave of court at the hearing upon the bill, answer, and proofs, by striking out the consideration stated, and substituting that admitted. *Doe v. Doe*, 37 N. H. 268.

And a complaint for rescission of a contract for fraudulent representations must positively and directly allege that the representations inducing the execution of the contract were relied on, and were false, and known to be false by the other party when made, and that plaintiff did not know their falsity, and was misled, to his injury. *Church v. Baumgardner* (Ind. App.) 92 N. E. 7.

And an allegation in a complaint for reformation by a proportionate reduction of the price in a contract of sale of a tract of land, under the mutual mistake of fact that it contained 28 acres, when it contained several acres less, is insufficient when it does not allege that the mistake of the vendor of the land as to acreage was what induced the purchaser to fix the contract price, instead of a proportionately reduced rate, or 28 L.R.A.(N.S.)

that the purchaser meant to fix the to by a certain sum per acre, the mere statement that she was mistaken as to the number of acres not having the effect of an allegation. *Moffett v. Jaffe*, 132 Div. 7, 116 N. Y. Supp. 402, reversing *Misc. 584*, 114 N. Y. Supp. 614.

But a complaint in a suit to reform a contract, which contains a succinct statement of the contract as intended by the parties, and the agreement actually reduced to writing and signed, and points out the differences between the contract agreed upon and the one alleged to have been signed by mistake, and that the difference was caused by the mutual mistake of the parties, is sufficient. *Webb v. Hammond*, 31 Ind. App. 613, 68 N. E. 916; *State v. Lorenz*, 22 Wash. 289, 60 Pac. 644.

It need not set out the exact language omitted from or inserted in the written agreement by mistake. *State v. Lorenz*, supra.

And a bill for reformation of a contract, alleging what the real agreement was, and that, by mutual mistake and inadvertence of the parties and the scrivener, the contract was not so executed, sufficiently shows that the mistake was mutual. *Smelser v. Pugh*, 29 Ind. App. 614, 64 N. E. 943.

And the fact that the complaint in an action for the reformation of a mortgage does not, in express terms, aver that the mortgage was erroneously executed through mutual mistake, will not render it insufficient, if it sets up facts from which such a conclusion is inevitable. *Murdoch v. Leonard*, 15 Wash. 142, 45 Pac. 751.

Nor is it necessary, in order to entitle a contract intended to include certain land, which does not do so by mistake, to be reformed or enforced, that the agreement should show an adequate consideration, and in an action on the contract no consideration for its execution need be alleged. *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179.

And a prayer in a petition in an action in equity on a policy of insurance, that the policy be so reformed as to permit concurrent insurance of a specified amount, and for such other and further relief as plaintiff may be or show himself entitled to, is broad enough to include relief from a provision of the policy rendering it void if the insured now has or shall hereafter procure any other insurance, unless consent in writing is indorsed on the policy. *Fitchner v. Fidelity Mut. Fire Asso.* 103 Iowa, 276, 72 N. W. 530.

So, where, in an action upon a written contract, the defendant claims a mistake, and seeks to have the contract reformed because thereof, he should allege the facts entitling him to the reformation by way of counterclaim or cross bill, and should pray judgment for such reformation. *Born v. Schrenkeisen*, 110 N. Y. 55, 17 N. E. 339; *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099.

And all the persons interested must be made parties thereto. *Green v. Stone*, supra.

And although the defendant in a suit by vendor to recover possession of land conveyed by mistake may, in his pleading, rely on his deed alone, he may show without special plea that after the discovery of the alleged mistake, the vendor received a full consideration for the land, and agreed to let the conveyance remain undisturbed. *Wittbecker v. Walters*, 69 Tex. 470, 6 S. W. 788.

So, defenses in an action to reform a deed, that the deed expresses the contract, and if it does not, there was such a mutual mistake as would authorize defendant to rescind, are not inconsistent, and both may be relied upon. *Lord v. Horr*, 30 Wash. 477, 71 Pac. 23.

But where a plaintiff alleged the execution and delivery by the defendant to his testator of a bond for the payment of a certain sum, and a mortgage to secure the same, and the defendant denied the execution of the bond and mortgage, but did not set up any equitable defense, he will not be permitted to show on the trial by oral testimony that it was agreed between himself and the obligee in the bond, at the time it was executed, that the bond should cover only such amount as should be found to be due from defendant to the obligee, upon a settlement. *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399.

So, a bill in equity, which, as originally filed, prayed for the reformation of a mortgage and the foreclosure thereof, may be amended by striking out the prayer for a foreclosure, and making the bill one for the reformation of the mortgage, and for the removal of a cloud on the title of the mortgagee. *Hawkins v. Pearson*, 96 Ala. 369, 11 So. 304.

And although a judgment cannot be set aside and a new trial granted merely on the ground of a mistake of counsel on a question of law, yet, after reversal of a judgment on appeal, if the mandate is sufficiently broad to permit it, the trial court may allow the pleadings to be amended so as to meet the objections to the former judgment, and to that end may allow a defense improperly pleaded to be perfected, or a new defense, by way of counterclaim or otherwise, to be pleaded, although the effect is to relieve the party from the effect of such a mistake. *Wisconsin M. & F. Ins. Co. Bank v. Mann*, 100 Wis. 596, 76 N. W. 777.

And where a father, in making a gratuitous disposition of some of his lands among his sons, made a mistake in the description of the land in a deed to one of them, and he took possession and improved the lands intended thereby to be conveyed, and gave a mortgage upon the same, and afterwards, on discovery of the mistake in the deed, after the father's death, procured the other heirs, except one, to convey the lands by proper description to his wife, for the purpose of defrauding the mortgagee, a bill to foreclose the mortgage, which joins as defendants the wife of the mortgagor and the heir whose interest was not conveyed to such

wife, and seeks to litigate their rights to the lands as against the mortgage, setting out the facts, and praying for a correction of the mistake in the deed, and a foreclosure of the mortgage, is not demurrable on the ground of multifariousness in this regard, and the complainant is not required to wait until he has foreclosed the mortgage and become the purchaser before he can litigate such adverse claims to the land. *Cummings v. Freer*, 26 Mich. 128.

k. Proof.

1. Nature of.

Equity will grant relief on the ground of mistake, not only when the mistake is expressly proved, but also when it may be inferred from the nature of the transaction. *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923.

When a mistake appears upon the face of a written instrument, a court of equity will correct it without evidence *aliunde*. *Wagenblast v. Washburn*, 12 Cal. 208; *Michel v. Tinsley*, 69 Mo. 442.

As, for instance, where the seal is omitted, where the deed purports to be under seal, and where there is no granting clause, although there are words of warranty. *Michel v. Tinsley*, *supra*.

And where the evidence in a case shows clearly, unequivocally, and decisively the existence of a mistake in an instrument, and there is no evidence to the contrary, a verdict against its correction is contrary to law and evidence, and without evidence to support it. *Crockett v. Crockett*, 73 Ga. 647.

And a mistake in a deed in the omission of land therefrom intended to be included may be established by evidence of the circumstances and nature of the transaction, and the conduct of the parties in relation thereto, provided the natural and reasonable inferences to be drawn therefrom clearly and decidedly prove the alleged mistake. *Layman v. Minneapolis Realty Co.* 60 Minn. 136, 62 N. W. 113.

And the original contract or writing may be given in evidence, as well as subsequent acts done or procured by the party charged with the fraud, and which tend to prove fraud or mistake. *Columbus & T. R. Co. v. Steinfeld*, 42 Ohio St. 449.

And option contracts forming the basis of the transaction pursuant to which a deed was made are admissible in evidence in an action to reform the deed, alleged to contain, by mutual mistake, other lands besides those intended to be conveyed. *Stahn v. Hall*, 10 Utah, 400, 37 Pac. 585.

So, a witness may testify as to the intention of the parties in an action to reform a deed for mistake. *Southern Finishing & Warehouse Co. v. Ozment*, 132 N. C. 839, 44 S. E. 681.

And a deed for a tract of land described by metes and bounds, and of estimated quantity, for a given sum, imports a sale in gross, and a much larger deficit in quan-

tity would be required to evidence mistake than where the sale was made by the acre. *Rich v. Ferguson*, 45 Tex. 396.

It has been held, however, that evidence outside the deed, and inconsistent with it, must be shown in order to set up a parol trust or to reform the deed. *Harding v. Long*, 103 N. C. 1, 14 Am. St. Rep. 775, 9 S. E. 445; *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976.

And that where a mistake is alleged in a deed, it may be proved by other than the subscribing witnesses, they being dead. *Brock v. O'Dell*, supra.

So, courts of equity will grant relief more readily where the mistake is made to appear by reference to another writing. *Wyche v. Greene*, 11 Ga. 159.

And while the most unequivocal testimony is required before courts of equity will grant relief against written contracts, antiquity of the transaction, as well as the fact that the donor himself was the draftsman of the instrument, increases the difficulty as to the sufficiency of the proof. *Wyche v. Greene*, 10 Ga. 57.

So, courts of equity are reluctant to rectify deeds on oral evidence unless there are circumstances which, in their opinion, justify a trial on affidavit evidence, such as where final instructions are proved, and it is clear that the deed as executed departed from them. *Bonhote v. Henderson* [1895] 1 Ch. 742, affirmed in [1895] 2 Ch. 202.

And where a deed executed and accepted as execution of a contract to convey differs from such contract as to the amount of land conveyed, the presumption is that the deed, being the last express agreement on the subject, expresses the final purpose of the parties, and that the change was made by mutual agreement; and the mere fact that the contract and the deed do not agree does not make out a case for the reformation of the deed; it must be proved that the discrepancy arose through fraud or mistake. *Whitney v. Smith*, 33 Minn. 124, 22 N. W. 181.

2. Burden of.

While courts of equity have jurisdiction to reform written instruments on the ground of mutual mistake, yet the presumption is that the writing speaks the final agreement of the parties, and the burden is on the complainant, seeking for the reformation of the instrument, to overcome this presumption. *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 541; *Moore v. Tate*, 114 Ala. 582, 21 So. 820; *Smith v. Allen*, 102 Ala. 407, 14 So. 760; *Campbell v. Hatchett*, 55 Ala. 548; *Hertzler v. Stevens*, 119 Ala. 333, 24 So. 521; *Hough v. Smith*, 132 Ala. 204, 31 So. 500; *George v. Howard*, 56 Iowa, 646, 10 N. W. 212; *Dulany v. Rogers*, 50 Md. 524; *Griffin v. Miller*, 188 Mo. 327, 87 S. W. 455; *Brown v. Brown*, 79 Hun, 44, 29 N. Y. Supp. 652; *Berringer v. Schaefer*, 52 How. Pr. 69.

And the burden of proof to establish fraud or mistake which will warrant the

reformation of a contract rests upon the person asserting it. *Bigelow v. Wilson*, 99 Iowa, 456, 68 N. W. 798; *George v. Howard*, supra.

Besides the ordinary burden of proof which rests upon every litigant who holds the affirmative of an issue, there is in cases for the reformation of written instruments the additional burden of overcoming the strong presumption created by the contract itself. *Harrison v. Hartford F. Ins. Co.* 30 Fed. 862.

And one who seeks the reformation of a contract because of a mutual mistake has the burden to establish both the mutual agreement and the mistake, not merely by a preponderance of evidence, but by proof so clear and convincing as thoroughly to satisfy the mind of the court. *Simpkins v. Taylor*, 81 Hun, 467, 31 N. Y. Supp. 169; *Coles v. Bowne*, 10 Paige, 526; *St. Anthony Falls Water-Power Co. v. Merriman*, 35 Minn. 42, 27 N. W. 199.

So, the burden rests with one seeking to rescind a contract, or to relieve himself from some contractual liability on account of the fraud of another, clearly to prove the fraud or the circumstances from which it should be assumed. *Hoeldtke v. Horstman* (Tex. Civ. App.) 128 S. W. 642.

And where a grantor seeks to avoid a deed on the ground of mistake or fraud, and it appears he was the owner of the land for many years before the deed, the burden of proving his ignorance of the nature and extent of his title rests upon him. *Taylor v. Cayce*, 97 Mo. 242, 10 S. W. 332.

So, a person suing to reform a written instrument has the burden of showing that, when altered, it will correctly show the actual intention of both parties. *Potter v. Frank* (Me.) 76 Atl. 489.

And where a written instrument is sought to be reformed upon the ground that, by mistake, it does not correctly set forth the intention of the parties, or where the declaration of the mortgagor at the time he executed the mortgage, that the equity of redemption should pass to the mortgagee, is sought to be proved, or where it is insisted that the mortgagor, by a subsequent parol agreement, surrendered his rights, the burden of overcoming the strong presumption arising from the terms of a written instrument rests upon the moving party. *Howland v. Blake*, 97 U. S. 624, 24 L. ed. 1027.

And a person filing a bill to correct and reform policies of insurance as to their dates has the burden to show by clear, exact, and convincing evidence that the policies do not truly state the real date of their issuance. *Mitchell v. Capital City Ins. Co.* 110 Ala. 583, 17 So. 678.

And the burden rests with an insurance company in an action against it upon a policy, to show that the policy did not in fact cover loss from tornado, and that the failure to erase the word "tornado" from the policy, or the insertion of that word, was a mistake which neither the insurer nor the insured intended. *Arkansas Mut. F. Ins. Co. v. Witham*, 82 Ark. 226, 101 S. W. 722.

But the burden of proof does not rest upon the defendant in an attack by the maker upon a trust deed, to establish that the plaintiff, who made and seeks to cancel the deed, understood it at the time it was executed. *Taylor v. Buttrick*, 165 Mass. 547, 52 Am. St. Rep. 530, 43 N. E. 507.

3. Cogency of.

(a) General rules.

Equity has jurisdiction to reform written instruments where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, if the evidence be sufficiently cogent thoroughly to satisfy the mind of the court. *Nutter v. Brown*, 51 W. Va. 598, 42 S. E. 661; *Cross v. Bean*, 81 Me. 525, 17 Atl. 710.

Or, as it is put by some of the cases, if the evidence of the mistake or fraud be "clear and convincing," or "clear and satisfactory." *Berry v. Sowell*, 72 Ala. 14; *Whitehead v. Brown*, 18 Ala. 682; *Colorado Inv. Loan Co. v. Beuchat* (Colo.) 111 Pac. 61; *Sawyer v. Hovey*, 3 Allen, 331, 81 Am. Dec. 659; *Story v. Gammell*, 68 Neb. 709, 94 N. W. 982; *Mitchell v. Griffith* (Neb.) 126 N. W. 998; *Tilton v. Tilton*, 9 N. H. 385; *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33; *Biggs v. Bailey*, 40 W. Va. 188, 38 S. E. 499; *Jarrell v. Jarrell*, 27 W. Va. 743.

And evidence leaving no reasonable doubt that, through a mistake, an instrument does not embody the real intention of the parties to it, warrants equity in reforming the instrument. *Fuchs v. Treat*, 41 Wis. 404.

A mere preponderance of the evidence of mistake is not sufficient. *Moore v. Tate*, 114 Ala. 582, 21 So. 820; *Hough v. Smith*, 132 Ala. 204, 31 So. 500; *Arkansas Mut. F. Ins. Co. v. Witham*, 82 Ark. 226, 101 S. W. 721; *Wilson-Ward Co. v. Farmers' Union Gin Co.* (Ark.) 126 S. W. 847; *Tillar v. Wilson*, 79 Ark. 256, 96 S. W. 381; *Loukowski v. Pryor*, 46 Colo. 584, 106 Pac. 7; *Stockbridge Iron Co. v. Hudson Iron Co.* 102 Mass. 45; *Burns v. Caskey*, 100 Mich. 94, 58 N. W. 642; *Crookston Improv. Co. v. Marshall*, 57 Minn. 333, 47 Am. St. Rep. 612, 59 N. W. 294; *Fritz v. Fritz*, 94 Minn. 264, 102 N. W. 705; *Mikiska v. Mikiska*, 90 Minn. 258, 95 N. W. 910; *Layman v. Minneapolis Realty Co.* 60 Minn. 136, 62 N. W. 113; *Devereux v. Sun Fire Office*, 51 Hun, 147, 4 N. Y. Supp. 655; *Weed v. Whitehead*, 1 App. Div. 192, 37 N. Y. Supp. 178; *Bowers v. New York L. Ins. Co.* 68 Fed. 785.

Nor is it sufficient that there may be some reason to presume a mistake. *Wall v. Arrington*, 13 Ga. 88.

And it has been held that the existence of the original contract, and of a mistake in reducing it to writing, must be shown "beyond a reasonable doubt," or "beyond a reasonable controversy," to warrant reformation. *Smith v. Allen*, 102 Ala. 407, 14 So. 760; *Moore v. Tate*, supra; *Clopton v. Martin*, 11 Ala. 187; *Hand v. Cox* (Ala.) 51 So. 519; *Parker v. Carter*, 91 Ark. 162, 28 L.R.A.(N.S.)

120 S. W. 836; *Franklin v. Jones*, 22 Fla. 526; *Jackson v. Magbee*, 21 Fla. 622; *Wyche v. Greene*, 11 Ga. 159; *Houser v. Austin*, 2 Idaho, 204, 10 Pac. 37; *Sutherland v. Sutherland*, 69 Ill. 481; *Douglas v. Grant*, 12 Ill. App. 273; *Linn v. Barkey*, 7 Ind. 69; *Wachendorf v. Lancaster*, 61 Iowa, 509, 16 N. W. 533, 14 N. W. 316; *Bodwell v. Heaton*, 40 Kan. 36, 18 Pac. 901; *Schaefer v. Mills*, 69 Kan. 25, 76 Pac. 436; *Andrews v. Andrews*, 81 Me. 338, 17 Atl. 166; *National F. Ins. Co. v. Crane*, 16 Md. 260, 77 Am. Dec. 289; *Stockbridge Iron Co. v. Hudson Iron Co.* 102 Mass. 45, s. c. subsequent appeal, 107 Mass. 290; *Mosby v. Wall*, 23 Miss. 81, 55 Am. Dec. 71; *Steinberg v. Phoenix Ins. Co.* 49 Mo. App. 255; *Henderson v. Stokes*, 42 N. J. Eq. 586, 8 Atl. 718; *Miaghan v. Hartford F. Ins. Co.* 12 Hun, 321; *Devereux v. Sun Fire Office*, supra; *Coles v. Bowne*, 10 Paige, 526; *Berringer v. Schaefer*, 52 How. Pr. 69; *Boyertown Nat. Bank v. Hartman*, 147 Pa. 558, 30 Am. St. Rep. 759, 23 Atl. 824; *Moser v. Libenguth*, 2 Rawle, 428; *Deseret Nat. Bank v. Dinwoodey*, 17 Utah, 43, 53 Pac. 215; *Bailey v. Woodbury*, 50 Vt. 166; *Fudge v. Payne*, 86 Va. 303, 10 S. E. 7; *Jarrell v. Jarrell*, 27 W. Va. 743; *Meiswinkel v. St. Paul F. & M. Ins. Co.* 75 Wis. 147, 6 L.R.A. 200, 43 N. W. 669; *Howland v. Blake*, 97 U. S. 624, 24 L. ed. 1027; *Pope v. Hoopes*, 84 Fed. 927.

But that the proof of mistake must be beyond a reasonable doubt to warrant reformation has been contradicted, the rule being held to be that, to reform and correct a written instrument upon the ground of mistake, the evidence must be clear and convincing, but it is not necessary that the proof establish the mistake clear of all reasonable doubt. *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688, overruling on this point, *Guernsey v. American Ins. Co.* 17 Minn. 104, Gil. 83; *Stille v. McDowell*, 2 Kan. 374, 85 Am. Dec. 590; *Southard v. Curley*, 134 N. Y. 148, 16 L.R.A. 561, 30 Am. St. Rep. 642, 31 N. E. 330; *Archer v. California Lumber Co.* 24 Or. 341, 33 Pac. 526.

And the general trend of the decisions would seem to be to require considerably more cogency of evidence than the ordinary preponderance rule of civil cases, but it was not designed to go quite to the extent of requiring the strict "beyond a reasonable doubt" rule of the criminal law.

The courts of different jurisdictions have adopted different methods of expressing the test applied to the cogency of evidence of mistake necessary to the reformation of a written instrument. A group, in which Alabama takes the lead, fixes the requirement as, "clear, exact, and convincing," or, "satisfactory evidence." *Moore v. Tate*, supra; *Mitchell v. Capital City Ins. Co.* 110 Ala. 583, 17 So. 678; *Burnell v. Morris*, 106 Ala. 349, 18 So. 82; *Ohlander v. Dexter*, 97 Ala. 476, 12 So. 51; *Guilmartin v. Urquhart*, 82 Ala. 570, 1 So. 897; *Alexander v. Caldwell*, 55 Ala. 517; *Hertzler v. Stevens*, 119 Ala. 333, 24 So. 521; *Hough v. Smith*, supra; *White v. Henderson-Boyd Lumber Co.* (Ala.) 51 So. 764.

Another group of cases has adopted the test that the mistake must be proved by clear and satisfactory evidence, or by clear and convincing evidence. *Burns v. Caskey*, *supra*; *Hinton v. Citizens' Mut. Ins. Co.* 63 Ala. 488; *Tyson v. Chestnut*, 100 Ala. 571, 13 So. 763; *Mitchell Mfg. Co. v. Kempner*, 84 Ark. 349, 105 S. W. 880; *Ezell v. Humphrey*, 90 Ark. 24, 117 S. W. 758; *Parker v. Carter*, *supra*; *Lestrade v. Barth*, 19 Cal. 660; *Leonis v. Lazzarovich*, 55 Cal. 52; *Jarnatt v. Cooper*, 59 Cal. 703; *Cox v. Woods*, 67 Cal. 317, 7 Pac. 722; *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 706; *Loukowski v. Pryor*, *supra*; *Jacobs v. Parodi*, 50 Fla. 541, 39 So. 833; *Hunter v. Bilyeu*, 30 Ill. 228; *Adams v. Robertson*, 37 Ill. 45; *Miner v. Hess*, 47 Ill. 170; *Schwass v. Hershey*, 125 Ill. 653, 18 N. E. 272; *Rexroat v. Vaughn*, 181 Ill. 167, 54 N. E. 917; *Northfield Farmers' Twp. Mut. F. Ins. Co. v. Sweet*, 46 Ill. App. 598; *Oiler v. Gard*, 23 Ind. 212; *Osmundson v. Thompson Bros.* 90 Iowa, 755, 57 N. W. 803; *Ring v. Ashworth*, 3 Iowa, 458; *Wachendorf v. Lancaster*, *supra*; *Cummins v. Monteith*, 61 Iowa, 541, 16 N. W. 591; *Murphy v. First Nat. Bank*, 95 Iowa, 325, 63 N. W. 702; *Mahoning Coal Co. v. Dowling (Ky.)* 124 S. W. 370; *Fitzpatrick v. Rjugo*, 9 Ky. L. Rep. 503, 5 S. W. 431; *Ætna Indemnity Co. v. Baltimore, S. P. & C. R. Co.* 112 Md. 389, 76 Atl. 251; *Mendenhall v. Steckel*, 47 Md. 453, 28 Am. Rep. 481; *Hunt v. Stuart*, 53 Md. 225; *German American Ins. Co. v. Davis*, 131 Mass. 316; *Sawyer v. Hovey*, 3 Allen, 331, 81 Am. Dec. 659; *Crookston Improv. Co. v. Marshall*; *Layman v. Minneapolis Realty Co.*; and *Mikiska v. Mikiska*, —*supra*; *Bartlett v. Brown*, 121 Mo. 353, 25 S. W. 1108; *Henderson v. Beasley*, 137 Mo. 199, 38 S. W. 950; *Griffin v. Miller*, 188 Mo. 327, 87 S. W. 455; *Slobodisky v. Phenix Ins. Co.* 52 Neb. 395, 72 N. W. 483; *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099; *Nevius v. Dunlap*, 33 N. Y. 676; *Miaghan v. Hartford F. Ins. Co.* *supra*; *Greene v. Smith*, 13 App. Div. 459, 43 N. Y. Supp. 610; *Kornegay v. Everett*, 99 N. C. 30, 5 S. E. 418; *Harding v. Long*, 103 N. C. 1, 14 Am. St. Rep. 775, 9 S. E. 445; *Ranney v. McMullen*, 5 Abb. N. C. 246; *Davenport v. Sovil*, 6 Ohio St. 459; *Clayton v. Freet*, 10 Ohio St. 545; *Foster v. Schmeer*, 15 Or. 363, 15 Pac. 626; *Epstein v. State Ins. Co.* 21 Or. 179, 27 Pac. 1045; *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige, 278, 19 Am. Dec. 431; *Monks v. McGrady*, 71 Tex. 134, 8 S. W. 617; *Fishack v. Ball*, 34 W. Va. 644, 12 S. E. 856; *Robinson v. Braiden*, 44 W. Va. 183, 28 S. E. 798; *Kropp v. Kropp*, 97 Wis. 137, 72 N. W. 381; *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85, 25 L. ed. 52; *United States v. Cushman*, 2 Sumn. 426, Fed. Cas. No. 14,908.

That is, the evidence must be such that, if standing alone, uncontradicted, it would establish a clear *prima facie* case of fraud or mistake. *Jarnatt v. Cooper*, 59 Cal. 703.

And such as would have satisfied a chancellor or court of equity under the former practice. *Kornegay v. Everett*, *supra*; *Wil-* 28 L.R.A.(N.S.)

Williamson v. Carpenter, 205 Pa. 164, 54 Atl. 718; *Breneiser v. Davis*, 141 Pa. 85, 21 Atl. 508.

There must have been a plain mistake, clearly made out by satisfactory proof. *Kent v. Manchester*, 29 Barb. 595; *Southard v. Curley*, 134 N. Y. 148, 16 L.R.A. 561, 30 Am. St. Rep. 642, 31 N. E. 330.

The prayer for relief in such case must be supported by overwhelming evidence. *Palmer v. Hartford F. Ins. Co.* 54 Conn. 488, 9 Atl. 248.

And another group has said that the evidence must be "clear and strong," or, "strong and conclusive." *Dulany v. Rogers*, 50 Md. 524; *Beall v. Greenwade*, 9 Md. 185; *Ligon v. Rogers*, 12 Ga. 281; *Goodell v. Field*, 15 Vt. 448; *Preston v. Whitcomb*, 17 Vt. 183; *Barry v. Harris*, 49 Vt. 392; *Shattuck v. Gay*, 45 Vt. 87; *Weidebusch v. Hartenstein*, 12 W. Va. 760.

And still another group holds that the proof of the mistake must be clear, unequivocal, and decisive. *Davenport v. Hudspeth*, 81 Ark. 166, 98 S. W. 699; *Marquette Timber Co. v. Chas. T. Abeles Co.* 81 Ark. 420, 99 S. W. 685; *Wilson-Ward Co. v. Farmers' Union Gin Co. (Ark.)* 126 S. W. 847; *Turner v. Todd*, 85 Ark. 62, 107 S. W. 181; *Arkansas Mut. F. Ins. Co. v. Witham*, 82 Ark. 226, 101 S. W. 721; *Tillar v. Wilson*, 79 Ark. 256, 96 S. W. 381; *Goerke v. Rodgers*, 75 Ark. 72, 86 S. W. 837; *McGuigan v. Gaines*, 71 Ark. 614, 77 S. W. 52; *Colorado Inv. Loan Co. v. Beuchat (Colo.)* 111 Pac. 61; *Wall v. Arrington*, 13 Ga. 88; *Allen v. Elder*, 76 Ga. 674, 2 Am. St. Rep. 63; *Iverson v. Wilburn*, 65 Ga. 103; *Habbe v. Viele*, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1; *National F. Ins. Co. v. Crane*, 16 Md. 260, 77 Am. Dec. 289; *Philpot v. Elliott*, 4 Md. Ch. 273; *State ex rel. Frank v. Frank*, 51 Mo. 98; *Williamson v. Carpenter*, *supra*; *Cranston Print Works v. Dyer*, 19 R. I. 208, 32 Atl. 922; *Bowers v. New York L. Ins. Co.* 68 Fed. 785.

And equity will not overturn a written instrument on the ground of mistake if the evidence tending to establish the mistake was of no greater weight than that tending to disprove the mistake. *Goerke v. Rodgers*, *supra*.

So, it is held that courts of chancery will exercise their jurisdiction to reform written contracts on the ground of mistake very sparingly, and only upon the clearest and most satisfactory proof as to the intention of the parties. *Trout v. Goodman*, 7 Ga. 383; *Wall v. Arrington* and *Ligon v. Rogers*, *supra*; *Gray v. Woods*, 4 Blackf. 432; *Hileman v. Wright*, 9 Ind. 126; *Stover v. Poole*, 67 Me. 217; *Tesson v. Atlantic Mut. Ins. Co.* 40 Mo. 33, 93 Am. Dec. 293; *Lyman v. United Ins. Co.* 17 Johns. 373; *Talley v. Courtney*, 1 Heisk. 715; *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 541; *Pulaski Iron Co. v. Palmer*, 89 Va. 384, 16 S. E. 275; *Carter v. McArtor*, 28 Gratt. 356.

And to warrant a correction, evidence to show a mistake in a written instrument must be clear and strong, so as to establish the mistake to the entire satisfaction of the

court. *Gillespie v. Moon*, 2 Johns. Ch. 596, 7 Am. Dec. 559; *Ford v. Joyce*, 78 N. Y. 618; *McDonnell v. Milholland*, 48 Md. 540; *Seward v. Spurgeon*, 9 Wash. 74, 37 Pac. 303; *VanVleet v. Sledge*, 45 Fed. 743; *Ivinson v. Hutton*, 98 U. S. 79, 25 L. ed. 66; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239.

The proof must be full, satisfactory, and conclusively convincing. *Phoenix Ins. Co. v. Ryland*, 69 Md. 437, 1 L.R.A. 548, 16 Atl. 109; *Beard v. Hubble*, 9 Gill, 420; *Prior v. Davis* (Fla.) 50 So. 535; *Franklin v. Jones*, 22 Fla. 526; *Northfield Farmers' Twp. Mut. F. Ins. Co. v. Sweet*, 46 Ill. App. 598; *Pennell v. Wilson*, 2 Robt. 505.

It must be clear, certain, and satisfactory. *Bailey v. Bailey*, 8 Humph. 230; *Home F. Ins. Co. v. Wood*, 50 Neb. 381, 69 N. W. 941.

The evidence must be clear, positive, and convincing. *Turner v. Shaw*, 96 Mo. 22, 9 Am. St. Rep. 319, 8 S. W. 897; *Rowley v. Flannelly*, 30 N. J. Eq. 612.

It must be clear, precise, and indubitable. *Boyertown National Bank v. Hartman*, 147 Pa. 558, 30 Am. St. Rep. 759, 23 Atl. 842; *Breneiser v. Davis and Williamson v. Carpenter*, *supra*.

It must be of such a character as would move a chancellor to reform a written instrument, and not merely of such a character as might induce a jury to reform it, and it must relate to the time when the instrument was executed. *Williamson v. Carpenter*, *supra*.

The mistake must be established by the weight of evidence, and must not be a mere inference. *Mattingly v. Speak*, 4 Bush, 316; *Stockhoff v. Brannin*, 14 Ky. L. Rep. 717.

And "must be clearly established" or "must be clearly proved" has been repeatedly applied to the questions of the intended contract and the mistake. *Carnall v. Wilson*, 14 Ark. 482; *Parker v. Carter*, 91 Ark. 162, 120 S. W. 836; *Hathaway v. Brady*, 23 Cal. 121; *Stille v. McDowell*, 2 Kan. 374, 85 Am. Dec. 590; *Conaway v. Gore*, 24 Kan. 389; *Stockhoff v. Brannin*, *supra*; *Farley v. Bryant*, 32 Me. 474; *Burgin v. Giberson*, 26 N. J. Eq. 72; *Kent v. Manchester*, 29 Barb. 595; *Eborn v. Cannon*, 43 Tex. 231; *Bonneville v. Dum* (Tex. Civ. App.) 128 S. W. 1179; *Probate Ct. v. May*, 52 Vt. 182; *Shirley v. Rice*, 79 Va. 442; *Griswold v. Hazard*, 26 Fed. 135; *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63, reversing 78 Fed. 33; *United States v. Cushman*, 2 Sumn. 426, Fed. Cas. No. 14,908.

The proper rule has been held to be that the party seeking to reform a written agreement must establish the fact that there was a mutual mistake not simply by a preponderance of the evidence, but by such evidence as will show conclusively that a mistake has been made, and satisfy the court or jury of such mistake beyond a reasonable doubt. *Devereux v. Sun Fire Office*, 51 Hun, 147, 4 N. Y. Supp. 655.

And the word "conclusive," as used with reference to the character of evidence neces- 23 L.R.A.(N.S.)

sary in cases in which it is sought to reform an instrument for fraud or mistake, means that measure or degree of proof which produces in the unprejudiced mind the belief and conviction of the truth of the facts asserted, having in view all the facts and circumstances surrounding the transaction. *West v. West*, 90 Iowa, 41, 57 N. W. 639.

A writing is itself regarded as evidence so strong that only other unequivocal evidence, irresistibly conclusive, is sufficient to reform it: *Jarrell v. Jarrell*, 27 W. Va. 743; *Western Min. & Mfg. Co. v. Peytona Cannel Coal Co.* 8 W. Va. 406.

And the proof must be free from all reasonable doubt, almost, if not quite, incontrovertible, and clear and overwhelming. *National F. Ins. Co. v. Crane*, *supra*.

To warrant a reform, the same strength of evidence is required to establish a mistake in a written conveyance as to establish a trust. *Modrell v. Riddle*, 82 Mo. 31.

The proper proof of mistake which will warrant its reformation means something more than cogent inference or strong probability, generated by the evidence. *Talley v. Courtney*, 1 Heisk. 715.

To warrant reformation in equity, the evidence must show certainly in what the mistake consists. *Spare v. Home Mut. Ins. Co.* 19 Fed. 14; *Weed v. Whitehead*, 1 App. Div. 192, 37 N. Y. Supp. 178.

And if proof as to a mistake in a written instrument is doubtful or unsatisfactory, the writing will be held to express correctly the intention of the parties. *Deseret Nat. Bank v. Dinwoodey*, 17 Utah, 43, 53 Pac. 215.

And where an agreement is twice reduced to writing in the same words, and a party to it seeks, contrary to both, to vary them, it can only be done on the strongest proof possible. *Henkle v. Royal Exch. Assur. Co.* 1 Ves. Sr. 317.

So, a person who seeks to reform an instrument upon the ground of mistake must not only show clearly and beyond doubt that there has been a mistake, but he must also show with equal clearness and certainty the exact and precise form and import that the instrument ought to have been made to assume, in order that it might express and effectuate what was really intended by the parties. *Keedy v. Nally*, 63 Md. 311; *Guilmartin v. Urquhart*, 82 Ala. 570, 1 So. 897; *Schwass v. Hershey*, 125 Ill. 653, 18 N. E. 272; *Fritz v. Fritz*, 94 Minn. 264, 102 N. W. 705; *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099; *Fowler v. Fowler*, 4 DeG. & J. 250.

And where a person sold land, and there was a mistake in the conveyance as to the quantity of land intended to be conveyed, the grantor supposing he owned the tract as described, a reformation of the deed, relieving the grantor from his covenants with reference to the land not owned by him, will not be had unless he established the mistake by evidence of the most satisfactory character. *McLucker v. Taggart*, 29 Iowa, 478.

And to reform a warranty deed to con-

form to the intention of the parties that it was to be a mortgage, on the ground that there was a mistake, the evidence must be clear, satisfactory, specific, and convincing that there was such a mistake. *Forester v. Van Auken*, 12 N. D. 175, 96 N. W. 301.

So, in reforming written business contracts, courts of equity move with great caution, and proof of the mistake, and that it really gives an unjust advantage to one party over the other, must be of the most convincing character. *Park Bros. v. Blodgett & C. Co.* 64 Conn. 28, 29 Atl. 133.

Nor will the reformation of an insurance policy by changing the date of issuance be granted, where the evidence as to the exact day of issuance is founded on inference or presumption, and not upon actual knowledge. *Mitchell v. Capital City Ins. Co.* 110 Ala. 583, 17 So. 678.

So, to warrant the reformation of a bond against sureties to make it correspond with what the parties intended and supposed it to be, there must be clearness and certainty in showing the mistake, every presumption being in favor of the instrument as it is, and the evidence must be unequivocal, both that an error was committed, and as to its precise character. *State ex rel. Frank v. Frank*, 51 Mo. 98.

And officers of a corporation who executed its note and personally signed it cannot have the note reformed for mistake, so as to exempt them from liability, in accordance with the claimed understanding of the parties that they were not to be personally liable, where the evidence does not clearly show that the understanding was as claimed. *Wilson-Ward Co. v. Farmers' Union Gin Co.* (Ark.) 126 S. W. 847.

So, before a court of chancery will consent to correct a mistake in the terms of a deed, participated in by only one of the parties thereto, where no fraud or deception is practised, and where a party of ordinary intelligence, who can read, has deliberately executed said deed, the proof of mistake, where admitted at all, must be strong, clear, preponderating, and convincing to the mind of the court. *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39.

Nor will equity reform a written contract where the proof in the action for reformation does not show the provisions of the contract sought to be reformed. *Webb v. Hammond*, 31 Ind. App. 613, 68 N. E. 916.

And it is error for a trial court, in an action to reform a contract by inserting an additional provision constituting a new consideration, to insert such provision, unless the testimony establishes that as the true agreement and contract between the parties. *Jewett v. Chicago, M. & St. P. R. Co.* 45 Mo. App. 58.

To warrant the reformation of a written instrument for mistake, however, it is not entirely accurate to require that the testimony should be positive; the better rule is that it should be clear, strong, and satisfactory, whether positive or presumptive. *Greer v. Caldwell*, 14 Ga. 207, 58 Am. Dec. 553.

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And while, as a general rule, in order to induce a court of equity to rectify an instrument on the ground of mistake, it must be shown that the mistake was the concurrent mistake of all the parties, this rule applies to the ordinary cases of rectifying mistakes in an instrument where it is sought to alter the instrument in some prescribed or definite method, and for this reason it is necessary to prove not only that there has been a mistake, but also what was intended to be done, in order that the instrument may be set right according to what was intended; and the rule does not apply to a case in which the purpose of the rectification is to set aside the deed *pro tanto* as to the parties alleging the mistake; for such a case no proof would be necessary of any further agreement. *Bentley v. Mackay*, 4 De G. F. & J. 279.

So, where a court of error, acting upon a bill of exceptions, reviews the finding of the court below upon the fact of mistake, a doubt as to the degree of clearness will not authorize a reversal. *Clayton v. Freet*, 10 Ohio St. 544.

And where the fact of mutual mistake is clearly shown or conceded, the ordinary rule as to the preponderance of evidence controls in a suit for reformation of a contract, as to the consideration, the performance, and the prejudice. *Conaway v. Gore*, 24 Kan. 389.

And parol evidence of confessions or declarations of a party to a contract as to a mistake made thirteen years before, if uncorroborated by other facts and circumstances, is not sufficient to warrant a reformation of the contract. *Gillespie v. Moon*, 2 Johns. Ch. 596, 7 Am. Dec. 559.

So, when reformation is sought of a deed which, through fraud or mistake, conveys less land than was orally bought and paid for, the case does not stand as if there were no deed, and the error may be corrected without proof of such part performance as is necessary for a decree of specific performance, compelling a conveyance of the whole land when no part of it has been conveyed. *Hitchins v. Pettingill*, 58 N. H. 3.

And a written contract will not be reformed to correspond to the alleged intent of the parties at the instance of one of them, who acknowledges that it was read over to him before its execution, and that he was then satisfied with it, though there is other evidence of mutual mistake. *Jurgensen v. Carlesen*, 97 Iowa, 627, 66 N. W. 877.

So, evidence that a written contract was fraudulently misread to a party when he signed it, by a third person to whom it was intrusted merely for the purpose of delivery, is insufficient to warrant a reform of the contract. *Sylvius v. Kosek*, 117 Pa. 67, 2 Am. St. Rep. 645, 11 Atl. 392.

(b) Contradiction as to intention.

The right of recovery of a party to a contract on a question of reformation for mistake is not confined to cases in which there is no conflict of evidence upon the question

of the intention of the parties. *Devereux v. Sun Fire Office*, 51 Hun, 147, 4 N. Y. Supp. 655; *Mills v. Mills*, 30 N. Y. S. R. 165, 8 N. Y. Supp. 811.

The fact that there is a conflict of evidence with reference to a mutual mistake in a contract is not necessarily a bar to relief in the way of reformation. *Jenkins v. Lefaiver*, 29 N. Y. S. R. 886, 9 N. Y. Supp. 19; *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 796; *Hutchinson v. Ainsworth*, 73 Cal. 452, 2 Am. St. Rep. 823, 15 Pac. 82.

It is sufficient if upon all the evidence the mistake is established in a clear and convincing manner, to the entire satisfaction of the court. *Hutchinson v. Ainsworth*, *supra*.

And if the proofs of mistake of a scrivener in drawing a deed are entirely plain and satisfactory to the court, relief by way of reformation will be granted, though the mistake is denied and there is a conflict of testimony. *Baldwin v. National Hedge & Wire Fence Co.* 19 C. C. A. 575, 39 U. S. App. 162, 73 Fed. 574.

And it is sufficient to justify the reformation of a written contract for mistake, if the evidence is conflicting as to the mistake of one party, and tends to show that the other party knew or suspected that the first party was making a mistake. *Wilson v. Moriarity*, 88 Cal. 207, 26 Pac. 85.

And where a deed conveys a right, and then reserves and takes away the same right, and one of the parties interested claims it to be a mistake, and the other claims that the deed is as it was intended to be, it cannot be said, because of the contradiction, that the proof of the mistake is not clear, convincing, and conclusive so as to warrant a reformation of the deed, since the deed as it stood, conveying and taking away precisely the same right, would be entirely useless. *Perry v. Knight*, 85 Me. 184, 27 Atl. 96.

So, where the evidence in an action to reform a deed is sufficient to satisfy the court that the deed does not express the intention of the parties, the court is not bound to accept the statement of the defendant as to his intention, in contradiction of the written contract; and from his statement to the plaintiff that the deed was intended to be an execution of the agreement the court is authorized to find that the mistake was mutual, and that his failure to include in his deed all the lots sold, in accordance with the written agreement, without showing a release from his obligation, was either a mistake on his part or a fraud upon the plaintiffs. *Sullivan v. Moorhead*, *supra*.

And where the evidence which tends to prove fraud or mistake in an action for the reformation of a written instrument, if standing alone, uncontradicted, is sufficiently clear and convincing, the judgment cannot be reversed on the ground that such evidence is contradicted by other evidence, since the right to pass upon the credibility of witnesses is not vested in the court; the only question to be decided by the court in 28 L.R.A.(N.S.)

respect to the sufficiency of the evidence is whether that which tends to prove the alleged fraud or mistake, if standing alone, without contradiction, would make a *prima facie* case. *Jarnatt v. Cooper*, 59 Cal. 703.

The denial under oath by the defendant in a suit to reform an instrument on the ground of mistake, that there was any mistake, however, must be given considerable weight in determining the sufficiency of the evidence to establish mutual mistake. *Lesser v. Demarest* (N. J. Eq.) 72 Atl. 14; *Fowler v. Fowler*, 4 De G. & J. 250.

And where the answer to a bill alleging a contract to have been entered into by mistake denies the mistake, the strongest proof is necessary to destroy the effect of the denial. *Watkins v. Stockett*, 6 Harr. & J. 435; *Goerke Co. v. Diskon* (N. J. Eq.) 75 Atl. 780; *Greene v. Smith*, 13 App. Div. 459, 43 N. Y. Supp. 610; *Meiswinkel v. St. Paul F. & M. Ins. Co.* 75 Wis. 147, 6 L.R.A. 200, 43 N. W. 669.

And where, in a suit to reform a written instrument, there is nothing but the recollection of witnesses, and the defendant, by his answer, denies the case set up by the plaintiff, the plaintiff is without a remedy. *Mortimer v. Shortall*, 2 Drury & War. 363; *Ramsey v. Smith*, 32 N. J. Eq. 28; *McClain v. Smith*, 158 Pa. 49, 27 Atl. 853; *Sable v. Maloney*, 48 Wis. 331, 4 N. W. 479.

Nor will equity interpose to amend a written instrument, such as a policy of insurance, without the clearest and most satisfactory proof of the mistake and of the real agreement between the parties,—especially where the mistake is denied in the answer. *Lyman v. United Ins. Co.* 2 Johns. Ch. 630.

So, where, in an action to correct a deed to make it conform to the alleged intentions of the parties, two of them are dead, and the evidence as to the mistake is contradictory, the reformation will be refused. *Webb v. Nease*, 66 Ark. 155, 49 S. W. 1081.

And in a suit for the reformation of a deed conveying real estate, so as to make the deed comply with a previous parol agreement, when the testimony is conflicting and is not full, clear, and convincing in favor of reformation, a decree denying reformation will not be reversed as contrary to the evidence. *Prior v. Davis* (Fla.) 50 So. 534.

So, where it is sought to reform a written instrument, and the testimony of part of the witnesses is explicit and satisfactory, and stands upon an equal footing with that of other witnesses, contradictory thereto, as to credibility, and conforms with the written agreement, the agreement will be upheld. *Hoover v. Reilly*, 2 Abb. (U. S.) 471, Fed. Cas. No. 6,677.

And where the evidence as to whether a written contract by mistake omitted a clause agreed upon by the parties is conflicting, and the witnesses seem to be equally reliable, and both sides are supported by circumstances attending the negotiations for the contract and the performance of work under it, the proof is not of that clear and conclusive character required to justify the court in reforming the contract. *Little v.*

Webster, 16 N. Y. S. R. 107, 1 N. Y. Supp. 315.

And where one party to an assignment of a mortgage testifies distinctly to facts indicating that no guaranty was in contemplation of the parties prior to the execution of the assignment, and the attorney for the other party, corroborated by his clerk, testifies that the former party positively agreed to guarantee the mortgage immediately before the assignment was drawn and executed, and that in his presence he dictated to his clerk the form in which the guaranty should be drawn, no case for a reform of the assignment by striking out the guaranty is made out. *Moran v. McLarty*, 75 N. Y. 25.

Nor is parol evidence to vary a written deed permitted to prevail against the positive answer of the defendant denying the charges of inserting provisions in the instrument different from those agreed upon, and of surprise on the complainant in the execution of the deed, where the complainant might have read the deed, and it was his own folly if he did not or if he signed when he did not understand it. *Picton v. Graham*, 2 Desauss. Eq. 592.

And when on a bill filed by a grantor to have a deed reformed by striking out the covenants of warranty, the complainant's evidence is that he employed an attorney to foreclose the mortgage under which the land was sold, and to prepare a deed to the purchaser, and upon its preparation, supposing it contained only a conveyance of his interest as mortgagee, he signed it without reading it over and without knowing it contained covenants of warranty, and the attorney testified that the covenants of warranty were inserted through his inadvertence, the proof is insufficient to authorize the reformation prayed for, where the grantee testifies that she purchased the land upon the express understanding with the grantor that he would make her a perfect title, and her testimony is corroborated by other evidence to the effect that the grantor admitted that he agreed to make the grantee a warranty title, and knew he had executed such a deed to her. *Burnell v. Morris*, 106 Ala. 349, 18 So. 82.

And equity will not reform a deed in which the easterly line of the lands therein conveyed is described as running "west about ten rods," so as to read "west two rods," where the oral testimony as to the northerly line was conflicting, and the only evidence as to the easterly line was the scrivener's testimony that, in copying the description from an earlier deed, he read the word "two" as "ten," where in the printed copy of this deed annexed to the report the word was printed "ten," and upon inspection of the deed it was impossible to determine whether the word was intended for "ten" or "two." *Loud v. Barnes*, 154 Mass. 344, 28 N. E. 271.

So, where, when a contract was made, only the seller and purchaser were present, and they are in immediate conflict as to what was the subject-matter of the sale and purchase, a deed conveying all the timber

on certain land will not be reformed so as to show that only merchantable pine timber of certain dimensions was intended, the evidence not being clear and exact enough to authorize a reformation. *White v. Henderson-Boyd Lumber Co.* (Ala.) 51 So. 764.

And where a contract for the exchange of a farm for a stock of goods at invoice value provided for the invoice at wholesale cost as shown by cost marks on the goods, the owner of the farm is not entitled to have it reformed so as to require the invoice to be at wholesale cost without reference to the marked price, where there is a preponderance of evidence that the parties intended that the value of the goods should be determined by the cost marks. *Simpson v. Kane*, 98 Iowa, 271, 67 N. W. 247.

So, where a person executed a deed absolute on its face, for a money consideration stated therein to have been paid, and the grantee afterwards died, the deed will not be reformed and declared to have been intended as a mortgage, on application of the grantor, where the allegation that it was intended as a mortgage is denied by the answer. *Watkins v. Stockett*, supra.

And a bond conditioned that a named person shall on his part abide and perform the orders and decrees of the supreme court will not be reformed so as to be a mere bail bond for such person, where the evidence as to the intent of the parties as to the character of the bond is conflicting and the fraud is not clearly proved. *Griswold v. Hazard*, 26 Fed. 135.

And where a contract between an employer and employee gave the employee 5 per cent of the employer's profits as part of his salary, equity will not reform the contract so as to give him only its profits in operating its department store, on the ground that this was omitted from the contract by mistake, where the contract was drawn by the employer's president, and was accepted by the employee without hesitation or objection or advice of counsel, and is claimed by him to contain the agreement as made. *Goerke Co. v. Diskon*, supra.

So, where in a suit for reformation of a written contract the testimony is conflicting, the failure of the complainant to call as a witness a disinterested person who was present and took part in the original negotiations weighs against his claim. *Pope v. Hoopes*, 84 Fed. 927.

And though an averment of fraud, accident, or mistake in making a deed is properly pleaded in an action to reform the deed, when the answer is responsive it must stand until overcome by the testimony of two witnesses, or that of one witness and circumstances which are equivalent to the testimony of another. *Hollenback's Appeal*, 121 Pa. 322, 15 Atl. 616.

And the parol testimony of one of the parties to a written contract, if denied by the other, must be corroborated by another witness, or evidence equivalent to another witness, before a court of equity will attempt to reform it or set it aside, or before a judge sitting as a chancellor should sub-

mit it to a jury in a proceeding at law. *North & West Branch R. Co. v. Swank*, 105 Pa. 555.

So, in an action to reform a deed for mutual mistake the existence of which is denied by the defendant, it was the duty of the lower court to determine which contention was correct; and by giving judgment in favor of one of the parties the presumption is raised that the issue was implicitly found in his favor. *Wilson v. Wilson*, 23 Nev. 267, 45 Pac. 1009.

And the decision of the trial court upon a conflict of evidence as to a mistake is conclusive upon the appellate court. *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 796.

(c) Application of rules as to cogency in particular cases.

Evidence that a grantor wished to convey a life estate only, and that the word "assigns" was stricken out of his deed in two places where it occurred, but by accident was left in other places, is sufficient to establish that he intended to convey a life estate only, and to warrant a reformation of the deed. *Newland v. First Baptist Church Soc.* 137 Mich. 335, 100 N. W. 612.

And where a deed contained no words of inheritance, and it was obviously the intention of the parties, shown on its face, that a fee should pass, and it contained words of perpetuity, which in a devise would carry a fee, and trusts were declared which required that a fee should pass in order to secure their execution, the grantee is entitled to have the mistake corrected in his favor, unless there was something in the peculiar character in which the parties stood before the court to prevent such exercise of its ordinary jurisdiction. *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390.

But where a deed conveying land to trustees and their successors forever was attacked for mistake, and a reformation sought, so that it might convey a fee-simple estate, proof by the draftsman that the grantor agreed that the land should be conveyed to the trustees and their successors forever, and that there was nothing in his instructions showing any intention that the land should ever return to the grantor, does not establish the alleged mistake. *Showman v. Miller*, 6 Md. 479.

And where a contract for a deed was entered into and thoroughly talked over and considered, and a lawyer was consulted and made a draft of the conditions, and they seemed to be intelligently understood, the mere fact that the deed was one which took immediate effect, contrary to the alleged understanding of the grantors, no fraud appearing, does not warrant a cancelation of the deed on the ground that it was executed through mistake. *Stewart v. Dunn*, 77 App. Div. 631, 79 N. Y. Supp. 123.

Nor will a deed conveying the right to flow so much of the grantor's land as would be flowed by raising the water of a stream by a dam to a given height be canceled upon a bill for that purpose, alleging that the

deed was procured by false representations of the grantee as to the quantity of land that would be flowed by thus raising the water, where the evidence shows that the parties acted upon the assumption that the prospective flowage could be ascertained with certain accuracy by a personal inspection of the premises and vicinity, that neither of them pretended to possess any knowledge on the subject not thus obtainable, and that an agent of the grantor inspected the premises before the conveyance, for this very purpose, and there is no proof that the grantee at the time of such inspection did anything which was calculated to mislead such agent as to the real extent of the land which would be flowed. *Sanford v. Nymman*, 23 Mich. 326.

And where, owing to a mistake in the measurements of a lot, a portion forming a narrow gore 6 to 10 feet in width had not been conveyed in a deed, and this portion lay between the rest of the lot and a street, and it appeared that measurements corresponding with the measurements in the original plat were used in the deed, and that the defendant had failed for twenty-two years to assert any title to the omitted portion, and that his grantee had made large improvements upon a part of the tract and had regularly paid the taxes, and that the grantor had admitted that he supposed he had conveyed the whole lot, an intention to convey the whole is sufficiently established, and the court will reform the deed. *Kellogg v. Chapman*, 30 Fed. 882.

But a conveyance will not be rectified on the allegation that by mistake it passed more than was included in a previous agreement pursuant to which it was given, where the parties were dead, and the agent of the grantor acknowledged the extended agreement, and the agent of the grantee, who could have given a personal account of the transaction, was not examined in the case. *Beaumont v. Bramley*, Turn. & R. 41.

And the declaration of a magistrate who has since died, that a mistake in a deed was made by him, is inadmissible in evidence in a proceeding to correct the mistake, as hearsay. *Westbrook v. Harbeson*, 2 M'Cord, Eq. 112.

Nor is evidence in ejectment, of the undisclosed intentions and opinions of the parties to the plaintiff's deed, sufficient to show any mistake of a mutual nature, and it is therefore inadmissible to establish a defense of such mistake, in the absence of other evidence. *Breneiser v. Davis*, 141 Pa. 85, 21 Atl. 506.

And where a father conveyed adjoining lots to his two sons, not by an equal division, and the grantee of one of the sons, after the death of the father, alleged in an action of ejectment that the father made a mistake in the description of the respective deeds, and there was evidence that the father before the delivery of the deeds, by declarations to others, expressed an intention exactly reversing the description in the conveyances to the two sons, and that the sons after the conveyance occupied the property

exactly as if the father had conveyed according to that expressed intention, but their occupation after the deeds was just the same as before,—the evidence is insufficient to warrant a reform of the instruments. *Williamson v. Carpenter*, 205 Pa. 164, 54 Atl. 718.

So, where a husband and wife purchased land, the wife paying more than half of the purchase money, and the conveyance was made, by mistake, to the husband alone, without her knowledge or consent, and they entered into possession, and she remained in possession after her husband's death, equity will reform the deed by inserting her name as one of the grantees, and decree her to be the sole owner of the property since the death of her husband, as against the heirs of her husband and a mortgagee with notice of her possession to whom one of the heirs had executed a mortgage. *Mastin v. Mastin*, 17 N. Y. S. R. 625, 1 N. Y. Supp. 746.

And a deed by a woman, made in contemplation of marriage, conveying property to a trustee, his executors and administrators, in trust for her sole and separate use for her life, and then in trust for such child or children as she may leave surviving, and if she dies without making any will, then the property to become the property of her husband, and the trustee to reconvey to the grantor or to her said husband or the survivor of them, contains upon its face sufficient evidence of a manifest purpose of the grantor to convey an estate in fee to the trustee in trust for the grantor for her life, and upon her death without issue to convey the property to the husband in fee, and a decree directing the reformation of the deed in those respects should be made, where the wife died intestate and without issue, but leaving the husband surviving. *Moore v. Quince*, 109 N. C. 85, 13 S. E. 872.

But statements made by a grantor to his wife a day or two before a deed was executed, as to what the agreement between the parties was, are not part of the *res gestæ* and admissible as such in an action to reform the deed. *White v. Henderson-Boyd Lumber Co.* (Ala.) 51 So. 764.

And where a wife's name is mentioned in the recital of a deed as a party thereto, but she is neither named nor referred to in the granting or operative clauses of the deed, in which the name of the husband alone appears, and the proof shows that the party drawing the deed was instructed to make it to the husband and wife jointly, but a mortgage of the same date recites that the husband is the sole owner of the land, the evidence is not sufficiently clear and certain to reform the deed on the ground that the name of the wife was omitted by mistake, and that it was intended to convey the land to the husband and wife jointly. *Boyer-town Nat. Bank v. Hartman*, 147 Pa. 558, 30 Am. St. Rep. 759, 23 Atl. 842.

So, where a grantor in a general warranty deed had no title to the coal under the land, which was not excepted from the deed, evidence clearly showing that the grantees

knew the grantor did not own the coal, and did not intend to include it in the sale, and that they never could have supposed they were buying it, is sufficient to warrant the submission of the case to a jury to determine whether the omission to except the coal from the deed was a mutual mistake. *Stafford v. Giles*, 135 Pa. 411, 19 Atl. 1028.

And where an owner of coal land gave an option, reserving to himself 25 or 30 acres of coal in the tops of the hills, and the person receiving the option exercised it, and had his attorneys prepare a deed in which the reservation was described as the seam or bed of coal which may be in, upon, or under the above described premises, known as the Pittsburgh Seam, when it appeared that there was no coal known as the Pittsburgh Seam on the premises, and that the variance in the description in the deed from that in the option was the result either of deception by the grantee, or mutual mistake as to the name of the vein, and the evidence was uncontradicted that the coal reserved was an actual vein known to the grantee, and there was evidence that, at the time the deed was executed and delivered, representations were made to the owner by the grantee that the description in the deed covered the coal referred to in the option,—the grantor is entitled to have the deed reformed so as to read into it the description contained in the option. *Mikesell v. Wehrle*, 37 Pa. Super. Ct. 231.

So, where a bill is filed for the foreclosure of a mortgage, in which it is alleged that the mortgage had been canceled, and with the bond had been surrendered to the defendant by mistake, under a mistaken apprehension that the mortgage debt had been satisfied, when in truth it had not, the voluntary cancellation of the securities by the holder is a strong circumstance, which can only be overcome by clear evidence that the mortgage had never been paid. *Banta v. Vreeland*, 15 N. J. Eq. 103, 82 Am. Dec. 269.

And where trustees holding lands for themselves and their associates for mining purposes conveyed them (the associates also releasing) to one person to enable him to mortgage them, which he did; and reconvey the lands to his grantors, subject to the mortgage, and the mortgage, by the omission of the words of inheritance, conveyed only a life estate, instead of a fee; and one associate, who was not a nonresident, the others all being so, took possession and held the land subject to the mortgage as agent for the trustees; and some years after his death his administrator abandoned the land, which was let by the mortgagee's agent on a written lease; and, the tenant being in possession, the land was sold at judicial sale to pay the deceased associate's indebtedness, and bid in for a very small sum, and the purchaser took possession,—the mortgagee and his assignee both being dead, the latter's executors, upon clear evidence of the intention of the parties to the mortgage, the sum

loaned being much more than a life estate in the land was worth, were entitled to have the mortgage reformed so as to convey a fee. *Durant v. Crowell*, 97 N. C. 367, 2 S. E. 541.

But a court of equity will not reform a mortgage for uncertainty or misdescription, when the evidence fails to identify the land intended to be mortgaged. *Turner v. Hart*, 1 Fed. 295.

And the law will not hold that a mortgage embraces lands which ought not to have been put in it, although in a condition to be mortgaged and deliberately included in it by the mortgagor himself, on the naked ground that the mortgagor swears he entertained a secret design to exclude such lands from the description. *Shepard v. Shepard*, 36 Mich. 173.

And where it is claimed that by mistake a mortgage described land, giving the beginning point at the northwest corner of a named league, whereas it should have been and was intended to be the northwest corner of the lower half of that league, evidence that, at the time the mortgage was given, sundry third persons were occupying the upper half of the league, claiming to be the owners of it, is not sufficient to establish the allegation of mistake. *Eborn v. Cannon*, 32 Tex. 231.

And where an insolvent debtor duly executed and delivered a mortgage of lands to a trustee to secure a bona fide indebtedness to his wife, but the name of the trustee was omitted in the granting clause, and also in the covenants of the mortgage, but in the clause of defeasance was a copy of a promissory note signed by the debtor and payable to the assignee for the use and benefit of the wife, and the mortgage was duly recorded, and afterwards other parties obtained judgment liens on the land, the mortgage, taking all its parts together, furnishes the means to supply the omission of the name of the grantee, and it is properly reformed so as to supply the omission. *Hitesman v. Donnel*, 40 Ohio St. 287.

And evidence of declarations by plaintiff in an action to correct a mutual mistake as to the amount of mortgage notes given for the purchase of land before the papers were drawn, as to the price agreed upon, is competent to corroborate his statement as to the same. *Jones v. Warren*, 134 N. C. 390, 46 S. E. 740.

But evidence in an action to reform a mortgage, that it was executed eleven years before the filing of the bill; and the draftsman who drew it did not testify that he was instructed to include the husband in the covenant to pay the mortgage, but concluded that that ought to have been done from the fact that the money, as he understood, was to be loaned to the husband; and the wife, to whom the mortgaged property belonged, testified that the money was loaned to her and she in turn loaned it to her husband, in evidence of which she exhibited a mortgage and bill executed by her husband to her,—is entirely insufficient to

warrant the court in reforming the mortgage by inserting a personal covenant upon the part of the husband. *Stiles v. Willis*, 66 Md. 552, 8 Atl. 353.

And where there was an agreement and understanding as to property with reference to which notes and a mortgage had been given, that, should the husband die before his wife, she should become the sole owner of the property, and if she died first he should become the sole owner, and by mistake the papers did not include such understanding, the mere probability that in a transfer of stock as a part of the same transaction, and the issuing of a new certificate in the name of the wife, the agreement and intention were the same as in relation to the rest of the consideration, will not, in the absence of direct evidence to that effect, establish a mistake in such transfer, so as to justify a reformation of the stock certificate. *Kropp v. Kropp*, 97 Wis. 137, 72 N. W. 381.

So, where a note falls due, and is renewed, and an indorser indorses the renewal note in blank, expecting and understanding, without express agreement, that it is to be filled up the same as the original, and it is filled up differently, this is insufficient evidence to go to the jury to affect the written instrument, or to authorize its reformation on the ground of mistake. *Ahlborn v. Wolff*, 118 Pa. 242, 11 Atl. 799.

But where one man purchased a drug store of another, for which he paid by giving forty-eight notes secured by a chattel mortgage, and no provision for payment of interest was made therein, an interpretation of the contract, that it was one to pay interest, by the parties themselves, under which they acted for two years and more by the payment and receipt of interest, and by repeated promises of the purchaser to pay interest, in the end outweighs the inference from the written instrument, and warrants a reformation of the contract by inserting a provision for interest. *Bayrhoft v. Rohde*, 42 N. Y. S. R. 466, 16 N. Y. Supp. 851.

So, where insurance policies were agreed to be assigned as collateral security, and the papers drawn up were absolute assignments, and their execution was procured by the representation of the attorney and agent for the insurance company that an absolute assignment would have the effect of an assignment as collateral security only, and that to render it effectual as collateral security absolute terms were necessary, evidence to this effect presents a question of fact for the determination of the trial court, and is sufficient to support a conclusion for relief in favor of the assignor. *Marsh v. McNair*, 48 Hun, 117.

And where a fire insurance policy on property devised to a testator's children was made out in the name of his widow as executrix, and in an action by the widow and children to recover the amount of the policy it was averred in the petition that the insurance was intended and understood

by the parties to the policy to be for the benefit of the owners of the property, and there was a prayer for judgment that, if necessary, the contract might be reformed, evidence of the conversation of the agent with the assured and the underwriter in relation to the object of the policy and the interest of the insured was admissible with a view to such reformation. *Globe Ins. Co. v. Boyle*, 21 Ohio St. 127.

But evidence of an insured person that he informed the company's agent of the intention of his firm to replenish the stock insured, and afterwards take out additional insurance so as to make the total amount of insurance on the property a named figure, does not establish a mutual mistake in the policy, such as would justify a court of equity in reforming it by inserting a provision permitting reinsurance to the named amount. *Home F. Ins. Co. v. Wood*, 50 Neb. 381, 69 N. W. 941.

And the right of persons to reimbursement from a railroad for advances which they made, though perhaps not too uncertain an interest to be insurable, and though insurance thereon might be valid, yet a court of equity would not, by reforming a contract of insurance, make it apply to such an interest, unless it appeared with almost absolute certainty that the parties intended it. *Bishop v. Clay F. & M. Ins. Co.* 49 Conn. 167.

So, an unconditional assignment of an entire patent will be held to have been intended only as a license for a single county, and reformation granted accordingly, where not only the parol evidence, but every incident and circumstance attending the sale, both before and after execution of the deed, showed that the parties negotiated for the sale of the county alone, and there is no evidence, outside of the deed, of any other agreement or understanding. *Baldwin v. National Hedge & Wire-Fence Co.* 19 C. C. A. 575, 39 U. S. App. 162, 73 Fed. 574.

And where an absolute bill of sale of a negro had been given, and a bill in equity was afterwards filed to have the same reformed on the ground of fraud or mistake, because the deed was intended as a security only for money loaned at a high rate of usury, and certain witnesses testified to declarations of the usurer, acknowledging that he had a lien only on the slave, and that if principal and interest were paid the debtor might keep him,—these circumstances, taken together, might afford a presumption that the deed was made absolute by fraud or mistake; and testimony to this effect should be submitted to the jury, that they may determine whether it had this effect. *Greer v. Caldwell*, 14 Ga. 207, 58 Am. Dec. 553.

And a contract by which one person agreed to run the boat of another from one named place to another, risk of navigation assumed, covers the risk of the boat being too large to pass through the locks; 28 L.R.A.(N.S.)

and where the hirer was prevented from performing his contract for this reason, and alleged that there was a verbal agreement between the parties, in pursuance of which the written contract was intended to be drawn, that the risk as to the practicability of the boat passing through the locks was to be, and was understood by them as, assumed by the owner, and asked to have the written contract reformed to correspond with the agreement, a mutual mistake is sufficiently shown; and the hirer is entitled to introduce evidence as to the original agreement. *Pitcher v. Hennessey*, 48 N. Y. 415.

So, inadequacy of price, while not of itself sufficient ground for reformation of a deed as between parties standing on an equality, is yet a material fact which, in connection with other facts, may amount to proof of fraud or mistake such as will warrant a reformation. *Baldwin v. National Hedge & Wire-Fence Co.* supra.

But evidence tending to show that a disputed clause was in an assignment when it was executed, that plaintiff read portions of the assignment, and had an opportunity to read it all, that it was dictated and written in his presence and with his consent, though he denied all knowledge of the existence of a guaranty clause in it prior to the commencement of an action brought to enforce it,—does not show a mutual mistake so clearly as to authorize a judgment directing a reformation of the assignment. *Moran v. McLarty*, 11 Hun, 68.

And where a lease was to some extent defaced by erasures and interlineations, and an attorney was directed to make a new one to take its place, and it was understood by both parties that the legal effect and form of the new lease were to be the same as the old; but the lease given gave the lessee no right to surrender the lease, which right was secured to him by the old lease; but no fraud was alleged, and it was not averred that the stipulation was omitted by mistake; and a witness testified that the two leases were compared, and the clauses providing for forfeiture were fully considered,—the proof of mutual mistake is not so clear and precise as to justify a decree reforming the lease. *Liggett v. Shira*, 159 Pa. 350, 28 Atl. 218.

Nor will a lease of rooms, with certain restrictions as to the business to be conducted therein by the lessee, be reformed for mistake or fraud, so as to permit the lessee to conduct his business therein, where he signed it with full knowledge of the restrictions, when he was doubtful whether it would permit his business to be conducted therein, upon the unauthorized assertion of the lessor's bookkeeper, that the lessor understood the purpose for which the lessee rented, and the statement of the agent who brought about the leasing, that there would be no trouble about it. *Campau v. National Film Co.* 159 Mich. 169, 123 N. W. 606.

VIII. Conclusion.

As a general rule, equity will reform written instruments to correct mistake. Equity has power to reform written instruments to make them conform to the true intention of the parties. And it may reform written instruments where there is a mutual mistake upon the part of the parties, or a mistake on one side and fraud or inequitable conduct on the other.

To warrant equitable interference for the reformation of contracts, there must have been originally a valid agreement sufficiently expressing in terms the real intention of the parties, and the written contract must have failed to express such true intention, and this failure must have been due to mutual mistake, or mistake on one side and fraud or inequitable conduct on the other. Equity will not rescind or reform a contract, however, where neither party has acquired a right or suffered a loss by the contract, or if the injury resulted from the negligence of the complaining party. And a court of equity cannot give a written instrument a more extended operation than the natural and legal import of the words in it authorize. And a third person cannot be substituted in the place of one of the parties who signed a contract. And one asking for the reformation of an instrument must stand upon some superior equity to that of the party against whom he asks it.

Courts of equity, in rescinding or reforming contracts, go upon the principle that where a mistake is manifest they will, in the exercise of their ordinary discretion, correct it and hold a party according to his original intention. They consider that as done which is agreed to be done and which ought to be done. A written instrument is the evidence of the contract between the parties to it; and if through mistake it fails to present their agreement, the contract it expresses is not their contract, and the true contract remains unexecuted, and equity will reform the writing, causing it to express the true intent of the parties.

There are two classes of mistakes of law in contracts: First, a mistake in law as to the legal effect of the contract actually made; and, second, a mistake in law in reducing to writing the contract, whereby it does not carry out or effectuate the intention of the parties. In the former case the contract actually entered into will seldom, if ever, be relieved against, unless there are other equitable legal features calling for the interposition of the court; but in the second class the mistake is not in the contract, but terms are used or omitted which give the instrument a legal effect not intended by the parties, and different from the contract made, and here equity usually grants relief, unless barred by some other ground. With reference to the first class of cases, the rule has been asserted that equity will not relieve from an act done under mistake of law, unmixed

with matters of fact, unless there is some additional ground for equitable relief. Other equitable elements must concur, such as surprise, undue influence, bad faith, fraud, imposition, and the like. But in applying the maxim that ignorance of law does not excuse, the courts have, in cases of particular hardship, distinguished between ignorance of the existence of the law, and of its legal effect, giving relief in cases of ignorance of the effect. This rule applies particularly to mistake or ignorance as to legal consequences of an act or contract, such a mistake being a mistake of law pure and simple, for which no relief can be granted, as are also questions of the construction of a contract or of the definition of words in it. And it has been applied to mistakes in deeds, mortgages, leases, bonds, and common contracts, and other miscellaneous instruments. This rule has been adopted from the common law, and has been followed by many late cases, but it has been to some extent superseded by the rule that equity will correct mistakes without reference to whether they are mistakes of law or mistakes of fact, where they result in a failure to effectuate the intention of the parties.

In any event the doctrine that mistake or ignorance of law is no excuse for breach or nonperformance of an agreement is confined to cases of pure unmixed mistake of law, in which there is no mistake of fact, and no element of trust or fraud entering into the contract. And the rule is strongly supported that a mistake of law may, in a proper case, be corrected in equity, as well as a mistake of fact. And the rule is growing in favor, and has become the prevailing one, that the main object of equity jurisdiction should be to effectuate the intention of the parties to the contract in question, and that any mistake of such parties, which would defeat such intention, should be corrected in equity so as to carry it into effect, whether it be a mistake of law or a mistake of fact, and without reference to the principle that mistake or ignorance of law does not excuse. This rule has been applied to mistakes in deeds, which prevent the deed from expressing the intent of the parties, including omissions, insertions wrongfully made, mistakes in reservations, and in assumption of mortgages or other encumbrances, and as to the interest conveyed, and as to the quantity and description. But to reform a contract in equity under this rule, it must be shown that the true intention of the parties was different from the contract as reduced to writing, and that by some fraud or mistake the real contract between the parties was not truly reduced to writing. This principle has also been applied to mortgages and deeds of trust, and bills of sale, and to leases, and contracts with reference to lands, and bonds, and negotiable instruments, and insurance policies. And insurance policies may be reformed for mistake after, as well as before, loss, if the

assured has not been guilty of laches. But the power of courts of equity to correct mistakes in policies of insurance is exercised with great caution, and only when the proof is entirely satisfactory. The omission of the seal from an instrument is a mistake apparent upon the face of the instrument, which a court of equity will correct.

The rule that equity will not interfere to cancel a contract made through mistake of law applies to a mistake as to the general law, and not to a case where a party is mistaken as to the effect of existing circumstances in relation to his private rights, interests, or relations. Such mistakes are in reality mistakes of fact, and equity will consider them. Nor does the maxim that ignorance of the law is no excuse for the breach or nonperformance of any agreement apply to special or private acts of the legislature, which are designed only to operate upon particular persons, or to regulate private concerns. A party must know enough about his title, however, not, by his want of knowledge of it, to mislead a purchaser to his detriment; and where a deed purports to convey all interest and title of the grantor it will be given effect accordingly, although he actually held a greater interest than either he or the grantee, at the time of the conveyance, supposed he owned. The qualification of the rule above noted also applies to mistakes as to legal rights as affecting compromises and settlements. And if parties to a contract recognized the fact that something was uncertain as to the amount or condition of the subject-matter of their dealing, and the contract relating thereto is in the form intended, there is no ground for correcting a mistake, if it should finally turn out that one has intervened. This also applies to compromises of doubtful rights, and to voluntary settlements between parties, when characterized by good faith. And they will not be disturbed for any ordinary mistake, either of law or fact, in the absence of inequitable conduct, their very object being to settle all possible errors without judicial controversy. Nor can a contract or payment made for the purpose of avoiding litigation be rescinded for error in law. Compromises of doubtful claims will not be set aside, except for fraudulent misrepresentation or concealment of facts, or for such imposition as amounts to unfair and unconscientious dealing. Concealment of facts which one is not bound to disclose is not sufficient. And the court will not inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made. Equity will in a proper case, however, relieve against an agreement of compromise, made under a mistake of law by the party seeking relief. And if the parties are not on equal terms, and one misleads the other, and obtains property thereby against right and equity, as well as against law, he will be compelled to restore it. Parol evidence is

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admissible to make out a case for the reformation of a settlement, but the jurisdiction in such cases is cautiously exercised.

The rule seems to be practically universal, that mistake or ignorance of law entering into a contract furnishes ground for interference by equity whenever the mistake is mutual. And a mistake is mutual, within this rule, when it is common to all the parties to the contract or instrument. But cases of this class also take the position that a mistake of law, to be a ground of interference by equity, must have been mutual, or must have been induced by fraud or circumvention. A mistake of one party, not induced by the act of the other, affords no ground for equitable intervention, though a mistake on one side may be ground for rescinding an agreement, but not for reforming it. And the reformation must consist of making the agreement what the parties intended it. The rule that mutual mistake or fraud is essential to reformation, however, is not necessarily applicable where the mistake occurs merely in the reduction of the agreement to writing. And it does not apply to the case of a contract executed between parties in the relation of vendor and purchaser, whom it is in the power of the court to replace in their original positions.

So, equity will reform a written instrument which, through the mistake of one party, accompanied and induced by fraud or other inequitable conduct of the other party, does not express the true intention. And misrepresentation, whether wilful or accidental, if prejudicial, is ground for reforming a contract. And if one party to a contract is ignorant with reference to a matter of law involved, and another party, knowing of such ignorance, takes advantage of it to make a contract advantageous to himself, a ground for reformation exists. False assertions of value, when no warranty is intended, however, do not constitute a ground of relief to a purchaser, if the assertion is a mere matter of opinion in which the parties may differ. Nor is a mere misrepresentation as to the legal effect of a contract, or the rights of the parties under it, a ground for canceling it as fraudulently obtained. And a representation as to what the law will or will not permit to be done is ordinarily to be regarded rather as the expression of an opinion than the assertion of a fact. And, ordinarily, mistake upon the part of the purchaser relative to the qualities of property, caused by communications of the seller, do not call for interposition of equity. And the mere fact that the person is of weak understanding, however produced, if there be no fraud or surprise, is not an adequate ground for relief against his contracts. Nor will a misrepresentation avoid a contract, if it be one of such a nature that the person to whom it was made had no right to rely on it, since the court will not aid one who refuses to exercise his own discretion. And to be a ground for reformation, the misrepresenta-

tion must be of some material fact which the party might have placed confidence in, and not a mere opinion. Misrepresentation and fraud in corruptly deceiving one as to matter of law amount to fraud in a legal sense, and furnish ground for interference of equity. And fraudulent representations as to the legal effect of an instrument will avoid it, though made to one who has actually read it, if he is unable to judge of its true construction. And knowingly availing one's self of a fiduciary relation to mislead the other party to a contract, by a misrepresentation of its legal effect, or knowingly taking advantage of the other's actual ignorance of the law, amounts to a fraud which is correctible in equity. Nor can one by falsehood deceive an illiterate man, and impose upon him a writing for one thing, when it is another, and receive the benefit of his fraud. And a person intrusted to reduce a contract to writing is bound to do it truly; and any variation from the original contract is a fraud which equity will correct. Undue concealment which amounts to fraud for which equitable relief will be given, where there is no peculiar relation of confidence and trust between the parties, is the nondisclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has not merely a conscientious right, but a legal one, to know. The gist of the inquiry, however, is not whether the misstatement was known to be false by the person making it, but whether the person to whom it was made was deceived thereby. And the person deceived must be prompt in repudiating his contract on discovering the fraud. Where one party to a contract seeks to avail himself of an opportunity afforded by a mistake of the other party, and attempts to enforce an inequitable advantage without consideration, and the other party is not blamable, equitable relief can be afforded to the party so mistaken, if the other party is not thereby injured; and the mistake need not be mutual. Ignorance or mistake of law, admixed with misrepresentation, imposition, undue influence, mental imbecility, or surprise, gives rise to a mixed question of law and fact of which equity will take cognizance. And equity will relieve when the legal effect of a transaction is misunderstood, the want of proper understanding being produced by misleading statements of the other party to the contract. This rule applies to leading a person to the belief that an instrument will have a different effect from its real effect, as well as to actual misrepresentations of fact. To justify the reformation of a contract on the ground of inequitable conduct of a party, however, it must appear that some relation of trust or confidence between the parties had been abused, or that there was fraud, or fraud and mistake, or that the means of knowing the facts were not equally open to both parties. And to constitute a ground of rescission, a misstatement must have

been believed and acted upon by the party to whom it was addressed.

A court of equity has no jurisdiction to enforce a contract void at law, or to modify it so as to make it legal, and then enforce it. The rule is different, however, where the defect is one which merely renders the instrument inoperative, and not wholly void; and in such case reformation may be had. And while a mistake as to the existence or identity of the subject-matter of a contract is fatal to the contract itself, a mistake as to the value or quantity of property sold, or other collateral attributes, as distinct from a mistake as to the existence or identity thereof, warrants correction of the contract, if the thing delivered is existent and the identical thing in kind. That a contract would be invalid if not in writing is not a reason to deny reformation. So the rule is well supported that equity will not relieve against defects or mistakes in a voluntary conveyance or contract, of one made without consideration, and that it will not aid one volunteer against another. But though the transfer is without consideration, if a legal conveyance be effectually made, the court will protect all equitable interests and enforce all equitable rights and duties under it, as completely as if made with consideration. And the rule that a deed will not be reformed at the instance of a mere volunteer does not apply on a bill to reform a voluntary deed, in a dispute between parties claiming under it, the grantor being indifferent. But a pre-existing debt is sufficient to prevent a mortgage from being voluntary. And a deed founded on a consideration to be paid a third party is not voluntary. So the rule has been acted on to some extent, that a court of equity has jurisdiction, in a proper case, to reform or rectify a voluntary settlement, as well as a settlement for value. Under this rule a deed of gift, drawn by a mistake for a different interest from that intended, may be corrected. And a mistake upon the part of a donor, in giving more than was intended, justifies a decree of reformation. Equity will not reform a gift, however, against the intention of the donor. Nor will a court of equity lend its aid, at the instance of a donee, to reform a voluntary deed. And an error in the description of land in a voluntary conveyance will not be corrected, unless all the parties consent. And equity will not correct a mistake in a voluntary deed, to the injury of a bona fide purchaser for value without notice. Courts of equity, in some instances, have asserted jurisdiction as to mistakes in wills, to the same extent as in other matters. And under the rule thus asserted, equity will correct a mistake in the name of a legatee, or in the description of the land devised. But the rule has also been asserted, that to authorize a correction of a mistake in the description of land devised by will, the mistake must have been clearly demonstrable from the structure and scope of the will itself. And the prevailing rule

would seem to be that a will cannot be corrected because the testator misapprehended its effect, and that equity will not entertain a bill to reform a will, and that, in the absence of latent ambiguity in wills, extrinsic evidence cannot be received to show intentions not expressed in them.

With reference to contracts for the sale of a homestead, the absence of a release of the right of homestead, acknowledged as required by law, renders the transfer of the homestead of no validity, and a court of equity has no power to reform the contract by the insertion therein of such release and acknowledgment; it cannot give life to an instrument having no validity in itself. It has been held, however, that equity will correct a mutual mistake in the description in a written instrument by which a man and wife have sought to encumber their homestead. And the right of a purchaser who has paid full value, to reform a conveyance from a husband and wife of a homestead, which conveyance was executed with proper formalities to pass her interest, is not affected by the fact that the wife was ignorant of her interest. And under this rule a homestead mortgage executed by a husband and wife in conformity with the statute providing therefor may be reformed in equity for mistake in describing the land, if the quantity of land conveyed is not thereby increased. Under the old rule creating an arbitrary disability to protect married women from the alienation of their real estate through acts of coercion of their husbands, contracts of married women, not made in the form prescribed by law, were absolutely void; and when there was an omission of some statutory requirement in the deed, the mistake could not be corrected in equity; and this was so, though the woman's husband assented to the original deed. And a defect in a deed of a husband and wife could not be rectified as against the wife. But under statutes doing away with the wife's disability to contract, a deed or contract of a married woman may be reformed in equity the same as that of an unmarried woman, or of anyone else.

It is a general rule, both at law and in equity, that parol evidence is not admissible to vary a written instrument. This rule was applied by the English courts to prevent the use of parol evidence in equity in the correction of mistakes in written contracts, and many of the American courts followed the lead of the English courts, and some of the prominent states still cling to the rule. Even under this rule, parol evidence may be received where there is anything in the writing to go by. And a written instrument may be corrected upon parol evidence, where such evidence is corroborated by the documents and subsequent transactions in the case. The rule that excludes parol evidence when offered to vary or control written contracts, however, is held by the weight of authority not to apply to cases where the written contract was obtained by fraud, mistake, or imposition, and the object of

the evidence is to correct it. And under this theory, parol evidence is admissible in equity for relief from mistake in a written contract or other instrument, to show the mistake and what the real contract was, as well as to show fraud. Cases of this class take the view that the statute of frauds does not interfere with the power of courts of equity to reform written instruments in which the parties intended to comply with the statute, but were prevented by fraud, accident, or mistake. But under this rule, parol evidence will not be admitted to prove a contract entirely different from that expressed in the writing, except for fraud, mutual mistake, etc. And parol evidence will not be admitted to show that an instrument of a particular class was designed for use for an entirely inconsistent purpose. Some of the late and well-considered cases have asserted the theory that if the proposed reformation of a written instrument involves the specific enforcement of an oral agreement within the statute of frauds, or the terms sought to be added will so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient bar, unless the defendant is estopped to plead it. Under this theory, courts of equity can take from a contract on parol evidence, but cannot add to it. But even under this rule it has been held that courts of equity have power and jurisdiction to so reform an executory contract which is valid and binding on its face as to relieve it from anything inserted therein through deception, fraud, or mutual mistake, and to make its statements speak the truth as it was intended to insert it in the instrument. And the great majority of cases seem to adopt the theory that when, because of mistake or fraud, the intention of the parties has not been carried out, until there is a reformation there either is no contract to be contradicted or modified, or, if there is one, its scope and limits are unascertained, and parol evidence is admissible and necessary, not to contradict or modify the contract, but to show what it really was. Within this rule, to insist upon the legal effect of a written agreement in which a material mistake had been made would be such a fraud as to admit parol testimony to reform the deed by correcting the mistake. So, parol evidence may be used with reference to an alleged mistake in a written instrument, when it is not introduced to contradict the writing or control its legal effect, but in a matter collateral to the writing, the contract remaining untouched and in full force, the evidence being received in such case to show the application of the instrument and existing rights under it. But neither at equity nor at common law, in the absence of proof of fraud or mistake, can a contract be controlled by evidence that it was executed on the faith of a contemporaneous or preceding oral stipulation not embraced in

it. And parol evidence will not be received to engraft upon or incorporate with a valid written contract an incident occurring contemporaneously with it, and inconsistent with its terms.

Freedom from negligence is a condition precedent to relief from mistake of law in a written instrument. And relief in equity will be denied where the trouble is the result of the complainant's want of proper diligence. A party asking equitable relief must show that he has used due diligence and good faith to avoid both the making and the consequences of the mistake. And the mistake must have been as to a fact of such a nature that the party could not by reasonable diligence get knowledge of it when put upon inquiry. He must have exercised at least the degree of diligence which may be fairly expected from a reasonable person. One who signs a written instrument in ignorance of its contents is presumptively guilty of gross negligence, and the burden of proof rests with him to rebut the presumption. The rule that negligence of a person in signing a contract estops him from afterwards asserting that the writing does not truly express the agreement of the parties, however, does not apply where the contract was obtained by fraud or entered into by mutual mistake. And the mere fact that a party to a contract was negligent in not examining it for omissions will not prevent relief in equity. Whether or not there will be correction must depend upon the circumstances of each case. Nor is the negligence or laches of a person seeking relief from a mistake in a contract caused by him a defense in an action for reformation or other relief, where such negligence or laches caused the other party no injury. But negligence, where the means of knowledge were easily accessible, is fatal to a reformation of a contract. If the fact with reference to which a person claims to have been mistaken is one of which he might have obtained knowledge by reasonable diligence, equity will suppose that he must have had knowledge. But the bare fact that a man did not read over a contract when he executed it, or know its contents, will not relieve him from it. A contract may be reformed for mutual mistake, though a party neglected to read it. And if a party to a contract is under a moral or a legal duty to make disclosures to the other, and fails to do so, the misconception by the other of the facts which should have been disclosed is not such negligence as will bar the injured party from equitable relief from the mistake. And a person injured by a mistake in a written instrument should take steps promptly to get relief in equity, and cannot complain if he is guilty of laches and suffers therefrom. And relief should be denied when there is unreasonable delay in bringing suit. But that suit was not immediately commenced on discovery of the mistake does not bar the right to have it reformed; the complainant is justified in exhausting persuasion before resorting to litigation. And a person seeking relief is not chargeable

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with negligence, if he moves within a reasonable time. And the statute of limitations begins to run against an action for reformation of a mistake in a written instrument, not from the date of the instrument, but from the time of the discovery of the mistake. Courts of equity are liberal in allowing mistakes to be corrected when they are clearly established, notwithstanding the acquiescence of the party, providing no injury has resulted in the meantime to the person against whom the relief is sought, or those claiming under him, or them. But if fraud and mistake are admitted as exceptions to the running of the statute of limitations, they will only prevent the running of the statute until the fraud and mistake are discovered, or by the use of reasonable diligence might have been discovered, by the party applying for relief. So, the general rule is that relief in the way of reformation of a written contract should not be granted where the party seeking it has acquiesced in the agreement after becoming aware of the mistake. And a mutual mistake in a deed, in conveying land in excess of that bargained for, cannot be corrected at the suit of the vendor, where, after the discovery of the mistake, he received payment of the purchase money for the land conveyed, and yielded possession thereof to the vendee. Nor can a contract be rescinded for a mistake as to its terms, where the party seeking to rescind completed the contract, and afterwards brought action to reform it. And a promissory note cannot be reformed after judgment taken upon it, though the defendant in a suit at law is not estopped from seeking equitable relief because a judgment was taken in a court of law, and he did not invoke the power of equity thereto until after the judgment, where he had a purely equitable defense which could not be made available in a court of law. And the mere commencement of an action for damages for breach of a written contract, which action was afterwards dismissed without a determination on the merits, does not bar a subsequent action for reformation of the contract, for a mistake in it.

One of the provinces of equity is to cause to be done that which should be done; and if a written contract misstates the real agreement as made and understood by both parties, in some essential particular, the contract is a mistaken one, and the mistake may be corrected in equity. And where a contract is reformed by equity, the rights of the parties under it are measured by the reformed contract. Equity also interferes to prevent the fraudulent use of a written instrument for a purpose not contemplated at the time it was made. But equity will not contravene the express provisions or policies of the law, in order to reform a contract for mistake. And a conveyance will not be reformed, in the absence of fraud without proof that previous to its execution there was a mutual agreement for sale and purchase different from that described in the deed, and that the misdescription was in-

serted by mistake. Nor will important conditions which the parties never fully assented to be inserted in a lease by a court of equity, where there is not sufficient evidence thereof. And if a grantee in a deed by mistake in it holds a greater estate than belongs to him, and conveys it to an innocent purchaser, receiving the consideration, he may be treated as a trustee for the real owner. Nor will equity interfere to aid one creditor against another on the ground of mistake. But the right of a creditor to have a specific lien which is about to fail from mistake of a draftsman set up in equity is superior to that of the general creditors of an insolvent intestate, who have no lien. Power to reform or rescind contracts is vested exclusively in courts of equity, and cannot be exercised by courts of law. Courts of law may construe contracts, but cannot reform or rescind them. But a Federal court has jurisdiction of a suit in equity to reform a contract, where the action is brought in a state court by a foreign assignee of the contract against a citizen of the state in which the suit is brought, and thence removed to the Federal court, although the parties to the contract are both citizens of the same state. And a court of law may, in giving effect to the intention of the parties to a written contract as gathered from the entire instrument, disregard a mistake apparent on the face of the writing, when, notwithstanding the mistake, the intent remains clear from other parts of the contract. A contract can only be reformed to express something which the parties agreed on and meant to put in, but left out, or by striking out or changing something they did not mean to express. But if, after making an agreement, in process of reducing it to writing the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere, either by way of defense to the enforcement of the contract, or by cancellation or reformation thereof. And on the question of relief from a mistake in the instrument, which fails to carry out the intention of the parties to it, it is immaterial whether the proceeding is by bill to correct the mistake, or whether the mistake is set up in the answer by way of defense. So, injunction may be employed to prevent the execution of provisions of a written instrument resulting from mistake. And injunction will lie where the mistake occurred upon the part of one party only, though the contract could not be reformed unless the mistake was mutual. So a court of equity, having jurisdiction to amend a contract, acquires the right, incidentally in the same suit, to give relief in damages or by such other mode as justice may require. Such an action for rescission and enforcement contains but one cause of action. And where a decree directs the correction of an instrument, it is not necessary that the formal correction be made before final decree. It is also proper to set up, as a defense in a suit for specific performance of a contract, that the contract relied on does

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not correctly and truly express the agreement of the parties, but that there is some material omission, insertion, or variation through mistake. And where mistake is set up as a defense against a claim for the specific execution of an agreement, parol evidence is admissible to establish such defense, though the rule has been asserted that courts of equity will not ordinarily compel the specific performance of a contract with variations, additions, or new terms to be introduced into it by parol evidence. Nor will equity make a decree in a suit for specific performance, which will compel the defendant to convey, while leaving the complainant free to reject the deed tendered in compliance with the decree. And it cannot at once reform a contract, and then cancel it on the ground that a party has not done what the reformed contract required of him. But equity will not refuse to decree specific performance of an agreement on the ground that a contracting party had mistaken its legal effect. And equity will not compel specific performance where the contract would not be reformed when through mutual mistake it was defectively reduced to writing. If the mistake in a written instrument is mutual, the remedy is by bill in equity for reformation. But where the mistake is unilateral, the whole contract must be set aside, and no relief can be granted in such case after the position of the parties has been so changed that their original rights cannot be restored. Equity will not usually rescind a contract for mistake, unless the party can be put *in statu quo*. And if a person seeks to correct a written instrument in his own favor, a court of equity will refuse its aid, unless he is willing that other mistakes therein should be corrected, which would be against his interests. Where it will subserve the purposes of justice, equity will restore a mortgage released through mistake, and give it its original priority as a lien. But this cannot be done as against a bona fide holder for value. Courts of equity will relieve against mistake, and correct and reform all kinds of deeds and written instruments, including both executed contracts, such as deeds, mortgages, leases, etc., and executory contracts, such as bonds, insurance policies, notes, bills of exchange, etc. And executed contracts may, in a proper case, be corrected either by enlarging or by restricting the subject-matter. But a court of equity will not reform a deed made by a person individually, so as to convert it into a deed as trustee for persons who never received any of the purchase money or were never otherwise involved by the individual deed of the trustee. And a court of equity will not enforce a building contract. Nor, as a general rule, are judicial sales subject to correction by reforming the deeds. But mistakes are corrected in equity, even when they occur in the records of proceedings of courts and exist in the records of sales, not by reviewing the judgments or proceedings of the courts, but by restricting the parties from taking advantage of the mistake. The

equity of a vendee for the correction of a deed, however, is not displaced by a lien of a subsequent judgment or execution, thereunder. Anyone having an equitable title to property, with an apparent legal title, with reference to which a mistake was made, may assert the mistake either by way of defense, or by way of a direct proceeding in equity for reformation. And relief will be granted as between the original parties or privies in law, in fact, or estate, including personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, and judgment creditors or purchasers for value with notice of the facts. An action may be maintained against a remote grantor, where he conveyed with covenants sufficient to support the action, which were the same as those contained in the plaintiff's deed. So, an instrument executed by a surety may be reformed in equity for fraud or mutual mistake, in the same manner as if it were executed by the principal debtor; though a joint bond cannot be shown, as against the surety, to be a joint and several bond, by evidence outside the contract, unless it leaves no doubt of the mistake. A contract which fails to express a material term of the real contract which the parties mutually intended to make, however, will not be reformed in equity, as against innocent third persons who had acquired vested rights and who cannot be placed in *statu quo*. Nor will courts of equity reform and enlarge a mortgage executed by an insolvent person, if the rights of creditors would be injured thereby. Nor does a decree reforming a deed or contract affect the rights of persons not parties to the suit. Within the meaning of these rules, a mere creditor, or even a creditor having a general lien, such as a judgment, is not an innocent purchaser against whom reformation of a contract or other written instrument may not be had. And a court of equity would be less disposed to interfere for the reformation of an instrument for a mistake of law, in favor of a particular creditor against the general creditors of an insolvent estate, than in an ordinary case.

A mistake in a contract or instrument, to warrant relief in equity, must be material, and there will be no rescission where the contract as written is of the same legal effect as it is corrected. But a person purchasing land subject to a mortgage is not estopped by the insertion, by mistake of the scrivener, of a stipulation that the grantee agrees to pay the mortgage debt, since the mortgagee is not prejudiced thereby. Nor will a written instrument be reformed for mistake of law, where it appears that the person complaining has an adequate remedy at law. But the mere existence of the remedy at law is not sufficient, if it was not as full, adequate, and complete as the one contemplated by the parties. Where the only relief sought for is reformation or rescission of the instrument for mistake, demand for reformation or rescission must be made before bringing action therefor. But where other distinct grounds of equitable relief are as-

serted, demand for rescission or reformation need not be made. A mistake alleged as a ground for reformation of a contract must be stated in the pleadings with precision, and made apparent. And where fraud is relied upon, it must be averred. And it is essential that the fraud, mistake, or surprise should be alleged in the bill as the ground and object of parol proof. And the agreement, both as it is and as it ought to be, should be set forth. But a complaint need not set out the exact language omitted from or inserted in the agreement. And the failure to allege in terms that the instrument in question was erroneously executed through mutual mistake does not render the pleading insufficient, if it sets up facts from which such conclusion is inevitable. Nor need a consideration for the execution of the contract in question be alleged. Where a party to a contract defends against it on the ground of mistake, he should allege the facts entitling him to reformation by way of counterclaim or cross bill, and should pray judgment for reformation. Defenses that a deed expresses the contract, and, if it does not, there was such a mutual mistake as would authorize its rescission, are not inconsistent, and both may be relied on.

Mistake which will warrant the correction of a written instrument may be established by direct proof, or it may be inferred from the nature of the transaction. When the mistake appears upon the face of the instrument, the court may correct it without outside evidence. And a witness may testify as to the intention of the parties, in an action to reform an instrument for mistake, though it has been held that evidence outside the deed and inconsistent with it must be shown in order to set up a parol trust or to reform the deed, and that a mistake must be proved by other than the subscribing witnesses. Equity will grant relief more readily where the mistake is made to appear by reference to another writing. And the courts are reluctant to rectify deeds on oral evidence, but will do so when the proof is clear and convincing. An executed written instrument is presumed to express the final agreement of the parties, and the burden is on the person seeking reformation of such an instrument to overcome the presumption by establishing fraud or mistake. And it has been held that to overcome this presumption the evidence of mistake or fraud must be clear and convincing; clear and satisfactory; clear, exact, and convincing. And it has been held that it must be shown beyond a reasonable doubt, but this has been denied, the rule being held to be that the evidence must be clear and convincing, but it need not establish mistake clear of all reasonable doubt. A conflict of evidence on the question of the existence of the mistake does not bar relief in the way of reformation, but a denial that there was a mistake, made under oath, must be given considerable weight in determining the sufficiency of the evidence to establish mistake.

F. H. B.

KANSAS SUPREME COURT.

ÆTNA MILL & ELEVATOR COMPANY,
Appt.,
v.
KRAMER MILLING COMPANY.

(82 Kan. 679, 109 Pac. 692.)

Trademark — infringement — use of own name.

A person will not be prohibited from using his own name upon marks or brands placed upon articles of his own manufacture, merely because it has first been rightfully used by another, who has established the reputation of, and built up trade in, like articles by the use of the same name in a trademark, sign, or label thereon; but

Headnote by BENSON, J.

Note. — Limitation of right to use one's own name as a tradename.

This note is supplemental to one in 1 L.R.A.(N.S.) 660, and aims merely to present decisions on the question which have appeared since the compilation of the earlier note.

Such recent decisions uniformly support the general rule that while every person is entitled honestly to use his own name in business, either alone, or associated with others in a partnership or corporation, he may not use his name as an artifice to mislead the public as to the identity of the business or corporation, or the article produced, and thereby unfairly divert the business of another, who first lawfully selected the tradename, established a business, and produced an article which is identified by the name. *Sheffield-King Mill. Co. v. Sheffield Mill. & Elevator Co.* 105 Minn. 315, 127 Am. St. Rep. 574, 117 N. W. 447; *International Silver Co. v. Rogers*, 72 N. J. Eq. 933, 129 Am. St. Rep. 722, 67 Atl. 105, reversing 71 N. J. Eq. 560, 63 Atl. 977; *World's Dispensary Medical Asso. v. Pierce*, 122 N. Y. Supp. 818.

If he uses his own name, it must be so used as not to deprive others of their rights, or to deceive the public; and the name must be accompanied with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of the fact. *International Silver Co. v. Rogers*, supra.

In *Kaufman v. Kaufman*, 123 N. Y. Supp. 699, it is said that the principle is well established that a man must use his own name honestly, and not as a means of pirating upon the good will and reputation of a business rival; and that if he cannot use his own name without inevitably representing his goods as those of another, then he cannot use his own name at all.

And in *J. F. Rowley Co. v. Rowley*, 154 Fed. 744, reversed on other grounds in 88 C. C. A. 258, 161 Fed. 94, it is said: "If a fraudulent purpose to filch trade good will exists, the fact that it is attempted under semblance of the use of a man's own name 28 L.R.A.(N.S.)

such person will not be permitted, by any artifice or device or otherwise, to induce the belief of customers or others desiring to purchase that the articles so marked are the products of the other.

(June 11, 1910.)

A PPEAL by plaintiff from a judgment of the District Court for Harper County, sustaining a demurrer to the petition in an action brought to restrain the alleged unlawful use of plaintiff's trademark, and to recover damages for such use. Reversed.

The facts are stated in the opinion.

Messrs. W. P. Hackney, J. T. Lafferty, and Edward T. Hackney, for appellant:

The Kramers had a right to sell their tradename, and did so sell, and cannot now

makes the use none the less wrong. As an abstract right, every person has a right to the use of his own name; but when the use of such name is but a cloak to cover an intended fraud upon the rights of another, the wrongdoer has himself, and not the law, to blame for placing a limitation upon the right to the use thereof."

The following cases instance the extent to which the courts have gone in restraining the use by a person of his own name, as being likely to deceive the public:

Thus, in *Gordon Hollow Blast Grate Co. v. Gordon*, 142 Mich. 488, 105 N. W. 1118, an injunction was issued against the use of the defendant's name as the manufacturer of grates in competition with the corporation in which his individual name occurred, but his firm was permitted to state that they manufactured a grate under letters patent granted to him, in connection with another statement, made equally prominent, that the firm is distinct from, and has no connection with, the complainant company; in *International Silver Co. v. Rogers*, supra, against the manufacture and sale of goods stamped with the words, "W. H. Rogers of Plainfield, N. J.," unless also stamped with the words, "not the original Rogers," or "not connected with the original Rogers," and this although the boxes, packages, and wrappers in which such silverware was put up were marked, "not connected with any other Rogers;" in *World's Dispensary Medical Asso. v. Pierce*, supra, restraining the defendant from putting up, advertising, or offering for sale any proprietary remedies under the name of Pierce's, or Dr. Pierce's, where it appeared that the name had, by reason of its use by plaintiff, come to be generally recognized by the public as referring to and designating plaintiff's business and its remedies,—especially since the defendant was not entitled to the use of the title "Dr.;" in *Kaufman v. Kaufman*, supra, restraining a dealer in hats from using the name "Kaufman" unless in connection with his first name on a line with it and in letters of equal size, in competition with another of the same name, who had, for some years past, used his surname as a

use it, when it will come in competition with their grantees.

Andrew Jurgens Co. v. Woodbury, 56 Misc. 404, 106 N. Y. Supp. 571; Regent Shoe Mfg. Co. v. Haaker, 75 Neb. 426, 4 L.R.A.(N.S.) 447, 106 N. W. 595; Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 271, 53 L.R.A. 384, 82 Am. St. Rep. 346, 63 Pac. 480; Bates Mfg. Co. v. Bates Mach. Co. 141 Fed. 213; Landreth v. Landreth, 22 Fed. 41; William Rogers Mfg. Co. v. Rogers & S. Mfg. Co. 11 Fed. 495; Von Faber v. Faber, 124 Fed. 603; Walter Baker & Co. v. Slack, 65 C. C. A. 138, 130 Fed. 514; Ball v. Best, 135 Fed. 434; Royal Baking Powder Co. v. Royal, 58 C. C. A. 499, 122 Fed. 337; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625;

designation of his hats; in Von Faber-Castell v. Faber, 76 C. C. A. 538, 145 Fed. 626, against the use of defendant's surname on pencils without prefix, in competition with A. W. Faber; in Hall's Safe Co. v. Herring-Hall-Marvin Safe Co. 14 L.R.A.(N.S.) 1182, 76 C. C. A. 495, 146 Fed. 37, against using the name, "Hall's Safe Company," or any other name having similarity to the name, "Hall's Safe & Lock Company," in competition with the purchaser of the business and good will of the Hall's Safe & Lock Company, without also giving information to the public that it is not the business formerly carried on by the Hall's Safe & Lock Company; in Bates Mfg. Co. v. Bates Numbering Mach. Co. 172 Fed. 892, affirmed in 178 Fed. 681, against any further use of the words, "Bates Numbering Machine Company," as defendant's corporate name, in competition with the Bates Manufacturing Company, whose machine had for several years been extensively and exclusively advertised as the "Bates Numbering Machine," and as such known to the purchasing public; and in Russia Cement Co. v. Le Page Liquid Glue, Oil, & Fertilizer Co. 14 B. C. 317, restraining defendants from carrying on business as manufacturers or vendors of any preparation of glue or other adhesive under any name or title of which the name Le Page or "Le Page's" forms part, where it appeared that the glue designated as Le Page's is generally understood to be that manufactured by plaintiff.

So also, in Andrew Jurgens Co. v. Woodbury, 197 N. Y. 66, 90 N. E. 344, modifying and affirming 128 App. Div. 924, 112 N. Y. Supp. 1121, an injunction against the manufacture and sale of soap known as "Woodbury's New Skin Soap," in competition with the purchasers of the formula of "Woodbury's Facial Soap," was approved, although held to go too far in forbidding the defendants from using the name Woodbury on other soaps, or in connection with other articles where such use is not deceptive or misleading.

And in David E. Foutz Co. v. S. A. Foutz Stock Food Co. 163 Fed. 408, it was held 28 L.R.A.(N.S.)

Skinner v. Oakes, 10 Mo. App. 45; Hoxie v. Chaney, 143 Mass. 502, 58 Am. Rep. 149, 10 N. E. 713; International Silver Co. v. William H. Rogers Corp. 66 N. J. Eq. 140, 57 Atl. 725, 2 A. & E. Ann. Cas. 407, 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 60 Atl. 187, 3 A. & E. Ann. Cas. 804; Rogers v. Wm. Rogers Mfg. Co. 17 C. C. A. 575, 35 U. S. App. 848, 70 Fed. 1019; Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L.R.A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; Le Page Co. v. Russia Cement Co. 17 L.R.A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; Croft v. Day, 7 Beav. 84; Bissell Chilled Plow Works v. T. M. Bissell Plow Co. 121 Fed. 357; Chickering v. Chickering & Sons, 56 C. C. A. 475, 120 Fed. 69; Lamb Knit-Goods Co. v. Lamb

that the S. A. Foutz Stock Food Company, organized by Stanley A. Foutz, to manufacture and sell certain animal remedies under formulas prepared by him, should not be permitted to continue its business in competition with the owner of the business which had been carried on under the name of S. A. Foutz & Brother, the animal remedies manufactured by whom had become extensively known as the Foutz remedies, without amending its corporate name so as to read, "The Stanley A. Foutz Stock Food Company," and stating in its advertising and on its packages that the formulas used are those prepared by Stanley A. Foutz, and the goods are not the remedies prepared by the successors to S. A. Foutz & Brother.

And in Dickson v. Dickson [1909] 1 Ir. Ch. 185 (as digested in Butterworth's Yearly Digest for 1909), where it appeared that the plaintiffs had for many years traded in Dublin and elsewhere as seedsmen, nurserymen, and florists, under the name of Alex. Dickson & Sons, and had established a considerable trade and reputation; that the defendant, Alexander Dickson, had for many years carried on business as a nurseryman and seedsman in the city of Dublin, at first under his own name, but for the past twelve years under the name of the Ashbourne Agricultural Company, with a shop in Dublin and a nursery in Dundrum; that in 1905 he changed the name of the business at Dundrum to "Alex. Dickson & Sons," advertising under that name; that he had one son, but no partnership in fact existed, and the business at Dundrum was identical with the business in Dublin,—it was held that the plaintiffs were entitled to an injunction restraining the defendant from the use of the name Alex. Dickson & Sons.

On the other hand, the extent to which a person is legitimately entitled to use his own name in competing with one having the right to use the name in a similar business is illustrated by the following decisions:

In Von Faber-Castell v. Faber, 71 C. C. A. 383, 139 Fed. 257, reversing 124 Fed. 603, it was held that Eberhard Faber might use the name "E. Faber" in the sale of lead pencils in competition with the house of

Glove & Mitten Co. 120 Mich. 159, 44 L.R.A. 841, 78 N. W. 1072.

A use of one's own name, unaccompanied by a caution or explanation so specific as to prevent confusion, may be enjoined.

Sheffield-King Mill. Co. v. Sheffield Mill. & Elevator Co. 105 Minn. 315, 127 Am. St. Rep. 574, 117 N. W. 447; Shaw Stocking Co. v. Mack, 21 Blatchf. 1, 12 Fed. 707; Pillsbury v. Pillsbury-Washburn Flour Mills Co. 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841; Pillsbury-Washburn Flour Mills Co. v. Eagle, 41 L.R.A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608; Brown Chemical Co. v. Meyer, *supra*; Chas. S. Higgins Co. v. Higgins Soap Co. and Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co. *supra*; Hopkins, Trade Marks, 2d ed. 145; Howe Scale Co. v. Wyckoff, Seamans, & Bene-

dict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609; Donnell v. Herring-Hall-Marvin Safe Co. 208 U. S. 267, 52 L. ed. 481, 28 Sup. Ct. Rep. 288; Ball v. Broadway Bazaar, 149 N. Y. 429, 87 N. E. 674.

Messrs. Fred Washbon and E. C. Wilcox, for appellee:

A person is entitled to use his own name in his own business; and if such name is not selected unnecessarily, or for the purpose of unfair competition, an injunction will not be granted.

28 Am. & Eng. Enc. Law, 2d ed. p. 429; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Howe Scale Co. v. Wyckoff, Seaman & Benedict, 193 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup.

A. W. Faber, where it did not appear that he used the initials of his Christian name, rather than the name in full, with a fraudulent intent, or that he had reaped any unfair advantage therefrom; or that the public had been deceived thereby.

In *Donnell v. Herring-Hall-Marvin Safe Co.* 208 U. S. 267, 52 L. ed. 481, 28 Sup. Ct. Rep. 288, reversing 74 C. C. A. 361, 143 Fed. 231, it was held that the successor to the business and good will of a safe and lock company, with the right to use the surname of the founder, which has a commercial value, while entitled to protection against the use, in the sale of safes made by the sons of such founder, who were members of the original corporation, of any name, mark, or advertisement indicating that the seller is the successor of the original company, or that its goods are the product of that company, or its successors, and against any interference with the good will, cannot have an injunction totally restraining the use of such surname, and thus interfere with the right of the founder's sons to continue in the safe business, and use their own name in so doing.

So also in *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.* *supra*, it was held upon the same state of facts as that involved in the preceding case, that the sons had the right to use their own family name in the business of manufacturing and selling safes, and to adopt all proper means of making it known to the public that the safes they offered are made by them; and, if they choose to organize a corporation for that purpose, that they have the right to use their family name in its title so long as they make no endeavor to lead the public into the belief that the safes they make are the product of the original company's successors in business.

In *J. F. Rowley Co. v. Rowley*, 154 Fed. 744, an injunction was issued against the use of the name "Rowley" in connection with the manufacture and sale of artificial limbs, where the Rowley name had become firmly associated in the public mind with

the complainant's product; but upon appeal, in 88 C. C. A. 258, 161 Fed. 94, it was held that the decree was too broad in restraining the defendant from using his own name "in any manner whatsoever," and that its use might be allowed, provided that an explanation should be attached which would avoid deception. The case was accordingly remanded for the purpose of describing the precise terms of the explanation which, in view of all the circumstances, should be attached to defendant's use of the name; and in 96 C. C. A. 371, 171 Fed. 415, it was held that a decree of the court below, restraining the defendant from the use, in the manufacture or sale of artificial limbs, of the name "Rowley" without initials, and from its use with initials, unless in each and every instance in which the name should be so used it should be accompanied by explanatory words sufficient clearly to distinguish the goods manufactured from the goods of the complainant, was in conformity to both the letter and the spirit of the instructions given by the appellate court in remanding the case.

In *Fine Cotton Spinners' & D. Asso. v. Harwood Cash & Co.* [1907] 2 Ch. 184, it was held that while John Harwood Cash might lawfully compete under his own name with the successor to the business carried on under the style of "John Cash & Sons," and might also have taken partners and carried on business as "Harwood Cash & Company," yet, that without ever setting up any business for himself, he could not confer upon a joint stock company formed by himself in conjunction with a number of other persons the right to use the name of Cash in a competing business, the court saying: "I think, also, that such a company merely by registration does not acquire and incorporate the individual rights which its promoters may respectively have had to carry on business in their own names; and, further, I think that a person of the name of 'A,' without transferring a business and good will, cannot, by merely authorizing the promoters of a company to

Ct. Rep. 1002; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; R. W. Rogers Co. v. Wm. Rogers Mfg. Co. 17 C. C. A. 576, 35 U. S. App. 843, 70 Fed. 1017; Donnell v. Herring-Hall-Marvin Safe Co. 208 U. S. 267, 52 L. ed. 481, 28 Sup. Ct. Rep. 288; White v. Trowbridge, 216 Pa. 11, 64 Atl. 862; Bates Mfg. Co. v. Bates Mach. Co. 141 Fed. 213.

Benson, J., delivered the opinion of the court:

The petition in this case alleged that prior to January 1, 1905, J. E. Kramer and S. P. Kramer had owned and operated the Ætna Mills at Wellington under the name of Kramer Brothers, and manufactured there several high grades of flour which were extensively advertised, and the brands

thereof had become generally known over this country and Europe, and the reputation thereof was such that a ready sale was obtainable therefor; that in establishing this reputation the name "Kramer" or "Kramer Brothers," coupled with the grades to which they were attached, became a distinguishing mark, whereby any flour having such names met with a ready sale; that, on the date named, Kramer Brothers sold their business to the plaintiff by bill of sale, describing the property, with this addition: "Also our flour brands, trade signs, mottoes, and the full and entire good will of our business;" that "Kramer's High Patent" is one of the trademarks and brands so bought by the plaintiff, and a copy of that brand, as used on flour sacks, is shown by exhibit B, attached to the petition (other brands are referred to and shown in other

use his name as part of their title, confer upon such company a right to do so as against other people who would be damaged thereby."

The case of *Cash v. Cash*, 84 L. T. N. S. 349, 745, which is set forth in the earlier note above referred to, and there characterized as an extreme case, was modified on appeal in 86 L. T. N. S. 211, in which it was held that the injunction granted by the court below went too far in restraining the defendant from carrying on business under his own name, and it was accordingly modified so as to restrain the defendant from carrying on a competing business, either in the name of Cash, or under any style in which the name Cash appears, without taking reasonable precautions clearly to distinguish the business carried on, and the goods manufactured or sold by the plaintiff, and from carrying on any such business under any name or in any manner so as to mislead or deceive the public into the belief that such business is the same as was formerly carried on by plaintiff's vendor and predecessor.

Other cases illustrating the extent to which a person is legitimately entitled to use his own name in competing with one having the right to use the name in a similar business, are: *Sheffield-King Mill. Co. v. Sheffield Mill. & Elevator Co.* 105 Minn. 315, 127 Am. St. Rep. 574, 117 N. W. 447; and *White v. Trowbridge*, 216 Pa. 11, 64 Atl. 862; which are sufficiently set forth in the opinion above reported.

In the earlier note above referred to the statement is made that the rule as to the right of a person to engage in business under his own name, notwithstanding the fact that another of the same name has already established a similar business, does not apply to the right of a corporation to use the name of a stockholder or director as a tradename, since the name of a corporation is an artificial thing, selected arbitrarily by the incorporators themselves. While this limitation upon the right of a person

to use his own name has been recognized by a number of courts (*Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879; *International Silver Co. v. William H. Rogers Corp.* 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 60 Atl. 187, 3 A. & E. Ann. Cas. 804; *J. & P. Coats v. John Coates Thread Co.* 135 Fed. 177; *International Silver Co. v. Rodgers Bros. Cutlery Co.* 136 Fed. 1019; *Fine Cotton Spinners' & D. Asso. v. Harwood Cash & Co.* supra; *Russia Cement Co. v. Le Page Liquid Glue, Oil & Fertilizer Co.* 14 B. C. 317), a more reasonable rule has been laid down by the Supreme Court in *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609, that, in the absence of contract, fraud, or estoppel, any man may use his own name in all legitimate ways, and as the whole, or a part, of a corporate name, the court saying: "If every man has the right to use his name reasonably and honestly in every way, we cannot perceive any practical distinction between the use of the name in a firm and its use in a corporation. It is dishonesty in the use that is condemned, whether in a partnership or corporate name, and not the use itself."

In accordance with the rule laid down by the Supreme Court, it is held in *Bates Mfg. Co. v. Bates Mach. Co.* 141 Fed. 213, that the fact that a person assisted in forming a corporation, in the name of which his own name was used, did not, in the absence of proof that he transferred to such corporation the exclusive right to use his name in its business, preclude the use of his name as part of that of another corporation organized by him to engage in a competing business.

And see, also, as recognizing the same rule, *Donnell v. Herring-Hall-Marvin Safe Co.* 208 U. S. 267, 52 L. ed. 481, 28 Sup. Ct. Rep. 288; *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.* 14 L.R.A.(N.S.) 1182, 76 C. C. A. 495, 146 U. S. 37; *David E. Foutz Co. v. S. A. Foutz Stock Food Co.* 163 Fed. 408.

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exhibits); that the plaintiff, after such purchase, and after it had registered such brands and trademarks, continued to manufacture and sell these brands of flour, and the commodities so designated have acquired a great reputation, are well known to the public and to buyers by such names and trademarks, and the business is a source of great profit to the plaintiff; and that in June, 1905, J. E. Kramer and S. P. Kramer—the former “Kramer Brothers”—organized the defendant company, purchased mills at Anthony, and proceeded to manufacture flour. The following allegation is then made: “The plaintiff further avers that the defendant, well knowing the plaintiff’s right in and to all said brands and trademarks so purchased and owned by it, as aforesaid, since the month of July, 1905, in disregard of the plaintiff’s rights, makes and offers for sale and sells, and still makes and sells, a similar article, an imitation of plaintiff’s said articles of flour and meal, well knowing that the same is an imitation of the plaintiff’s said flour and meal, and well knowing of the rights of the plaintiff to the trademarks and brands as aforesaid, which it puts up, similar to that of the plaintiff, and has labeled with plaintiff’s said trademark and brand and with labels similar to that of plaintiff, using the word ‘Kramer,’ which marks and brands so used by the defendant to deceive the public, as aforesaid, are attached to the original petition on file herein, marked ‘exhibits K and L,’ and the same are here referred to and made a part of this amended petition; that said imitation was calculated to deceive and does deceive buyers of said article and the public, and has induced many persons to purchase defendant’s article in the belief that it was made by the plaintiff, thereby greatly diminishing plaintiff’s profits.” Allegations of damages and averments appropriate for an injunction follow, with a prayer for relief accordingly. A demurrer was sustained to the petition, and the plaintiff appeals.

The following is the inscription upon one of the brands so sold, as shown by exhibit B:

Ætna
Plansifter
Mills
(Picture of Mill)
KRAMER’S
HIGH PATENT

Kramer Bros.
Wellington, Kans.

24 Kramer’s Flour
lbs. HIGH PATENT
28 L.R.A.(N.S.)

Exhibits K and L are inscriptions upon packages of flour made by the defendant company, and which it is alleged are used in violation of the plaintiff’s rights. Upon one side of the sack is the mark or brand designated as “exhibit K,” as follows:

KRAMER’S
C H A N C E L L O R
HIGHEST PATENT

KRAMER MILLING COMPANY
ANTHONY, KANSAS

49 CHANCELLOR FLOUR
lbs. HIGHEST PATENT

The word “Chancellor” is in large display letters in white upon a blue band printed diagonally across a red shield. This symbol and the word “Kramer’s,” in large letters, are the most prominent features of the brand. On the reverse side of the sack is the inscription or brand marked “Exhibit L” as follows:

THIS IS THE GENUINE
“KRAMER’S” FLOUR
Every sack guaranteed
If
This Sack Does Not Give Perfect
Satisfaction Bring It Back
And Get Your Money

The words in the first and second line are the most conspicuous feature in this inscription.

The petition states facts sufficient to constitute a cause of action, unless from the exhibits, which show precisely the marks and brands complained of, it appears that their use by the defendant is not a breach of any duty or obligation on its part. The exact question, then, is whether the exhibits K and L are brands that the defendants cannot lawfully use after having made the sale to the plaintiff of the mill, good will of the business, flour brands, and trade signs.

It will be noticed that, apart from the word “Kramer’s” and “Highest Patent,” there is little in Exhibit K that resembles the “Kramer’s High Patent” label or trade mark. The word “Chancellor” in display letters upon a red shield is entirely dissimilar from anything appearing upon the brand sold to the plaintiff. On the other side of the sack, however, is the inscription marked “exhibit L,” — “This is the genuine ‘Kra-

mer's' Flour,"—in conspicuous letters, the words "Kramer's Flour" being displayed, in red in a manner that would at once attract notice. The prominent word "Kramer's" is made more significant and challenges greater attention by being placed in quotation marks. Why was this done if the word was innocently used as pertaining to the defendant's corporate name only? These matters, in connection with the inscription "Kramer's Highest Patent" on the other side of the sack, might well indicate to a purchaser desiring to buy that the sack contained the well-known product of the Ætna Mills, sold under the brand of "Kramer's High Patent," shown in exhibit B.

The discussion in the briefs has taken a wide range, covering cases of "piracy," so called, in the wrongful use of trademarks, and of unfair competition in the wrongful use of labels, wrappers, packages, etc., which although analogous, still differ from technical trademarks. The principles that govern these different subjects are similar, however, and for the purposes of this discussion need not be precisely distinguished. The plaintiff clearly had the right to purchase the labels in question, and acquired by such purchase, in connection with the establishment and its good will, the legal rights of the Kramers to use them before the sale, and must be protected to the same extent that they might have been. Mr. Justice Field said, in *Kidd v. Johnson*, 100 U. S. 617, 620, 25 L. ed. 769, 770, that "when the trademark is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred, either by contract or operation of law, to others, the right to the use of the trademark may be lawfully transferred with it."

In *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625, it was said: "There are a few cases indicating that the mere right to use a name is not assignable (notably *Chadwick v. Covell*, 151 Mass. 190, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068); but none that it may not be assigned to an outgoing partner or to a successor in business, as an incident to its good will."

In *Ball v. Broadway Bazaar*, 194 N. Y. 429, 435, 87 N. E. 674, 676, the rights incident to trademarks and analogous rights in tradenames were discussed. The court said: "Although we agree with the learned appellate division in recognizing the technical distinction between trademarks and tradenames, we think the same fundamental principles of law and equity are applicable to both. 'All such cases, whether of trademark or tradename, or other unfair use of

another's reputation, are concerned with an injurious attack upon the good will of a rival business; customers are diverted from one trader to another, and orders intended for one find their way to the other.' Sebastian, *Trade-Marks*, p. 17. Trademarks and tradenames are in reality analogous to the good will of the business to which they appertain. The trademark represents it in the market, and the tradename proclaims it to those who pass the shop. In either case, such unfair conduct as is calculated to deceive the public into believing that the business of the wrongdoer is the business of him whose name, sign, or mark is simulated or appropriated, constitutes the gist of the offense."

A manufacturer who, to designate his goods has adopted a name or device, not subject to appropriation as a trademark, may still be protected in its use from unfair competition if the circumstances warrant it. *Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.* 91 C. C. A. 363, 165 Fed. 413.

In *J. G. Mattingly Co. v. Mattingly*, 96 Ky. 430, 438, 27 S. W. 985, 987, it was held that the brand, "J. G. Mattingly & Sons, Standard Bourbon, Est. 1845, Louisville, Ky.," and another brand with the words, "Pure Rye," instead of "Standard Bourbon," might be lawfully sold and transferred with the establishment, and their use thereafter by one of the vendors of the same surname was restrained. The court said: "That their intention was by some device, if not by actual use of the tradename of J. G. Mattingly & Sons, to induce belief that the whisky they contracted for had been made at the distillery in question and according to the formula long used there, and thus defraud and injure plaintiff, is shown by a letter B. D. Mattingly, April 21, 1890, wrote to Jones, Munday, & Company, in which he proposed a secret contract for manufacture on joint account of whisky having the Mattingly brand on it. In that letter is this significant language: 'We can use all the Mattingly thunder we want, save the exact brands.'"

In a leading case on this subject, the court of appeals of New York held that the right of a person to use his own name in business, notwithstanding the prior use of the name by others, does not extend to a corporation of which he is a promoter and member. The court said: "Whether the court will interfere in a particular case must depend upon circumstances,—the identity or similarity of the names, the identity of the business of the respective corporations, how far the name is a true description of the kind and quality of the articles manufactured or the business carried on, the extent of the confusion which may be

created or apprehended, and other circumstances which might justly influence the judgment of the judge in granting or withholding the remedy." Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L.R.A. 42, 43 Am. St. Rep. 769, 39 N. E. 490.

One may not, in the use even of his own name in connection with a manufactured article, to promote its sale, resort to any artifice to mislead the public, and thereby induce a belief that the article is the one manufactured by another, which has become known to the trade by the particular mark or brand. Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002.

In *Russia Cement Co. v. Le Page*, 147 Mass. 206, 208, 9 Am. St. Rep. 685, 17 N. E. 304, the imitation by one manufacturer of the trademark of another by the use of the same surname as a prefix was considered. Le Page, the defendant in that action, and another, had been engaged in the manufacture of glue known as "Le Page's Liquid Glue." They used that mark upon cases and bottles; the word "Le Page" being the prominent feature. They sold out the business, including the trademarks, to the Russia Cement Company, a corporation, which thereafter advertised the article extensively under the trademark or name of "Le Page's." Le Page then commenced to manufacture and sell a glue under the name, "Le Page's Improved Liquid Glue," and described its manufacture as carried on under the management of Wm. N. Le Page, the original inventor and manufacturer of Le Page's Liquid Glue. The court said: "A person cannot make a trademark of his own name, and thus debar another, having the same name, from using it in his business, if he does so honestly, and without any intention to appropriate wrongfully the good will of a business already established by others of the name. Everyone has the absolute right to use his own name honestly in his own business, for the purpose of advertising it, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right to it are subjected is *damnum absque injuria*. But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. . . . One who has carried on a business under a tradename, and sold a particular article in such a manner, by the use of his name as a trademark or a tradename, as to cause the

business or the article to become known or established in favor under such name, may sell or assign such tradename or trademark when he sells the business or manufacture, and by such sale or assignment conclude himself from the further use of it in a similar way." This language was quoted with approval in *Howe Scale Co. v. Wyckoff, Seamans, & Benedict*, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609.

Other cases involving the transfer of trademarks, labels, etc., and the rights of vendor and vendee, are collated and discussed in subject notes in 1 L.R.A.(N.S.) 704, 20 C. C. A. 165, and 30 C. C. A. 376.

There may be relief against others than the vendors, however, in cases of unfair competition, by the use of trademarks signs, and labels.

The Sheffield-King Milling Company, a manufacturer of flour in Minnesota, designated the flour made at its mill by various brands, among which were "Sheffield's Best" and "Gold Mine." Its flour was generally known as "Sheffield's Flour," and the name "Sheffields" was used as part of its trademarks, tradenames, and brands, and the name became generally known in the flour trade. Afterwards, B. B. Sheffield, with others, organized a corporation named the "Sheffield Mill & Elevator Company," and proceeded to solicit business from the customers of the Sheffield-King Company, representing that it was a successor thereto, and making other false representations. B. B. Sheffield was the son of the founder of the business of the Sheffield-King Company. In an action by the last-named company against the new company, to restrain the latter from this unfair competition in trade the supreme court of Minnesota sustained an injunction against the new company, restraining it, among other things, from using as a trademark or tradename, or as a part thereof, the word "Sheffield," and from representing itself as a successor to the business of the first company. The court said: "It is apparent that an effort was made by the defendant so to name itself that the business built up by the plaintiff's predecessor, the Sheffield Milling Company, might be attracted by the name 'Sheffield;' that the name of the defendant was fraudulently selected by it for that purpose, and for the purpose of diverting the business of the plaintiff to itself; and, further, that the defendant has been guilty of unfair competition in business with plaintiff. . . . The intent of the promoters, officers, and agents of the defendant in adopting and using the name 'Sheffield,' in connection with the business of manufacturing and marketing flour by the defendant, may be inferred from their acts and the circumstances con-

nected with the incorporation of the defendant and the conduct of its business. It clearly appears from the evidence that the name 'Sheffield,' by long use, became and is a valuable tradename, descriptive of the flour made by the plaintiff, and signifies to the commercial world a desirable grade of flour; and, further, that the right to use the name in such connection was sold to the plaintiff by the promoters of the defendant. Upon the evidence in this case, much of which is not disputed, it seems difficult to explain the acts and conduct of the defendant's officers and agents, except upon the theory that they intended the necessary consequences thereof, which were unfairly to deprive the plaintiff of that which it had honestly acquired and paid a fair consideration therefor." *Sheffield-King Mill. Co. v. Sheffield Mill. & Elevator Co.* 105 Minn. 315, 319, 127 Am. St. Rep. 574, 117 N. W. 447, 449.

The same result was reached in the case of *Walter Baker & Co. v. Slack*, 65 C. C. A. 138, 130 Fed. 514. *Walter Baker & Company* were the manufacturers of "Baker's Cocoa" and "Baker's Chocolate," articles so marked and known and extensively advertised and sold. Other marks and symbols were upon the labels in connection with these names. Thus the name "Baker's" became associated in the minds of dealers and associates with the product of *Walter Baker & Company*. Years after the business had been so carried on, *William Henry Baker* began, in another state, to make and put upon the market chocolate and cocoa products, so labeled as to cause them to be sold and accepted as the goods of *Walter Baker & Company*. He was enjoined and obeyed the decree. Two of the labels of the goods of the party enjoined were "Baker's Best Cocoa," and "Baker's Premium Best Cooking Chocolate," and were sold by a grocer who was made a party to the suit. This party, being only enjoined in part, complainant appealed. Upon that appeal, the court said: "It must not, however, be overlooked that the word 'baker,' as applied to chocolate and cocoa manufactured by the appellant, had, in the course of years, come to represent to purchasers the product of *Walter Baker & Company*, and was so generally known to the trade. The appellee had largely dealt in those products, and was well informed of those facts, prior to the time when he undertook the sale of the product of *William Henry Baker's* manufacture. It must also not be overlooked that *William Henry Baker* instituted his business and applied the name of 'Baker' to his products fraudulently, with the expectation of profiting by the tradename of 'Baker,' and in the hope of diverting to himself some part of the trade

which legitimately belonged to *Walter Baker & Company, Limited*. We must therefore deal with the conduct of the appellee in the marketing of this product of *William Henry Baker* in the light of these circumstances. He had the right, as we assume, to sell that product; but honesty and good faith required that he should not palm it off as the product of *Walter Baker & Company*; that he should not represent it as 'Baker's Chocolate' or 'Baker's Cocoa,' for that meant to the purchaser that it was the product of *Walter Baker & Company, Limited*."

It was held in *White v. Trowbridge*, 216 Pa. 11, 64 Atl. 862, that a retiring partner, who had not entered into any contract restricting him from using trademarks of the firm, should not be enjoined from afterwards using trademarks and labels which were not so similar as to deceive persons of ordinary intelligence, using ordinary care. The court approved the following conclusion of the trial court: "The defendant is not deprived of the right to use his own name in connection with the conduct of his business simply from the fact that his surname is a portion of the trademark used by the copartnership of which he was formerly a member, and whose business has been continued by plaintiffs." But the court also approved the following: "He has no right to use said name for the purpose of misleading the public, or to induce persons to deal with him in the belief that they are dealing with, or acquiring the product of, the old firm, or its successors in business."

In an extended note in 20 C. C. A. 165, upon unfair competition in trade, which reviews many authorities, it was said: "The principle which governs in the case to which this note is appended is one which has long been recognized in the courts both of this country and of England. Stated in brief, and in its most comprehensive form, it is that no man has a right to pass off his goods upon the public as and for the goods of another, and thereby work a fraud upon both the public and his rival in trade. This principle is broader than the rules applicable to strict, technical trademarks, but it is not something separate and apart from trademark law. Rather, it may be said, it lies at the very foundation of trademark law, and covers, besides, a large field to which some of the technical trademark rules do not extend. . . . Independently of the existence of any technical trademark, no manufacturer or vendor will be permitted to so dress up his goods, by the use of names, marks, letters, labels, or wrappers, or by the adoption of any style, form, or color of packages, or by the combination of any or all of these indicia, as to cause

purchasers to be deceived into buying his goods as and for the goods of another."

The defendant company should not be prevented from a just and proper use of its corporate name, although embracing the surname of the Kramers, former proprietors of the Ætna mills; but in such use it cannot be allowed, by any artifice or device or otherwise, to induce the customers of the Ætna mills or others who may desire to purchase plaintiff's products, to deal with it upon the supposition that they are dealing with or buying the wares of the plaintiff. *W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* 100 Me. 461, 4 L.R.A. (N.S.) 960, 62 Atl. 490; *Regent Shoe Mfg. Co. v. Haaker*, 75 Neb. 426, 4 L.R.A. (N.S.) 447, 106 N. W. 595; *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 53 L.R.A. 384, 82 Am. St. Rep. 346, 63 Pac. 480; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; *N. K. Fairbank Co. v. Luckel, K. & C. Soap Co.* 42 C. C. A. 376, 102 Fed. 327.

The court cannot say as matter of law that the use of the labels shown in exhibits K and L was such that persons of ordinary intelligence, exercising usual care, would not be misled into the supposition that the flour was that produced by the plaintiff. The petition presented questions of fact whether the brands, labels, and methods used by the defendant resulted in unfair competition within the principles stated in this opinion, and therefore stated a cause of action.

The judgment is reversed, with directions to overrule the demurrer, and proceed with the cause.

All the Justices concur.

MAINE SUPREME JUDICIAL COURT.

DANIEL W. SIMONDS

v.

MAINE TELEPHONE & TELEGRAPH COMPANY.

(104 Me. 440, 72 Atl. 175.)

Highway — obstruction — reel of pipe.

1. A reel of lead pipe needed for its work, which is placed by a telephone company in line with its poles near the curb of a street in which it is engaged in stringing its wires, under lawful authority from the municipality, is not an unlawful obstruction to travel, which will render it liable for injuries caused by a traveler's horse becoming frightened at it, although it is of such appearance as would be likely to frighten well-broken horses not accustomed to it.

28 L.R.A. (N.S.)

Same — frightened horse — duty of driver.

2. The driver of a horse approaching an appliance which a telephone company is lawfully using in a highway is bound to foresee that the horse may be frightened at it, and to take measures to avoid or prevent the possible consequences.

Appeal — motion to set aside verdict.

3. A verdict not directed can be set aside on motion if from the whole record it is clearly wrong, and it is not necessary, in order to get the case before the reviewing court, to except to the rulings of the trial judge rather than to move to set aside the verdict.

(November 19, 1908.)

MOTION by defendant to set aside a verdict of the Supreme Judicial Court for Somerset County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Sustained.

The facts are stated in the opinion.

Messrs. Butler & Butler for defendant.
Mr. Bernard Gibbs for plaintiff.

Emery, Ch. J., delivered the opinion of the court:

The defendant telephone company had acquired from the proper authority the right to erect and maintain in Main street and other streets in Madison village, "telephone poles and wires to be placed thereon, together with such supporting and strengthening fixtures and wires as the company might deem requisite." In the erection of its plant there, the company made use of cables or groups of wires inclosed in lead pipe a little over an inch in diameter, and strung upon its poles. The lead pipe used came from the factory wound on wooden reels 3 feet in length and 4 feet in diameter, and so constructed that they could be mounted on axles, and the pipe be unwound from them into its proper place in the plant. On May 11, 1907, the defendant's foreman of construction in Madison sent men to Main street to prepare for stringing

Note. — Liability of public service company for frightening horses by construction apparatus in street.

It was held in *Lewis v. Ballston Terminal R. Co.* 45 App. Div. 129, 60 N. Y. Supp. 1035, that evidence that a corporation organized for operating an electric railroad permitted a steam locomotive which, without statutory authority, it used in the construction of its road, to stand upon its tracks in a narrow part of a highway, is, in an action brought to recover damages for injuries sustained in consequence of the plaintiff's horse being frightened by the escape of steam from the loco-

and to string such wires and cables on the poles already erected in that street. For this work some of the men under his direction placed one of these reels of lead pipe on the side of the street next the sidewalk and in the line of the poles upon which the cables were to be strung. While the men were at work upon the poles and wires preparing to string the cables and pipe, but before they had begun to unwind the pipe from the reel, the plaintiff came driving his horse along the street toward the reel, when the horse became frightened from the appearance of the reel, or of the lead pipe wound round it, and ran away, to the plaintiff's injury.

The plaintiff's horse was an ordinarily well-broken horse, and was being driven with ordinary care. The reel and pipe were inert, not in operation, and were placed close to the sidewalk, leaving ample room for the public travel, but were of such appearance as would be likely to frighten well-broken horses unaccustomed to them, though in this case it is uncertain whether it was the appearance of the reel or the brightness of the pipe that caused the fright. There was no evidence that the company was any more aware than the plaintiff that the reel was likely to frighten horses.

Upon the foregoing facts established by the evidence, the plaintiff contends in support of the verdict that the reel and pipe were at the time and place *per se* an unlawful obstruction to public travel in the street. In his declaration and in his evidence he bases his claim for damages on that proposition alone. He does not complain of any negligence in the operation or care of the reel and pipe.

We do not think the proposition can be sustained. Having the right to erect and maintain its poles and string on them its wires and cables where it did in the street, the company had the concomitant right to use suitable appliances therefor and in reasonably needful places. For the work of stringing on the poles and the wires and lead pipes inclosing them, some kind of a reel was appropriate and needful, and it needed to be in the street in the line of the poles.

motive, sufficient to warrant a jury in finding that the corporation was guilty of negligence; such evidence imposing upon it the duty of establishing that the locomotive was necessarily placed in the position in which it was, and that it did not unreasonably interfere with the right of the public.

Attention is called to *Heinmiller v. Winston*, 131 Iowa, 32, 6 L.R.A.(N.S.) 150, 117 Am. St. Rep. 405, 107 N. W. 1102, and *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296, for cases involving the liability for the use of a steam shovel and a steam engine in

There is no suggestion in the evidence that any other kind of a reel, larger, smaller, or of different shape or color, would have been less likely to frighten horses, or that it could have been so located as to be still serviceable and less startling to horses. Indeed, so far as appears, the horse would have been equally frightened by the bright lead pipe coiled on the ground or in a cart.

It is not the law that economic progress is to be arrested or even turned aside, whenever a well-broken horse, carefully driven, is frightened or likely to be frightened thereby. To say that well-broken horses, carefully driven, must not be frightened, is to say that no new appliance, however useful, shall be used on or near highways. It is common knowledge that all horses, even those well broken and carefully driven, are liable to be frightened by any unaccustomed appearance or noise, and indeed by accustomed appearances and noises in unaccustomed situations; that they are susceptible to fright from the most trivial things; that their vagaries are unforeseeable; and that it is practically impossible to guard against them. On the other hand, it is equally common knowledge that well-broken horses can ordinarily be so accustomed to appearances and noises as not to be at all frightened by them.

In this age of economic progress, it is the more reasonable and workable, and hence the legal, rule that owners and drivers of horses should recognize that the highways are not exclusively for their use; that other and new instrumentalities for transportation and transmission, and appliances for their construction and maintenance, are often legally allowed upon the highways; and that they should early accustom their horses to whatever new conditions thus arise, and be on their guard against them. In this case it was as much incumbent on the plaintiff as on the defendant to foresee that his horse might be frightened by the reel or the lead pipe, and have taken measures to avoid or prevent the possible consequences. The reel and the lead pipe being otherwise lawfully where and when they were in the street, the mere fact that they

railway construction work near a highway, so as to frighten horses.

As to liability for placing near a highway objects calculated to frighten horses, see the note to *Davis v. Pennsylvania R. Co.* 12 L.R.A.(N.S.) 1152.

As to liability for discharge of steam near a street or highway so as to frighten horses, see the note to *Ft. Wayne Cooperage Co. v. Page*, 23 L.R.A.(N.S.) 946.

As to the liability of a municipality for injuries caused by a horse becoming frightened at an object in a highway, see the note to *Bowes v. Boston*, 15 L.R.A. 365.

W. J. I.

were likely to frighten horses unaccustomed to them did not make their presence there unlawful. The consequences of the fright must therefore remain where they fell. *Farrell v. Oldtown*, 69 Me. 72; *Winship v. Enfield*, 42 N. H. 197; *Hughes v. Fond du Lac*, 73 Wis. 380, 41 N. W. 407; *Thompson v. Dodge*, 58 Minn. 555, 28 L.R.A. 608, 49 Am. St. Rep. 533, 60 N. W. 545; *Steiner v. Philadelphia Traction Co.* 134 Pa. 199, 19 Atl. 491.

The plaintiff further claims, however, that the defendant should have brought the case to the law court upon exceptions to the rulings of the presiding justice, instead of upon a motion to set aside the verdict, and cites in support of his claim *Stephenson v. Thayer*, 63 Me. 143. It was not necessary for the defendant to except and rely upon exceptions to the rulings of the presiding justice, no verdict having been directed. A verdict not directed can be set aside on motion if from the whole record it appears clearly wrong.

Motion sustained.

Verdict set aside.

MASSACHUSETTS SUPREME JUDICIAL COURT.

NELLIE B. ROGERS, Admr., etc., of
Richard Rogers, Deceased.

v.

ANNIE M. PHILLIPS.
Two Cases.

SAME

v.

FRED G. PHILLIPS.
Two Cases.

(— Mass. —, 92 N. E. 327.)

Highway — collision of bicycle and automobile — negligence.

It is not negligence *per se* for a man riding a bicycle along a street in front of an automobile to attempt to cross the road in front of the machine, if it was so far behind him that it might reasonably have been expected that the driver would see him, and could and would, by the exercise of proper care, so manage the machine as to avoid a collision; but the question is one for the jury under all the circumstances of the case.

(June 27, 1910.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court after directing verdicts in defendants' favor of consolidated actions brought to recover damages for the death of plaintiff's intestate, which was al-

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leged to have been caused by the negligence of defendant Annie M. Phillips. New trial granted.

The facts are stated in the opinion.

Messrs. Herbert Parker and Henry H. Fuller, for plaintiff:

A traveler is not necessarily negligent because he attempts to cross a street without first looking or listening to ascertain whether an automobile is approaching. Such a traveler has a right to assume that other persons using the highway with him will exercise a proper degree of care.

Purtell v. Jordan, 156 Mass. 573, 31 N. E. 652; *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A.(N.S.) 345, 76 N. E. 224, 4 A. & E. Ann. Cas. 396; *McDonald v. Bowditch*, 201 Mass. 339, 87 N. E. 585; *Shapleigh v. Wyman*, 134 Mass. 118; *McGourty v. De Marco*, 200 Mass. 57, 85 N. E. 891.

Whether or not an omission to look behind before crossing the street is evidence of a lack of due care is a question for the jury.

Bowser v. Wellington, 126 Mass. 391;

Note. — Liability for collision of automobile with bicyclist.

For other notes involving the negligent operation of automobiles in general, see the title "Automobiles" in "Index to Notes" of this series.

The reciprocal duties of a bicyclist and automobilist when approaching one another at street intersections are governed by the common-law rule that each is bound to exercise reasonable care so as not to collide with the other. *Weber v. Swallow*, 136 Wis. 46, 116 N. W. 844.

The owner of an automobile was properly found guilty of negligence, where he drove it up behind and ran into one who was proceeding on a bicycle in the same direction. *Heath v. Cook* (R. I.) 68 Atl. 427.

So, where an automobile which was being turned about at the junction of two streets struck and injured a bicycle rider, the jury was properly instructed, in substance, that the driver of the automobile might rightfully turn it, using any part of the street therefor, subject, however, to the right of others to use the street; that it was the duty of vehicles in meeting to pass to the right, and that the fact that an accident happened on the right-hand side of a street might be considered in evidence, and that the jury should consider all the facts and circumstances, and determine therefrom whether the driver of the automobile at the time of such collision was doing anything he should not have done. *Johnson v. Shaw*, 204 Mass. 165, 90 N. E. 518.

And under such circumstances, it was not error to refuse to an instruction that a statute declaring the law of the road had no application to the place where such accident occurred. *Ibid.*

The questions of negligence and com-

Rand v. Syms, 162 Mass. 163, 38 N. E. 196; Lovejoy v. Dolan, 10 Cush. 495; Clinton v. Revere, 195 Mass. 151, 80 N. E. 813; Stinson v. Kenny, 176 Mass. 429, 57 N. E. 699.

The defendant was negligent.

Gifford v. Jennings, 190 Mass. 54, 76 N. E. 233.

Messrs. Curtis G. Metzler and William L. Pullen, for defendant:

The plaintiff failed to show that her intestate was in the exercise of due care.

Creamer v. West End Street R. Co. 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep.

456, 31 N. E. 391; Mathes v. Lowell, L. & H. Street R. Co. 177 Mass. 416, 59 N. E. 77; Hurley v. West End Street R. Co. 180 Mass. 370, 62 N. E. 263; Judge v. Elkins, 183 Mass. 229, 66 N. E. 708; Donovan v. Lynn & B. R. Co. 185 Mass. 533, 70 N. E. 1029; Murphy v. Boston Elev. R. Co. 188 Mass. 8, 73 N. E. 1018; Bartlett v. Worcester Consol. Street R. Co. 189 Mass. 300, 75 N. E. 706; Stackpole v. Boston Elev. R. Co. 193 Mass. 562, 79 N. E. 749; Holian v. Boston Elev. R. Co. 194 Mass. 74, 11 L.R.A.(N.S.) 166, 80 N. E. 1; Tognazzi v.

tributory negligence are for the jury, where, at the time a bicyclist was about to cross an intersecting street, there was on his left a wagon with a high box upon it, and an automobile which approached from the opposite direction and instead of keeping to the right, as required by law, was driven diagonally across the street intersection in front of the wagon and the bicyclist, who was unable to avoid a collision with it. Reed v. Martin (Mich.) 125 N. W. 61.

So, where a boy sixteen years of age riding a bicycle was struck by an automobile which attempted to pass in front of him from one side of the street to another, when so close that a collision was inevitable, and the defendant claims that the boy ran into the automobile in spite of all the former could do to prevent it, it is for the jury to determine who was to blame for the accident. Campbell v. Dreher, 33 Ky. L. Rep. 444, 110 S. W. 353.

And the question of negligence and contributory negligence was held to be for the jury in McGee v. Young, 132 Ga. 606, 64 S. E. 689, where the plaintiff claimed that the defendant, who apparently started to turn at a street intersection, suddenly changed the course of his automobile, and ran into the bicycle the plaintiff was riding, while the defendant claimed that the plaintiff deflected his bicycle, and in spite of all the former could do, collided with the automobile.

Where, while riding a bicycle westward on the north side of a street, at an intersection of a cross street, the rider collided with an automobile which had just crossed from the south side of the street, behind an east-bound street car, for the purpose of going north on the cross street, and the evidence is conflicting as to whether the plaintiff was riding his bicycle rapidly while leaning over the handle bars, and had an opportunity when 25 or 30 feet distant from the point of collision to observe the approaching automobile, he will be held guilty of contributory negligence either in failing to keep a proper lookout or in riding too near to the street car at a speed which rendered a collision inevitable. Weber v. Swallow, supra.

It is contributory negligence for a bicycle rider, upon approaching a much-traveled intersecting city street, to look but once for approaching vehicles, where, had he exercised due care, he might have seen the auto-

mobile which struck him, in time to have avoided it. McCarragher v. Proal, 114 App. Div. 470, 100 N. Y. Supp. 208.

On the question of contributory negligence the jury may consider the fact that a municipal ordinance required the plaintiff, as he approached an intersecting street, to give right of way to vehicles thereon, notwithstanding the violation of the ordinance did not, of itself, constitute negligence, it being for the jury to determine from all the facts and circumstances, including the violation of the ordinance, whether the plaintiff was guilty of contributory negligence. Ibid.

Whether the violation of a municipal ordinance will in general constitute negligence or contributory negligence, see the note to Sluder v. St. Louis Transit Co. 5 L.R.A.(N.S.) 230.

A declaration is good upon demurrer, where it alleges in substance that the plaintiff, while riding a bicycle with due care along a public street, was injured by the negligent and careless driving of an automobile in the opposite direction, between the plaintiff and a vehicle standing near the curb, which shut off the latter's view, the space between it and the plaintiff being too short to permit the stopping of either the bicycle or automobile, so as to avoid a collision. Hughes v. Connable, 5 Penn. (Del.) 523, 64 Atl. 72.

But a declaration which, in addition to averring such facts, alleges that the defendant did not give reasonable notice of the approach of his automobile, so that the plaintiff, who was exercising due care, could get out of its way, is not sufficient. Ibid.

So, a count in a declaration is bad which alleges that such automobile was run at a rapid rate of speed, and that the defendant careless and negligently omitted to give reasonable notice of its approach in time for the plaintiff to avoid injury. Ibid.

And there can be no recovery under a declaration alleging in substance that the defendant negligently ran his automobile into and collided with a person riding a bicycle in a public street, which resulted in the latter's death, where it appears that the accident was caused solely by the slipping of the bicycle, which threw the rider to the pavement without coming into collision with the automobile. Merklinger v. Lambert, 76 N. J. L. 806, 72 Atl. 119.

Milford & U. Street R. Co. 201 Mass. 7, 21 L.R.A.(N.S.) 309; 86 N. E. 709; Willis v. Boston & N. Street R. Co. 202 Mass. 463, 89 N. E. 31.

If deceased saw the automobile and attempted to cross and chanced it, he was not in the exercise of due care.

Madden v. Boston Elev. R. Co. 194 Mass. 491, 80 N. E. 447.

The plaintiff's intestate did not exercise due care.

Murphy v. Boston Elev. R. Co. 188 Mass. 8, 73 N. E. 1018; Holian v. Boston Elev. R. Co. supra.

Hammond, J., delivered the opinion of the court:

The collision occurred upon a straight, broad, smooth road in open daylight. There were no other travelers, either vehicles or pedestrians, to obstruct the view or distract the attention. The whole road for the time being was, for the use of each of the vehicles in question, subject only to the right of the other; and yet the collision occurred. Was there evidence of due care of the deceased, who was upon the bicycle? That is the only question raised upon this record.

The case is close. The burden was upon the plaintiff to show due care of the deceased. And she does not meet this burden simply by showing that there was an accident and that thereby the deceased was injured. It is to be noted, however, that this is not a case where the physical movements of the injured leading up to the accident are purely of conjecture, as in a class of cases of which *Ralph v. Cambridge Electric Light Co.* 200 Mass. 566, 86 N. E. 922, is a type; nor where the movements are such as, by their very nature, to show negligence, as in the familiar class of cases where it is held that entering upon a railroad track at a highway crossing without looking or listening is of itself evidence of negligence; nor yet where an approaching car is so near that stepping upon the track is plainly a careless act. On the contrary there is considerable evidence as to the movements of the respective parties. While it is unquestioned that the collision would not have occurred if the deceased had not attempted to cross the road, yet it cannot be ruled as a general proposition of law that a traveler is necessarily negligent because he attempts to cross a street even without first looking or listening to ascertain whether a vehicle is approaching. Such a traveler has a right, in the absence of anything to the contrary, to assume that other persons using the highway will exercise a proper degree of care toward him. *Bowser v. Wellington*, 126 Mass. 391; *Purtell v. Jordan*, 156 Mass. 573, 31 N. E. 652; *Hennessey* 28 L.R.A.(N.S.)

v. Taylor, 189 Mass. 583, 3 L.R.A.(N.S.) 345, 76 N. E. 224, 4 A. & E. Ann. Cas. 396, and cases cited. When there is a collision upon the highway, the question whether there is negligence on the part of either of the actors is ordinarily a question of fact for the jury. *Hennessey v. Taylor*, supra, and cases cited.

The evidence in the present case was somewhat conflicting, but we think the jury might properly have found that while the deceased was riding his bicycle on the right side of the road near the curbstone, and while the automobile was behind him going in the same direction, he determined to retrace his steps, and for that purpose began to cross the road; that the automobile was so far behind him that it reasonably might have been expected that the defendant would see him, and that if she should see him she could and would, by the exercise of proper care on her part, so manage the automobile as to avoid a collision. Crossing the road under such circumstances would not necessarily be negligent as matter of law. The question of the negligence of the act would be one of fact for the jury. Nor do we see in the other circumstances of the case anything absolutely conclusive in law against the existence of due care on the part of the deceased. Upon the whole evidence this question, as it ordinarily is in cases of collision between travelers upon the highway, was one of fact for the jury.

It follows that the ruling was wrong. In accordance with the terms of the report, the entry is new trial granted.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPHINE HALM, Admr., etc., of —
Halm, Deceased, Plff. in Err.,
v.

BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY.

(— N. J. —, 76 Atl 1014.)

Bridge — duty to light.

1. Lighting a bridge by artificial light is no part of its erection, rebuilding, or repair.

Same — guard rail at right angle — negligence.

2. Proof that a guard rail has been placed at right angles to the side of a bridge.

Headnotes by VOORHEES, J.

Note. — Duty to light highway bridge.

It does not appear that the duty of a municipality or private proprietor in regard to lighting highway bridges is differ-

where the highway is broader than the width of the bridge, running from said bridge toward the side of the highway, assuming that such rail was so placed by the board of chosen freeholders, and forms a part of said bridge, is not evidence of wrongful neglect on the part of such board to erect, rebuild, or repair the bridge, to sustain a recovery, under § 9 of the bridge act (Gen. Stat. 1895, p. 307), for damages resulting from a vehicle running into such guard rail at night.

(Pitney, Parker, Bergen, and Vroom, JJ., dissent.)

(June 20, 1910.)

ERROR to the Supreme Court to review a judgment of nonsuit in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Colby & Whiting for plaintiff in error.

Mr. John Griffin, for defendant in error:

The defendant is not bound by law to light its bridges.

Weeks v. Somerset County, 68 N. J. L. 622, 54 Atl. 826; Macomber v. Taunton, 100 Mass. 255; Randall v. Eastern R. Co. 106 Mass. 276, 8 Am. Rep. 327.

Voorhees, J., delivered the opinion of the court:

The plaintiff's intestate, while riding at his son's invitation in an automobile driven

ent from the duty to light other parts of the highway.

Thus, in Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418, it was held that a bridge within a city is a part of the street, and the city having power to light its streets, it is its duty to light the bridge as part of the street, so as to protect persons using it. And in Chicago v. Thomas, 141 Ill. App. 122, this decision is approved to the effect that it is the duty of a city to light a bridge as much as any other part of a street.

And the duty to light bridges may rest upon the assumption by a municipality of the duty of lighting streets generally, in which case it is only required that they be so lighted as to be reasonably safe for ordinary travel. Chicago v. Apel, 50 Ill. App. 132; Chicago v. McDonald, 57 Ill. App. 250; Chicago v. Wright, 68 Ill. 586.

It may, because of circumstances, become the duty of the proprietor of a bridge to light it in order to make it reasonably safe for travel at night, as where the bridge may be opened to permit the passage of water craft or covered so that natural light is excluded. Thus, in Stephani v. Manitowoc, 89 Wis. 467, 62 N. W. 176, where a city 28 L.R.A.(N.S.)

by his son, on March 22, 1908, at about 7:15 P. M., on Harrison avenue, was injured by reason of the vehicle coming in contact with a guard rail at a bridge over Frank creek in said highway. The bridge in question was a county bridge. It was not of the full width of the highway, at the time of the accident; the proof being that some two years before the highway had been widened and curbed on one side, so that there was a space of about 7 feet on the side of the bridge between it and the line of curbing. It was also shown that from the side of the bridge, extending at right angles toward the curb, there had been erected, by whom does not appear, a fence or barrier composed of 2 x 4 uprights carrying a top rail of 4 x 6 timber. This fence or barrier extended some 3 or 4 feet from the side of the bridge, the remaining space up to the curb being without any guard, so that a person driving along the curb would meet with no physical barrier to prevent him going into the creek. The automobile in question had proceeded from Paterson to Newark, where the side oil lamps were lighted; but the large gas lamps were not. The journey was continued on the highway in question toward Jersey City. It was dark when the bridge was reached, and there was no light on the fence or railing; but there were lights along the highway, one arc light being within 70 feet of the bridge. The driver describes the occurrence as follows: "When we came to the bridge, it was dark, and there was no light there at all. We came along and we heard a crash of our machine." They

maintained a drawbridge, the court said that it was its duty to make the bridge reasonably safe for travel both by day and by night, and if it was not reasonably safe in the nighttime without being lighted, it was the duty of the city to light it.

And in Manley v. St. Helens Canal & R. Co. 2 Hurlst. & N. 840, Watson, B., in writing a concurring opinion, says, if a bridge is so constructed as to be opened at night, it ought to be lighted and watched.

In Com. v. Central Bridge Corp. 12 Cush. 242, it was held that a provision in the charter of a toll bridge company that the bridge should at all times be kept in good, safe, and passable condition, requires the company to light the bridge, if the jury find it necessary in order to make it safe for travel by night.

And in Conowingo Bridge Co. v. Hedrick, 95 Md. 669, 53 Atl. 430, where the keeper of a covered toll bridge let the rider of an unlighted bicycle on the bridge behind a pedestrian who was injured from the resulting collision, it was held that failure of the bridge company to light the bridge was to be considered in determining if it was negligent.

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came within 5 or 10 feet of the bridge before they saw the railing and ran into it, going through it a few feet, tearing it away. The declaration avers negligence in the defendants in the erection, rebuilding, and repair of the bridge, whereby the same was dangerous, because vehicles "were likely to come suddenly, unexpectedly, and unavoidably in contact with the railing;" that the defendants failed to "light the bridge by artificial lights," and erected the bridge so negligently that "it was unsafe . . . for the persons to draw near to and enter upon the bridge." At the conclusion of the plaintiff's case, a nonsuit was granted. To review this judicial action, this writ is being prosecuted.

As negligence of the driver cannot be imputed to the decedent, the question of contributory negligence does not arise. The sole question, therefore, to be disposed of, is the negligence of the defendants.

It is conceded that in the daytime the bridge was perfectly safe. Section 9 of the bridge act (Gen. Stat. 1895, p. 307) provides that if the "board of chosen freeholders shall wrongfully neglect to erect, rebuild, or repair . . . [any bridge] by reason whereof, any person or persons shall receive injury or damage in his or their persons or property, he or they may bring his or their action of trespass on the case against . . . against said board of chosen freeholders . . . and recover judgment." The scope of this act has been narrowed by this court to those cases in which injuries have been sustained, for failure of the bridge safely to perform its appropriate functions where of right there is a reliance upon them. *Jernee v. Monmouth County*, 52 N. J. L. 553, 11 L.R.A. 416, 21 Atl. 295. It is also settled that the above act gave a private remedy for the neglect of a public duty, which at common law did not exist. *Maguth v. Passaic County*, 72 N. J. L. 226, 62 Atl. 679. Therefore, to warrant a recovery, the case must be brought within the scope of this act.

The plaintiff's claim that the bridge should have been lighted by the freeholders must fail. Lighting a bridge by artificial light is no part of its erection, rebuilding, or repair.

The remaining allegations of negligence are that the defendants had repaired the highway, over which they had control, whereby it became wider than the bridge, and had neglected to provide guard rails or a wing fence, running at a proper angle from the curb to the bridge.

It is at once perceived that a barrier placed at an acute angle to the curb, if not seen by a passing carriage, would be dangerous. So this railing was dangerous, if at

all, simply because not seen. It is not argued that there was any defect either in the bridge proper or the railing. The latter was placed there for the purpose of warning and protection, and appears to have been sufficient for that purpose. There is no provision of law that bridges should be constructed to the full width of the highway, and I apprehend it is a matter of common knowledge that they ordinarily do not extend to such width. This, therefore, did not constitute a wrongful construction. Nor can the fact that the barrier extended from the side of the bridge at a right angle, instead of being at an acute angle with the creek, be considered wrongful construction. The ordinary rule must be applied to boards of freeholders, regarding the building of bridges; that is, a breach of duty must be demonstrated by proof.

No proof has been offered that the construction was different from ordinary construction, or that it was not sufficient for the purpose for which it was intended. The case is not unlike *Feil v. West Jersey & S. R. Co.* 77 N. J. L. 502, 72 Atl. 362, which arose over the construction of a railroad platform across which passengers were accustomed to pass. The court there said: "There is nothing in the present case to support the conclusion that the defendant company failed to observe the degree of care indicated in the construction of its platform at the Millville station. There is no proof that it differs in its character from platforms in general use by the defendant and other railroad companies; and no presumption of want of due care arises from the fact that a railroad company, presumably to meet the requirements of its traffic, has constructed its platform in such a way that one portion of it is lower than another, when the difference of level is not greater than the height of an ordinary step. Negligence must be proved, and, in a case like the present, that can be done only by showing that the platform is of a design which a reasonably careful judgment would disapprove as being likely to cause accident to persons using it as a way to and from trains. To hold otherwise would be to leave railroad companies to the mere caprice of juries, and subject them to the danger of being found guilty of negligence no matter what plan of construction they might adopt." See also *Weeks v. Somerset County*, 68 N. J. L. 622, 54 Atl. 826.

Proof that a guard rail has been placed at right angles to the sides of a bridge, where the highway is broader than the width of the bridge, running from said bridge toward the side of the highway, assuming that such rail was so placed by the board of chosen freeholders, and forms a

part of said bridge, is not evidence of wrongful neglect on the part of such board to erect, rebuild, or repair the bridge, to sustain a recovery, under the bridge act, for damages resulting from a vehicle running into such guard rail at night.

The judgment is affirmed.

Pitney, Parker, Bergen, and Vroom, JJ., dissent.

NORTH CAROLINA SUPREME COURT.

E. M. DAIL, Appt.,
v.

LEE J. TAYLOR.

(151 N. C. 284, 66 S. E. 135.)

Negligence — exploding bottle — *res ipsa loquitur*.

1. The mere explosion of a bottle of carbonated beverage to the injury of a purchaser is not sufficient to carry to the jury the question of the negligence of the one who bottled it, under the doctrine of *res ipsa loquitur*.

Evidence — negligence — exploding bottles.

2. Evidence of the explosion to the injury of the purchaser of a bottle of carbonated beverage, accompanied by evidence that other bottles put up by the same bottler had exploded during the several preceding months, is sufficient to carry to the jury the question of the latter's negligence, in an action to hold him liable for the injury.

(November 18, 1909.)

APPEAL by plaintiff from an order of the Superior Court for Pamlico County granting a nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Plaintiff, a retailer in soft drinks, was injured by the explosion, while he was removing it from a crate, of a bottle of car-

Note. — Applicability of rule *res ipsa loquitur* in action for personal injuries from defects in articles manufactured or sold by the defendant.

That negligence on the part of a seller or manufacturer is not made out from the mere fact that personal injury resulted from the use of the article sold or manufactured was, with little or no discussion, declared to be the law in *Standard Oil Co. v. Murray*, 57 C. C. A. 1, 119 Fed. 572; *Leavitt v. Fiberloid Co.* 196 Mass. 440, 15 L.R.A.(N.S.) 855, 82 N. E. 682; *Talley v. Beever*, 33 Tex. Civ. App. 675, 78 S. W. 23. 28 L.R.A.(N.S.) J. A. C.

bonated beverage called "coca-cola," which he had purchased from defendant, the manufacturer and bottler.

Further facts appear in the opinion.

Messrs. Thomas W. Davis, D. L. Ward, and H. L. Gibbs, for appellant:

Any evidence that plaintiff might give showing negligence upon the defendant in its bottling works, as that other bottles similarly charged had exploded, would be some evidence to go to the jury, under the doctrine of *res ipsa loquitur*.

Blevins v. Erwin Cotton Mills, 150 N. C. 493, 64 S. E. 428; *Darling v. Westmoreland*, 52 N. H. 405, 13 Am. Rep. 55; *Texas & P. R. Co. v. DeMilley*, 60 Tex. 194; *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620, 37 S. E. 873; *Evans v. Keystone Gas Co.* 148 N. Y. 112, 30 L.R.A. 651, 51 Am. St. Rep. 681, 42 N. E. 513; *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812; *Baird v. Daly*, 68 N. Y. 547; *Moran v. Corliss Steam Engine Co.* 21 R. I. 386, 45 L.R.A. 267, 43 Atl. 874; *Butcher v. Providence Gas Co.* 12 R. I. 149, 34 Am. Rep. 626; *Loring v. Worcester & N. R. Co.* 131 Mass. 469; *Butcher v. Vaca Valley & C. L. R. Co.* 67 Cal. 518, 8 Pac. 174; *Harrell v. Albemarle & R. R. Co.* 110 N. C. 215, 14 S. E. 687, 8 Enc. Ev. pp. 926-928, 933; *Bemis v. Temple*, 162 Mass. 342, 26 L.R.A. 254, 38 N. E. 970; *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95; *District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; *Bloomington v. Legg*, 151 Ill. 9, 42 Am. St. Rep. 216, 37 N. E. 696; *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205; *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *Chicago & N. W. R. Co. v. Netolicky*, 14 C. C. A. 615, 32 U. S. App. 168, 406, 67 Fed. 665; *Crocker v. McGregor*, 76 Me. 282, 49 Am. Rep. 611; *Raper v. Wilmington & W. R. Co.* 126 N. C. 563, 36 S. E. 115; *Weiser v. Holzman*, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; *Watson v. Augusta Brewing Co.* 124 Ga. 121, 1 L.R.A.(N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118; *Gold Ridge Min. Co. v. Tallmadge*, 44 Or. 34, 102 Am. St. Rep. 602, 74 Pac. 325; *Ellis v. Portsmouth & R. R. Co.* 24 N. C. (2 Ired. L.) 138; *Huey v. Gahlenbeck*, 121 Pa. 238, 6 Am. St. Rep. 792, 15 Atl. 520; *Chesson v. John L. Roper Lumber Co.* 118 N. C. 59, 23 S. E. 925; *Womble v. Merchants' Grocery Co.* 135 N. C. 474, 47 S. E. 493; *Howser v. Cumberland & P. R. Co.* 80 Md. 146, 27 L.R.A. 154, 45 Am. St. Rep. 332, 30 Atl. 906; *Treadwell v. Whittier*, 80 Cal. 574, 5 L.R.A. 498, 13 Am. St.

Rep. 175, 22 Pac. 266; Springer v. Ford, 189 Ill. 430, 52 L.R.A. 930, 82 Am. St. Rep. 464, 59 N. E. 953; 4 Wigmore, Ev. § 2509; Scott v. London & St. K. Docks Co. 3 Hurlst. & C. 596; Overcash v. Charlotte Electric R. Light & P. Co. 144 N. C. 572, 57 S. E. 377, 12 A. & E. Ann. Cas. 1040; Winslow v. Norfolk Hardwood Co. 147 N. C. 275, 60 S. E. 1130; Fitzgerald v. Southern R. Co. 141 N. C. 530, 6 L.R.A.(N.S.) 337, 54 S. E. 391; Stewart v. Van Deventer Carpet Co. 138 N. C. 60, 50 S. E. 562; Hale, Torts, 482; Jensen v. The Joseph B. Thomas, 81 Fed. 578; Labatt, Mast. & S. § 843; Aycock v. Raleigh & A. Air Line R. Co. 89 N. C. 321; Shearm. & Redf. Neg. § 59; Lehew v. Hewett, 138 N. C. 8, 50 S. E. 459; Moore v. Parker, 91 N. C. 279; McCord v. Atlanta & C. Air Line R. Co. 134 N. C. 53, 45 S. E. 1031; Jordan v. Asheville, 112 N. C. 744, 16 S. E. 760; Grant v. Raleigh & G. R. Co. 108 N. C. 469, 13 S. E. 209; Judson v. Giant Powder Co. 107 Cal. 549, 29 L.R.A. 718, 48 Am. St. Rep. 146, 40 Pac. 1020.

There is an implied warranty in the sale of chattels by a manufacturer who sells an article of his own making, that it will be free from latent defects arising from the process of manufacture or the use of defective materials.

Gold Ridge Min. Co. v. Tallmadge, supra; Woodward v. Miller, 119 Ga. 618, 64 L.R.A. 932, 100 Am. St. Rep. 188, 46 S. E. 847; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Sinclair v. Hathaway, 57 Mich. 60, 58 Am. Rep. 327, 23 N. W. 459; Hodges v. Wilkinson, 111 N. C. 56, 17 L.R.A. 545, 15 S. E. 941; Bierman v. City Mills Co. 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep. 636, 45 N. E. 856; Rodgers v. Niles, 11 Ohio St. 48, 78 Am. Dec. 290; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; Wisconsin Red Pressed Brick Co. v. Hood, 67 Minn. 329, 64 Am. St. Rep. 418, 69 N. W. 1091; Benjamin, Sales, 7th ed. 633-686; 2 Schouler, Pers. Prop. § 346; 10 Am. & Eng. Enc. Law, p. 149; Poland v. Miller, 95 Ind. 387, 48 Am. Rep. 730; Bushman v. Taylor, 2 Ind. App. 12, 50 Am. St. Rep. 228, 28 N. E. 97; Weiser v. Holzman and Wellington v. Downer Kerosene Oil Co. supra; Lewis v. Terry, 111 Cal. 39, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; Randall v. Newson, L. R. 2 Q. B. Div. 102; Schubert v. J. R. Clark Co. supra; Elkins v. McKean, 79 Pa. 493; Koelsch v. Philadelphia Co. 152 Pa. 355, 18 L.R.A. 759, 34 Am. St. Rep. 653, 25 Atl. 522; Watson v. Augusta Brewing Co. and Blood Balm Co. v. Cooper, supra; Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; Craft v. Parker, W. & Co. 96 Mich. 245, 21 L.R.A. 139, 55 N. W. 812; Clement v. Cros-

by & Co. 148 Mich. 293, 10 L.R.A.(N.S.) 588, 111 N. W. 745, 12 A. & E. Ann. Cas. 265; Wiedmer v. New York Elev. R. Co. 41 Hun, 284; Shepard v. Creamer, 160 Mass. 496, 36 N. E. 475; Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565; Gerlach v. Edelmeyer, 15 Jones & S. 292; Womble v. Merchants' Grocery Co. supra; Dunn v. Balantyne, 5 App. Div. 483, 38 N. Y. Supp. 1102; Earl v. Cronck, 131 N. Y. 613, 30 N. E. 864; Smith v. Boston Gaslight Co. 129 Mass. 318; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Kearney v. London, B. & S. C. R. Co. L. R. 5 Q. B. Div. 411; Johnson v. Southern R. Co. 122 N. C. 958, 29 S. E. 784; Avera v. Sexton, 35 N. C. (13 Ired. L.) 247; Cogdell v. Wilmington & W. R. Co. 124 N. C. 302, 32 S. E. 706; Gates v. Max, 125 N. C. 141, 34 S. E. 266.

Messrs. Simmons, Ward, & Allen, for appellee:

The doctrine of *res ipsa loquitur* is not applicable, as the thing causing the accident was not under the control of the defendant.

6 Thomp. Neg. p. 613; Stewart v. Van Deventer Carpet Co. 138 N. C. 60, 50 S. E. 562; Womble v. Merchants' Grocery Co. 135 N. C. 474, 47 S. E. 493; 4 Wigmore, Ev. § 2509; Benedick v. Potts, 88 Md. 52, 41 L.R.A. 480, 40 Atl. 1067; Standard Oil Co. v. Murray, 57 C. C. A. 1, 119 Fed. 572; Glaser v. Seitz, 35 Misc. 341, 71 N. Y. Supp. 942; O'Neill v. James, 138 Mich. 567, 68 L.R.A. 342, 110 Am. St. Rep. 321, 101 N. W. 828, 5 A. & E. Ann. Cas. 177; Guinea v. Campbell, Rap. Jud. Quebec, 22 C. S. 257.

Hoke, J., delivered the opinion of the court:

The plaintiff in this case was the purchaser of the goods, or one of them, and therefore the many authorities cited as to when and to what extent a vendor is responsible to third persons for negligent default in the sale of goods do not in strictness apply, and, there being no evidence tending to show a breach of warranty, express or implied, the appeal presents the question whether there is sufficient evidence of actionable negligence as between vendor and vendee to carry the case to the jury; that is, has there been legal evidence offered tending to show a breach of some legal duty on the part of defendant incident to the contract relation between them, and not contained within the terms and stipulations of the agreement? Such breach of duty could be said to exist when a vendor sells goods having a latent defect of a kind likely to cause some physical injury to the vendee, and of which the vendor was aware, or which he should have ascertained by proper care and attention (Wharton, Neg. § 774; 29 Cyc. Law & Proc. pp. 430, 431),

and may be referred to the general principle announced in the notable case of *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, where it was said that "whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

Considering the case in this aspect, it is very generally held that in a claim of this character a plaintiff is not required to establish his case by direct or positive proof, but the issue must be submitted to the jury whenever facts are shown forth in evidence from which a fair and reasonable inference of negligence may be made. Speaking to this question in *Shearman & Redfield on Negligence*, § 58, the authors say: "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of resulting injury to himself. Having done this, he is entitled to recover unless the defendant produces evidence to rebut this presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default, but this is going too far. If the facts proved make it probable that the defendant violated his duty, it is for the jury to decide whether he did so or not. To hold otherwise would be to deny the value of circumstantial evidence. As already stated, the plaintiff is not bound to prove his case beyond a reasonable doubt, though the facts shown must be more consistent with the negligence of the defendant than with the absence of it. It has never been suggested that evidence of negligence should be direct and positive. In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence, and, as that fact itself is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly on the fact of negligence,—a kind of evidence which might not be satisfactory in other classes of cases open to clearer proof. This is on the general principle of the law of evidence, which holds that, to be sufficient or satisfactory evidence, which satisfies an unprejudiced mind." This statement is cited with approval in the opinion of the court in *Fitzgerald v. Southern R. Co.* 141 N. C. 530-534, 6 L.R.A. (N.S.) 337, 54 S. E. 391, and in that case it was held as follows: "(2) Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and, if the facts

proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence." There are instances where this requirement is met by simply proving the occurrence and the resultant injury, a doctrine which finds expression in the phrase *res ipsa loquitur*, and which has been considered and applied in several recent decisions of this court, as in *Fitzgerald's Case*, supra; *Ross v. Double Shoals Cotton Mills*, 140 N. C. 115, 1 L.R.A. (N.S.) 298, 52 S. E. 121; *Stewart v. Van Deventer Carpet Co.* 138 N. C. 60, 50 S. E. 562; *Womble v. Merchants' Grocery Co.* 135 N. C. 474, 47 S. E. 493.

Plaintiff insists that these authorities apply in his favor here, and that he should have been allowed to go to the jury on proof of the occurrence and the injury without more, but we do not think this position can be sustained. The principle only applies to cases where, on proof of the occurrence and the injury, the existence of negligent default is the more reasonable probability; and should not be allowed to prevail where, on proof of the occurrence without more, the matter still rests only in conjecture. As said in *Labatt on Master and Servant*, § 843, quoted with approval in some of the cases referred to: "The rationale of the doctrine is that in some cases the very nature of the occurrence may of itself, and through the presumption it carries, supply the requisite proof. It is applicable when, under the circumstances shown, the accident presumably would not have happened if due care had been exercised. Its essential import is that on the facts proved the plaintiff has made out a prima facie case, without direct proof of negligence." While coca-cola seems to be a recognized article of merchandise not usually or necessarily dangerous under ordinary conditions, the evidence shows that it is put up in glass bottles, charged with gas to a pressure of not less than 60 pounds to the square inch, in this instance shipped in cases or crates for quite a distance, and handled in various ways and by different parties; and the facts present a case where it would be entirely unsafe to permit the application of the principle contended for, or to hold that the explosion of one single bottle of such an article under such circumstances should of itself rise to the dignity of legal evidence sufficient, without more, to carry a case to the jury. *Glaser v. Seitz*, 35 Misc. 341, 71 N. Y. Supp. 942.

While we hold this to be a correct position as to mere proof of the occurrence, we are of opinion that there was error in sus-

taining defendant's motion of nonsuit, for the reason that there was additional testimony tending to show a want of proper care on the part of the defendant. The witness Mark Hargett testified that he bought coca-cola of plaintiff, which was bottled by defendant, the latter part of the week before plaintiff received his hurt. On Saturday some customers came, and in taking a bottle out the neck came off, and on the following day, Sunday, in taking another bottle from a crate, it exploded, and a piece of glass cut witness's arm, another piece struck a little girl's shoe standing by, went through the shoe, and cut her foot to the bone. Another witness, C. S. Weslett, testified "that all along for the last two years witness had seen these bottles from defendant's works explode in the store." True, the witness seems subsequently to have given evidence qualifying this statement, but we are not at liberty to select the more favorable portion of a witness's statement and act on it for defendant's benefit. In a motion of this kind we have repeatedly held that the evidence making for plaintiff's claim must be taken as true and interpreted in the light most favorable for him, and, applying this rule, we think the additional testimony indicated, with the evidence describing the occurrence, presents a case which requires that the issues raised should be submitted to the jury, and that the order directing a nonsuit was erroneous. There was testimony offered on part of plaintiff purporting to be expert evidence and tending to show additional circumstances indicating negligence on the part of defendant; but, as the court made no finding on the question of the witness being an expert, and the facts are not fully set out, we purposely refrain from expression on this question.

There is error, and this will be certified to the end that the order of nonsuit be set aside, and the cause restored to the docket for trial.

Reversed.

WASHINGTON SUPREME COURT.

LOUISA EASTERLY, Appt.,

v.

JOHN MILLS et al., Respts.

(54 Wash. 356, 103 Pac. 475.)

Trial — jury — waiver.

1. The verdict of a jury is waived by motions by both parties for directed verdicts, where there is no conflict in the evidence as to any material fact and the court is authorized to enter such judgment as the evidence warrants.

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Broker — secret commission — duty to account.

2. A real-estate broker who, to secure the terms on which he is authorized to sell, effects an intermediate sale to one who for a bonus is willing to comply with the owner's terms and hold the property subject to such terms as the true purchaser can meet, thereby securing a commission of which his principal is ignorant, is bound to account to him for it.

(August 3, 1909.)

APPEAL by plaintiff from a judgment of the Superior Court for Pierce County dismissing an action brought to recover a portion of the proceeds of a sale of real estate made by defendants as plaintiff's agents. Reversed.

The facts are stated in the opinion.

Messrs. Bates, Peer, & Peterson, for appellant:

An agent who has his principal's property listed with him for sale at not less than a given price cannot sell it at a greater price than the list price, and, concealing

Note. — Right of principal to recover from broker or other agent commissions which he received from other party to the contract.

This note does not purport to cover the general question concerning the rights of the principal when his agent makes secret profits out of the transaction for the performance of which he is employed, but is limited strictly to cases such as the *EASTERLY v. MILLS*, in which the question arose whether the principal has the right to recover from his agent commissions which the latter, known or unknown to him, received from the party with whom the agent negotiated.

In accordance with the *EASTERLY CASE* it has been held in a number of cases that an agent who, while employed by his principal, secretly accepts a commission from the other party to the contract, cannot be permitted to retain it, but must account to his principal therefor. *Commercial Club v. Davis*, 136 Mo. App. 583, 118 S. W. 668, (purchaser's agent secretly receiving commissions from seller); *Morrison v. Ogdensburg & L. C. R. Co.* 52 Barb. 173 (agent of purchaser securing secret commissions from seller); *Segar v. Edwards*, 11 Leigh. 213 (agent of seller being also agent of buyer, and having made contract with latter for half the profits on a resale); *Powell v. Jones* [1905] 1 K. B. 11 (subagents taking commission from other party); *Fawcett v. Whitehouse*, 8 L. J. Ch. 50 (person employed on behalf of himself and copartners in negotiating lease, taking as absolute gift to himself from the lessors a large sum of money); *Morrison v. Thompson*, L. R. 9 Q. B. 480 (purchaser's agent dividing commissions with vendor's agent); *Lister v. Stubbs*,

that fact from his principal, account to the latter merely for the list price, retaining to his own use the difference between the list price and the price for which he actually sold the property.

Smith, Fr. § 23; Pom. Eq. Jur. § 950; Humphrey-Gibson Co. v. Robinson, 134 N. C. 432, 46 S. E. 953; Northrup v. Bathrick, 80 Neb. 36, 113 N. W. 808; Deter v. Jackson, 76 Kan. 568, 92 Pac. 546; Helberg v. Nichol, 149 Ill. 249, 37 N. E. 63; Stearns v. Hochbrunn, 24 Wash. 206, 64 Pac. 165.

On petition for rehearing.

The defendants are liable not only for the fraudulent profits they received, but for the entire amount lost to plaintiff because of their fraud.

Rockefeller v. Merritt, 35 L.R.A. 633, 22 C. C. A. 608, 40 U. S. App. 666, 76 Fed. 914; Fisher v. Mellen, 103 Mass. 503; Irwin v. Sherril, 1 N. C. pt. 2, p. 1 (Taylor, p. 1) 1 Am. Dec. 574; Hart v. Tallmadge, 2 Day, 381, 2 Am. Dec. 105; Weber v. Weber, 47 Mich. 569, 11 N. W. 389; Bean v. Herrick, 12 Me. 262, 28 Am. Dec. 176; White v. Merritt, 7 N. Y. 352, 57 Am. Dec. 527; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360; McGibbons v. Wilder, 78 Iowa, 531, 43 N. W. 520; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; Medbury v. Watson, 6 Met. 246, 39 Am. Dec. 726; Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572, 12 N. E. 247; Culver v. Avery, 7 Wend. 380, 22 Am. Dec. 586; Leonard v. Springer, 197 Ill. 532, 64 N. E. 299; Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321, 69 N. W. 722; Stiles v. White, 11 Met. 356, 45 Am. Dec.

214; Hindman v. First Nat. Bank, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 931; Goldsmith v. Koopman, 140 Fed. 616; Bishop, Non-Contract Law, § 351; Kerr, Fr. & Mistake, 331-339; Carpenter v. Wright, 52 Kan. 221, 34 Pac. 798; Tilly v. Wolverton, 46 Minn. 256, 48 N. W. 908.

Messrs. L. C. Stevenson and M. F. Porter, for respondents:

The court could not compel the defendant to accept a conveyance of property which he had never purchased, nor could it require him to pay over money which he had never received.

Baker v. Brown, 82 Cal. 64, 22 Pac. 870; Glover v. Layton, 145 Ill. 92, 34 N. E. 53.

Crow, J., delivered the opinion of the court:

Action by Louisa Easterly against John Mills and Fred Mills, copartners as John Mills & Son, to recover a portion of the proceeds of a sale of real estate made by the defendants as her agent. On trial and at the close of the evidence, the defendants moved the court to discharge the jury and enter judgment in their favor. Thereupon the plaintiff moved for a directed verdict in her favor. The defendants' motion being sustained, the action was dismissed. The plaintiff has appealed.

The appellant contends that the trial court erred in denying her motion for a directed verdict. The respondents insist that the proper judgment was entered, and contend that, even though there had been sufficient evidence in favor of appellant to warrant its submission to the jury, the ap-

L. R. 45 Ch. Div. 1 (agent of buyer taking secret commissions from seller); La Compagnie De Pulpe De Metabetchouan v. Paquet, Rap. Jud. Quebec 29 C. S. 211 (agent of buyer taking commissions from seller).

In Barber v. Martin, 67 Neb. 445, 93 N. W. 722, it was held that the general manager of a corporation, in effecting a sale of the entire capital stock of his company, acts as the agent of all the stockholders, and he cannot retain a secret compensation received from the vendee.

The fact that the land was afterwards used for lottery purposes does not alter the rule. Commercial Club v. Davis, supra.

In Cohen v. Kuschke, 83 L. T. N. S. 102, it was held that if the agent of a purchaser receives a secret commission from the seller, the purchaser is entitled to recover either from the agent or the donor or both.

But when a purchaser's agent accepts commissions from the seller, the relation between the purchaser and his agent is that of debtor and creditor, and not that of trustee and *cestui que trust*, and the purchaser, therefore, cannot follow the moneys so received by the agent into the investments thereof. Lister v. Stubbs, supra.

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Where an owner of land fixed his own price, and did not employ the agent to secure the best price he could obtain, but only to secure the acceptance of his proposition, and the seller received all that he agreed to take, the fact that the agent for the purchaser divided his commissions with the seller's agent does not entitle the seller to demand from his agent the commissions so received. Law v. Ware, 238 Ill. 360, 87 N. E. 308.

When the principal acceded to the receiving by the agent of commissions from the party with whom he negotiated, or had knowledge thereof, he cannot recover. Culverwell v. Campton, 31 U. C. C. P. 342; Webb v. McDermott, 3 Ont. Week. Rep. 644.

So, in Holmes v. Cathcart, 88 Minn. 213, 60 L.R.A. 734, 97 Am. St. Rep. 513, 92 N. W. 956, it was held that an agent employed to exchange real estate, who is told by his principal that the amount received on the exchange must include all commissions to be received or claimed by such agent, is not liable to the principal for commissions received from the other party on making the exchange on the terms and for the price fixed by the principal.

G. V.

pellant and respondents, by their joint motions, withdrew the cause from the jury. When the two motions were interposed, there being no conflict in the evidence as to any material fact, the parties in effect waived a verdict of the jury, and submitted the cause for determination by the trial judge, who was then authorized to enter such judgment as the evidence warranted; and we will on this appeal dispose of the case on the same theory. *Knox v. Fuller*, 23 Wash. 34, 44, 62 Pac. 131; *Grigsby v. Western U. Teleg. Co.* 5 S. D. 561, 59 N. W. 734.

The following facts appear from the evidence: That on February 18, 1907, the appellant, being the owner of certain improved real estate in Puyallup, entered into a written contract whereby she authorized the respondents to sell the same for \$4,000, one-half cash, and agreed to pay them a commission of \$150. That on or about April 29, 1907, one T. Shenkenberg approached the respondent John Mills with a proposition to buy the place for \$4,500, paying \$500 cash and the remainder in instalments. That thereafter Mills effected an arrangement with one J. H. Williams, by which he was to purchase the property from the appellant for \$4,000 cash, and immediately sell to Shenkenberg for \$4,500, payable in instalments. That, before seeing Williams, Mills placed Shenkenberg in possession of the property and accepted \$50 from him as a deposit, with the understanding that, if he finally bought, it should apply on the purchase price, otherwise he was to become appellant's tenant, the deposit to be then applied on rent. That, after separate negotiations with Williams and Shenkenberg, the respondent John Mills went to Everett, where Mrs. Easterly lived. That he told her he could sell the place for \$4,000, and effect an arrangement whereby the sale would be for cash, but that he could not sell for any larger sum. That, relying on these statements, appellant finally agreed to sell for \$4,000, executed a deed to Williams reciting a consideration of \$10, and on June 11, 1907, received from respondents a draft for \$3,838, as proceeds of the sale, less commission and expenses incurred. Immediately thereafter a written contract of sale was executed by Williams to Shenkenberg for \$4,500, which was antedated to April 29, 1907, the day upon which the original interview occurred between Shenkenberg and the respondent John Mills. Williams then paid respondents an additional commission of \$150. The respondents did not inform the appellant that they could sell to Shenkenberg for \$4,500, that they had placed Shenkenberg in possession, or that Williams was about to sell to Shenkenberg for \$4,500

and pay them an additional commission of \$150. In September, 1907, the appellant first learned of the sale to Shenkenberg, and commenced this action to recover the extra \$500, less commission thereon. The respondents have shown that the appellant expressed herself as satisfied with the sale at the time it was closed, and that they were authorized by their written contract of employment to sell for \$4,000. They contend that they could not sell for \$4,500 and secure \$2,000 cash; that the appellant at the time needed more money than the \$500 cash payment Shenkenberg was willing and able to make; that they carried out appellant's specific instructions; that they first made the sale to Williams for appellant; and that, after their relation to her as agent had been thus terminated, they made the second sale to Shenkenberg.

These contentions are not fully sustained by the evidence; but, conceding them all to be true, and assuming that no fraud was intended, respondents nevertheless ignored and failed to perform duties which devolved upon them as appellant's agents. "The relation between a broker and his principal is a fiduciary one, calling for the exercise of the utmost good faith. It is the duty of the broker to serve his principal to the latter's best advantage, and all profits which are the result of the relation belong to the principal." 11 Current Law, 450, and cases cited. "A broker is not permitted to deal with the subject-matter of his agency for his own advantage, but must give the principal the benefit of any profit he may make in the transaction. Thus, where a broker employed to sell sells at a higher price than that authorized by the principal, or than that represented by the broker as the price received, or where a broker employed to purchase buys at a less price than that limited by or represented to the principal, he must account to his principal for the difference." 4 Am. & Eng. Enc. Law, 2d ed. p. 969. In *Holmes v. Cathcart*, 88 Minn. 213, 216, 60 L.R.A. 734, 97 Am. St. Rep. 513, 516, 92 N. W. 956, 957, the supreme court of Minnesota said: "The principal may authorize his agent to sell or exchange his property; but it does not necessarily follow that the agent, by carrying out the specific instructions given him, fully performs his duty, and is relieved from liability. He is bound to the exercise of the most perfect good faith, and to keep his principal informed of facts coming to his knowledge affecting his rights and interests. If, after receiving instructions to sell property on certain specified terms, the agent learns that other and more advantageous terms can be obtained, it is his plain duty,

and he is under every legal and moral obligation, to communicate the facts to the principal, that he may act advisedly in the premises." If a real-estate broker sells for a price in advance of that stipulated by his principal, and fails to account to the latter or inform him of the true facts, he becomes liable to his principal for the excess. A broker is not entitled to realize any financial benefit in addition to his stipulated commission, as the result of secret negotiations which he conceals from his principal. Such profits in equity and justice belong to the principal, and some of the authorities hold that, if the agent realizes a profit from concealed negotiations, he must not only account to his principal therefor, but that he will forfeit his right to the stipulated commission. *Jameson v. Kempton*, 52 Wash. 106, 100 Pac. 186; *Stearns v. Hochbrunn*, 24 Wash. 206, 64 Pac. 165; *De L'Archerie v. Rutherford*, 54 Wash. 134, 102 Pac. 1033; *Collins v. McClurg*, 1 Colo. App. 348, 29 Pac. 299; *Humphrey-Gibson Co. v. Robinson*, 134 N. C. 432, 46 S. E. 953; *Cotton v. Holliday*, 59 Ill. 176; *Jansen v. Williams*, 36 Neb. 869, 20 L.R.A. 207, 55 N. W. 279; *Eidson v. Saxon* (Tex. Civ. App.) 30 S. W. 957; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Deter v. Jackson*, 76 Kan. 568, 92 Pac. 546; *Helberg v. Nichols*, 149 Ill. 249, 37 N. E. 63.

Without regard to the respondents' intentions, they were at least guilty of a constructive fraud.

John Mills, the active partner, in part testified as follows:

Mr. Shenkenberg liked this place very much, and they decided to take it, if he could get it on his terms at \$4,500. . . . We told Mr. Shenkenberg we could not sell it to him, that Mrs. Easterly would not sell it to him under those conditions, that she required half, or approximately half, cash. "But," I said, "it is possible we can get a third party to carry this title and sell it to you on these terms," and I took the deposit from him with the perfect understanding on his part that we might not be able to get the deal through at all. If we were not able to do that, we would either refund his money, or the money he paid would apply as rental. Mr. Shenkenberg thoroughly understood that. We had some of his money, and we had something to tie to, so that we went out and tried to find somebody that would take that title. . . . We finally found Mr. Williams, who, for the \$500 bonus, was willing to buy this property, inasmuch as we had Mr. Shenkenberg in tow and could resell it for him immediately

after for \$4,500 on terms. Under these conditions Mr. Williams was willing to take the place, and did take the place. When we sold the place to Mr. Williams, we were acting for Mrs. Easterly. . . .

Q. Now, then, you may explain to the jury why that contract of sale was dated back until April, if you know.

A. I know exactly why. Money was hard to get, and our experience had shown that it was difficult to find a purchaser for that place, and, as an additional inducement to Mr. Williams, we told him that the interest on this contract would start back from the time that Mr. Shenkenberg made his deposit or to that day. Now, this was agreeable to Mr. Shenkenberg. We talked with him, and he was agreeable to that, and that brought the first annual payment of interest on Mr. Williams's contract that much nearer, and was an additional incentive to him to pay out the money and buy this place. . . . I will say that we were using every effort at our command to effect this sale for Mrs. Easterly, and after we had a tentative agreement with Mr. Shenkenberg, that was a very great help in that transaction. In fact, it would have been impossible to have gotten the deal through without the preliminary contract with Mr. Shenkenberg. . . . I told Mrs. Easterly the best we could do—the best sale we could make—was \$4,000 cash, which was exactly the case. . . . The sale could not have gone through without the preliminary arrangement with Mr. Shenkenberg. . . .

Q. You got a commission from Mr. Williams for making that sale?

A. Part of a commission, yes. . . .

Q. You got your commission all right from Mrs. Easterly for making this sale?

A. Yes, sir.

Q. Part of commission,—how much of a commission from Mr. Williams?

A. \$150.

In *Kingsley v. Wheeler*, 95 Minn. 360, 104 N. W. 543, the court said: "An agent to sell land does not fulfil the measure of legal requirements by merely carrying out his specific instructions. He owes the duty of making a full, fair, and prompt disclosure of all facts affecting the principal's rights or interests, or pertaining to the sale of land by him. He is denied the right to profit at the expense of his principal by concealment of facts which he ought to have revealed. Whatever advantage accrues to him by violation of his duties, he must make good to his principal, whom he has wronged." Although it was their duty to do so, respondents never communicated to

appellant the fact that they could sell to Shenkenberg for \$4,500 on his terms. Had they done so, she, being thus advised, might have effected a more satisfactory and less expensive arrangement for realizing the cash which she then needed. She was at least entitled to the chance of doing so. Respondents had negotiated with Shenkenberg, and placed him in possession in contemplation of a sale for \$4,500. As the result of their negotiations with him and Williams, they collected an additional commission of \$150, of which appellant was ignorant. This they were not entitled to do, and any profit thus secretly earned by them must inure to her benefit. There is no evidence showing that Williams was in collusion with the respondents, or that he knew of their concealment of the actual facts from appellant. Although some courts have announced the rule that in cases of this kind the agent loses his right to a commission, we cannot apply any such rule here, as the appellant in her complaint has conceded respondents' right to the stipulated commission on the original sale. Their additional profit, realized from secret negotiations, was the \$150 received from Williams without appellant's knowledge, and we now hold that they must account to appellant for that sum, she being entitled to a directed verdict therefor.

Respondents, as evidence of their good faith, contend that they conducted no negotiations for a sale to Shenkenberg until after their agency for the appellant had been terminated. There is no question, however, but that their original negotiations were with Shenkenberg, and that they would not have entered into any arrangement with Williams had they not relied on such original negotiations with Shenkenberg and the deposit of the \$50 made by him, which they concealed from appellant. They were undoubtedly appellant's agents when dealing with Shenkenberg.

The judgment is reversed, and the cause remanded, with instructions to enter judgment in favor of appellant for \$150, with interest from June 11, 1907, and costs. The appellant will recover her costs in this court.

Rudkin, Ch. J., and Mount, Parker, Dunbar, Fullerton, Chadwick, and Gose, JJ., concur.

Petition for rehearing denied, December 15, 1909.

28 L.R.A.(N.S.)

WASHINGTON SUPREME COURT.

GEORGE W. REESE and Wife, Appts,
v.
SIMON P. WESTFIELD et al., Respts.

(56 Wash. 415, 105 Pac. 837.)

Land contract — forfeiture — return of instalments.

The vendor in a land contract providing for payment in instalments, and reserving the right of forfeiture for default, making time of the essence of the contract, may enforce the forfeiture for default in the last instalment, and retain the payments made, if he is not himself in default with respect to the contract obligations as to abstract of title and delivery of deed.

(December 18, 1909.)

Note. — Tender of deed or abstract of title as condition of enforcing forfeiture for failure of vendee to pay last instalment of purchase money.

REESE v. WESTFIELD makes a distinction between the right of the owner of land, who has contracted to give a deed or abstract on payment of the purchase price, to enforce a forfeiture where the default is made in payment of the last instalment, and where the default is in earlier instalments; and holds that tender of the deed or abstract and payment of the last instalment are dependent and concurrent, that the tender of the deed is as much a part of the contract as the payment of the last instalment, and hence, that the vendor cannot enforce a forfeiture without tender of performance on his part. But in the case of earlier instalments, the giving of the deed is independent of the payment of such earlier instalments, since to compel him to tender a deed before all payments are made would jeopardize his security.

In *Mix v. Beach*, 46 Ill. 311, the owner of land gave an obligation to convey it on payment of a specified sum in two instalments, which obligation contained the following clause: "And it is expressly agreed by and between the parties, that a non-fulfilment on the part of said . . . [vendee] in any part of the aforesaid undertaking shall operate as a complete forfeiture." The first instalment was paid when due, but not the second, nor was any deed tendered, as the vendor had not good title. Notwithstanding the comprehensive language of the forfeiture clause quoted above, it was held in an action by the vendee for specific performance that the vendor was not in a position to avail himself of it. The court said: "As a general rule, there must be mutuality in agreements to enable parties to place each other in default. Before . . . [the vendor] could urge that the holder of his obligation was in default on the last pay-

A PPEAL by plaintiffs from a judgment of the Superior Court for Yakima County in defendants' favor in an action brought to recover possession of certain real property. Affirmed.

The facts are stated in the opinion.

Mr. William B. Bridgman, for appellants:

It is not necessary, in case of final payment not being paid at the time specified, that the vendor offer the vendee a deed and demand said final payment before declaring a forfeiture.

Voight v. Fidelity Invest. Co. 49 Wash. 612, 96 Pac. 162; Hogan v. Kyle, 7 Wash. 595, 38 Am. St. Rep. 910, 35 Pac. 399; Drown v. Ingels, 3 Wash. 424, 28 Pac. 759; Wilson v. Morrell, 5 Wash. 654, 32 Pac. 733; Neis v. O'Brien, 12 Wash. 358, 50 Am. St. Rep. 894, 41 Pac. 59; Witherow v. Witherow, 16 Ohio, 238; Pease v. Baxter, 12 Wash. 567, 41 Pac. 899; Gray v. Blanchard, 8 Pick. 284; Moran & Co. v. Palmer, 36 Wash. 684, 79 Pac. 476; Jennings v. Dexter Horton & Co. 43 Wash. 301, 86 Pac. 576; Pom. Eq. Jur. last ed. ¶ 455; Glock v. Howard & W. Colony Co. 123 Cal. 1, 43

L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713.

Messrs. Stephen E. Chaffee and Roberts & Udell, for respondents:

The vendor must tender a deed, and, in the case at bar, an abstract of title to the property sold to the vendee before he is entitled to receive the payment of the final instalment under the contract, and before he can declare a forfeiture or bring an action to cancel the contract, where time is of the essence of the contract.

Stein v. Waddell, 37 Wash. 634, 80 Pac. 184; Tacoma Water Supply Co. v. Dumermuth, 51 Wash. 609, 99 Pac. 741; Primm v. Wise, 126 Iowa, 528, 102 N. W. 427; Bruggemann v. Converse, 47 Wash. 585, 92 Pac. 429; Frink v. Thomas, 20 Or. 265, 12 L.R.A. 243, 25 Pac. 717; Powell v. Dayton, S. & G. R. Co. 14 Or. 356, 12 Pac. 665; Knott v. Stephens, 5 Or. 235; Gregg v. English, 38 Tex. 139; Johnson v. Jackson, 27 Miss. 498, 61 Am. Dec. 522; 2 Warvelle, Vendors, pp. 849, 880; Leaird v. Smith, 44 N. Y. 618; Crabtree v. Levings, 53 Ill. 526; Fry, Spec. Perf. § 1080; Mudgett v. Clay, 5 Wash. 110, 31 Pac. 424; Thomas v. McCue, 19 Wash. 287, 53 Pac. 161; Peck v. Brighton Co. 69

ment, he should have been able and willing, if required, to comply with his part of the agreement. Had it been an intermediate instalment, it might have presented a different question. . . . The payment of the last instalment and the conveyance of the land were simultaneous and concurrent acts, and neither could demand a performance by the other, unless ready and willing to perform on his part. . . . Had . . . [the vendor] procured a conveyance and tendered a deed, or perhaps only notified . . . [the vendee] of the fact, and the latter had failed to make payment, then he would have been in default. The doctrine of equity is compensation, and not forfeiture."

In Kessler v. Pruitt, 14 Idaho, 175, 93 Pac. 965, under an agreement by which the owner of land was to furnish an abstract of title upon payment of the balance of the purchase price, the court held that, whether the agreement be regarded as a contract of sale or a mere option, the stipulations for the payment of the balance of the purchase price and the furnishing of the abstract were mutual, concurrent, and dependent, and that the purchaser, therefore, could not be put in default until the abstract had been tendered to him, and he had had an opportunity to examine it.

It would seem that there is no difference in principle between the necessity of the vendor tendering a deed before enforcing a forfeiture in case of default in payment of the last instalment, when there are several, and failure to pay the purchase money on time when it is a lump sum. Accordingly it has been held that where the vendor of land executes a bond for title, 28 L.R.A.(N.S.)

conditioned to make title upon payment of the purchase money, and the purchase money is not paid when due, the covenants are mutual and dependent, the payment of the money and the conveyance are to be concurrent acts, and hence the vendor cannot rescind without first tendering a deed. The following is a partial list of cases so holding, given for the light they throw on the main question: Arther v. Pearson, 32 Miss. 131; Cranwell v. Clinton Realty Co. 67 N. J. Eq. 540, 58 Atl. 1030; Leaird v. Smith, 44 N. Y. 618; Knott v. Stephens, 5 Or. 235; Gregg v. English, 38 Tex. 139; Mudgett v. Clay, 5 Wash. 110, 31 Pac. 424; Tacoma Water Supply Co. v. Dumermuth, 51 Wash. 609, 99 Pac. 741 (whether there is a forfeiture clause or not).

If, when the last instalment is past due, other instalments are also unpaid, the vendor cannot forfeit the contract unless a deed is tendered and payment demanded. Peck v. Brighton Co. 69 Ill. 200; Brentnall v. Marshall, 10 Kan. App. 488, 63 Pac. 93.

A purchaser of property to be paid for in instalments, where there is no time fixed for the delivery of the deed, is not entitled to receive his deed until the last payment is made; nor is a purchaser obliged to part with his money before he receives the deed. Gray v. Meek, 199 Ill. 136, 64 N. E. 1020 (see other cases there cited).

In Claude v. Richardson, 127 Iowa, 623, 103 N. W. 991, it was said that when a land contract provides for the payment of the balance of the purchase price upon the execution of a deed and abstract, neither party can put the other in default without a tender.

R. A. E.

Ill. 200; Hines v. Baine, Smedes & M. Ch. 530; Arther v. Pearson, 32 Miss. 131; McCroskey v. Ladd, 96 Cal. 455, 31 Pac. 558; Monson v. Bragdon, 159 Ill. 61, 42 N. E. 383; Watson v. White, 152 Ill. 364, 38 N. E. 902.

Chadwick, J., delivered the opinion of the court:

This appeal involves only one question of law. In November, 1903, plaintiff George W. Reese entered into an agreement in writing, whereby he agreed to sell to defendant Simon P. Westfield certain lands at Sunnyside, in Yakima county. The contract was the usual time contract for the sale of lands, and provided for the payment of the purchase price in instalments; the last payment becoming due May 1, 1907. Defendants Milton and Door have succeeded to the interests of Westfield. A request for an extension of time was asked after the last payment had become due, but was refused. On October 1, 1907, a forfeiture was declared, and this action was begun to recover possession of the property. The contract contained the following clause: "Time is the essence of this contract, and in case of failure of the said party of the second part to make either of the payments or perform any of the covenants on his part, this contract shall be forfeited and determined at the election of the said party of the first part; and the said party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said parties of the first part in full satisfaction and liquidation of all damages by them sustained; and they shall have the right to re-enter and take possession of said land and premises and every part thereof. The parties of the first part hereby agree to give an abstract of title to said lot, continued to the date of delivery of deed to second party." The court made, among others, the following finding: "That the two last payments above mentioned (being intermediate payments) were made subsequent to the time on which they became due, and were accepted by the plaintiffs." This forbearance, coupled with the time elapsing between the 1st of May, 1907, and the 1st day of October, 1907, might possibly bring this case within the rule of Douglas v. Hanbury, 56 Wash. 63, 104 Pac. 1110, but the facts are not before us, and for the sake of security in our judgment of the case, we have deemed it best to meet the main contention upon which appellant relies to defeat the judgment of the court below. The question is whether a forfeiture can be declared as against a purchaser who had met all payments under his con-

tract except the last payment; when the contract provides for the giving of an abstract and delivery of the deed. Appellant seeks to distinguish the case of Stein v. Waddell, 37 Wash. 634, 80 Pac. 184, upon which he says the judgment of the lower court was based, saying: "In the case of Stein v. Waddell, the seller had accepted a portion of that last payment which was in default after default was made, and then a few days later declared the forfeiture." But the decision in that case was not made to depend alone upon the payment of a part of the last instalment. It rested in the stronger equity that the agreement to tender a deed was mutual, concurrent, and dependent upon the payment of the last instalment due on the purchase price. This rule was there said to be firmly established by the authorities. 29 Am. & Eng. Enc. Law, 2d ed. pp. 686, 687. Such contracts are mutual and dependent when it appears that the payment and delivery of the deed are to be made at the same time. 29 Am. & Eng. Enc. Law, 2d ed. p. 689.

It is contended that the broad rule laid down in Stein v. Waddell was explained by the later cases. Voight v. Fidelity Invest. Co. 49 Wash. 612, 96 Pac. 162; Garvey v. Barkley, 56 Wash. 24, 104 Pac. 1108, and Sleeper v. Bragdon, 45 Wash. 562, 88 Pac. 1036. In the first case it was pointed out that there was no obligation to tender a deed until all the payments had been made, and that the last payment was not due until two years after the commencement of the action to forfeit the contract. The point here involved was not before the court. In the second case the purchaser had wholly failed to perform the conditions of his contract, and forfeiture had been promptly asserted. In Sleeper v. Bragdon the purchaser had made default and obtained an extension under an understanding that, if payment was not made within the time given, the forfeiture would be insisted upon. She was notified in advance that the vendor had elected to forfeit the contract, and she knew that, by her own act in failing to meet the extended payment, the cancelation of the contract was completed, and that she was not entitled to any further consideration or notice. Notwithstanding this, she sought to tender the amount due, and demanded performance. The court held, and properly, considering the facts of the particular case, that her rights had ceased. The cases really in line with the case of Stein v. Waddell are Bruggemann v. Converse, 47 Wash. 581, 92 Pac. 429, and Tacoma Water Supply Co. v. Dumermuth, 51 Wash. 609, 99 Pac. 741. In the first case it was said: "The ap-

pellants, not having complied with the requirements of the contract in tendering a deed which was, by the terms of the agreement, made a condition precedent to receiving the purchase price, will not be heard to complain that the other party to the contract has violated its conditions." In the latter case, after citing *Stein v. Waddell* and other cases, the court said: "Under the above authorities, the respondents could only claim a forfeiture and put the appellant in default by tendering a deed and demanding payment of the purchase price, and this they failed to do." If the case of *Stein v. Waddell* and the succeeding cases to which we have referred have been hitherto misunderstood, we desire now, for the sake of certainty, to lay down the rule that where land is sold under a time contract calling for payment by instalments, and every instalment has been paid except the last one, the vendor may, if he act with reasonable promptness, declare a forfeiture, unless by the terms of the contract he has agreed to perform some act necessary to the complete performance of his agreement; as, for instance, the giving of an abstract or the tender of a deed, in which event his power to forfeit depends upon his offer and ability to perform; for, as this court has said, his duty to tender performance depends upon, and is concurrent with, the duty of the vendee to meet the final payment. While we admit that the conditions providing for forfeiture in contracts of this character are usually held to be for the benefit of the vendor, and we have been hitherto, and are now, willing to give the vendor the full benefit of all the conditions of his contract, and say that all payments prior to the last payment are conditions precedent, we have no sympathy with the holding of some courts to the effect that the whole duty is upon the purchaser, and, unless he tenders the last payment, the vendor is entirely released from any obligation to convey or tender conveyance. The covenants are independent so long as no duty is imposed on the vendor, but if any covenant puts both parties to action and concurs in time, it must be held to be dependent and concurrent. It seems that the logical sequence of the rule allowing a forfeiture for intermediate payments without tender of performance is that the last payment should not be forthcoming until the abstract and deed are tendered, when it is so provided in the contract; for it is primary law that a failure of title will relieve the vendee. *Warvelle, Vendors*, 813.

There is nothing in the assertion that any other rule will interfere with, or destroy, or invite a breach of, the contract as 28 L.R.A.(N.S.)

the parties have made it. What we have undertaken to show is that a tender of performance, when stipulated in the agreement, as well as a tender of payment, is a part of the contract. The two engagements make the contract. The one is dependent on the other.

The judgment of the lower court is affirmed.

Rudkin, Ch. J., and Fullerton, Morris, and Gose, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

McGRAW OIL & GAS COMPANY et al.
v.

R. W. KENNEDY et al., Appts.

(65 W. Va. 595, 64 S. E. 1027.)

Gas — lease — forfeiture.

1. A lease for oil and gas is for five years, "and as long thereafter as oil or gas, or either of them, is produced by the party of the second part." The lessor cannot forfeit it because he thinks the gas not in paying quantity; the lessee claiming that it is, and willing to pay the sum stipulated for the well. It is for the lessee to say whether the gas is in paying quantity, acting in good faith.

Same — failure to market.

2. When a producing gas well is developed, but its product not marketed, that fact does not authorize the lessor to forfeit the lease; the lessee being willing to pay the agreed sum for a gas well.

Same — failure to drill additional wells.

3. An oil and gas lease cannot be canceled in equity only for failure to drill additional wells.

Same — estate created.

4. Under the lease in this case, a well producing gas is drilled, and the lessee elects to consider it in paying quantity. An estate has thus vested in him.

(April 27, 1909.)

Headnotes by BRANNON, J.

Note. — Is lessor entitled to declare forfeiture of oil and gas lease for failure of the lessee to market product after completing well.

As to the effect of a provision for mining royalties or an annual rental on right to forfeit mining lease for failure to prosecute work, see note to *Chauvenet v. Person*, 11 L.R.A.(N.S.) 417. See also note to *Evans v. Consumers' Gas Trust Co.* 31 L.R.A. 673, as to forfeiture of oil and gas lease.

There is a distinction between the rights

A PPEAL by R. W. Kennedy, the Crystal Ice Company, and the South Penn Oil Company, from a decree of the Circuit Court for Taylor County in consolidated cross suits to cancel two leases of different date of the same oil and gas lands, each of which was alleged to constitute a cloud on title as to the other; R. W. Kennedy and the Crystal Ice Company complaining of so much of the decree as dismissed their bill filed to cancel the lease of later date, and the South Penn Oil Company complaining of so much as sustained a demurrer to its cross bill filed to obtain the same relief. Reversed.

The facts are stated in the opinion.

Messrs. B. F. Bailey and Davis & Davis, for appellants Kennedy and Crystal Ice Company:

The discovery of gas in paying quantities, under the original lease, converted the lessee's estate from a mere right to search, into a vested estate in the oil and gas underlying the land, with the right in them and

their assigns to extract the same at their pleasure.

Crawford v. Ritchey, 43 W. Va. 257, 27 S. E. 220; Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978; Ammons v. South Penn Oil Co. 47 W. Va. 610, 35 S. E. 1004; South Penn Oil Co. v. Edgell, 48 W. Va. 348, 86 Am. St. Rep. 43, 37 S. E. 596; Harness v. Eastern Oil Co. 49 W. Va. 232, 38 S. E. 662; Lawson v. Kirchner, 50 W. Va. 344, 40 S. E. 344; Core v. New York Petroleum Co. 52 W. Va. 276, 43 S. E. 128; Urpman v. Lowther Oil Co. 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433; Ammons v. Toothman, 59 W. Va. 165, 115 Am. St. Rep. 908, 53 S. E. 13; Headley v. Hoopen-garner, 60 W. Va. 626, 55 S. E. 744; Kilcoyne v. Southern Oil Co. 61 W. Va. 538, 56 S. E. 888; Lowther Oil Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101; Bryan, Petroleum & Gas, 174; Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732; Colgan v. Forest Oil Co. 194 Pa. 234, 75 Am. St. Rep. 695, 45 Atl. 119; Parish Fork Oil Co. v. Bridgewater

of parties under an ordinary contract or lease of land to be searched and developed for oil and gas after either or both of these minerals have been found and produced, and such rights prior to development and production. In the latter case the right of the licensee or lessee is inchoate, and no estate in the land is vested in him, while in the former case the finding and production of either of these minerals gives the lessor a vested leasehold estate in the leased premises. This distinction is of importance as affecting the right of the lessor to the aid of equity to forfeit or cancel an oil or gas lease for breach of condition express or implied. Where the right is inchoate and no leasehold estate is vested, courts of equity are inclined to enforce the forfeiture of a contract or lease of this character for the failure of the lessee or licensee to comply substantially with the express conditions thereof, and in many jurisdictions also for a failure to comply substantially with conditions implied from the nature of the lease, the character of the mineral, and other circumstances. This line of cases has no important bearing upon the right of the lessor in such a lease to enforce forfeiture of the same for breach of condition, express or implied, after discovery and production of oil or gas by the lessee. Under such circumstances the right of the lessor to forfeit the lease for breach of any of its conditions, unless such right is expressly given, is generally denied, at least, where there is an adequate remedy by action for damages for the breach.

This note does not deal with the general question as to forfeiture, but it is limited to the right of the lessor to enforce a forfeiture of such a lease for failure of the lessee to market the product after discovery and production. There is a distinction as to the right of the lessor to have the

product marketed where gas has been discovered rather than oil. Undoubtedly as to either of these minerals it is competent for the lessee to contract expressly that the lease shall be forfeited for failure to market the product, but where the lease does not contain an express provision authorizing the forfeiture for breach of an express or implied agreement by the lessee to market the product, a distinction exists between the rights of the parties where forfeiture is sought for failure to market gas and for failure to market oil. In the absence of an express forfeiture clause for breach of agreement to market the product, generally no implied agreement authorizing a forfeiture for the failure to market either of these minerals arises where the premises are located in what is termed "wild cat territory," where there are no pipe lines and no means to market the product. As to gas, however, even where there are pipe lines and a market for the product, ability to market depends considerably upon the volume and pressure, and though gas may exist in large quantities, yet if, by reason of over-development or for any other cause, the flow is not sufficiently strong to insure its transportation, the failure to market would not be a ground for forfeiture. In this connection it should be remembered that a number of gas wells are usually connected with the same pipe line for transportation to the consumer, and no well can be connected with the pipe if the pressure is below the average.

As remarked by the court in Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801: "It is only to the end that the oil and gas shall be extracted with benefit or profit to both that reasonable diligence is required. Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as

Gas Co. 51 W. Va. 583, 50 L.R.A. 566, 42 S. E. 655.

Whether the gas was in paying quantities or not is a question left to the judgment of the lessee, and the quantity discovered is not material in deciding whether any estate vested under the lease.

Urpman v. Lowther Oil Co. 53 W. Va. 505, 97 Am. St. Rep. 1027, 44 S. E. 433.

The remedy of the lessor when a sufficient number of wells are not drilled is not a forfeiture of the lease, but an action for damages, unless the contract itself otherwise clearly specifies.

Ammons v. South Penn Oil Co.; Harness v. Eastern Oil Co.; Core v. New York Petroleum Co.; and Urpman v. Lowther Oil Co.,—supra.

There can be no abandonment of a lease without both the intention to abandon and an actual relinquishment of the leased premises.

Urpman v. Lowther Oil Co. 53 W. Va. 500, 97 Am. St. Rep. 1027, 44 S. E. 433.

the quantity of oil and gas capable of being produced from the premises, as indicated by prior exploration and development, the local market or demand therefor or the means of transporting them to market, the extent and results of the operations, if any, on adjacent lands, the character of the natural reservoir,—whether such as to permit the drainage of a large area by each well,—and the usages of the business. Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required. A plain and substantial disregard of this requirement constitutes a breach of the covenant for the exercise of reasonable diligence."

In Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46, it was held not to be a ground for forfeiture that a lessee of an oil and gas lease did not continue to develop land and market oil or gas therefrom, where the land was not located in the vicinity of a pipe line into which oil or gas might be delivered.

But where the only rental or benefit accruing to lessor from the lease is a royalty based upon the quantity of oil or gas produced and marketed, inability to market this product has been held not to be an excuse where abandonment by the lessee for failure to operate and market is claimed.

An interesting case in which it is so held is Urpman v. Lowther Oil Co. 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433. There the lessees under an oil and gas lease abandoned the same after completing two oil wells, which they only partially operated, left the oil in a tank to be marketed, so that it went to waste, and allowed the derrick and other parts of the rigging to decay. The court said: "It is argued that there were no pipe lines nearer than 10 miles to convey oil, and 28 L.R.A.(N.S.)

The mere failure to market off the premises the gas from the well in question constitutes no evidence whatever of its abandonment.

Double v. Union Heat & Light Co. 172 Pa. 388, 33 Atl. 694; Ahrens v. Chartiers Valley Gas Co. 188 Pa. 249, 41 Atl. 739.

Messrs. A. B. Fleming, C. W. Powell, Kemble White, and G. M. Alexander for appellant South Penn Oil Company.

Messrs. Dent & Dent for appellees.

Brannon, J., delivered the opinion of the court:

Hugh Evans, on September 20, 1899, leased a tract of 528 acres of land in Taylor county to U. S. Ditman and J. C. Gawthrop for production of oil and gas. The lease provided that Evans have free of charge gas for use in his residence; the lease to continue for the term of five years "and so long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, heirs, executors, ad-

that the company made fruitless efforts to get the Eureka Pipe Line Company to extend a line to that section. This would put in the lease a condition for excuse not in it. The first lease gave Metz not a cent of return except a share of oil. His motive in making it was therefore only development. It is not reasonable, but unjust, that an oil company should thus bore two wells, discontinue work, remove implements, do nothing for a year, give plain sign of no intent to go on, and yet hold Metz's land tied up. How long would it remain bound up so as to prevent him from contracting with others to develop? True, this may not alone show intent to abandon; but it tends to show that we ought not demand any more evidence than is manifest in the case to establish abandonment. If, as is claimed now for the purpose of this case, oil in paying quantity was found, where did the company get the right to indefinitely suspend, and not pay Metz his share of oil? Not from the lease. His right was to have the well worked or surrendered."

In Indiana the rule has been asserted that while forfeitures are usually against conscience and without equity, and courts of chancery will ordinarily refuse to relieve in such cases, yet an exception to the rule exists where it is against equity to permit a party longer to assert his title.

In Gadbury v. Ohio, & I. Consol. Natural & Illuminating Gas Co. 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 259, where the grantee of oil and gas rights who by the terms of the contract was required to pay \$100 each year for the product of each gas well while the same was being used off the premises, after completing a well and discovering gas in paying quantities, closed the well and declined to market the gas, the court, after holding that there was an implied condition

ministrators, or assigns." The lease deed provided that the lessee deliver into pipe line to the credit of Evans one eighth of oil produced and pay \$200 yearly for "each gas well the product from which is marketed and used off the premises." The lease provided that the lessees drill a well within twelve months or pay thereafter \$132 quarterly until one should be drilled. No well having been drilled within twelve months, the sum of \$132 was paid Evans, extending the lease to December 20, 1900. Before the 20th of December the Southern Oil Company, under some agreement with Ditman and Gawthrop, drilled a well and produced gas in December, 1900. The casing was drawn from the well, and the well prepared for use by the insertion of a wall packer and 1,400 feet of tubing, and a cap at the top, with a gate through which the gas could be removed. This was done to

save all gas. Tests of the gas produced in the well were made at various times; the tests varying in quantity from 331,700 to 1,140,500 cubic feet. No gas from the well was marketed; but it was closed so as to save the gas from waste. The Southern Oil Company sold its interest in the well to the South Penn Oil Company, and then Ditman and Gawthrop assigned the lease to the South Penn Oil Company. Later the South Penn Company assigned the estate in the gas to the Hope Natural Gas Company, reserving the estate in the oil. Later the Hope Natural Gas Company assigned the gas right to R. W. Kennedy to hold in trust for the Crystal Ice Company, a corporation engaged in manufacturing ice in the city of Grafton. The well was bought to give fuel to this and other plants, and a franchise from Taylor county and Grafton to lay pipes from the well to the plant was obtained by the ice company. This was

subsequent to develop the property, further held that it was a proper case for a court of equity to enforce a forfeiture by a decree quieting the owner's title, in view of the facts that the gas might be withdrawn through wells on other land, that specific performance could not be enforced, that the completion of the well cut off liquidated damages expressly stipulated for in the event of noncompletion, and that there was no measure of damages available in an action at law, since the damages, while substantial, would be speculative.

And in *Brewster v. Lanyon Zinc Co.* supra, it was said that even if there was no express engagement upon the part of the lessee to operate the well and market the product if oil or gas were found in paying quantities, yet an intention so to do would be implied from an engagement to pay royalties to be gauged according to the production of oil or gas; the rule being that whatever is necessary to the accomplishment of that which is expressly contracted to be done is part and parcel of the contract, though not specified. This implied condition being necessary to give effect to the express terms of the lease, it would come within the purview of a forfeiture provision of the lease authorizing its forfeiture by the lessor for the breach by the lessee of any of the mentioned conditions. The court said: "The conclusion is that compliance with the covenant to continue with reasonable diligence a work of exploration, development, and production after the expiration of the five-year period if during that time oil and gas, one or both, be found in paying quantities, is by the terms employed made a condition the breach of which entitles the lessor to avoid the lease."

But it has been held not to be a ground for forfeiture for a lessee to hold onto his lease and fail to so operate the premises as to produce reasonable results, where the lease contained an express provision for

forfeiture for breach of certain conditions, which did not include a right to forfeit for breach of an implied condition reasonably to operate the premises. *Harri v. Ohio Oil Co.* 57 Ohio St. 118, 48 N. E. 502.

A gas lease containing a provision that it shall remain in force so long as the lessee diligently develops the land and markets the product becomes inoperative and of no effect where the lessee, after having drilled and developed a gas well containing sufficient gas to market, does not market same, although he had an opportunity so to do, also fails to further develop the premises, but drills and completes gas wells upon adjoining premises and markets the product therefrom. *Buffalo Valley Oil & Gas Co. v. Jones*, 75 Kan. 18, 88 Pac. 537.

Where, however, an oil and gas lease is "for and during the term of two years, or as much longer as oil and gas are found in paying quantities or the hereinafter described rental is paid," the lessor is not entitled to terminate the lease because gas or oil have not been found in paying quantities, where the lessee has completed a well containing a large volume of gas, which, however, he does not market, where he complies with the lease by paying the agreed rental. *Summerville v. Apollo Gas Co.* 207 Pa. 334, 56 Atl. 876. The court said: "It may be that for some time the lessee was not able to find a purchaser for the gas, but that was not the affair of the lessors; they were not interested in the proceeds of the sale of the gas. Their rights under the agreement extended only to the receipt of a stipulated annual rental for each well, and the free use of gas for domestic purposes. Beyond this, the question of whether or not the quantity of gas was profitable, was for the decision of the lessee. It may be that the final disposition of the product of the well was such as to amply remunerate it for the delay in finding a market."

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under the authority of the directors of the ice company, and the purchase money was paid out of its treasury. The well was in "wild cat territory." There was no pipe line near it. When the well was drilled, Evans, the lessor, piped gas from it to his residence, and has ever since used the gas for his domestic purposes. He received \$132 for failure to drill the first year, and after the well was drilled he received seven payments of \$200 each, the annual payments stipulated for each gas well. He was tendered the \$200 for the year ending December 20, 1907, but refused to receive it. On March 20, 1907, Evans leased the same tract to the McGraw Oil & Gas Company. The latter company had full notice of the first lease, when it leased, and notice was served on it by Kennedy of his claim of title, and warning the McGraw Oil & Gas Company and John T. McGraw not to go on the premises, and warning them that, if they should produce oil or gas on the land, Kennedy would claim for the same. Notwithstanding this notice, the McGraw Company entered and drilled a well producing gas. The McGraw Company brought a chancery suit against Kennedy and the Crystal Ice Company to declare the lease made by Evans to Ditman and Gawthrop forfeited and cancel it as a cloud upon its title under the second lease. Later Kennedy and the Crystal Ice Company brought a chancery suit against the McGraw Oil & Gas Company, the South Penn Company, and Evans, setting up the first lease,—that from Evans to Ditman and Gawthrop,—claiming under it title paramount to that conferred by the second lease,—that from Evans to the McGraw Oil & Gas Company,—and to cancel the latter lease as a cloud upon the title conferred by the first lease, and to make the McGraw Company responsible for gas taken from the premises. The South Penn Company filed in the case of the Crystal Ice Company an answer, containing also cross bill matter against the McGraw Company, Evans, and others, seeking to have declared void as to the first lease the lease from Evans to the McGraw Company. The cases were heard together, and a decree was pronounced, sustaining a demurrer to the cross bill of the South Penn Company, and dismissing the bill filed by Kennedy and the Crystal Ice Company, and canceling the right of Kennedy and the Crystal Ice Company, and enjoining them from asserting any right against the McGraw Company, and from doing anything to interfere with or prevent the McGraw Company from developing and using the land for gas. The Crystal Ice Company, Kennedy, and the South Penn Oil Company appeal.

It cannot be said that the first lease is
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forfeited by any express forfeiture clause found in it. The theory of the McGraw Company is that such a lease confers no vested estate in oil or gas in the earth, but at most confers only a right to search for oil and gas, and that only when oil or gas shall be found in paying quantity and marketed does any estate vest in the lessee, and that no estate ever vested under the first lease, because the gas found was not in paying quantity. This lease does not limit its term by requiring that oil or gas shall be found in paying quantity, as leases usually do. It says that the lease shall endure "five years from this date and as long thereafter as oil and gas, or either of them, is produced therefrom by the party of the second part." So this lease contains nothing in terms allowing the lessor to end it because oil or gas is not found in paying quantity; and, if there were such provision, I should regard it as made in the interest of the lessee to protect him from payment of the annual sum for a gas well, if insufficient in quantity, and not as intended to give the lessor right to terminate the lease against the lessee's will, he treating the quantity as sufficient and electing to pay. What right has Evans to say that no estate vested by reason of insufficiency of gas, when the lease makes no such provision, and the lessee chooses to regard it as sufficient and pay as if it were? And again it has been held, even when such a clause is in the lease, that it is with the lessee to say whether the product is in paying quantity. *Urpman v. Lowther Oil Co.* 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433; *Thornton, Petroleum & Gas*, § 119. So held in *Summerville v. Apollo Gas Co.* 207 Pa. 334, 56 Atl. 876, and by Judge Goff in *Kellar v. Craig*, 61 C. C. A. 366, 126 Fed. 630; *Young v. Forest Oil Co.* 194 Pa. 243, 45 Atl. 121, is notable for this construction of such a clause. It says that the operator has election to say whether it will pay. It is useless to argue that a lease does not vest right to oil and gas in place, and therefore no right vests of any character, if the quantity is too small to pay. No one says that the lease carries title to these minerals, even after a paying well has revealed them; but an estate, a right of value then vests, that is, right to retain possession of the land for operation and to go on to sever the minerals from the land and convert them into personalty. When this well was found, the lessee had right, if he chose, to keep possession and pay the annual rental. He had a vested right. Evans was only entitled to the rental. Title vested. He gets the same pay as if the well produced a larger quantity. There is really no evidence that it was not a paying well. The cross bill

alleges that it was, and this is to be taken as true on demurrer. Evans for seven years so treated it, for he received seven annuals of \$200, knowing that the gas was not being marketed, knowing the status of the well. Though the gas was not marketed, the well was being used to comply with the lessee's covenant to furnish Evans gas for his use. The law is that "the right to declare a forfeiture must be distinctly reserved, that the proof of the happening of the event on which the right is to be exercised must be clear, that the party entitled to do so must exercise his right promptly." *Thompson v. Christie*, 138 Pa. 230, 11 L.R.A. 236, 20 Atl. 934. Will equity allow Evans to wait and wait, drawing large sums of money yearly, and then at the eleventh hour suddenly forfeit? Is he not estopped? Such acceptance of money by Evans, knowing all the facts, is forcible against him as an estoppel in a court of equity. *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151. As to the suit by the McGraw Company, it is virtually, really, a suit in equity to enforce a forfeiture. Equity will not take affirmative, active steps to enforce a forfeiture. *Pheasant v. Hanna*, 63 W. Va. 613, 60 S. E. 618, where the subject is discussed by Judge Poffenbarger. So held in *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762. That clause in the lease by which the lessees were to pay \$200 yearly for each gas well "the product from which is marketed and used off the premises" was designed to protect the lessee from demand unless he marketed the gas. It is not a stipulation to market or give up. That is for the lessee's protection, and that has been waived and royalty paid. Moreover, there is evidence going to show that the gas was, in fact, in paying quantity.

Title having vested, the lease contains no clause that forfeits it. It is argued not definitely, but virtually, that failure to drill other wells forfeits. We have frequently held that, where there is no express provision requiring additional wells, but only an implied one, this will not forfeit. *Core v. New York Petroleum Co.* 52 W. Va. 276, 43 S. E. 128; *Kellar v. Craig*, supra. I have never been reconciled to the doctrine that for failure to drill additional wells the lessor must sue at law for damages, and equity will not cancel unless for draining from nearby territory, and thus exhaust oil in the leasehold involved. I have asked: How many actions must the landlord bring? How can damages be measured? How can we see into the depth of the earth? But it has been so held. The reason is that equity will not, as a rule, enforce a forfeiture of an estate. It will not especially insert such a clause when the parties have not inserted it, especially when they did

insert forfeiture for failure to drill or pay commutation, but did not insert forfeiture for failure to drill additional wells. As to duty to drill additional wells for gas, the Pennsylvania supreme court has held, practically, that it does not exist in gas as in case of oil, because of the difference. A small oil well can be used; a gas well of slight pressure will not enter the gas line. *McKnight v. Manufacturers' Natural Gas Co.* 146 Pa. 185, 28 Am. St. Rep. 790, 23 Atl. 164. That was for both oil and gas, but development seemed to show the section to be gas territory, as in this case; but we express no opinion as to this. We only say there can be no forfeiture for mere failure to drill more wells.

It is argued that failure to market the gas forfeits the lease. So it was claimed in *Summerville v. Apollo Gas Co.* 207 Pa. 334, 56 Atl. 876, as to a lease for two years "and as much longer as oil and gas are found in paying quantities," and the court said that the lessor had no right to forfeit at the end of two years because during that time no oil or gas had been marketed. "It may be that for some time the lessee was not able to find a purchaser for the gas, but that was not the affair of the lessors. They were not interested in the proceeds of the sale of the gas. Their rights under the agreement extended only to the receipt of a stipulated annual rental for each well, and the free use of gas for domestic purposes. Beyond this the question of whether or not the quantity of gas was profitable was for the decision of the lessee. It may be that the final disposition of the product of the well was such as to amply remunerate it for the delay in finding a market." There is no evidence that the well was not in paying volume.

Is it claimed that the well and lease have been abandoned? As said in *Urpman v. Lowther Oil Co.* 53 W. Va. 506, 97 Am. St. Rep. 1027, 44 S. E. 434; "The loss of valuable property by mere abandonment is not easily shown or readily held by the courts." To constitute abandonment by the lessee of a lease for oil, there must be both an intention to abandon, and an actual relinquishment of the leased premises. *Sult v. A. Hochstetter Oil Co.* 63 W. Va. 317, 61 S. E. 307, says the tenant must quit and the landlord take possession to work abandonment. Abandonment is not only not established, but plainly negatived, in this case. The lessees paid, and Evans received, for seven years, the rental money for the well. The lessees tendered for the year 1907. The leasehold was assessed with taxes to Kennedy. The lessee put in the well 1,500 feet of tubing, wall packer, and casing head. The lease was at different times conveyed

from one to another as an existing lease. The Grafton Ice Company in December, 1904, paid \$1,000 for the lease, and made preparation to pipe the gas from the well to Grafton to its ice manufactory. They have cared for the well, blown and tested it, and never been out of possession; nor has Evans ever tried to expel that company from his premises. He says he never hindered it from going on the premises to attend to the well, and that "they always had that right."

Therefore we reverse the decree, and dismiss the bill filed by the McGraw Company, and we decree that the lease in the record specified, dated the 20th day of March, 1907, from Hugh Evans and wife to the McGraw Oil & Gas Company, be canceled, annulled, and set aside as to the rights of the Crystal Ice Company, Robert M. Kennedy, the South Penn Oil Company, and all other parties having rights derived under and by virtue of the lease in the record specified, dated the 20th day of September, 1899, made by Hugh Evans and wife to U. S. Ditman and J. C. Gawthrop; and this cause is remanded to the Circuit Court of Taylor County for further proceedings.

Petition for rehearing denied June 12, 1909.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

v.

WILLIAM GIBSON, Plff. in Err.

(— W. Va. —, 68 S. E. 295.)

Indictment — cutting and wounding — specification of instrument.

1. An indictment for malicious cutting and wounding, with intent to maim, disfigure, and kill, need not specify the instrument with which the injury was inflicted.

Criminal law — "wound" — what constitutes — weapon.

2. To constitute a "wound" within the meaning of § 9, chap. 144, Code 1906, an injury must have been inflicted with a weapon other than any of those with which the human body is provided by nature, and must include a complete parting or solution of the external or internal skin.

Evidence — indictment — assault with intent to kill — malicious cutting and wounding — proof.

3. Though said statute makes it a felony for a person maliciously to cause another bodily injury by any means, with intent to maim, disfigure, or kill him, an indictment charging only malicious cutting and wounding with such intent is not broad

enough to let in proof of such injury inflicted otherwise than by cutting or wounding.

Indictment — assault with intent to kill — means of injury.

4. An indictment for maliciously or unlawfully causing bodily injury otherwise than by shooting, stabbing, cutting, or wounding, should specify the means by which the injury was caused.

Trial — criminal prosecution — presence to accused — presumptions.

5. The presumption of the continuance of a fact or state of things shown to exist applies to a record showing the presence of a prisoner in court at the commencement of each day's proceedings in the trial.

Appeal — admission of hearsay evidence — harmless error.

6. Admission of hearsay evidence without objection and exception affords no ground for complaint in the appellate court.

Same — exclusion of proper testimony — subsequent admission.

7. Error in sustaining an objection to a

Note. — Internal hemorrhage as evidence of statutory wounding.

There is but little authority upon this question. The decision in the foregoing case is supported by *R. v. Jones*, 3 Cox, C. C. 441, where it was held that evidence of a violent kick inflicted upon the body of a woman, followed by a flow of blood mingled with urine, would not sustain an indictment charging "wounding," where there was no evidence as to the precise part or parts of the body from which the blood came.

As is stated in *STATE v. GIBSON*, the rule is that, in criminal cases, there can be no statutory "wounding" unless the skin is broken. *Moriarty v. Brooks*, 6 Car. & P. 684; *R. v. Wood*, 4 Car. & P. 381; *State v. Leonard*, 22 Mo. 450; *State v. Nieuhaus*, 217 Mo. 332, 117 S. W. 73. A wound is any injury breaking the skin. *Shaddock v. Alpine Pl. Road Co.* 79 Mich. 7, 44 N. W. 158. And a breaking of the cuticle or outer skin only is not a wounding. *Com. v. Gallagher*, 6 Met. 565; *R. v. M'Loughlin*, 8 Car. & P. 635.

But it seems that it is not necessary that the external skin be broken. Thus, in *R. v. Waltham*, 3 Cox, C. C. 442, it was held that a violent kick in the private parts of a man, causing the internal membranous lining of the urethra to break and bleed, was a wounding, although the external skin was not broken. And in *R. v. Smith*, 8 Car. & P. 173, the breaking of the internal skin of the mouth was held to be a wounding.

The difficulty in both *STATE v. GIBSON* and *R. v. Jones*, supra, was, apparently, not that evidence of internal bleeding will not satisfy a charge of wounding if it results from the assault, but, rather, there was no proof that the internal bleeding was the result of the assault. It might have resulted from some other cause.

proper question is cured by admitting an answer to another question covering the same subject-matter.

(May 17, 1910.)

ERROR to the Circuit Court for Pocahontas County to review a judgment convicting defendant of unlawfully wounding. Reversed.

The facts are stated in the opinion.

Messrs. N. C. McNeill and Price, Osen-ton, & McPeak, for plaintiff in error:

A wound is an injury to the person by which the skin is broken or cut.

30 Am. & Eng. Enc. Law, p. 1296; Com. v. Gallagher, 6 Met. 568; State v. Leonard, 22 Mo. 450.

Messrs. William G. Conley, Attorney General, and D. E. Matthews for the State.

Poffenbarger, J., delivered the opinion of the court:

Upon an indictment for feloniously and maliciously wounding one Cleveland Slavin, the plaintiff in error, William Gibson, was convicted of the milder offense of unlawful wounding, and sentenced to confinement in the penitentiary for a period of five years. On the writ of error allowed him, he makes a number of assignments of error.

Gibson and several others were employed in a mill at Dunlevie, West Virginia. Practical joking was a custom among these men. Slavin, without the knowledge of Gibson, put oil on the handle of the latter's oil can, so that, in picking it up, his hand became greasy. He also oiled an iron bar used by Gibson. Having ascertained from the other men who had played the prank on him, Gibson began to throw oil on Slavin's back, and, when he turned around, threw it in his face. Thereupon Slavin threw a stick at Gibson, who responded with another, which broke in two. Slavin returned a piece of this stick. Then Gibson threw an iron bar at him, which struck him on the right side of the back over the kidney, injuring him to such an extent that he was confined to his bed for two weeks or more, and his bladder had to be relieved, by artificial means, of the urine, which, when extracted, was found to be bloody.

The sufficiency of the indictment is challenged because it omits designation of the instrument with which the wound was inflicted. This assignment of error is not well taken. The indictment need not set forth or describe the instrument. Crookham v. State, 5 W. Va. 510; Canada v. Com. 22 Gratt. 899; Jackson v. Com. 90 Va. 107, 30 S. E. 452; Erle's Case, 2 Lewin, C. C. 133; State v. Ladd, 2 Swan, 226.

As the evidence fails to show any solu-

tion or breaking of the skin of the prosecuting witness, lack of an essential element of the offense charged in the indictment is asserted, under the technical rule that there can be no wound, within the meaning of the maiming statute, without a solution or fracture of the skin. This position seems to be well sustained by authority. There must be a complete breaking of the skin, external or internal. Our statute (§ 9, chap. 144, Code 1906), in so far as it uses the terms "stab, cut or wound," is the same as the English statute of 9 Geo. IV., and the term "wound" in that connection has been limited in its meaning to the extent above stated. R. v. Wood, 4 Car. & P. 381. In order to inflict a wound within the meaning of that statute, it was necessary to use an instrument of some sort, wherefore it was not effected by biting off a finger, nose, or ear, or causing any other injury with the teeth or hands. R. v. Jennings, 2 Lewin, C. C. 130; Elmsly's Case, 2 Lewin, C. C. 126; R. v. Stevens, 1 Moody, C. C. 409; R. v. Harris, 7 Car. & P. 446. But the instrument need not be a sharp or pointed one. Anything with which the skin is broken is sufficient, though blunt, provided it is a weapon other than those with which the human body is naturally provided. R. v. Smith, 8 Car. & P. 173; R. v. Withers, 1 Moody, C. C. 294; R. v. Hughes, 2 Car. & P. 420; R. v. Sheard, 2 Moody, C. C. 13, 7 Car. & P. 846; R. v. Payne, 4 Car. & P. 558; R. v. Briggs, 1 Moody, C. C. 318. But a fluid working injury not by the force of its contact, but only by its effect when applied to the body, was not regarded as a weapon, wherefore a wound inflicted by throwing oil of vitriol in the face was not within the statute. R. v. Murrow, 1 Moody, C. C. 456; Henshall's Case, 2 Lewin C. C. 135. For these principles, see the following additional authority: 1 Russell, Crimes, 3d Eng. ed. 731; Bishop Statutory Crimes, 314; State v. Leonard, 22 Mo. 449, 450; Com. v. Gallagher, 6 Met. 565, 568.

Our statute has been broadened somewhat by the use of the term, "or by any means cause him bodily injury with intent," etc. Under a proper indictment, any sort of bodily injury, inflicted by any means, with intent to maim, disfigure, or kill, is an offense under this statute, punishable as a malicious or unlawful wounding; but it is not a technical wounding, and an indictment merely for cutting and wounding does not cover it. This addition to the statute does not alter the meaning of its original terms. It simply introduces a new offense, made up of new elements. The indictment in this case charges that the prisoner cut and wounded the prosecuting witness, with the

intent to maim, disfigure, and kill, thereby causing him great bodily injury. There is no averment of any bodily injury caused otherwise than by cutting and wounding. Under it, therefore, no other sort of injury can be proved. The indictment gives no notice of intent to charge any other malicious or unlawful act.

Admitting lack of proof of any fracture of the external skin, the attorney general is forced to the contention that the presence of blood in the urine justifies an inference of fracture of the covering or skin of the kidney, there being some authority for the position that the solution of an inner lining of any portion of the body constitutes a wound. In *R. v. Smith*, supra, it was held that a blow on the face with a hammer, breaking the lower jaw and parting the internal skin, was sufficient. Two cases, *R. v. Waltham*, 3 Cox, C. C. 442, and *R. v. Jones*, 3 Cox, C. C. 441, are cited, in *Bishop on Statutory Crimes*, § 314, as holding that the parting of the membrane lining of the urethra constitutes an offense; but these two reports are not in our library, for which reason we are unable to see what the evidence was. The fracture may have been shown by positive and direct evidence. It was susceptible of proof in that way in the case of the broken jaw, and may have been in the other two cases. Here we have nothing but a mere uncertain inference, arising from the presence of blood in the urine. We think this is too remote and uncertain to sustain a verdict.

The next important assignment of error is the omission from the record of any plea and joinder of issue. After the writ of error was allowed by this court, an attempt was made to cure this by the entry of a *nunc pro tunc* order, showing that, before the jury was impaneled and sworn, the defendant had entered his plea of not guilty, and placing the same upon the record as of the 7th day of October, 1909, the date of the trial. Upon what evidence the entry of such plea before the trial was ascertained, the record does not show. The defendant objected to the entry of the order, but did not take any bill of exceptions showing the character of evidence upon which it was made, nor in any way place such evidence upon the record. Hence the action of the court, in entering the order, does not seem to have been objected to on account of the insufficiency of the evidence. The court having had jurisdiction of the parties and the subject-matter, there is a presumption in favor of the correctness of the judgment. *McClure-Mabie Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. 921; *Griffith v. Corrothers*, 42 W. Va. 59, 24 S. E. 569; *Reed v. Nixon*, 36 W. Va. 681, 15 S. E. 416; *Rams-*
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berg v. Erb, 16 W. Va. 787; *Harris v. Lewis*, 5 W. Va. 575. For aught that appears in the record here, there may have been a formal plea of not guilty in the file of papers or a minute of its entry upon the clerk's docket. The only inquiry, therefore, is whether the court had power, after the end of the term at which the judgment was rendered and after the allowance of a writ of error by this court, to enter such an order. It was a mere interlocutory order, placing upon the record what had actually transpired, by way of amendment, to sustain the judgment. Both reason and authority sustain the action of the court in making such amendment at a subsequent term. *Re Wight*, 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487; *Galloway v. McKeithen*, 27 N. C. (5 Ired. L.) 12, 42 Am. Dec. 153; *Curling v. Hyde*, 10 Mo. 374; *State v. Clark*, 18 Mo. 432; *Nelson v. Barker*, 3 McLean, 379, Fed. Cas. No. 10,101; *Bilansky v. State*, 3 Minn. 427, Gil. 313; *Weatherman v. Com.* 91 Va. 796, 22 S. E. 349, 10 Am. Crim. Rep. 93; *Black*, Judgm. § 126; *Freeman*, Judgm. § 156; 16 Am. & Eng. Enc. Law, p. 1005; 1 *Bishop*, Crim. Proc. § 1343. That it was done after the allowance of a writ of error is also immaterial. It is an amendment, made by the trial court and certified here, to sustain its judgment, and comes fully within the reasoning of our decisions. *Gauley Coal Land Asso. v. Spies*, 61 W. Va. 19, 55 S. E. 903; *McClure-Mabie Lumber Co. v. Brooks*, supra; *Hopkins v. Baltimore & O. R. Co.* 42 W. Va. 535, 26 S. E. 187; *Capehart v. Cunningham*, 12 W. Va. 750.

In response to the complaint that the record does not show the prisoner was in court when the verdict was rendered, it suffices to say the order shows he was there when the jury was impaneled and after the verdict was rendered, from which the presumption of his presence during the intervening period arises. The continuance of a fact or state of things once shown to exist is presumed, in the absence of evidence to the contrary. *State v. Nethken*, 60 W. Va. 673, 55 S. E. 742; *State v. Goodrich*, 14 W. Va. 834, 846; *Moore v. Gilliam*, 5 Munf. 346.

The hearsay evidence of the witness Slavin was not excepted to. Hence the court did not err in admitting it.

While the court sustained an objection to a question propounded to the witness Copeland, concerning the attitude of Arbrogast and Jennings, and the prisoner excepted, the evidence, desired and sought by the question, was admitted in response to another question. Hence the error, if any, was cured.

As it does not appear what it was expect-

ed the witness Bodin would say, in response to the question propounded to him concerning a weapon in the hands of Arbrogast, the action of the court in sustaining the objection to the question is not shown to have been prejudicial, even if erroneous.

It is said the court abused its discretion in sentencing the prisoner to five years' imprisonment; but, as the judgment will have to be reversed for insufficiency of the evidence, we do not deem it necessary to pass upon this question.

For the reasons stated, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

IDAHO SUPREME COURT.

BOISÉ VALLEY CONSTRUCTION COMPANY, Limited, Respt.,

v.

THEODORE KROEGER, Appt.

(17 Idaho, 384, 105 Pac. 1070.)

Contract — railroad — right of way — bonus.

1. Agreement sued on in this action considered, and held that it embodies two separate and independent contracts.

Same — certainty — parol evidence — construction.

2. A contract whereby the obligor promises and agrees to pay a railroad company the sum of \$600 "as soon as said first parties [the railroad company] or their assigns have constructed and put into operation an electric railway line from the city of Boise to the strip of land above described, said first parties to give street car service of intervals of not more than thirty minutes, and to charge a fare from the city of Boise to said strip of land of not more than 5 cents," is certain and definite as to the time the obligation becomes due; and, while parol evidence is admissible to explain what was meant by "other considerations" named in the contract, it cannot vary the specific terms as to the time at which the obligation becomes due. Held, also, that the term "to the strip of land above described" does not mean "upon or over the strip of land above described."

Eminent domain — appropriation without right — remedy of owner.

3. Where K.'s land has been appropriated by a railroad company for its right of way, and a road has been built thereon, K. may elect to waive his remedies in ejectment, injunction, and trespass, and may sue as upon an implied promise and contract to pay reasonable compensation for the lands taken. In such case, the landowner has a right to assume that the company could

acquire his land by proceedings in condemnation, and he may therefore waive such proceeding, and assume that the railroad company will pay him reasonable compensation therefor. If it fails to keep its implied contract in this respect, he may have his action for the value of the land taken as upon contract.

Same — acquiescence — effect — instructions.

4. Instruction given by the court as to acquiescence examined, and held that, while the conduct set forth and enumerated in the instruction would preclude the landowner from thereafter resorting to the action of ejectment against the railroad company, and also preclude him from obtaining an injunction against the company continuing its work and operations, still such conduct would not divest him of the title to his property, and would not be inconsistent with the assumption on his part that the

Note. — Right of one whose property has been taken for public use without his consent and without condemnation proceedings, to maintain action for compensation or for permanent damages.

The limitation of this note excludes all questions as to the remedies available to one whose property has been taken under the circumstances indicated, except the single remedy by action for compensation or permanent damages. And so the question whether statutory remedies are exclusive is treated only in so far as it bears on the point whether the statutory remedies exclude an action in this form.

Legal remedies.

It seems to be the general rule where private property has been taken for a public purpose without the consent of the owner and without condemnation proceedings, that the owner may maintain some form of common-law or equitable action to recover just compensation. The right of the owner to compensation when private property is taken for a public use is secured by the Constitutions of the United States and of most of the states, and in case private property is so taken without compensation and without the consent of the owner, a direct action to recover such compensation seems to be the simplest and most logical remedy available to the owner.

In some cases the right of the owner to maintain an action for compensation has been based upon an implied promise or contract to pay the reasonable value of the property taken. *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; *United States v. Russell*, 13 Wall. 623, 20 L. ed. 474; *Chicago League Ball Club v. Chicago*, 77 Ill. App. 124.

In *United States v. Lynah*, supra. Mr. Justice Brewer, in delivering the opinion

company would pay him reasonable compensation for the land taken.

Same — sale of land — damages recoverable.

5. Held that the following instruction was erroneous: "If you believe from the evidence as alleged in the answer that plaintiff committed injuries to the lands of the defendant in the building of the railway grade mentioned in the pleadings and the evidence, and you further believe from the evidence that since the commission of such injury defendant has sold and disposed of his said lands, then the court instructs you that the defendant may not recover for any injuries to said lands, save such as may have accrued to the same as you may believe from the evidence accrued thereto, between the building of such grade or embankment and the time of the sale of such lands."

Held, further, that where the acts of the tortfeasor have been completed and con-

of the court, after reviewing the authorities, says, page 464, L. ed. 546: "The rule deducible from these cases is that when the government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates."

The right of an owner to recover compensation in an action based upon an implied promise or contract to pay the reasonable value of the property taken for a public purpose without his consent and without condemnation proceedings has often been affirmed or acknowledged by the Federal courts in cases where he has sought other relief which, under the circumstances, has been refused, or where judgment has been adverse to the claimant on other grounds.

In *Great Falls Mfg. Co. v. Atty. Gen.* (*Great Falls Mfg. Co. v. Garland*) 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631, denying an injunction to restrain United States officials from using lands taken for the purpose of supplying water to the city of Washington, the court said that where the United States by its agents takes and retains private property for a public use, without the owner's consent and without condemnation proceedings, the owner may recover compensation in the court of claims as upon an implied contract.

The case of *Schillinger v. United States*, 24 Ct. Cl. 278, involved the use upon the Capitol grounds of a patent for improvement in pavements, and the court of claims held that it had not jurisdiction, as such use under the circumstances involved no contractual rights, but after an examination of the authorities the court said, page 298: "Careful examination of these cases shows that a contract to pay is implied whenever the government, acting through a competent agent, takes or uses individual property, acknowledging explicitly or tacitly that the property is individual property. 28 L.R.A.(N.S.)

summated, and the causes from which the injury must necessarily flow are patent and obvious, in such case the injury is of such a permanent nature that the whole damages, past, present, and prospective, may be recovered in one action, and that one recovery only should be allowed.

Damages — construction of railroad — measure.

6. Actions against railroad and other public service corporations for damages committed by them in the construction of their roads differ from actions for damages sustained by reason of the maintenance of a nuisance, and should not be governed by the rule applicable to nuisance cases.

Same — real property — total loss — permanent injury — temporary injury.

7. The rule in this state as to the measure of damages to real property is as follows: "If land is taken or the value

No formal proceedings in condemnation are necessary to this result. Where, however, there is a denial of private right in an alleged patent, and the invention is nevertheless appropriated or used by the government, the appropriation or use is in the nature of a tort, and an action thereon is not within the general jurisdiction of this court."

In *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717, another patent case decided adversely to the plaintiff on the ground that he had not a patentable invention, the court nevertheless said: "If the right of the patentee was acknowledged, and without his consent an officer of the government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie within the jurisdiction of the court of claims."

In a greater number of cases, however, actions to recover compensation have not proceeded upon the specific ground of implied promise or contract to pay the reasonable value of property taken, but they have been actions to recover compensation by way of permanent damages for the wrongful use and appropriation; and such actions have been very generally allowed where private property has been taken for a public use without the consent of the owner and without condemnation proceedings and compensation. *Parkdale Corp. v. West*, 12 L. R. App. Cas. 602; *Blanchard v. Kansas City*, 5 McCrary, 217, 16 Fed. 444; *Hollingsworth v. Tensas Parish*, 4 Woods, 280, 17 Fed. 109; *Archer v. Levee Inspectors*, 128 Fed. 125; *Stein v. Burden*, 24 Ala. 146, 60 Am. Dec. 453; *Highland Ave. & Belt R. Co. v. Matthews*, 99 Ala. 27, 14 L.R.A. 464, 10 So. 267; *Cullen v. New York, N. H. & H. R. Co.* 66 Conn. 211,

thereof totally destroyed, the owner is entitled to recover the actual cash value of the land at the time of the taking or destruction, with legal interest thereon to the time of the trial.

"If the land is permanently injured, but not totally destroyed, the owner will be entitled to recover the difference between the actual cash value at a time immediately preceding the injury and the actual cash value of the land in the condition it was immediately after the injury, with legal interest thereon to the time of the trial."

"If the land is temporarily, but not permanently, injured, the owner is entitled to recover the amount necessary to repair the injury and put the land in the condition it was at the time immediately preceding the injury, with legal interest thereon to the time of the trial."

(December 11, 1909.)

APPEAL by defendant from a judgment of the District Court for Ada County

33 Atl. 910; Rome v. Perkins, 30 Ga. 154; Atlanta v. Hunnicutt, 95 Ga. 138, 22 S. E. 130; Indianapolis & C. Gravel Road Co. v. Belt R. Co. 110 Ind. 5, 10 N. E. 923; Bloomfield R. Co. v. Grace, 112 Ind. 128, 13 N. E. 680; Indiana, B. & W. R. Co. v. Allen, 113 Ind. 308, 3 Am. St. Rep. 650, 15 N. E. 451; Ft. Wayne v. Hamilton, 132 Ind. 487, 32 Am. St. Rep. 263, 32 N. E. 324; Chicago, I. & E. R. Co. v. Patterson, 26 Ind. App. 295, 59 N. E. 688; Mulholland v. Des Moines A. & W. R. Co. 60 Iowa, 740, 13 N. W. 726; Wichita & W. R. Co. v. Fechheimer, 36 Kan. 45, 12 Pac. 362; Memphis & C. R. Co. v. Payne, 37 Miss. 700; Souldard v. St. Louis, 36 Mo. 546; Allen v. Wabash, St. L. & P. R. Co. 84 Mo. 646; Webster v. Kansas City & S. R. Co. 116 Mo. 114, 22 S. W. 474; Hickman v. Kansas City, 120 Mo. 110, 23 L.R.A. 658, 41 Am. St. Rep. 684, 25 S. W. 225; McReynolds v. Kansas City, C. & S. R. Co. 34 Mo. App. 581; White v. Northwestern North Carolina R. Co. 113 N. C. 610, 22 L.R.A. 627, 37 Am. St. Rep. 639, 18 S. E. 330; Phillips v. Postal Teleg. Cable Co. 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022; Platt v. Pennsylvania Co. 43 Ohio St. 228, 1 N. E. 420; Cincinnati v. Kemper, 7 Ohio Dec. Reprint, 251; Longworth v. Cincinnati, 48 Ohio St. 637, 29 N. E. 274; Cureton v. South Bound R. Co. 59 S. C. 371, 37 S. E. 914; Frater v. Hamilton County, 90 Tenn. 661, 19 S. W. 233; International & G. N. R. Co. v. Benitos, 59 Tex. 326; Loop v. Chamberlain, 17 Wis. 504, second appeal, 20 Wis. 135; Hackstack v. Keshena Improv. Co. 66 Wis. 439, 29 N. W. 240.

In some cases the question of the passing of title to the property involved has arisen in actions of this kind, and in Wichita & W. R. Co. v. Fechheimer, supra, the court said that the owner is at liberty to choose any one of several appropriate remedies, and if the railroad in its nature, de-

in plaintiff's favor in an action brought to recover upon a contract whereby defendant agreed to pay a certain sum upon fulfillment of certain conditions which plaintiff alleged he had complied with. Reversed.

The facts are stated in the opinion.

Messrs. D. D. Williams, Gustave Kroeger, and J. C. Johnston for appellant.

Mr. Ira E. Barber, for respondent:

The injury, if any, accruing to the land by reason of the digging of the ditch upon the right of way of the railroad is a continuing injury, and one for which the successor in title would have a right of action.

Clarke v. Midland G. W. R. Co. [1895] 2 Ir. Q. B. 294; Ohio & M. R. Co. v. Wachter, 123 Ill. 440, 5 Am. St. Rep. 532, 15 N. E. 279; Van Hoozier v. Hannibal & St. J. R. Co. 70 Mo. 145; New York Nat. Exch. Bank v. Metropolitan Elev. R. Co. 108 N. Y. 660, 15 N. E. 445; North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821; White-

sign, and use, is of a permanent character, and the injuries permanent in their nature, the owner may sue for compensation for permanent appropriation and injury; but that in such case it should appear that the verdict and judgment include damages for the entire injury, and it should also clearly appear, from the pleadings or from the evidence, findings, and judgment, what interest in the land the owner has parted with, and also what interest has been acquired by the company.

In the case of White v. Northwestern North Carolina R. Co., supra, an action for damages to plaintiff's property resulting from the construction of a railroad on a street in front thereof, the court said: "It will be observed that the defendant did not introduce its charter or show that it had condemned any part of the street or the rights or easement of the abutting proprietor. It justifies its conduct solely upon the mere license of the city of Winston, and in this view of the case its occupation, in so far as it affects the plaintiff, must be regarded as unlawful. If this be so, the plaintiff may maintain a common-law action for damages to be assessed up to the time of the trial, or it seems she may sue for the permanent damage, if any, which has been inflicted upon her property by reason of the location and construction of the defendant's road, and by so doing confer upon the defendant (so far as she is concerned) an easement to occupy the street."

Where a municipal corporation appropriates private property for a street, without notice to a mortgagee whose mortgage is duly recorded, the latter may maintain an action against the municipal corporation to recover damages for the conversion of his interest in the property, and in such an action evidence is not admissible of the condemnation proceedings to which the

house v. Fellowes, 10 C. B. N. S. 765; Lamb v. Walker, L. R. 3 Q. B. Div. 389; Mitchell v. Darley Main Colliery Co. L. R. 14 Q. B. Div. 125; Smith v. Seattle, 18 Wash. 484, 63 Am. St. Rep. 910, 51 Pac. 1057; Church of the Holy Communion v. Paterson Extension R. Co. 66 N. J. L. 218, 55 L.R.A. 81, 49 Atl. 1030; Bank of Hartford County v. Waterman, 26 Conn. 324.

Where one stands by and directs or permits another to do an act, he is precluded from asserting any right thereafter, to the injury of the other party.

Frier v. Lowe, 232 Ill. 622, 83 N. E. 1083.

Allshie, J., delivered the opinion of the court:

This action was commenced for the recovery of the sum of \$600 on a contract entered into between the appellant and H. P. Ustick as trustee for the respondent company. The contract sued upon is set out

mortgagee was not made a party, and of which he had no notice. Harrison v. Sabina, 1 Ohio C. C. 49.

In the following cases of unlawful taking of property for a public use, the owners maintained actions of trespass to recover damages for the taking and use: Atlantic & G. R. Co. v. Fuller, 48 Ga. 423; Hall v. Pickering, 40 Me. 548; Natchez, J. & C. R. Co. v. Currie, 62 Miss. 506; Littleton v. Berlin Mills Co. 73 N. H. 11, 58 Atl. 877; Bloodgood v. Mohawk & H. River R. Co. 18 Wend. 9, 31 Am. Dec. 313; Rusch v. Milwaukee, L. S. & W. R. Co. 54 Wis. 136, 11 N. W. 253. These cases are to be distinguished from the cases not within the scope of this note, where the owner has maintained the ordinary action of trespass, and recovered damages as for a trespass, as distinguished from a taking or a permanent injury.

In Republican Valley R. Co. v. Fink, 18 Neb. 82, 24 N. W. 439, an action to recover damages for injury to real estate unlawfully taken by the railroad company, in which it was contended by the defendant company that the plaintiff's statutory remedy was exclusive, and that an action of trespass would not lie, this form of action was sustained, but a judgment for the plaintiff was reversed on the ground of an erroneous instruction in the court below as to the measure of damages, the appellate court saying that, though either the owner or the company may institute proceedings to condemn, yet, as the award must be made and the money paid or deposited before the corporation has any legal right to appropriate the property, if this is not done, an action for injury to the possession will lie, because the corporation has no legal right to occupy the premises. "In an action for trespass, however, the corporation will only be liable for such damages as result from the wrongful appropriation 28 L.R.A.(N.S.)

at length in the complaint, and reads as follows: "This agreement, between H. P. Ustick, trustee, parties of the first part, and Theodore Kroeger, party of the second part, is to the effect: First.—That for and in consideration of the sum of \$1, the receipt whereof is hereby acknowledged, and other considerations, I hereby agree to deliver unto said first parties, by good and sufficient warranty deed, a strip of land described as follows: The north 30 feet of the southeast quarter (S. E. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section twenty-two (22) T. 3 N. R. 2 E., in the county of Ada, state of Idaho, for the purpose of and as a right of way for an electric railway to be built upon standard gauge, and operated by said first parties or their assigns, said deed to be delivered by me to said first parties or their assigns, as soon as the track of such electric railway is laid upon the above-described property; and for and in consideration of the sum

tion. The value of the land must be ascertained in the mode pointed out in the statute. . . . The corporation does not acquire an easement in the right of way by the verdict in this case; that can only be done by condemnation proceedings. . . . Until the land is condemned and the damages paid, the corporation is a trespasser, and is liable for the actual injury sustained, but that does not include the value of the land taken."

In Keil v. Chartiers Valley Gas Co. 131 Pa. 466, 17 Am. St. Rep. 823, 19 Atl. 78, where the original entry was through mistake and condemnation proceedings were subsequently instituted, pending which an action to recover damages was brought by the owner, it was held that trespass would lie for the breach of the close, although the condemnation proceedings transferred the adjustment of the damages necessarily consequent upon the entry under the right of eminent domain, from the common-law action to the statutory proceeding. "The right to sue, however, vested at the commission of the trespass; . . . and damages for the breach of the close, and for any deprivation of use, or other injury sustained prior to the tender of the bond, are recoverable in this action. But for the permanent injury by reason of the appropriation . . . and the effect of such appropriation on the remainder, the damages are secured by the bond, and will be assessed in the proceeding instituted for that purpose, and now pending."

In the case of Sherman v. Milwaukee, L. S. & W. R. Co. 40 Wis. 645, it was held that where a railroad company takes possession of land for which it is liable to make compensation, without the consent of the owner, and without having ascertained and paid the compensation under the process given by the statute, it is liable to an action of ejectment or to an action

of \$1, the receipt whereof is hereby acknowledged, and other considerations, I further agree and contract to pay to said first parties the sum of six hundred and ²⁰/₁₀₀ dollars, as soon as said first parties or their assigns have constructed and put into operation an electric railway line from the city of Boise to the strip of land above described, said first parties to give street car service of intervals of not more than thirty minutes and to charge a fare from the city of Boise to said strip of land of not more than 5 cents. This contract binds the heirs, successors, and assigns of the parties hereto."

The defendant answered, admitting the execution of the agreement, but denying that the plaintiff in the action had per-

formed the contract on its part, and by way of further defense alleged that, as part of the consideration for the execution of the contract to pay the sum of \$600 mentioned therein, Ustick, as trustee, or his assigns, were to construct the electric railway mentioned in the contract so that it would extend the full length of the north side of the tract of land described in the agreement, and that both the plaintiff and Ustick have failed, neglected, and refused to so construct the line of road. It is further alleged in the answer that the plaintiff's agent, Ustick, knew and understood that defendant entered into such contract and agreement to pay the sum of \$600 for and in consideration of the road being built upon the strip of land men-

of trespass, in which the owner may recover the damages accruing before suit brought, but not permanent damages as for the taking of the land.

There are also numerous cases of action to recover compensation for property taken without the consent of the owner and without condemnation proceedings or compensation, where the right to maintain such an action did not seem to be disputed, but in which there were various other questions involved.

In *Cohen v. St. Louis, Ft. S. & W. R. Co.* 34 Kan. 158, 55 Am. Rep. 242, 8 Pac. 138, the court said: "It seems to be admitted by the parties that an action of this kind may be maintained; or, in other words, it seems to be admitted that where a railroad company has constructed and is operating its railroad through a piece of land belonging to another, without having first obtained a right of way by any formal condemnation proceedings, and without having procured any title to the land or any easement therein, the owner of the land may waive formal condemnation proceedings and all formal modes of transfer, and elect to regard the action of the railroad company as taking the property under the right of eminent domain, and may commence an ordinary action to recover compensation for all the damages which he has sustained by reason of the permanent taking and appropriation of the right of way by the railroad company. We think such an action may be maintained."

Other cases of this kind at law are *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. 415; *Bentonville R. Co. v. Baker*, 45 Ark. 252; *Porter v. Midland R. Co.* 125 Ind. 476, 25 N. E. 556; *Donald v. St. Louis, K. C. & N. R. Co.* 52 Iowa, 411, 3 N. W. 462; *Central Branch Union P. R. Co. v. Andrews*, 26 Kan. 702; *Louisville, St. L. & T. R. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. Rep. 303, 29 S. W. 14; *Gulf, C. & S. F. R. Co. v. Donahoo*, 59 Tex. 128; *Welsh v. Chicago, B. & K. C. R. Co.* 19 Mo. App. 127; *Ragan v. Kansas City & S. E. R. Co.* 111 Mo. 456, 20 S. W. 234.
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Blackwell, E. & S. W. R. Co. v. Rebout, 19 Okla. 63, 91 Pac. 879, 14 A. & E. Ann. Cas. 1150, was a case of condemnation proceedings by the company, consolidated with an action for damages by the owner, the petition in the latter action having been filed before, but valid service of summons therein not having been effected until after, the condemnation proceedings were instituted by the company; and while it seems to be admitted that an owner might maintain such an action where his property had been taken without his consent and without any condemnation proceedings to acquire the right of way, yet it was held in this case that the action at law could not be maintained to recover damages for the injury after condemnation proceedings had been instituted by the company, for the purpose of ascertaining the rights of the parties for an appropriation of a right of way and fixing the compensation of the landowner.

In *Rio Grande & E. P. R. Co. v. Ortiz*, 75 Tex. 602, 12 S. W. 1129, it was held that where a railroad company takes private land for its right of way without payment therefor and without the consent of the owner, and the law provides that payment shall be made for lands taken for public use before the right to such use can be acquired, the title remains in the owner until the money is paid, unless such payment is waived, and he may bring a direct action to recover his damages for the appropriation. A judgment for the owner in such an action should be regarded merely as an assessment of the amount due him and a demand therefor until paid. It does not affect his title until the railroad company, by payment of the sum due, acquires the legal right to use the land or the right of way, and while the judgment remains unpaid the owner may demand and sue for compensation from another railroad company which has succeeded to the rights of the original company, and continues to use the land.

There are also cases in which other forms of relief have been sought, wherein the right of the owner whose land has been illegally taken for a public use, to maintain an action to recover compensation for all dam-

tioned and described in the agreement, and that it was the purpose and intention of the defendant to subdivide his tract of land into smaller tracts and build houses thereon for rent and sale, and that the failure on the part of the plaintiff to build and erect its railway on such ground amounted to a failure of consideration for the promise to pay the said sum of \$600. It is also alleged that in building its line of road plaintiff had dug and excavated a large ditch on the south side of its track, partly on the land of defendant, and partly on the 30-foot right of way above referred to, and that the ditch or excavation had been so made and maintained that the water used by the defendant in irrigating the remainder of his tract of land adjoin-

ing the right of way would flow and run off into the ditch, and in so doing cut deep ditches or gullies on defendant's land, and otherwise damage the lands of defendant adjoining the said right of way, and render a part of defendant's land worthless, to his damage in the sum of \$600. For a further and second defense and counterclaim the defendant set up the contract sued upon, and alleged that he had promised and agreed to convey a 30-foot right of way along the north side of his place for the purpose of building and constructing plaintiff's line of railway, but that, instead of using and occupying the same and building the road thereon, the plaintiff had used and occupied a portion of defendant's land contiguous to the proposed right

ages which he sustained by reason of the permanent taking and appropriation, has been affirmed or suggested. *Zimmerman v. Kansas City Northwestern R. Co.* 75 C. C. A. 425, 144 Fed. 622; *Evansville & T. H. R. Co. v. Nye*, 113 Ind. 223, 15 N. E. 261; *Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524; *Louisville, N. A. & C. R. Co. v. Soltwedde*, 116 Ind. 258, 9 Am. St. Rep. 852, 19 N. E. 111; *St. Julien v. Morgan's L. & T. R. Co.* 35 La. Ann. 924; *St. Julien v. Morgan's L. & T. R. & S. S. Co.* 39 La. Ann. 1063, 3 So. 280; *Lawrence v. Morgan's L. & T. R. & S. S. Co.* 39 La. Ann. 427, 4 Am. St. Rep. 265, 2 So. 69; *County Comrs. v. McGee*, 20 Ohio C. C. 201; *Goodin v. Cincinnati & W. Canal Co.* 18 Ohio St. 169, 98 Am. Dec. 95.

A rare instance where the court has refused this form of relief is the case of *Johnson v. Alameda County*, 14 Cal. 106, an action founded on implied assumpsit, to recover a compensation for land illegally taken by the county for a road, in which case the court held that where the compensation for land taken by a county for a public use, as for a road, does not precede or accompany the taking, the entire action of the county authorities is void, and a suit against the county for compensation does not lie.

In *Atlantic & G. W. R. Co. v. Robbins*, 35 Ohio St. 531, the court said: "Our conclusion, therefore, is that the unlawful and wrongful conversion and use of land, against the will of the owner, and under such circumstances that he is not prevented or estopped from recovering possession, will not entitle such owner, where the title still remains in him, to maintain an action to recover a judgment for the value of the land, and to an order of sale of the same to pay the judgment; and that, in such case, the owner has his election to proceed under the [statute] to recover the compensation and damages to which he is entitled to under the Constitution, or by action for the unlawful entry and possession, to recover the possession and damages for use and occupation."

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Equitable remedies.

In the case of *Thornton v. Sheffield & B. R. Co.* 84 Ala. 109, 5 Am. St. Rep. 337, 4 So. 197, a railroad company had taken possession of land under an agreement with the owner for a right of way across his land, upon certain conditions which it did not fulfil, and the court held that the owner was entitled to maintain a bill in equity to recover compensation from the company for the right of way, and such bill would be made effective by injunction, if necessary, until the damages were properly ascertained, or until the company obtained the right of way in legal form.

In *Organ v. Memphis & L. R. Co.* 51 Ark. 235, 11 S. W. 96, the owner maintained a claim for compensation in equity in the nature of a vendor's lien.

In *Florida Southern R. Co. v. Hill*, 40 Fla. 1, 74 Am. St. Rep. 124, 23 So. 566, it was held that where a railroad company possessing the power of eminent domain takes land without the consent of the owner and without condemnation proceedings, the latter may elect to regard the act of the company as done under the right of eminent domain, and may resort to equity in the first instance to establish the amount due him for compensation, and to enforce payment thereof by charging it upon the company's interest in the land and improvements as a lien thereon, and to foreclose such lien.

In the case of *Charleston & W. C. R. Co. v. Hughes*, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972, where the railroad company had taken lands by condemnation proceedings against the assignee of a life tenant, without making the remainderman a party, the remainderman, upon the death of the life tenant, sought equitable relief, and the court held that equity would determine the compensation to be paid in such a case, and give time to the railroad company within which to settle, before allowing the owner to recover the premises in ejectment.

The case of *Phillips v. Postal Teleg. Cable Co.* 130 N. C. 513, 89 Am. St. Rep. 868, 41

of way, and was occupying the same with its track and right of way to the damage of defendant in the further sum of \$600. Defendant prays judgment for the sum of \$1,200 for the damages sustained by reason of the acts set out in his answer and counterclaims. Judgment was entered in favor of the plaintiff for the sum of \$580, and defendant has appealed.

A great many errors have been assigned, but we shall not undertake to treat them separately or in detail, as a consideration of a part only of the assignments will dispose of all and settle this appeal.

In the first place, it was contended by the defendant that he was not liable to pay the \$600 under this contract until the plaintiff should complete the construction

of its line of road the full length of this strip of land agreed to be conveyed by defendant as a right of way. The court construed the agreement as embodying two separate and distinct contracts, the first for the conveyance of a right of way as set out and described in the agreement, and the second as a separate and distinct contract to pay the sum of \$600 at the time and in the manner specified in the agreement, *viz.*, "as soon as said first parties or their assigns constructed and put into operation an electric railway line from the city of Boise to the strip of land above described," and on the condition that the company should give a street car service at intervals of not more than thirty minutes, and charge a fare of not to exceed

S. E. 1022, holds that a landowner or his successor in interest may maintain an equitable action for the assessment and recovery of permanent damages, and compensation for land taken for and used by a telegraph company.

Kendall v. Missisquoi & C. River R. Co. 55 Vt. 438, holds that a court of chancery has jurisdiction of a bill to have plaintiff's damages ascertained, and for injunction if the damages are not paid, where the railroad company has taken plaintiff's land without his consent and without any compliance with the statutes as to taking lands for railroads.

In Ashley v. Little Rock, 56 Ark. 391, 19 S. W. 1058, it is said that one whose land is taken by a railroad company without his consent and without condemnation proceedings has an equitable quasi vendor's lien, the enforcement of which is in fact specific performance.

The owner of a mortgage interest in land taken by a railroad company for its right of way, without its making compensation therefor, the land being taken after the condition in the mortgage was broken, but before foreclosure, has a lien thereon enforceable in equity for its equivalent in money, which lien holds although the mortgagor has agreed with the company as to the amount of damages, and although the company is insolvent, and the railroad is owned and operated by a new company formed by the mortgagees of the former company after foreclosure of their mortgage. Adams v. St. Johnsbury & L. C. R. Co. 57 Vt. 240.

The case of Bridgman v. St. Johnsbury & L. C. R. Co. 58 Vt. 198, 2 Atl. 467, also holds that where a railroad company took private land for railroad purposes, the owner has a lien on the land enforceable in equity for his damages, which lien is not affected by bringing suit at law against such company to recover damages for the taking, and obtaining judgment therein under a statute; and such judgment is conclusive as to the amount of damages to be recovered in a proceeding to foreclose the lien against a subsequent company which succeeded to the rights of the first company.

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Statutory remedy as exclusive of action for compensation or permanent damages.

There are many cases of actions to recover compensation by way of damages for the unlawful taking of property for a public purpose, without the consent of the owner and without condemnation proceedings, in which the form of action has been objected to on the sole ground that a statutory remedy was provided, which remedy was alleged to be exclusive of the common-law remedy.

In this connection, it is necessary to distinguish those cases where there has been a "taking" or injury of private property in strict compliance with, and pursuant to, a statute specifically authorizing a particular public work, and providing the method of compensation for those injured thereby, but where, such compensation not having been made, an action is brought at common law to recover damages. Such cases are not within the scope of this note.

To constitute a legal taking (under express statutory authority), by which those acts which cause the damage can be justified, and thereby remit the party to such exclusive statutory remedy, it must be shown that the requirements of law have been strictly complied with. Hamor v. Bar Harbor Water Co. 78 Me. 127, 3 Atl. 40.

In the cases, however, where the "taking" is unlawful because, if specially authorized by statute, such statute has not been strictly complied with, or because, if assumed to be effected under mere general charter powers to exercise the right of eminent domain, no condemnation proceedings have been had or compensation made, nor the consent of the owner obtained to such taking, any statutory remedy provided has been generally held not to be exclusive of the pre-existing common-law remedy, unless the statute providing such new form of relief specifically provides that it shall be exclusive.

Where a city is specially authorized by statute, by and through the agency of a certain water board, "to take, hold, and convey to, into, and through said city" the

5 cents, between Boisé City and the strip of land described in the agreement. The court accordingly took the view, and so instructed the jury, that this \$600 became due as soon as the company completed its line of road "to" the strip or tract of land described in the agreement to be conveyed for a right of way, and the maintenance of a thirty-minute service at a 5-cent fare. We are satisfied that the court placed the correct construction on this contract. It embodied two separate and distinct contracts, and under its terms the company might have earned the right to collect this sum of money, and yet not be in a position to demand the right of way. It was clearly entitled to collect the sum agreed to be paid upon completion of its road to the

boundary line of defendant's premises as described in the agreement, and instituting the service as stipulated. Appellant contends that he was entitled to show by parol what the "other consideration" was as mentioned in the agreement. That position is correct, and was so recognized by the trial court, but that does not affect, alter, or modify the stipulation in the agreement that the money should be paid "as soon as said first party or his assigns have constructed and put into operation an electric railway line from the city of Boisé to the strip of land above described," etc. This fixes the maturity of the obligation to pay.

The inquiry as to whether the road has been built over the lands proposed to be

water of a certain stream, but the board does not strictly comply with the provisions of the statute in so taking the water, they and the city are each liable in an action of tort in the nature of trespass, though if the statute had been strictly complied with, the owner's statutory remedy for compensation would have been exclusive. *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Lund v. New Bedford*, 121 Mass. 286.

In the following cases of unlawful taking of private property for a public use, common-law actions to recover compensation by way of damages for the unlawful taking and appropriation have been maintained over the objection that, while the owner was entitled to compensation, his only method of obtaining same was pursuant to some statute providing a remedy, but not declaring it to be exclusive: *Cator v. Lewisham Dist.* 5 Best & S. 115; *Turner v. Sheffield & R. R. Co.* 10 Mees. & W. 425; *North Shore R. Co. v. Pion*, L. R. 14 App. Cas. 612; *Saunby v. Water Comrs.* [1906] A. C. 110, reversing 34 Can. S. C. 650; *Hanley v. Toronto, H. & B. R. Co.* 11 Ont. L. Rep. 91; *Wicher v. Canadian P. R. Co.* 16 Manitoba L. Rep. 343; *Thompson v. Sydney*, 40 N. S. 562; *Denslow v. New Haven & N. Co.* 16 Conn. 98; *Healey v. New Haven*, 49 Conn. 394; *Holley v. Torrington*, 63 Conn. 426, 28 Atl. 613; *Summy v. Mulford*, 5 Blackf. 202; *Lane v. Miller*, 22 Ind. 104; *Toney v. Johnson*, 26 Ind. 382; *Montgomery County v. Miller*, 82 Ind. 572; *Pittsburgh, Ft. W. & C. R. Co. v. Swinney*, 97 Ind. 586; *Chicago, I. & E. R. Co. v. Patterson*, 26 Ind. App. 295, 59 N. E. 688; *Drady v. Des Moines & Ft. D. R. Co.* 57 Iowa, 393, 10 N. W. 754; *Birge v. Chicago, M. & St. P. R. Co.* 65 Iowa, 440, 21 N. W. 767; *Atchison, T. & S. F. R. Co. v. Weaver*, 10 Kan. 344; *Hamor v. Bar Harbor Water Co.* 78 Me. 127, 3 Atl. 40; *Ash v. Cummings*, 50 N. H. 591; *Mellen v. Western R. Corp.* 4 Gray, 301; *Wamesit Power Co. v. Allen* and *Lund v. New Bedford*, supra; *Brickett v. Haverhill Aqueduct Co.* 142 Mass. 394, 8 N. E. 119; *Copiah County v. Lusk*, 77 Miss. 136, 24 So. 972; *Soulard v. St. Louis*, 36 Mo. 546; *Jamison v. Springfield*, 53 Mo. 224; *Markowitz v.* 28 L.R.A.(N.S.)

Kansas City, 125 Mo. 485, 46 Am. St. Rep. 498, 28 S. W. 642; *Republican Valley R. Co. v. Fink*, 18 Neb. 82, 24 N. W. 439; *Seeley v. Amsterdam*, 54 App. Div. 9, 66 N. Y. Supp. 221; *Phillips v. Postal Teleg. Cable Co.* 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022; *Hathaway v. Springfield, Mt. V. & P. R. Co.* 2 Ohio Dec. Reprint, 349; *Cincinnati v. Coombs*, 16 Ohio, 181; *Brown v. Powell*, 25 Pa. 229; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *Cureton v. South Bound R. Co.* 59 S. C. 371, 37 S. E. 914; *Duck River R. Co. v. Cochrane*, 3 Lea, 478; *Bellingham Bay R. & Nav. Co. v. Loose*, 2 Wash. 500, 27 Pac. 174; *Downs v. Seattle & M. R. Co.* 5 Wash. 778, 32 Pac. 745, 33 Pac. 973.

Other cases to the same effect on this point, though in each a judgment for the plaintiff was reversed on other grounds, are: *Pratt v. Saline Valley R. Co.* 130 Mo. App. 175, 108 S. W. 1099; *Blesch v. Chicago & N. W. R. Co.* 43 Wis. 183.

Where condemnation proceedings have been instituted, and there has been a taking of private property for a public use thereunder, but such proceedings are for some reason void, either as a whole or as to some particular person, and such person has brought a common-law action to recover his compensation or damages, it has been held, where the point was raised, that the owner is not obliged to seek his remedy by appeal in such void proceedings, or is not in any way barred thereby, but may maintain his common-law action for the recovery of the compensation to which he may be entitled. *Overmann v. St. Paul*, 39 Minn. 120, 39 N. W. 66; *Badgely v. Hamilton County*, 1 Disney (Ohio) 316. In the latter case, the court said: "The whole case may be summed up thus: The property of the plaintiff has been taken and appropriated to the use of the county, by its properly authorized agents, and for a lawful purpose. It has been thus taken without the plaintiff's consent and without being paid for. The law says it shall be paid for, and has provided a remedy; but the special remedy thus provided has failed the plaintiff, without fault on his part. He is, therefore, remitted, of necessity, to his action against

given, and in accordance with the contract, will properly arise at such time as the company demands a conveyance for the right of way. It is not involved in this action.

In the progress of the trial the defendant asked leave to amend his second alleged counterclaim so as to set out the contract entered into between the parties, and to allege the corporate capacity of the plaintiff, and more fully plead the fact that the plaintiff corporation had taken and occupied and used a portion of defendant's land not embraced in the right of way which defendant had contracted to convey. The record is not entirely clear as to the extent of the proffered amendment, but the position taken is clarified by the ruling of the court denying the application of the defendant to amend. The court said: "You have apparently attempted to set up that they had taken an additional tract of land to this 30-foot strip, and the allegation does not support the fact, although your evidence, perhaps one view of it, will show that; but I am satisfied, even if that was true, that there would not be a good cause of action for a counterclaim here, because if they have taken land that did not belong to them, why the defendant still owns the land, and would own the land. If you recovered judgment, it would not settle the question of title here to the property, and I do not believe defendant can sell that strip of land in that way. If they have taken land he has not conveyed to them, or agreed to convey to them, the defendant's action would probably be by ejectment, and with that view of the case I don't see any necessity for granting permission to amend, because it would be necessary for you to amend further, and that additional amendment the court will

still hold is not a subject of counterclaim, the taking of additional land, because you are asking for the full value of it, and if the court should award it, you would still own the land after you had the value of it, the title would still be in your client or his grantee, whoever it might be." It will thus be seen from the ruling of the court that the court took the view that a person whose land has been taken by a railroad company for a right of way, without being taken under a conveyance, dedication, or in the exercise of the right of eminent domain, cannot maintain an action against the company for the value of the property taken. This necessarily leads to an inquiry as to the rights of a landowner whose lands have been seized and entered upon by a public service corporation without first obtaining the right to do so, either by contract or by pursuing the statute conferring the power of eminent domain.

In *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306, the Supreme Court of the United States was considering a case where the agents of the government had appropriated private property for a public use, without any previous conveyance, dedication, or condemnation, and the court in passing on the question said: "The law will imply a promise to make the required compensation where property, to which the government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the court of claims, of actions found-

the county as at common law, for the damages he has sustained."

In *Hull v. Chicago, B. & Q. R. Co.* 21 Neb. 371, 32 N. W. 162, an action of ejectment by the owner of land taken by the railroad company after void condemnation proceedings, the court said: "While the manner of ascertaining the damages is exclusive, yet if a railroad company takes and occupies real estate without taking the necessary legal steps to condemn the land, and thus making its possession rightful, it is, as all others under like circumstances, a trespasser, and cannot justify its possession. Therefore the usual common-law remedies are available to the owner."

In the case of *Pettis v. Providence*, 11 R. I. 372, the city of Providence had instituted statutory proceedings relative to opening highways, and this was a petition for a jury trial to determine the amount of damages due to the petitioner. The petition was dismissed on the ground that the statute pro-

visions had not been strictly complied with by the city,—the court saying: "His property, therefore, though it has been taken from him, cannot be regarded as having been duly taken or condemned under the act, and, consequently, it would be premature to impanel a jury under the act to determine the damages. The city of Providence, in disposing of his property, inasmuch as it did not proceed in pursuance of the act, must be regarded as a wrongdoer, and we see nothing to prevent the petitioner from suing it as a trespasser."

But even when the other party has not proceeded regularly, the owner may be remitted to the statutory remedy, and lose his right of action at common law to recover compensation, in consequence of his assent to the proceedings and waiver of the irregularities. *Woolard v. Nashville*, 108 Tenn. 353, 67 S. W. 801; *Strickford v. Boston & M. R. Co.* 73 N. H. 81, 59 Atl. 367.

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ed 'upon any contract, express or implied, with the government of the United States.'" In *Cohen v. St. Louis, Ft. S. & W. R. Co.* 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242, the supreme court of Kansas considered the right of a landowner to waive the remedies of ejectment, injunction, and trespass, and to sue for the value of the land taken, and the rule adopted is stated in the syllabus as follows: "Where a railroad company has constructed and is operating its railroad through a piece of land belonging to another, without having obtained a right of way by any formal condemnation proceedings, and without having procured any title to the land over which it operates its railroad, or any easement therein, the owner of the land may waive formal condemnation proceedings and all formal modes of transfer, and elect to regard the action of the railroad company as taking the property under the right of eminent domain, and may commence an ordinary action to recover compensation for all the damages which he has sustained by reason of the permanent taking and appropriation of the right of way by the railroad company." 2 Elliott, Railroads, § 1048, says: "In many of the states a suit at common law may be maintained upon the implied promise to pay a just compensation for the lands taken. And for any taking or injury for which the statute does not provide a remedy the landowner may sue at common law. Some of the courts hold that, even though the original taking was wrongful, the landowner may affirm the taking and sue for compensation, and a recovery in such a suit vests the right to the lands in the defendant." Many cases are cited in the notes to this text sustaining the principle as stated. For authorities to the same effect, see *Central Branch Union P. R. Co. v. Andrews*, 26 Kan. 702; *Wichita & W. R. Co. v. Fechheimer*, 36 Kan. 45, 12 Pac. 362; *Evansville & T. H. R. Co. v. Nye*, 113 Ind. 223, 15 N. E. 261; *Lawrence v. Morgan's L. & T. R. & S. S. Co.* 39 La. Ann. 427, 4 Am. St. Rep. 265, 2 So. 69; *Zimmerman v. Kansas City Northwestern R. Co.* 75 C. C. A. 424, 144 Fed. 622; *Southern R. Co. v. Hood*, 126 Ala. 312, 85 Am. St. Rep. 32, 28 So. 662; *Galveston, H. & S. A. R. Co. v. Pfeuffer*, 56 Tex. 66.

It must be remembered that in this case the company which is alleged to have appropriated appellant's land is a corporation that is granted the right of eminent domain by both the Constitution and statute of this state. Const. art. 1, § 14; Rev. Codes. § 5210; *Portneuf Irrigating Co. v. Budge*, 16 Idaho, 116, 100 Pac. 1046. Appellant, knowing, therefore, as he must have, that the respondent company had the right to

take his property by proceedings under the power of eminent domain, might have concluded to waive the condemnation proceedings and take the value of the premises appropriated, without any controversy over the right to take the same. He likewise had a right to assume that the company would pay him a reasonable compensation therefor. If it failed to do so, he would be clearly entitled to sue on the implied promise and contract to pay him the reasonable value of the land taken. If the company entered upon appellant's land with his consent and acquiescence, and thereafter constructed its railroad and began operating its trains, it would then be engaged in a lawful business of a quasi public character in serving the public, and it would then be too late for appellant to pursue his remedy against the company by way of ejectment or injunction. *Southern R. Co. v. Hood*, and *Evansville & T. H. R. Co. v. Nye*, supra; 16 Cyc. Law & Proc. p. 768, and cases cited in note. Whether it entered and took possession of his lands, either with or without his consent or acquiescence, he would still have a right to assume, in the absence of an agreement or understanding to the contrary, that the company would pay him the reasonable value of the lands taken. If A steals B's horse, B may pursue the property in claim and delivery, or he may waive the tort and sue as upon contract for the reasonable value of the animal, and A will not be heard in a court of justice to answer and deny the contract, and set up as a defense that he stole the animal. So, in a case of this kind, if A should seize and appropriate B's real estate for an easement authorized under the Constitution and statute of the state, B may maintain his action to oust and eject the trespasser, or he may enjoin him from using and occupying the land, or he may waive both such remedies, and sue upon an implied contract to pay reasonable compensation for the property taken. In the latter event title to the easement vests in the company appropriating the property when the judgment is paid, in the same manner as it does upon condemnation under the statute.

While the court's statement as to the appellant's rights with reference to any additional land the company had taken for its right of way was erroneous as a matter of law, still it is doubtful if any error was committed in this respect on account of the defective and insufficient manner in which the second counterclaim had been pleaded, and but very little improvement was offered to the pleading by the proposed amendment. It may be said, however, that the defendant in the action was forestalled

by the announcement of the court as to his view of the law. A complaint in such case, seeking to recover the value of land taken by a public service corporation where no condemnation has been had, should be specific as to the description of the premises, and also as to its allegations, showing that the pleader is proceeding on the theory that the land has been wholly taken, and that he is seeking the entire value thereof, so that, after judgment and payment, the right to the easement may vest in the company. *Wichita & W. R. Co. v. Fechheimer*, supra. Since we have concluded that this case must be reversed on other grounds, we advise that the defendant be allowed to amend his counterclaim, if he so desires, in order to bring the same within the rule herein announced.

Appellant requested an instruction as to the effect of a boundary line which existed between his property and that of the adjoining owners, announcing the rule as to the relative weight and importance to be given to such boundary line and a survey establishing the true line after the disappearance of the government monuments. The court declined to give the requested instruction, but instead thereof gave the following instruction: "You are instructed that, if you find from the evidence that the row of trees testified to has been acquiesced in and adopted by the owners of the tracts of land as the dividing line between the land of the defendant and the land adjoining on the north for a long period of years, and the owners of the two tracts have cultivated and improved their respective land up to the said line for a period of time longer than five years, then such fact would be better evidence of the location of the line between the two tracts of land than any survey made since such row of trees was adopted as such line. If, however, you find from the evidence that the plaintiff when locating its line found that said trees were not the correct dividing line, and afterwards constructed its road on the true line, and that the defendant before said road was constructed had an actual survey made, and found thereby that the line adopted by plaintiff was correct, and thereafter stood by without objection and permitted the plaintiff to construct its works upon such line, then, in that event, he should not be permitted, after construction of said road, to complain that it was not constructed upon the true line." The first part of this instruction announcing the law as to acquiescence in the boundary line established by the coterminous landowners was as favorable to appellant as he was entitled to have given to the jury. That instruction is in sub-
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stantial accord with the rule recently announced by this court in *Bayhouse v. Urquides*, 17 Idaho, 286, 105 Pac. 1066. Appellant assigns error against the giving of the latter part of the foregoing instruction as to his right to recover in the event he had permitted the plaintiff to construct its road upon his land, or had acquiesced therein. This part of the instruction was erroneous. While such conduct on the part of the appellant would have precluded him from subsequently maintaining the action of ejectment against the railroad company, and likewise have prevented him from maintaining injunction against the company continuing its construction and operation (*Southern R. Co. v. Hood*, 126 Ala. 312, 85 Am. St. Rep. 32, 28 So. 662; *Evansville & T. H. R. Co. v. Nye*, 113 Ind. 223, 15 N. E. 261), still such conduct would not divest him of the title to his property, nor would it be inconsistent with the assumption on his part that the company would pay him for the land that it was appropriating for its right of way. See cases hereinbefore cited.

Appellant assigns the giving of the following instruction as error: "If you believe from the evidence as alleged in the answer that the plaintiff committed injuries to the land of the defendant in the building of the railway grade mentioned in the pleadings and the evidence, and you further believe from the evidence that since the commission of such injury the defendant has sold and disposed of his said lands, then the court instructs you that the defendant may not recover for any injuries to said lands save such as may have accrued to the same, as you may believe from the evidence accrued thereto, between the building of such grade or embankment and the time of the sale of such lands." It appeared from the evidence that appellant had sold this land and parted with the title some time prior to the commencement of this action, and that evidence is clearly what called forth this instruction. There seems to be a diversity of opinion among the courts as to the particular actions of this character in which one recovery only will be allowed, and that for past, present, and prospective damages, and the cases in which a separate recovery will be allowed, from time to time, for recurring damages that may be sustained by the party. There is a long line of authorities, however, holding that, where the acts of the tortfeasor have been completed and consummated, and the causes from which the injury must necessarily flow are patent and obvious, and the injury, if any, is permanent,—past, present, and prospective damages can as readily be estimated in advance as after successive dam-

ages have occurred, and that the better rule is to allow only one recovery, and permit it to embrace all damages for past, present, and future injury to the property. *Chicago & E. I. R. Co. v. Loeb*, 59 Am. Rep. 341, and note (118 Ill. 203, 8 N. E. 460); *Fowle v. New Haven & N. Co.* 112 Mass. 334, 17 Am. Rep. 106.

The general rule is well stated by the supreme court of Massachusetts in *Fowle v. New Haven & N. Co.* as follows: "As a general rule, a new action cannot be brought unless there be a new unlawful act and fresh damage. . . . The case at bar is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury." Sutherland, speaking of the general rule, says: "When a wrongful act is done which produces an injury which is not only immediate, but from its nature must necessarily continue to produce loss independently of any subsequent wrongful act, then all the damages resulting, both before and after the commencement of the suit, may be recovered in one action." 4 Sutherland, Damages, § 1042. Mr. Freeman states the rule as follows: "All the damages which can by any possibility result from a single tort form an indivisible cause of action. . . . For damages alone no action can be permitted. Hence, if a recovery has once been had for the unlawful act, no subsequent suit can be sustained. There must be a fresh act as well as a fresh damage." Freeman, Judgm. § 241. Mayne on Damages, p. 138, says: "Similar questions often arise in cases where a person by digging, mining, building, or the like, affects the plaintiff's land or house in such a manner as to produce injurious consequences which manifest themselves at a later period. Here it is now settled that all subsequent or recurring damage may be assessed, and can only be recovered in a suit brought upon the original cause of action." In *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, the city cut a ditch along the side of the plaintiff's lot, and caused his lands to be overflowed, and it was held that the cause of action was complete when the unlawful act was committed, and that all of the damages accruing from the original wrong must be included in one action. The latter case 28 L.R.A.(N.S.)

was approved in *Stodghill v. Chicago, B. & Q. R. Co.* 53 Iowa, 341, 5 N. W. 495. The strongest, and perhaps most exhaustive, case holding to the contrary rule, is that of *Uline v. New York, C. & H. R. R. Co.* 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536. See also note to same case in 53 Am. Rep. 123.

The diversity of opinion existing seems to have arisen out of the common-law rule allowing repeated and successive actions against a party maintaining a nuisance, but there is a distinction between cases of nuisance and those cases where the damage arises out of the construction or operation of a railroad, for the reason that such a work or improvement constitutes a public highway, and is authorized and recognized by law, and the right of way itself, and all necessary ground incident thereto, may be taken in condemnation, so that the road and the work necessary and incident to its maintenance cannot be abated as a nuisance. The theory on which actions were allowed to be prosecuted against one maintaining a nuisance was that continued and repeated actions would overcome the persistency of the party maintaining the nuisance, and would result in its abatement. No such a rule can exist in the case of a railroad company, and besides the law looks with disfavor on a multiplicity of actions, and rather favors the settlement and determination of all matters that can be settled in one action. The purchaser from appellant took whatever portion of the land he acquired as it existed after the construction of the road, and he could not recover damages for the original wrong. *Chicago & E. I. R. Co. v. Loeb*, and *Stodghill v. Chicago, B. & Q. R. Co. supra*.

Appellant assigns as error the action of the court in giving the following instruction with reference to the measure of damages to be applied in the event the jury found in favor of the cross plaintiff: "If the jury believe from the evidence in this case that the plaintiff in constructing its railway entered upon and made excavations upon defendant's land in the manner charged in the cross complaint and answer, then the measure of damages, if you find from the evidence that the defendant has been damaged, would be the diminution of the value of defendant's land thereby; and unless you find from the evidence that the defendant's lands have been diminished in value by the making of said excavations and the digging of said ditch mentioned in the pleadings and evidence, your verdict on the question of damages will be for the plaintiff." The most serious objection to this instruction is the uncertainty with reference to the character of taking, injury, or damages to which it is intended to apply.

We assume, however, that the court had in mind the evidence adduced with reference to the excavations and ditches dug by the railway company, constituting a permanent injury to cross plaintiff's land, in which event the rule announced by the court was substantially the same as has been announced by this court. The rule as to the measure of damages was announced by this court in *Young v. Extension Ditch Co.* 13 Idaho, 174, 182, 89 Pac. 296, and is as follows: "If land is taken or the value thereof totally destroyed, the owner is entitled to recover the actual cash value of the land at the time of the taking or destruction, with legal interest thereon to the time of the trial. If the land is permanently injured, but not totally destroyed, the owner will be entitled to recover the difference between the actual cash value at a time immediately preceding the injury and the actual cash value of the land in the condition it was immediately after the injury, with legal interest thereon to the time of the trial. If the land is temporarily, but not permanently, injured, the owner is entitled to recover the amount necessary to repair the injury and put the land in the condition it was at the time immediately preceding the injury, with legal interest thereon to the time of the trial." We are entirely satisfied with this rule, and will not pause to consider, at this time, the reasons for the rule, or open that question to further consideration.

A number of other assignments of error have been argued, but we do not find any further question that is likely to arise on the retrial of this case that deserves or requires our consideration here. From what has been said it appears at once that a new trial must be had in this case. A new trial is rendered particularly necessary by reason of the instruction to the effect that the appellant could not recover damages which had not been actually sustained up to the time of his conveyance of the property.

Judgment is reversed, and a new trial ordered. Costs awarded in favor of appellant.

Sullivan, Ch. J., and Stewart, J., concur.

KANSAS SUPREME COURT.

A. MATHENEY

v.

CITY OF ELDORADO, Appt.

(82 Kan. 720, 109 Pac. 166.)

Accord and satisfaction — intent.

1. To constitute an accord and satisfaction, the agreement that a smaller sum shall

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be accepted in discharge of a larger one, originally claimed, must have been entered into by the parties understandingly and with unity of purpose.

Same — disputed claim — collateral security — right of holder to compromise.

2. A contractor undertook to build a bridge for a city, and arranged with a banker to furnish the money necessary to carry on the work, and he gave the banker a writing to the effect that all warrants for the construction of the bridge should be issued to and cashed by the banker. A dispute arose between the city and the contractor as to the amount due for certain extra work done on the bridge. Later an allowance was made by the city in full payment of the work, which the contractor refused to accept. He then informed the banker that the allowance must not be accepted. A warrant was drawn by the city for the allowance, and placed in the bank, where the funds of the city were kept in the custody of the son of the banker, who was deputy city treasurer. Some time afterwards the banker, without other authority than the writing mentioned, drew the money on the warrant, but neither the contractor nor the mayor and council of the city had any

Note. — Authority of pledgee to compromise obligations held as collateral security.

Very few cases have been found which, like *MATHENEY v. ELDORADO*, involve the right of the principal debtor to recover from the collateral obligor after the pledgee has attempted to compromise with the latter. Nearly all of the cases deal with the accountability of the pledgee to the principal debtor, — a somewhat different question. Cases passing on the latter question have, however, been included herein.

Neither the pledgee nor the pledgor of a claim can compromise with the debtor without the assent of the other; at least, where the debtor has notice of the pledge. *Fairbanks v. Sargent*, 117 N. Y. 320, 6 L.R.A. 475, 22 N. E. 1039.

As said in *McLemore v. Hawkins*, 46 Miss. 715, if the pledge be commercial paper, the pledgee's duty requires that he look to the interest of the pledgor, so as not to release any party by laches. His power extends to the collection of the entire debt, to be applied first to liquidate his demand, and to hold the surplus to the use of the pledgor. As to the excess, his power is that of agent to collect, but not to compromise, make a rebate, or to forgive in whole or in part.

The acceptance by the holder of a less sum than is due, in full satisfaction of the collateral notes, does not preclude the pledgor from recovering the balance due thereon from the maker. *De Clarke v. Waters*, 10 Wyo. 31, 65 Pac. 855.

So, the holder of collateral security in the form of notes secured by a mortgage is without power to accept from the maker of

knowledge that the warrant had been cashed until long after this action to recover the amount of the claim had been brought. Held, that the banker had no authority to make settlements for the contractor, and that the drawing of the money on the warrant did not operate as an accord and satisfaction of the original claim, nor preclude the contractor from recovering the entire debt.

Municipal corporation — appointment of superintendent of construction — regularity — right to question.

3. The city having appointed a superintendent to supervise the building of the bridge, and having accepted the work done under his supervision, as well as the bridge, is not in a position to deny liability for the work done under the direction of the superintendent, because of irregularity in the appointment of the superintendent.

Trial — right to special findings — extent.

4. A party is entitled to have a jury make special findings of the ultimate facts

of the case, but has no right to ask for mere evidentiary matters, nor that the jury shall file a bill of particulars as to each fact.

(June 11, 1910.)

A PPEAL by defendant from a judgment of the District Court for Butler County in plaintiff's favor in an action brought to recover compensation for extra material and labor alleged to have been furnished under a building contract. Affirmed.

The facts are stated in the opinion.

Messrs. K. M. Geddes and T. A. Kramer, for appellant:

Where a municipal body acts upon a claim that is presented to it, and allows a part of it in full payment, and rejects the balance, and the warrant is accepted by the claimant, it is a settlement in full, notwithstanding the fact that the claimant may attempt to take the warrant only as

the notes and mortgage a conveyance of a part of the mortgaged premises, in discharge of the mortgage, and in case he attempts to do so, the principal obligor may sue to set aside the release of the mortgage, and to foreclose it (Chester v. Hill, 66 Cal. 480, 6 Pac. 132); or he may ratify the conveyance and release, and hold his creditor responsible (Kelly v. Matlock, 85 Cal. 122, 24 Pac. 642).

As previously suggested, several cases hold that one holding commercial paper as collateral security cannot, except, perhaps, in very extreme cases, compromise with the maker of the collateral, and surrender the same for less than the amount due thereon, and that if he does so, he will be bound to account to the pledgee. *E. F. Hallack Lumber & Mfg. Co. v. Gray*, 19 Colo. 149, 34 Pac. 1000; *Fisher v. George S. Jones Co.* 108 Ga. 490, 34 S. E. 172; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Zimbleman v. Veeder*, 98 Ill. 613; *Foltz v. Hardin*, 139 Ill. 405, 28 N. E. 786; *Union Nat. Bank v. Post*, 64 Ill. App. 404; *Powell v. Ong*, 92 Ill. App. 95; *Depuy v. Clark*, 12 Ind. 427; *Rhomberg v. Avenarius*, 135 Iowa, 176, 112 N. W. 548; *Stevens v. Wiley*, 165 Mass. 402, 43 N. E. 177; *Garlick v. James*, 12 Johns. 146, 7 Am. Dec. 294.

So, one holding a mortgage on an unfinished building, as collateral security, is accountable if he releases it to the mortgagor upon the latter's verbal promise to make a new mortgage upon completion of the building. *Whittemore v. Hamilton*, 51 Conn. 153.

And the holder cannot sell the collateral for less than its value, knowing that the purchaser buys it with intent to cancel it. *Fletcher v. Dickinson*, 7 Allen, 23.

And the pledgee of a bond and mortgage may be held liable for the conversion thereof, notwithstanding he is given a power 28 L.R.A. (N.S.)

of sale, where, without demanding payment of the principal debt, he transfers them for a grossly inadequate sum to one who has an interest in the mortgaged property, and who satisfies the mortgage of record. *Campbell v. Parker*, 9 Bosw. 322.

If the collateral paper is worthless, it is the duty of the holder to return it to the pledgee; and he has no authority to dispose of it for any purpose other than to reimburse himself for amounts advanced to the pledgee. Authority to collect the collateral paper does not include authority to surrender it to the maker for cancellation. *Wood v. Matthews*, 73 Mo. 477.

Authority to the pledgee to grant extensions, or enter into compositions or special arrangements, is subject to the dominant obligation that it be exercised in good faith, for the purpose of liquidating the pledgee's debt and paying the surplus over to him; and a compromise framed with an eye to the interests of the pledgee alone, in which the interests of the pledgee are recklessly disregarded or wilfully sacrificed, is a violation of duty, rendering the pledgee accountable to the pledgee. *Canadian Bank v. Barrette*, 41 Can. S. C. 561.

The holder is not authorized to compromise the collateral by virtue of express written authority given in the transfer, to sell the same or any part thereof at public or private sale. *Union Trust Co. v. Rigdon and Zimbleman v. Veeder*, supra.

Nor does such power of sale authorize the pledgee of notes to trade them for bank stock. *Walley v. Deseret Nat. Bank*, 14 Utah, 305, 47 Pac. 147.

The pledgee may be compelled to account to the pledgee of an endowment policy of life insurance where, by the terms of the pledge, he is not authorized to surrender or sell it, and he nevertheless surrenders it before the maturity of the policy or of the

part payment, and to insist on his claim for the balance.

Wapello County v. Sinnaman, 1 G. Greene, 415; Perry v. Cheboygan, 55 Mich. 250, 21 N. W. 333; Cleveland County v. Seawell, 3 Okla. 281, 41 Pac. 592; Fulton v. Monana County, 47 Iowa, 622; Brick v. Plymouth County, 63 Iowa, 463, 19 N. W. 304; Bradley v. Delaware County, 57 Iowa, 552, 10 N. W. 898; United States v. Adams, 7 Wall. 403, 19 L. ed. 249; United States v. Child, 12 Wall. 232, 20 L. ed. 380; Leavenworth County v. Brewer, 9 Kan. 319; Pulling v. Columbia County, 3 Wis. 337; Neely v. Thompson, 68 Kan. 193, 75 Pac. 117; 1 Cyc. Law & Proc. pp. 333, 334; Treat v. Price, 47 Neb. 875, 66 N. W. 834; Traux v. Miller, 48 Minn. 62, 50 N. W. 935; Fuller v. Kemp, 138 N. Y. 231, 20 L.R.A. 785, 33 N. E. 1034.

The acts of Dunn were within the apparent scope of his authority, and that is sufficient to bind the plaintiff.

Babcock v. Deford, 14 Kan. 411; Aultman Threshing & Engine Co. v. Knoll, 71 Kan. 114, 79 Pac. 1074; Banks v. Everest, 35 Kan. 687, 12 Pac. 141; Bank of Lakin v. National Bank, 57 Kan. 183, 45 Pac. 587.

The city could not delegate to the superintendent authority to bind the city for the payment of any work on the bridge, and if any attempt had been made to delegate such power, it would have been null and void.

principal obligation, without notice to the pledgeor. Manton v. Robinson, 19 R. I. 405, 34 Atl. 148, 37 Atl. 8.

So, damages for the conversion of an insurance policy may be recovered from one with whom it was deposited as collateral security for the payment of a note, under an agreement authorizing him to surrender it to the company without notice, upon default in payment of the note, where he waives the provision authorizing the surrender, and thereafter surrenders the policy to the company, without notice to the pledgeor. Toplitz v. Bauer, 161 N. Y. 325, 55 N. E. 1059; Bailey v. American Deposit & Loan Co. 52 App. Div. 402, 65 N. Y. Supp. 330, affirmed without opinion in 165 N. Y. 672, 59 N. E. 1118.

The holder of collateral paper renders himself accountable for it where he transfers it for lesser security. Muirhead v. Kirkpatrick, 21 Pa. 237.

This means not that he cannot make the exchange, but that he is responsible for whatever loss results to the pledgeor. Girard F. & M. Ins. Co. v. Marr, 46 Pa. 504.

One is accountable for a note given to him as collateral security where he surrenders it to the maker, and takes in its place a bond, which, by a secret agreement, he promises shall be satisfied when he shall have received payment of the principal obligation. Chester v. Kingston Bank, 17 Barb. 271, affirmed in 10 N. Y. 336, 28 L.R.A.(N.S.)

28 Cyc. Law & Proc. pp. 278, 643; Chase v. Los Angeles, 122 Cal. 540, 55 Pac. 414; Jewell Belting Co. v. Bertha, 91 Minn. 9, 97 N. W. 424.

Messrs. Mooney & Stratford and E. N. Smith, for appellee:

When a debtor pays a portion of his debt, which portion he admits to be due at the time he pays it, but claims that is all that is due, and the creditor receives the same, and signs a receipt in full therefor, but at the same time claims that it is only a portion of the debt, and that the other portion still remains due, the creditor is not estopped by his receipt from afterwards suing the debtor, and recovering the balance of the debt not yet paid.

American Bridge Co. v. Murphy, 13 Kan. 35; Hamilton County v. Webb, 47 Kan. 104, 27 Pac. 825; St. Louis, Ft. S. & W. R. Co. v. Davis, 35 Kan. 464, 11 Pac. 421; Harrison v. Henderson, 67 Kan. 194, 62 L.R.A. 760, 100 Am. St. Rep. 386, 72 Pac. 875; 1 Cyc. Law & Proc. p. 332; Neely v. Thompson, 68 Kan. 193, 75 Pac. 117; Ellsworth v. Roositer, 46 Kan. 241, 26 Pac. 674.

Johnston, Ch. J., delivered the opinion of the court:

This was an action by A. Matheney to recover from the city of Eldorado for extra material and labor furnished in connection with the building of a bridge for the city,

So, one surrendering negotiable paper held by him as collateral security is accountable therefor to the pledgeor, where he surrenders it to the maker, and takes a new note in return. Farm Invest. Co. v. Wyoming College, 10 Wyo. 240, 68 Pac. 561; Greenwald v. Metcalf, 28 Iowa, 363.

Or takes in return part payment in cash and new notes for the remainder. Nexsen v. Lyell, 5 Hill, 466; Gage v. Punchard, 6 Daly, 229.

And a pledgee of a note as collateral security, who has received another note in payment thereof, cannot reinstate the pledgeor's liability upon the principal obligation, and deprive his assignee of his rights in the proceeds of the former note, by receiving back such note, and returning the other, without the consent of the pledgeor or his assignee. Post v. Union Nat. Bank, 159 Ill. 421, 42 N. E. 976.

In Newell v. Sexton, 61 Cal. 645, the lower court found that the pledgee of notes as collateral security was guilty of conversion where he surrendered them to the obligors therein, in consideration of a conveyance of land, for which he credited the principal obligation with a sum considerably less than the face value of the collaterals. The supreme court affirmed the judgment of the lower court, but concerned itself only with the right of recovery of the assignee of the transferee of the pledgeor's equity.

It has been held that where, by a compro-

in pursuance of a contract. On October 21, 1907, the city of Eldorado, by its mayor and council, made a contract with A. Matheney, by which the city agreed to pay \$3,350 for the construction of a stone arch bridge in the city, according to certain specifications. It provided that the sum mentioned should be paid for the "bridge proper," and that "all other work required by the council to be done shall be considered extra, and shall be paid for at the following prices," specifying particular rates per cubic yard or foot for excavation and masonry. The material used and the manner of construction were "to be subject to the inspection and acceptance or rejection of the superintendent appointed by the mayor and council," and, from time to time during the progress of the work, the superintendent, as well as the mayor and council, ordered extra work to be done in connection with the building of the bridge. Matheney borrowed the money with which to furnish the material from J. E. Dunn, the president of a local bank, and, to protect Dunn, he gave the following instruction to the mayor: "You are hereby authorized, instructed, and directed to draw any and all warrants, issued to me for work on central avenue bridge in favor of J. E. Dunn. He is hereby authorized to receipt for and cash the same." In accordance with the terms of the contract, \$3,350 was paid by the city

for the construction of the bridge proper. Much extra work was done, and Matheney filed with the city clerk claims amounting to \$2,713.50 for extra work and material, which included excavating, stonework, ornamental plates, cement walk on bridge, extra support for abutments, etc. The council questioned the amount of the bill, and after canvassing it for some time, authorized the payment of \$1,982.93 in full settlement of the account. A warrant for this amount was delivered to Dunn, who, after holding it for some time, obtained the money on it. It was never accepted by Matheney as full settlement of the account, and he contends that Dunn did not so accept it, and, further, that he had no authority to do so. On this action to recover on his claim, the jury found in favor of Matheney and awarded a verdict for \$546.53, being the difference between the amount of the warrant and the amount due for the extra work and material.

The petition of Matheney, although challenged for uncertainty, appears to have been sufficiently definite to advise the city of the nature of his claim, and to meet the requirements in pleading. The principal contention in the case is that, under the pleadings and the evidence, there was what amounted to an accord and satisfaction, a compromise and settlement of the controversy, which precludes appellee from main-

mise advantageous to all parties, the pledgee releases the collateral paper to the obligor therein, upon part payment thereof, the former will not be held responsible for the face value of the collateral. Such was the view of the law where a compromise was made after the insolvency of the collateral obligor, and the return unsatisfied of execution issued on a judgment against him. *Exeter Bank v. Gordon*, 8 N. H. 66.

And where, due to the insolvency of makers and indorsers, and upon advice of counsel, the pledgee surrendered the note, and took another for a lesser sum, which counsel thought might be collected. *Randolph v. Merchants' Nat. Bank*, 9 Lea, 63.

And where the pledgee of notes of a railroad company, which were practically worthless, surrendered them to the company, and accepted in their stead mortgage bonds, the court holding that the pledgee was accountable only for the actual value of the notes. *Griggs v. Day*, 136 N. Y. 152, 18 L.R.A. 120, 32 Am. St. Rep. 704, 32 N. E. 612; see, however, subsequent appeal in 158 N. Y. 1, 52 N. E. 692.

It was said in *Fant v. Miller*, 17 Gratt. 187, concerning the duties and rights of pledgees: "The object of their duty was to realize out of the collaterals as much as possible at the earliest practicable period; and they were invested with all the powers which were necessary or proper to enable them to attain that object. The first thing

to be looked to was the security of the collaterals, and the next, their collection. If a collateral was already secure, but was not paid on demand, it was their duty to bring suit upon it as early as convenient. If it was of doubtful solvency, and security could be obtained by giving reasonable time, it was their right, if not their duty, to give such time and obtain security. If a debtor could not, or would not, give security for his debt, and good policy required that he should not be sued, they were justifiable in not suing him. If more could be made by compounding or compromising a debt than in any other way, or if such a compromise was deemed advisable, in the exercise of a sound discretion, looking to the interest of the creditor, they had a right to make such compromise. New securities taken by them in the discharge of their duties might properly be taken in their own names. In determining whether it would be good policy to bring no suit for a debt, or to give time for its payment on obtaining security, or to accept a compromise, the fact that they acted under the advice of, and upon information derived from, their counsel, affords at least prima facie evidence that such action was bona fide and proper."

It should be stated that this note does not purport to cover the question of the effect of the compromise or release of the collateral security upon the obligation of sureties of the principal debtor.

L. A. W.

taining his action or recovering an additional amount. The city insists that, when it made an allowance of \$1,982.93 as full payment of the extra work on the bridge, and issued a warrant for that sum, which was cashed by Dunn, the original demand of Matheney was thereby satisfied and extinguished. To operate as a satisfaction and discharge in cases of this kind, the smaller sum must not only have been offered, but it must have been accepted with the understanding that it was in full satisfaction of the larger amount claimed. Was there a substitution of a later executed agreement for the earlier one? To make the later agreement effective, it was necessary that the minds of the parties should meet, and that it should have all the essential elements of an ordinary contract. In *Harrison v. Henderson*, 67 Kan. 194, 62 L.R.A. 760, 100 Am. St. Rep. 386, 72 Pac. 875, it was said: "An accord and satisfaction is the result of an agreement between the parties, and, like all other agreements, must be consummated by a meeting of the minds of the parties, accompanied by a sufficient consideration. If the creditor is to be held to abate his claim against the debtor, it must be shown that he understood that he was doing so when he received the claimed consideration therefor." P. 200. See also 1 Cyc. Law & Proc. p. 331. There is no accord as to settlement unless the parties acted understandingly, and each has complete knowledge of the essential facts involved. There does not appear to have been an accord between the city and Matheney as to the discharge of the indebtedness for extra work and material. Matheney never consented to accept the money in discharge of his claim, and never authorized Dunn to make such an acceptance. When Matheney was informed by the council that it had only allowed a part of his claim, he declined to accept the allowance, and informed Dunn to that effect. The funds of the city appear to have been kept in Dunn's bank, and his son was deputy city treasurer. When the warrant was issued, on June 25, 1908, it was turned over to the son, who was acting for both the city and the bank. Dunn did not draw the money on the warrant until July 18, 1908, and he did so then without the knowledge of Matheney, and after he had been told that it would not be accepted. Matheney did not learn that Dunn had drawn the money on the warrant until the holidays, several months after this action was begun. The mayor and council, it appears, were not aware that Dunn had obtained the money on the warrant until long after it was cashed, for as late as November 12, 1908, they made Matheney an offer of \$2,200 on his claim. 28 L.R.A.(N.S.)

Aside from the direction of Matheney not to accept the allowance, Dunn had no authority to make compromises for Matheney. The only authority conferred on him was in the writing already quoted. It may be doubted if that writing related to warrants for extras or for more than those issued for the bridge proper, but, assuming that it did, he was certainly not vested with authority to make settlements between the city and Matheney. Apparently the sole purpose of the writing was to protect Dunn for the advancements made to Matheney during the progress of the work. It gave him no right to adjust disputes as to what was due on the contract, nor any authority except to receive warrants after disputes were adjusted and settlements made between the two contracting parties. Power to make settlements of that character by the acceptance of warrants or otherwise could not be exercised unless it was expressly conferred. The writing did not purport to make Dunn the agent of Matheney to settle controversies with the city, and there was nothing in the subsequent conduct of Matheney which precluded him from insisting on full payment of the entire debt.

Error is assigned on the admission of testimony to the effect that certain work was done by Matheney under the direction of a superintendent appointed by the mayor and council to superintend the building of the bridge. The contract between the parties contemplated the appointment of a superintendent by the city, and provided that Matheney should furnish material and perform work subject to the inspection and acceptance of the superintendent. It is a little late for the city to question its own authority for the appointment of a superintendent to oversee the building of the bridge. The mayor and council did appoint a superintendent, and he did direct the work, with the knowledge and approval of the city authorities. The city adopted the action of the superintendent, and more than that, the materials which were furnished and the work done by Matheney have been accepted by the city and its officers. It is therefore bound to pay for such material and work at the rate specified in the contract, and this, notwithstanding the superintendent may have been irregularly appointed. *Ellsworth v. Rossiter*, 46 Kan. 237, 26 Pac. 674; *Mound City v. Snoddy*, 53 Kan. 126, 35 Pac. 1112; *Roberts v. St. Marys*, 78 Kan. 707, 98 Pac. 211.

There are other objections to testimony and some criticism of the instructions, but nothing substantial is found in any of them, and the evidence in the case appears to be sufficient to support the verdict by the jury.

Complaint is made that the jury were not

required to answer more fully one of the special questions submitted. The question was: "Did he (Matheney) object to or disavow the action of said J. E. Dunn, and, if so, in what manner? State fully." The answer was, "Yes." Appellant insists that the jury should have been compelled to state at length what the disavowal was. There was no error in the refusal. In effect, appellant asked for a recital of the evidence. A party is entitled to special findings as to ultimate facts, but has no right to ask for mere evidentiary matters, nor to require the jury to file a bill of particulars on each fact.

It is finally contended that the court should in any event have divided the costs. This is based on an offer which was made to confess judgment after the action was begun. The offer was for \$2,200, and was manifestly made on the theory that the warrant had not been cashed, and that no part of the claim for extras had been paid. The amount awarded by the jury was \$546.53, and this with the warrant previously cashed amounted to \$2,529.46. As this sum was considerably more than the amount of the offer, there was no reason for dividing the costs.

We find no error in the record, and therefore the judgment is affirmed.

All the Justices concur.

KANSAS SUPREME COURT.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Appt.,
v.

C. E. LEIBENGOOD.

(— Kan. —, 109 Pac. 988.)

Commerce—between intrastate points—passage into other state—effect.

The act requiring corporations and others operating railroads as common carriers to transport live stock within the state at a speed of not less than 15 miles per hour, unless prevented by some unavoidable cause (Laws 1907, chap. 276), does not apply to nor affect interstate commerce, and a shipment of live stock between points in the state, which passes for a short distance over the territory of another state, is interstate commerce, and noncompliance with the requirements of the statute in such a shipment affords no grounds for recovery against the carrier.

(July 9, 1910.)

A PPEAL by defendant from a judgment of the District Court for Miami

Headnote by JOHNSTON, Ch. J.
28 L.R.A.(N.S.)

County in plaintiff's favor in an action brought to recover damages for the alleged negligent failure promptly to transport certain live stock. Reversed.

The facts are stated in the opinion.

Messrs. John Madden and W. W. Brown, for appellant:

The shipment was interstate, and the state law has no application. *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; *Patterson v. Missouri P. R. Co.* 77 Kan. 236, 15 L.R.A.(N.S.) 733, 94 Pac. 138.

Mr. Frank M. Sheridan, for appellee:

Continuous transportation between two points in a state, partly through another state, is intrastate commerce purely.

7 Cyc. Law & Proc. p. 417; *Seawell v. Kansas City, Ft. S. & M. R. Co.* 119 Mo. 222, 5 Inters. Com. Rep. 262, 24 S. W. 1002; *Scammon v. Kansas City, St. J. & C. B. R. Co.* 41 Mo. App. 194; *Western U. Teleg. Co. v. Reynolds*, 100 Va. 459, 93 Am. St. Rep. 971, 41 S. E. 856; *Campbell v. Chicago, M. & St. P. R. Co.* 86 Iowa, 587, 17 L.R.A. 443, 4 Inters. Com. Rep. 203, 53 N. W. 351; *United States ex rel. Kellogg v. Lehigh Valley R. Co.* 115 Fed. 373; *State ex rel. Railroad Comrs. v. Western U. Teleg. Co.* 113 N. C. 213, 22 L.R.A. 570, 18 S. E. 389; *Lehigh Valley R. Co. v. Pennsylvania*, 145

Note. — Does transportation between points in same state over a route part of which is in another state constitute interstate commerce.

Railroad companies.

It was held in *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806, affirming *Monaghan (Pa.)* 45, 17 Atl. 179, that a railroad corporation of a state is liable to taxation by such state upon its receipts for the mileage within the state, for transportation by continuous carriage from a point in the state to another point in the state, but over a line which, in its course between these points, passes out of the state and back again into the state.

In giving a reason for its conclusion, the court said: "It should be remembered that the question does not arise as to the power of any other state than the state of the termini, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere, but it is simply whether, in the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the par-

U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806.

The Federal power with reference to commerce among the several states does not comprise that commerce which is completely internal, but is carried on between man and man in a state, as between different parts of the same state, and which does not extend through or affect other states.

Gibbons v. Ogden, 9 Wheat, 1, 6 L. ed. 23; *Kansas City Southern R. Co. v. Railroad Comrs.* 108 Fed. 359; *United States ex rel. Kellogg v. Lehigh Valley R. Co.* 115 Fed. 374; *Seawell v. Kansas City Ft. S. & M. R. Co.* 119 Mo. 235, 5 Inters. Com. Rep. 262, 24 S. W. 1002; *Dillon v. Erie R. Co.* 19 Misc. 124, 43 N. Y. Supp. 320; *People ex rel. Pennsylvania R. Co. v. Knight*, 171 N. Y. 363, 98 Am. St. Rep. 610, 64 N. E. 152.

Johnston, Ch. J., delivered the opinion of the court:

This was an action by C. E. Leibengood

against the Missouri, Kansas, & Texas Railway Company to recover damages resulting from an alleged negligent delay of the railway company in transporting two car loads of cattle from Beagle to Kansas City. The petition was in two counts. The first set forth a cause of action under the common law, and the second, a violation of an act requiring common carriers to transport live stock at a speed of not less than 15 miles per hour, unless prevented by some unavoidable cause. A recovery was had on the second count, which included damages for delay and attorney's fee, and the railway company appeals.

The contention of appellant is that the shipment of the cattle was interstate, and therefore that the act under which recovery was had is without application. It appears that the shipment in question was from Beagle, a point in Kansas, to and through Missouri for a distance of at least a mile to Kansas City, another point in

ticular way in which Philadelphia was reached from Mauch Chunk."

In *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214, however, it was held that a state railroad commission cannot, without violating the commerce clause of the Federal Constitution, fix and enforce rates for the continuous transportation of goods between two points within the state, where a large part of the route is outside of the state, through another state or territory.

Lehigh Valley R. Co. v. Pennsylvania, supra, was distinguished on the ground, *inter alia*, that the tax was determined in respect of receipts for the proportion of the transportation within the state, and that "such proportioned tax had been sustained in the case of commerce admitted to be interstate." The reasoning of the court is sufficiently set forth in *MISSOURI, K. & T. R. Co. v. LEIBENGGOOD*.

As this is a matter on which the Supreme Court of the United States has the last word, and as this is its last utterance on the subject, it may now be laid down that transportation between points in the same state, over a route part of which is in another state or territory, constitutes interstate commerce. In addition to the cases from the Supreme Court of the United States, cited above, the following cases so hold: *New Orleans Cotton Exchange v. Cincinnati, N. O. & T. P. R. Co.* 2 Inters. Com. Rep. 293; *Milk Producers' Protective Assn. v. Delaware, L. & W. R. Co.* 7 Inters. Com. Rep. 92; *United States v. Delaware, L. & W. R. Co.* 152 Fed. 269; *Poor v. Iowa C. R. Co.* 153 Fed. 226 (dictum); *United States v. Erie R. Co.* 186 Fed. 352; *St. Louis & S. F. R. Co. v. Hadley*, 108 Fed. 317; *St. Louis & S. F. R. Co. v. State*, 87 Ark. 502, 113 S. W. 203; *Patterson v. Missouri P. R. Co.* 77 Kan. 236, 15 L.R.A. (N.S.) 733, 94 Pac. 138; *State v. Cumberland & P. R. Co.* 105 Md. 478, 66 Atl. 458; *State ex rel. Railroad & W. Com.* 28 L.R.A. (N.S.)

mission v. Chicago, St. P. M. & O. R. Co. 40 Minn. 267, 3 L.R.A. 238, 2 Inters. Com. Rep. 519, 12 Am. St. Rep. 731, 41 N. W. 1047; *Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.* 110 Minn. 25, — L.R.A. (N.S.)—, 124 N. W. 819, followed in *Gray v. Minneapolis & St. L. R. Co.* 110 Minn. 527, 124 N. W. 1110; *Mires v. St. Louis & S. F. R. Co.* 134 Mo. App. 379, 114 S. W. 1052; *Shelby Ice & Fuel Co. v. Southern R. Co.* 147 N. C. 60, 60 S. E. 721; *Davis v. Southern R. Co.* 147 N. C. 68, 60 S. E. 722; *Shelby Ice & Fuel Co. v. Southern R. Co.* 147 N. C. 61, 60 S. E. 723; *Sternberger v. Cape Fear & Y. Valley R. Co.* 29 S. C. 510, 2 L.R.A. 105, 7 S. E. 836; *Hunter v. Charleston & W. C. R. Co.* 81 S. C. 169, 62 S. E. 13; *Fraser v. Charleston & W. C. R. Co.* 81 S. C. 162, 62 S. E. 14.

But many cases, in deference to what was supposed to have been held in *Lehigh Valley R. Co. v. Pennsylvania*,—a mistaken deference, as stated in *Hanley v. Kansas City Southern R. Co.* supra,—have held that transportation between points in the same state, though over a route which, for part of the distance, passes out of the state, does not constitute interstate commerce. *United States ex rel. Kellogg v. Lehigh Valley R. Co.* 115 Fed. 373; *Campbell v. Chicago, M. & St. P. R. Co.* 86 Iowa, 587, 17 L.R.A. 443, 4 Inters. Com. Rep. 203, 53 N. W. 351; *Seawell v. Kansas City, Ft. S. & M. R. Co.* 119 Mo. 222, 5 Inters. Com. Rep. 262, 24 S. W. 1002; *Dillon v. Erie R. Co.* 19 Misc. 124, 43 N. Y. Supp. 320; *Quarre. Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98.

Although a railroad company has a line between two points in a state lying wholly within the state, over which it is accustomed to ship goods, yet if, owing to a defective bridge owned by another company, it is compelled to use another line, lying partly

Kansas. How far the cattle were transported through Missouri is not definitely shown; but the railroad over which the cattle were taken passes out of Kansas at or near Rosedale, and re-enters the state near the stock yards where they were delivered. The statute under which the recovery was had provides:

"Section 1. That all persons, firms, or corporations operating railroads as common carriers shall transport all live stock received by them for transportation within this state without delay, and shall transport the same in a period of time not less than one hour for each 15 miles of the entire distance over which said shipment of stock is transported by rail within this state, unless prevented by unavoidable cause; provided, the time consumed by stops for watering and feeding, occasioned by the requirements of law or the order of the shipper, shall not be considered a part of the

time in which shipments are required to be made.

"Sec. 2. Any common carrier which fails or refuses to transport such live stock at the rate of not less than 15 miles per hour, as herein provided, shall be liable for all damages which may be sustained by any person on that account, which damages shall include the loss resulting from a depreciation on the market, shrinkage in weight of such live stock, the loss in time of shipper, his agent or employee, and any extra expense occasioned thereby, and all other damages which are the approximate result of such failure, together with the costs in case suit is brought to recover the same, and a reasonable attorney's fee, fixed by the court on the trial of said cause. All other statutory and common-law remedies, in addition to the remedies provided herein, are hereby preserved to the shippers." Laws 1907, chap. 276.

Was the shipment from one point in Kan-

outside the state, the transportation is interstate commerce, and not subject to the control of the state railroad commission. *St. Louis & S. F. R. Co. v. State*, 87 Ark. 562, 113 S. W. 203.

Where two cities within a state are connected by two railroads, one wholly within the state, and one whose route for a part of the distance lies without the state, a state statute fixing maximum rates and fares on the route lying wholly within the state is not void, as an interference with interstate commerce, although competition between the two railroads will force down the fares and rates on the line which, by passing for a part of the distance outside of the state, does an interstate business. *St. Louis & S. F. R. Co. v. Hadley*, *supra*.

When goods are received for transportation between two points in a state, it will be presumed to be an intrastate shipment, in the absence of evidence that shipment by a route which would take the goods outside of the state is usual or necessary. *Harter v. Charleston & W. C. R. Co.* (S. C.) 67 S. E. 290.

Telegraph companies

A somewhat similar question arises in relation to telegraph messages passing between two points in a state over a route part of which is in another state, for it has been settled by adjudications of the United States Supreme Court that telegraph lines, when extending through different states, are instruments of commerce which are protected by the commerce clause of the Federal Constitution. See *Western U. Telegr. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934.

On the authority of *Lehigh Valley R. Co. v. Pennsylvania*, *supra*, it was held in *State ex rel. Railroad Comrs. v. Western U. Telegr. Co.* 113 N. C. 213, 22 L.R.A. 570, 28 L.R.A. (N.S.)

18 S. E. 389, that telegraph messages between points in the same state do not constitute interstate commerce because of the fact that they traverse another state on the route, and, hence, the state might regulate the amount to be charged for such messages.

On the same authority it was also held in *Leavell v. Western U. Telegr. Co.* 116 N. C. 220, 27 L.R.A. 843, 47 Am. St. Rep. 798, 21 S. E. 391, that a telegraph company which has a continuous line between points in the same state, over which it might transmit a message received for that purpose, but which passes through another state on the route, cannot claim that the message is interstate commerce, and therefore exempt from state authority limiting the charge for transmission, although the company does not in fact transmit the message the whole distance, but delivers it at an intermediate point in another state, to another company, because its own line for the remainder of the distance is fully occupied by other business.

In *Western U. Telegr. Co. v. Reynolds*, 100 Va. 459, 93 Am. St. Rep. 971, 41 S. E. 856, a statute provided for a penalty of \$100 for each failure of any telegraph company to deliver a message promptly. In an action to recover the penalty for failure to deliver promptly a message sent from East Radford, Virginia, to Tom's Creek, Virginia, the court, on the authority of *Lehigh Valley R. Co. v. Pennsylvania*, *supra*, held the company liable, although the delay had occurred at Bluefields, West Virginia, where it had established a relay station. The court said: "Where the initial and terminal points are both in the same state, and the telegram is transmitted over the wires of the same company, and concerns only citizens of that state, the message is a domestic message, and its character in that respect is not altered by the circumstance that the line passes in

nas, through a portion of Missouri, to another point in Kansas, interstate, and, if so, is a state regulation of such a shipment permissible? The shipment sought to be regulated is a single and indivisible thing. The statute purports to regulate the time which shall be consumed from the origin to the end of the transportation. If the carrier fails to transport for the whole distance within the specified time, the prescribed penalties and liabilities attach. It is a regulation of a single act of transportation as a whole, and not of a part of it, that may be wholly performed within the state. The effect of the regulation is direct and immediate upon a shipment that is interstate. It is unlike cases of regulating the speed of trains in cities within the state, or the receipt or delivery of freight at points in the state, or the imposition of some liability for some other default occurring entirely within the state. If the statute applies, it directly affects a single shipment which is partly within and partly without the state. According to a ruling of the Supreme Court of the United States, such a shipment is interstate, and a regulation of it is beyond the legislative power of the state. In *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214, the transportation of goods on a through bill of lading from a point in Arkansas to another point in the same state, over a road which passed a short distance through Indian territory, was held to be interstate commerce, subject to the regulation of Congress, and free from interference by the state of Arkansas, which had undertaken to

regulate the shipment. It was there said that "the transportation of these goods certainly went outside of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the state." It was in effect held that, when the subject of regulation is indivisible, there can be no division of regulation, either as between states or as between the state and the nation; and that there can be no splitting of jurisdiction in proportion to the mileage in the state seeking to regulate interstate shipments. It was also said: "It is decided that navigation on the high seas between ports of the same state is subject to regulation by Congress (*Lord v. Goodall*, N. & P. S. S. Co. 102 U. S. 541, 26 L. ed. 224), and is not subject to regulation by the state (*Pacific Coast S. S. Co. v. Railroad Comrs.* [C. C.] 9 Sawy. 253, 18 Fed. 10); and although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last-cited case disposes equally of the case at bar. 'To bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state.'" The route of carriage was out of the state a very short distance, it is true; but, as we have seen, the shipment is to be treated as a unit, and the rule in such a case would appear to be the same whether the act of transportation was outside of the state one or a hundred miles. In *State v. Otis*, 60 Kan. 248, 56 Pac. 14, an act regulating the transportation of live stock, and which required the railroad company to carry the

part over territory of another state. Nor is it affected by the fact that the company has established a relay office in such other state. The statute deals with the company, not its agents. The company in this case undertook to transmit the message from one point to another in Virginia, and it cannot escape the penalty imposed by statute for its dereliction of duty on the theory that the statute has no extraterritorial force. The default complained of was not the stoppage of the message at Bluefields, but the failure to transmit it as promptly as practicable to Tom's Creek. And the response of the company that it was guilty, but guilty at a point beyond the limits of the state, constitutes no defense."

The doctrine of this case was reaffirmed in *Western U. Teleg. Co. v. Hughes*, 104 Va. 240, 51 S. E. 225, although the case of *Hanley v. Kansas City Southern R. Co.* supra, had then been decided. Two judges dissented in a strong opinion, on the ground that although such a statute might be valid where the default took place in the state, it could not where it occurred outside of the state. A writ of error was dismissed in 203 U. S. 505, 51 L. ed. 294, 27 Sup. Ct. 28 L.R.A. (N.S.)

Rep. 162, on a ground not involving the merits.

High seas and navigable waters.

No attempt has been made to collect the cases dealing with the relative rights of the states and of the Federal government to regulate traffic by water between two ports in the same state, which passes over the high seas or navigable waters of the United States, since the question is affected by the admiralty jurisdiction of the United States. as well as by the interstate commerce clause.

But see *Lord v. Goodall*, N. & P. S. S. Co. 102 U. S. 541, 26 L. ed. 224, and *Pacific Coast S. S. Co. v. Railroad Comrs.* 9 Sawy. 253, 18 Fed. 10, holding that under the clause of the Constitution giving Congress power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and entirely aside from its admiralty jurisdiction, Congress may regulate the liability of owners of vessels navigating the high seas, although they are engaged in the transportation of goods and passengers between ports and places of one state only. R. A. E.

shipper free in certain cases, was under consideration. The shipment was originated in Luray, Kansas, and ended a few yards from the state line in Kansas City, Missouri, and it was held to be interstate commerce, and the regulation a violation of the commerce clause of the Federal Constitution. To the same effect is *Missouri, K. & T. R. Co. v. Sinclair*, 77 Kan. 228, 94 Pac. 123.

Counsel for appellee contend that, as the transportation began and ended in the state, it was subject to state regulation, and rely on *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806, and some other cases based on that decision. That case, however, relates to taxation rather than transportation. In transporting property from place to place in Pennsylvania, the railway company passed for a short distance through New Jersey; but the tax which was the subject of controversy was determined upon the transportation within the state. It was held that a state might tax the business done in the course of a continuous carriage from one point to another in the state, although the railway company, in accomplishing it, incidentally traversed over a part of another state. In *Hanley v. Kansas City Southern R. Co.*, supra, Mr. Justice Holmes, who wrote the opinion, made it clear that the rule of the *Lehigh Valley Case* did not apply to a regulation of transportation. In speaking of the decisions of state courts which held that the *Lehigh Valley Case* was an authority for transportation which was partly outside of the state, he said: "These decisions were made simply out of deference to conclusions drawn from *Lehigh Valley R. Co. v. Pennsylvania*, supra, and we are of opinion that they carry their conclusions too far. That was the case of a tax, and was distinguished expressly from an attempt by state directly to regulate the transportation while outside its borders. 145 U. S. 204. And although it is intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax 'was determined in respect of receipts for the proportion of the transportation within the state.' 145 U. S. 201. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163. Whereas, it is decided, as we have said, that when a rate is established, it must be established as a whole." The distinction between the imposition of a tax and the regulation of 28 L.R.A.(N.S.)

transportation, as applied to a carrier doing interstate business, is commented upon in *Leavenworth v. Ewing*, 80 Kan. 58, 101 Pac. 664. It was there said: "The result of the authorities is that a rate on a continuous carriage from point to point within the state is to be regarded as a unit, and when it is applied to a shipment which passes through more than one state, it takes on an interstate character, and is beyond the regulation of the state; but a different rule obtains in the matter of taxation. The state may properly tax the property located within its borders of a corporation doing an interstate business, and may also tax that part of the business of such corporation which is done within the state." The language of the statute indicates a legislative purpose to limit its application to intrastate traffic. It refers to live stock received by carriers "for transportation within this state," and the time limit is applied to stock "transported by rail within this state." If, however, it were intended to apply to interstate commerce like the shipment in question, it would be necessarily invalid. In no event can there be a recovery under the statute for negligent delay in an interstate shipment.

It follows that the judgment must be reversed, and the cause remanded for further proceedings.

All the Justices concur.

LOUISIANA SUPREME COURT.

STATE OF LOUISIANA EX REL DAVID
J. REID

v.

P. D. LEBLEU, Registrar of Voters, Appt.

(126 La. —, 52 So. 849.)

Election — destruction of registry list — effect.

1. The registered voter is not disfranchised because of the destruction by fire of all the registrar's records.

Same — rights of voter.

2. He may have his name placed on the new book of the registrar by application at

Headnotes by BREAUX, Ch. J.

Note. — Effect of loss or destruction of registry lists.

Little authority has been disclosed upon the point covered by this note. The decision in *STATE EX REL. REID v. LEBLEU* is supported by *State ex rel. Hampton v. Waldrop*, 104 N. C. 453, 10 S. E. 694, where it was held that the fact that the registration book of an election precinct had been lost did not invalidate the election, where the

any time before the forty-eight hours preceding the opening of the polls.

Same—duty to register anew.

3. The voter who has registered, and whose registration papers are destroyed, is not in the category of a voter who has not registered. He cannot be made to register anew, as if he had never before been a registered voter. The registrar has authority to protect his office from imposition, and at the same time he may permit registered voters to have their names placed on the new poll book.

(June 30, 1910.)

A PPEAL by respondent from a judgment of the Judicial District Court for the Parish of Calcasieu, granting a writ of mandamus requiring him to place relator's name on the registration book as a qualified voter. Affirmed.

The facts are stated in the opinion.

Messrs. Joseph Moore, E. F. Gayle, and T. Arthur Edwards for appellant.

Messrs. Robert R. Stone and David R. Rosenthal for appellee.

Breaux, Ch. J., delivered the opinion of the court:

This was an application for a writ of mandamus, filed by David J. Reid in the district court, against the registrar of voters for the parish of Calcasieu, to compel him to place his (plaintiff's) name on the registration book as a qualified elector.

The registrar had refused to grant plaintiff's application to carry his name on the roll, and this application is to compel him

to enter his name on that roll. The plaintiff is a citizen of the United States and a resident of the parish of Calcasieu. The registration book, containing the names of voters, was destroyed by fire on the 23d of April, 1910. A few days thereafter, the registrar gave official notice in the local papers to all voters to come forward and register anew. This was done in order to afford an opportunity to the voters to register their names anew. Some time after his office had been opened, he gave notice that in thirty days prior to a special election he would close his office. The special election referred to is to be held on the 14th day of July, 1910.

The parties to this litigation seek an interpretation of the statutes in order, so far as possible, to avoid all illegalities and irregularities. If the majority of the voters called upon to vote at the special election of July 14, 1910, so elect, bonds are to be issued, as a result of the election, aggregating \$360,000. Other elections are to be held, primary and general, in the near future. It is probable that other voters, who had registered before the fire before mentioned, will also seek to exercise their franchise rights. The district court made the mandamus peremptory, and directed the registrar to enter the name of the relator. The registrar appeals.

The first objection urged (in argument only) by the respondent is one regarding the asserted failure of relator to make the required affidavit and take the required oath.

registrar procured another book, and entered therein the names of those who he knew had registered, together with those of subsequent applicants, and it appeared that no qualified person had been refused the right to vote. The court said: "The registration book should be present and used for the purposes prescribed by law at the voting place, while the election is in progress, and until all the votes are received. It should not—cannot—be dispensed with in any case, if it can be produced; but if it be lost, destroyed by accident, or made way with by fraud, or for fraudulent purposes, the mere fact that, by reason of such causes, it is not present at the election, as it should be, cannot deprive a registered voter of his right to vote. He had registered,—had perfected his right to vote by registration; he was a registered voter, as much so as if the registration book were present; and while the book is the proper and the better evidence of the fact, it is not the only evidence. He may offer evidence of the fact, if need be, by his own testimony, that of the registrar, and of such person or persons as were present and saw him registered. 28 L.R.A.(N.S.)

If, in such case, the judges of the election should be satisfied that he was then properly registered, he should be allowed to vote, and he should be, although it might turn out that the absence of the registration book might, in some way and for some cause arising, destroy the validity of the election at that voting place."

It is provided by statute in Kentucky that "any person who has registered, and whose certificate of registration has been lost or otherwise destroyed after the registration books containing his registration have been filed with the clerk of the county court, may, upon filing his affidavit before the county court clerk, showing that fact, obtain a duplicate certificate of registration, and, upon filing such an affidavit before the county court clerk, it is hereby made the duty of the said clerk to issue said certificate, for which he may charge the applicant a fee of 50 cents, and said certificate shall entitle the person named therein to vote as if issued by the officers of registration;" and this act is held valid. Yates v. Collins, 118 Ky. 682, 82 S. W. 282, 973. J. T. W.

Our answer to the contention of respondent is that he has not alleged these asserted grounds in his answer. The answer contains the general averment that relator came to respondent's office, and applied to place his name on the roll of registration, which was refused. Furthermore, the case is before us on an agreed statement of facts. No mention is made in this agreed statement of facts of a refusal on the part of the relator to take an oath or to comply with any direction of the registrar. As this objection is raised only in the written argument, it has every appearance of an afterthought. Relator must have taken the first registration oath at the time that he registered; i. e., any oath required at the time that he registered originally. As to any oath required of him (if any was required) when he appeared before the registrar the last time, the pleadings and the facts are silent on the subject. It is only mentioned in the brief.

There is really no issue before us as to either the failure to take an oath or to satisfy the registrar that he had previously registered at the time that he made his application to have his name placed on the roll. Respondent admits that relator registered. It must, in consequence, be held that he duly registered, in the absence of any showing to the contrary.

The next proposition of respondent is that a voter who fails to avail himself of the right to register cannot vote at an election held in accordance with act No. 98 of 1908. That is true. It does not apply to the case at bar. Relator did not fail to register. We have seen that he was duly registered, only the destroying flames burnt the written evidence of registration.

The next proposition of respondent is substantially to the same effect. Respondent, in support of this last proposition, urges that relator was negligent, indifferent, and for that reason he must be held to have voluntarily disfranchised himself. This proposition is not sustained, for the right sought is public. We will further state, in answer, the rule established should apply to all voters, without regard to laches or negligence, as there cannot be degrees of excellence in this matter or of indifference. It cannot reasonably be said to a voter, "Your right to have your name placed on the roll will be recognized, because you have been active enough," but to another, less active, or who may be guilty of laches, "You cannot register." That would not do. All must be treated alike,—the active, or the lame, the halt, and the blind. All have the right, or none have it. If they have it, it should be recognized, after reasonable inquiry in regard to the right of the voter to vote.

28 L.R.A.(N.S.)

We may as well state here the office of registrar is not to be imposed upon, as respondent seems to apprehend, by all who may apply to place their names on the registration book, without regard to whether they have previously registered or not. That officer should certainly be equal under the law to the duty of protecting his office from imposition.

We are decidedly of the opinion that relator has the right to have his name carried on the registration book.

The next contention of the respondent registrar is that the name of the voter cannot, under the statute, be placed upon the precinct register or voting list by the registrar or voter within thirty days of an election, citing act No. 98 of 1908, in support of the contention.

We will begin by stating that the condition brought about by the destruction of the records is abnormal. Still, a voter who has previously registered should not be disfranchised, nor should the rule laid down tend to exclusion rather than inclusion of the voters who, in good faith, seek to exercise their rights as voters, although they may be a little tardy in their application. There is no question of registration, as we have before stated. But, having secured the right to vote, he should be permitted to retain the right.

Another ground of respondent is that, although the registration record had been totally destroyed by fire, no person ought to be permitted to vote under the statute on any oath or written affidavit on the day of the election. That question is not before us. We have naught to do with acts on the election day. We have no objection to state that, in our opinion, the contention that the precinct registration, or poll books for each precinct must be furnished within forty-eight hours before the time fixed for the opening of the poll is sufficiently before us to justify us in expressing an opinion upon the subject. We are inclined to the opinion that the names of voters who had previously registered cannot be placed on the registration books within the forty-eight hours preceding the opening of the polls. This is rendered necessary, in order that the registrar may comply with the statute, and send the necessary books and papers from his office to the different polls and precincts, or where ever they are needed under the law.

In conclusion: A voter who has duly registered cannot be disfranchised on the ground that he has not had his name placed on the registration rolls thirty days before the election. He is not to be treated and considered as one who had not registered at all, as in this instance the relator had registered and secured the right which the statute pro-

vides. He cannot, under the statute, have his name carried on the registration roll within the forty-eight hours just preceding the opening of the polls. If he complies with the statute as now interpreted, he has all the rights on the day of the election of a voter who had had his name placed on the registration rolls thirty days before the day preceding the election.

For reasons stated, the judgment appealed from is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MABEL B. WINANS

v.

ANTHONY V. WINANS.

(205 Mass. 388, 91 N. E. 394.)

Divorce — jurisdiction — residence in state.

A husband and wife lived together in the state within the meaning of a statute making that fact a prerequisite to jurisdiction of the state courts over a divorce proceeding, where they came into the state with the intention of making their home there, and after remaining a few days looking for apartments selected one and sent their belongings there, although, before taking up a residence in the apartment, the husband left the state on business and never returned.

(March 23, 1910.)

REPORT by the Superior Court for Essex County for the opinion of the Supreme Court after dismissing a libel for divorce. Decree for libellant.

The facts are stated in the opinion.

Messrs. Charles Neal Barney, Henry T. Lummus, and Wilbert A. Bishop, for libellant:

Domicil in a state is acquired *animo et facto*.

Palmer v. Hampden, 182 Mass. 511, 65 N. E. 817.

Residence and intention are questions of fact.

Moor v. Harvey, 128 Mass. 219; Wright v. Boston, 126 Mass. 161.

The parties gained a domicil.

Palmer v. Hampden, *supra*; Wilbraham v. Ludlow, 99 Mass. 587.

If there is an intent to reside in a place, a residence in pursuance of that intention, however short, will establish a domicil.

Wharton, Conf. L. § 58; Dicey, Conf. p. 107; Stockton v. Staples, 66 Me. 197; White v. Tennant, 31 W. Va. 790, 13 Am. St. Rep. 28 L.R.A. (N.S.)

896, 8 S. E. 596; Williams v. Roxbury, 12 Gray, 21.

Domicil for the purposes of divorce may be acquired in the commonwealth without reference to any particular municipal division thereof.

Arnott v. Groom, 5 Sc. Sess. Cas. 2d series, 62; Re Craignish [1892] 3 Ch. 180; Jacobs, Domicil, § 133; Dicey, Conf. L. Am. ed. 1896, pp. 90-93.

Morton, J., delivered the opinion of the court:

This is a libel for divorce. The libellee was duly served and appeared, but was subsequently defaulted. Upon the evidence before him the presiding judge "found and ruled that the parties never lived together as husband and wife in this commonwealth within the meaning of the statute, and on that ground ordered that the libel be dismissed," and at the request of the libellant

Note. — Character of residence essential to give jurisdiction in divorce proceedings.

This question was treated in a note to Bechtel v. Bechtel, 12 L.R.A. (N.S.) 1100, and this note is supplementary thereto.

Following the limitations in the earlier note, this note will be confined to cases discussing the standard by which the facts relating to the domicil must be measured, and does not include cases which merely pass upon the question whether or not there had been residence for the requisite length of time in the jurisdiction.

As is shown in the earlier note, the intention of the party to take up a residence in the place is one of the essential elements of a domicil for divorce purposes, and this intention must be bona fide, and not merely claimed. This intention is to be considered in connection with the acts of the party.

Thus, in Bradfield v. Bradfield, 154 Mich. 115, 129 Am. St. Rep. 468, 117 N. W. 588, the court said that, in determining whether a complainant was a resident of the state under the divorce law, and in any case where residence is to be determined, the intention, coupled with the acts of the party, must be considered. Intention is always to be given large consideration, but merely claimed intention without acts to support it is not controlling.

And in Duxstad v. Duxstad, 17 Wyo. 411, 129 Am. St. Rep. 1138, 100 Pac. 112, the court said that a change of residence does not consist alone in going to and living in another place, but it must be with the intention of making that place the permanent residence. A residence once acquired continues until a new one is acquired.

So, in Petty v. Petty, 42 Ind. App. 443, 85 N. E. 995, it was held that a wife who leaves her former home with her child, to join her husband, who had resided for sev-

reported the case to this court. If, on the facts found by him, the finding was not warranted in law, then a decree nisi on the ground of desertion is to be entered; otherwise the libel is to be dismissed.

So far as the question is one of fact, the presiding judge has determined it adversely to the libellant. But the facts upon which he based his conclusion that the libel should be dismissed have all been reported by him, and the question whether he was wrong in ruling as he did becomes therefore a question of law.

The statute provides that "a divorce shall not, except as provided in the following section, be decreed if the parties have never lived together as husband and wife in this commonwealth." Rev. Laws, chap. 152,

eral months in another state, loses her residence in the first state, although she remained but a short time in the second domicile, when she had no intention of establishing a legal residence apart from her husband until after her return to the first state.

And in *Mason v. Mason*, 69 N. J. Eq. 292, 60 Atl. 337, the court said that under the facts of the case the complainant was entitled to a divorce, provided that the court had jurisdiction of her matrimonial status, —provided, in other words, that she had not come into the state for the mere purpose of obtaining a divorce or for the accomplishment of any other transient purpose, but had come and had resided there *animus manendi*.

The temporary absence from this state of one domiciled here will not be held a change of residence, unless to the *factum* of residence elsewhere be added the *animus manendi*; for a domicile, having once been acquired, continues until a new one is actually acquired *animus et facto*. *Watkinson v. Watkinson*, 68 N. J. Eq. 632, 69 L.R.A. 397, 60 Atl. 931, 6 A. & E. Ann. Cas. 326.

So, in *Dulin v. Dulin*, 33 Pa. Super. Ct. 4, it was held that a man engaged in newspaper, political, and philosophical work as a writer and lecturer, and who had changed his residence in response to the various demands of his professional labors, did not acquire a domicile therein within the meaning of the divorce law, although he had actually been within the state for a period of time greater than required by the law, when there was no suggestion of any domiciliary intent or of an abandonment of a former domicile. The court said: "Our statutes and decisions require that it must affirmatively appear that there has been a clear intention to abandon a former residence, and to make this state a permanent one with domiciliary intent, coupled with an actual bona fide residence for one year within this commonwealth previous to the filing of the petition or libel."

And in *Sworosi v. Sworosi*, 75 N. H. 1, 70 Atl. 119, it was held that a married woman residing in a sister state may for cause acquire a domicile apart from her husband.

§ 4. The exception referred to is immaterial so far as this case is concerned. The libellant concedes that it must appear that the parties were domiciled in this commonwealth in order to satisfy the requirement that they shall have lived together here as husband and wife. *Ross v. Ross*, 103 Mass. 575; *Weston v. Weston*, 143 Mass. 274, 6 N. E. 557. The question then is whether the presiding judge was wrong in finding, as he must have found, that the parties were not domiciled in Massachusetts.

It is plain that the libellant never lost her domicile in this commonwealth, except by reason of her domicile following that of the libellee, and we therefore need not consider further the facts in regard to her status. Was the presiding judge wrong in find-

band by removing to this state with the intention of permanently making it her home and actually residing here.

A mere residing for the requisite period of time is not sufficient to give a domicile. *R. v. Woods*, 6 Ont. L. Rep. 41.

Mere absence from a fixed home does not work a change in domicile. There must be an *animus* to change. *Blondin v. Brooks* (Vt.) 76 Atl. 184.

So, a wife who, upon being abandoned by her husband, leaves the city where she had lived with her husband, and goes into another state solely to earn her living, not acquiring a domicile therein, and still regarding the city as her home, does not lose her residence in the said city. *Cummings v. Cummings*, 133 Ky. 1, 117 S. W. 289.

Mere residence for the purpose of procuring a divorce has frequently been held insufficient to give a domicile within the meaning of the divorce law. *Mason v. Mason*, *supra*.

So, in *R. v. Woods*, *supra*, the court said that a mere "matrimonial domicile" is not sufficient.

A wife loses her residence in one state by going with her husband to another state, although she returned in about two months, where she had no other intention than to remain at the new place with her husband, unless a certain contingency should happen, which did not occur. *Hoffman v. Hoffman*, 155 Mich. 328, 118 N. W. 990.

To the same effect was the decision in *Lamont v. Lamont* (Ga.) 68 S. E. 96, where it was held that a woman who had been compelled by her husband's drunkenness to leave him, and who had established a domicile in a foreign jurisdiction, loses that domicile in going to live for a time with her husband, and, upon returning to the foreign jurisdiction again, must reside there the requisite length of time before she can maintain an action for divorce.

A traveling salesman who rents a room in a city which is the center of his activities thereby acquires a residence which satisfies the divorce law, although his business frequently calls him to other places. *Stone v. Stone*, 134 Mo. App. 242, 113 S. W. 1157.

ing that the libellee did not acquire a domicile here? The parties were married in New York city. The domicile of the libellee before marriage, as the judge has found, apparently had been in New York; and certainly, as he further found, it never had been in Massachusetts. The libellee had no business or family ties in New York and no fixed place of abode there or elsewhere, but roomed in various hotels in New York city, when not traveling with his mother, who spent her time in health resorts. He was upwards of forty years of age and had no occupation. The remainder of such fortune as he had was involved in litigation in New York city, and he was heavily in debt there. These are all the facts found in regard to the libellee's domicile before marriage, and his condition and circumstances, and they show conclusively, it seems to us, that he had no fixed place of abode in New York city and no family or business or other ties to keep him there. His domicile, if he had one there, would seem to have been of the most unsettled character. Indeed the presiding judge goes no farther than to find that his domicile before marriage "apparently" had been in New York, as though the matter was not free from doubt. Under such circumstances the acquisition of a new domicile or a change of domicile will be much more easily and readily inferred than when one has a fixed place of abode and a family and an established business, and associations more or less deeply rooted and permanent. A few days after the marriage the libellee and his wife came to Boston to the Hotel Touraine, where they stayed entertaining their friends and looking around for a house in which to live permanently. They

examined various places in the suburbs, but made no choice. The libellee said that he liked Boston and expected to enjoy living there. After they had been in Boston less than two weeks, they went to a health resort in Virginia at the request of the libellee's mother, who was ill there. Before leaving Boston the libellee requested his wife's sister, who lived in Boston, to find a suitable apartment to be occupied by himself and his wife on their return. The sister procured an apartment in Brookline, to which the greater part of the libellee's clothing, which, so far as appears, was all the personal effects that he had, was sent, and for which he and his wife started when they left Virginia on their return about a month later. On the way back from Virginia the libellee, who had expressed uneasiness about his financial affairs and a desire to see his lawyer, stopped off in New York, at his wife's suggestion, to see the lawyer. He put the libellant and her daughter by a former marriage into the train for Boston, and told her he would be in Boston in two days. The libellant never saw him afterwards, although he wrote expressing his intention to come. The presiding judge found, as he could not very well have helped finding, it seems to us on these facts, that the parties intended to take up their residence in this commonwealth when they came to Boston to the Hotel Touraine. He found that they did not intend to live permanently in Boston, but in some suburb when a suitable place of residence could be found. He was not satisfied that the libellee had any intention of returning to this commonwealth to live with his wife when he parted from her in New York.

In *Duke v. Duke*, 70 N. J. Eq. 135, 62 Atl. 466, affirmed in 72 N. J. Eq. 434, 65 Atl. 1117, the court said that there might be a domicile without an actual present residence, and that there might be a present residence without a domicile. The court goes on to say: "Now, the marks of the domicile are numerous. They include the character of the place, and the acts and declarations of the party in connection therewith; provided, of course, the declarations are made in good faith, sincerely, and *ante litem motam*."

An interesting question is raised in *WINANS v. WINANS*, which does not appear to have been squarely passed upon by the court, or, at least, which does not appear to have necessarily been adjudicated by the court in reaching its conclusion. That is, whether or not a party may acquire a domicile within the meaning of the divorce law in a state without acquiring a fixed domicile in any particular locality within the state. A similar question arose in *King v. King*, 74 N. J. Eq. 824, 71 Atl. 687. In this case a wife who had been deserted by her husband

went into New Jersey from another state, and resided for a short time at various places in an effort to find an inexpensive place to live. She finally located in a city permanently, and filed a petition for divorce in less than the statutory period thereafter. The court, however, held that, although she had not been a resident of that particular locality for the requisite length of time, she had been a resident of the state for that period, which satisfied the requirements of the law. The mere fact that she had moved from place to place in an effort to find an inexpensive place to live was immaterial where there was a bona fide intention of remaining a resident of the state. The court said: "Notwithstanding a frequent change of habitation may create a situation by which the proof of an *animus manendi* becomes difficult, yet, if proved, this, coupled with residence, although migratory, within the territory of the nation or state, equips the resident with a domiciliary status."

W. M. G.

In order to acquire a domicile, both the fact and the intent must concur. Actual residence and the intention to remain either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode, are required to constitute a change of domicile. The length of the residence is immaterial provided the other elements are present and are found to exist. A day or an hour, it has been said, will suffice for the acquisition of a domicile. *Jacobs, Domicil*, § 134, note. In this case, when the libellee came to Boston with his wife he intended, as the presiding judge has found, to reside permanently in this commonwealth. There was no *animus revertendi* on his part, and his intention to reside here was not contingent on his finding a suitable place of residence, but the finding of a suitable place of residence was rendered necessary by his determination to take up his abode permanently in this commonwealth. He did not intend to reside in Boston. But having come here with the intention to remain, and with no fixed or certain purpose to return to New York, the place where he was for the time being must be regarded, we think, as his home or domicile, unless it can be said that he did not acquire a domicile here until he had selected the place where he intended to reside permanently. *Wilbraham v. Ludlow*, 99 Mass. 587; *Whitney v. Sherborn*, 12 Allen, 111. We do not regard it as necessary that he should have done that. If he had been in *itinere* on his way from New York to some city or town in this state where he had decided to live, and had stopped for a few days in Boston entertaining friends, and then had gone to Virginia and never had returned to this state, so that he in fact never reached the place where he intended to reside, the case would have stood differently. *Briggs v. Rochester*, 16 Gray, 337. In that case the fact and intent would not have concurred until he reached his predetermined place of abode, which he would not have done. So, if he had been passing through this commonwealth to some town or city in another state, where he intended to make his home, and had remained for a few days at the Hotel Touraine, or if he had been here for some temporary purpose, like a wedding journey for instance, it is clear that he would not have acquired a domicile in this commonwealth. *Shaw v. Shaw*, 98 Mass. 158. But this case differs from either of the cases thus supposed. In the case before us the libellee came here with his wife for the purpose of making his home in this commonwealth, though he was undecided as to the particular place in which he would reside. For aught that appears he would have remained here except for his mother's ill-

ness, which unexpectedly called him to Virginia. He had no intention to return to New York. An apartment was selected for him and his wife in Brookline, and he took possession of it by sending his clothing to it, though he never in fact occupied it, as to which see *Williams v. Roxbury*, 12 Gray, 21. Under such circumstances we think that the libellee must be deemed to have acquired a domicile in this commonwealth, and to have lived here with his wife as husband and wife within the meaning of the statute. He was here for a short time only, it is true, but, as we have seen, the acquisition of a domicile does not depend on the length of the residence, and a domicile may be acquired in another state or country, even if the party has not determined in what particular place he will take up his residence. As *Chitty, J.*, said in *Craignish v. Hewitt* [1892] 3 Ch. 180, 192: "A man may be domiciled in a country without having a fixed habitation in some particular spot in that country." See also *Bell v. Kennedy*, L. R. 1 H. L. Sc. App. Cas. 307, 320, per Lord Westbury; *White v. Tennant*, 31 W. Va. 790, 13 Am. St. Rep. 896, 8 S. E. 596; *Bradley v. Lowry*, *Speers*, Eq. 1, 39 Am. Dec. 142; *Dacey*, Conf. L. 2d ed. 93 et seq.; *Jacobs, Domicil*, § 134. For the purposes of taxation or of settlement under the pauper laws, one must be an inhabitant of or have a domicile in some particular municipal division. *Briggs v. Rochester*, supra. *Colton v. Longmeadow*, 12 Allen, 598. But all that is required to give the courts jurisdiction in matters of divorce is that the parties shall have lived together as husband and wife in the commonwealth; that is, that they should have had a domicile here. Parties who have come into this commonwealth for the purpose of residing here permanently, without any intention to return to their former places of abode, and who are looking round to find a suitable place in which to live, cannot be said to be in *itinere*. Nor can their former domicile be said to adhere to them until they have fixed upon a place of abode in this commonwealth. They have abandoned their former domicile without any intention of returning, and with the intention of taking up their residence here, either permanently or for an indefinite time; and from the nature of the case their domicile must be, as already observed, where they are for the time being, although they do not intend to make their home in that particular place, but do mean to make it in the commonwealth into which they have removed. The fact that the libellee may have had no intention of returning to this commonwealth to live with his wife, when he parted from her in New York, is immaterial if he had previously acquired a domicile here.

The case before us differs from *Olivieri v. Atkinson*, 108 Mass. 28, 46 N. E. 422, and similar cases, inasmuch as it is expressly found in this case that it was the intention of the party whose domicile is in question to reside permanently in this commonwealth.

The result is that, in accordance with the report, a decree nisi on the ground of desertion will be entered for the libellant.

So ordered.

MONTANA SUPREME COURT.

JOHN R. OWENS, Resp't.,

v.

J. R. DAVENPORT et al., Appts.

(39 Mont. 555, 104 Pac. 692.)

Illegal contract — collateral compromise — enforceability.

One who having received an assignment of claims by an employer of labor, in consideration of his furnishing funds with which to pay the laborers, gives a duebill in satisfaction of an order upon himself by the employer for wages due for cutting timber on government land, in consideration of which he requires an assignment of the claim in order to defeat a right to assert a lien on the timber, cannot defeat liability thereon on the ground that the original contract was void, since his promise is a new and independent transaction, and not tainted by the illegality of the original agreement.

(November 8, 1909.)

APPEAL by defendants from a judgment of the District Court for Silver Bow County in plaintiff's favor and from an order denying a new trial in an action brought to recover wages alleged to be due for cutting certain timber. Affirmed.

The facts are stated in the opinion.

Messrs. Napton & Napton for appellants.

Mr. T. F. Nolan for respondent.

Holloway, J., delivered the opinion of the court:

This action was brought by plaintiff to recover from the defendants the sum of \$66.46. The complaint alleges that on December 14, 1905, this plaintiff sold, assigned, and transferred to defendants a certain order in writing, as follows:

Warnock's Camp, Dec. 12, 1905.

J. R. Davenport:—

Please pay to John R. Owens the sum of two hundred and twenty-six and 46-100 (\$226.46) dollars, in full payment to date, 28 L.R.A.(N.S.)

and charge the same to my account, and greatly oblige,
F. W. Warnock

That defendants then paid plaintiff therefor \$160, and promised and agreed to pay him the further sum of \$66.46 in January, 1906, but have failed and refused to do so. The amended answer admits the sale of the order, and that defendants paid therefor \$75, but deny they ever promised to pay any further sum. As a special defense it is alleged that plaintiff was employed by Warnock to cut mining timbers; that such timbers were cut from unsurveyed government land; that neither plaintiff nor Warnock had a permit from the government to cut the timber; that payment has not been made to the United States for the timbers so cut; and that the amount sued for herein by plaintiff is a bal-

Note.—Is promise by a third party to pay claim arising out of performance of contract between two other persons tainted by the illegality of that contract.

An express or implied promise by a third person who is a mere depository of money, the proceeds of an illegal contract, to pay same to one of the parties thereto, is not affected by the illegality of such contract, and may be enforced in behalf of the party to whom the promise was made, since such promise and the consideration upon which it is based are both independent of the illegal contract. *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russell*, 1 Bos. & P. 296; *Thomson v. Thomson*, 7 Ves. Jr. 471; *Sharp v. Taylor*, 2 Phill. Ch. 801; *McMullen v. Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Barker v. Parker*, 23 Ark. 390; *Fairbanks v. Blackington*, 9 Pick. 93; *Woodson v. Hopkins*, 85 Miss. 171, 70 L.R.A. 645, 107 Am. St. Rep. 275, 37 So. 1000, 38 So. 298; *Hatch v. Hanson*, 46 Mo. App. 323; *Roselle v. Beckemeir*, 134 Mo. 380, 35 S. W. 1132; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Merritt v. Millard*, 4 Keyes, 208; *Owen v. Davis*, 1 Bail. L. 315; *Bendet v. Ellis*, 120 Tenn. 277, 18 L.R.A.(N.S.) 114, 127 Am. St. Rep. 1000, 111 S. W. 795; *Jagman v. Neece* (Tex. Civ. App.) 59 S. W. 822; *Lemon v. Grosskopf*, 22 Wis. 447, 99 Am. Dec. 58; *Kiewert v. Rindskopf*, 46 Wis. 481, 32 Am. Rep. 731, 1 N. W. 163.

But if the person paying the proceeds of an illegal contract to a third person to be paid to one of the parties to the contract withdraws same or revokes his instructions as to payment, the party to the illegal contract to whom payment was to be made cannot enforce payment from the third person acting as depositor. *Edgar v. Fowler*, 3 East, 222. On this point Lord Ellenborough, Ch. J., said: "The money does not appear to have been actually paid into the defendants' hands in case of illegal transactions, it may always be stopped while it is *in transitu* to the person who is entitled to re-

ance due for the work so done for Warnock. Upon the trial the plaintiff offered in evidence the following writing, given to him by defendants, as evidence of the balance due:

Received on account. December 14, 1905, due John Owens \$66.46 on Warnock account to be paid in January.

J. R. Davenport.

The trial resulted in a judgment in favor of the plaintiff, and from such judgment and

an order denying them a new trial, defendants appealed.

Only three questions are argued in appellants' brief, and the first of these is disposed of adversely to appellants by the case of *Parnell v. Davenport*, 36 Mont. 511, 93 Pac. 939, which was a companion case to the one before us.

The second question argued relates to the special defense set forth in the answer. It is contended that the agreement between plaintiff and Warnock, under which the

ceive it. If, indeed, this had been a legal transaction, the money might perhaps have been considered as paid, but we will not assist an illegal transaction in any respect. We leave the matter as we find it, and then the maxim applies, *Melior est conditio possidentis*."

In the foregoing cases the promise to pay was based upon a consideration entirely independent of the illegal contract. *OWENS v. DAVENPORT* applies the same doctrine where the promise to pay was based upon an assignment of the amount due under an illegal contract. It is the only case found thus applying the doctrine.

The position of the court in that case finds support in language used in *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 408, to the effect that an express promise by a third person based upon a sufficient consideration, to pay an illegal claim, is not tainted by the illegality. The rule as thus stated, however, was not applied.

Compare with *Steers v. Lashley*, 6 T. R. 61, wherein Lord Kenyon, Ch. J., said that if a third person had lent money to one of the parties to an illegal contract, to pay the sum due thereon, and had received a bill of exchange for that sum, he could recover on the bill. He, however, added that where the bill of exchange growing out of an illegal contract was merely indorsed to a third person, he could not recover thereon if he knew of the illegality of the original contract.

In *Gibson v. Pearsall*, 1 E. D. Smith, 90, an agreement by a third person to pay the amount due the landlord under a lease invalid because the premises were leased for an illegal purpose was held, as a matter of law, not to be tainted with the illegality, where the consideration of the promise was a surrender of the premises by the tenant to the third party making the promise.

Compare with *Roller v. Murray*, 107 Va. 527, 59 S. E. 425, wherein it was stated that a promise by a third person to pay for services performed under an illegal contract was tainted with the illegality of the original contract, and hence was unenforceable, although the consideration was the conveyance by a party thereto, to such third person, of land growing out of the illegal contract. On this point the court said: "As a further argument against the demurrer, it is insisted by counsel for com-

plainant that the demurrant, Mrs. Murray, is a stranger to the contract, and that a stranger to an illegal contract cannot set up the illegality as a defense. The abstract proposition of law, as stated, is doubtless correct, but I do not think the authorities sustain the application of the principle to the situation of this case. The rule applies when the illegality does not appear on plaintiff's own showing, but is brought into the case in an affirmative way by the defendant as matter of defense, as by plea or answer, or where the illegal contract is collateral to the matter in suit. When the illegal contract is the substance of his suit, and the illegality appears by the plaintiff's pleadings, and a demurrer is interposed, or the question is otherwise brought to the attention of the court, the law is, I think, that the illegality thus appearing will defeat the suit." It is to be noted, however, that this case was also disposed of upon the finding as a fact that the third person making the promise was in privity with the parties to the illegal contract.

Jackson v. Baker, 48 Or. 155, 85 Pac. 512, held that money could not be recovered which had been paid by a third person in consideration of the illegal agreement of another to convey to a designated person the legal title to his homestead, after title thereto had been obtained from the United States.

An assignment of money due under an illegal contract is not tainted with the illegality of the contract assigned, and is good between the parties. *McBlair v. Gibbs*, 17 How. 232, 15 L. ed. 132.

A bank advancing money to enable a party to an illegal contract to carry same out is entitled to recover such money, and an assignment of the proceeds of the contract may be enforced by it to that extent, there being no proof that the bank or any of its officers knew of the illegal contract until the day it was entered into, and no finding that it participated in or furthered same. *Citizens' Nat. Bank v. Mitchell* (Okla.) 103 Pac. 720.

The heirs of a grantee of land who received same in a lottery, subject to an annual ground charge, are estopped from alleging the invalidity of the contract under which their ancestor received the land, as a defense to the payment of the ground rent. *Hipple v. Rice*, 28 Pa. 406. A. G. S.

work was done by Owens, was illegal, and therefore plaintiff cannot maintain this action upon an account arising out of such agreement. Assuming, without deciding, that, in an action by plaintiff against Warnock for wages, Warnock could have successfully made the defense that the contract from which the wages arose was illegal, still such a defense would have had to be specially pleaded; and, while either party to such agreement can raise the question of illegality, it is quite uniformly held that such a defense cannot be invoked by a third party. Plaintiff, having an order from Warnock for his wages, took it to these defendants, who paid him \$160 in cash, and gave him the duebill for the balance. But in order that plaintiff should not assert any claim to a right to a lien upon the timbers he had cut for Warnock, the defendants required him, as a consideration for accepting the order and promising to pay it, that he assign to them his claim against Warnock, thereby waiving any claim of a lien. Assuming, then, that the original agreement between plaintiff and Warnock was illegal, still the new promise of the defendants, evidenced by the duebill, was, we think, so far a new and independent transaction that it is not tainted by the illegality of the original agreement, and can properly be enforced. *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468; 9 Cyc. Law & Proc. p. 563.

We cannot see that the case is different from what it would have been had Warnock actually delivered the money to defendants, and defendants promised to pay it to plaintiff. Instead of doing just this, Warnock did substantially the same thing. He assigned to defendants the money coming to him from the Original Mining Company, from the sale of the timbers, and defendants agreed to pay the plaintiff the amount due him from Warnock. In principle just such a case is presented in *Barker v. Parker*, 23 Ark. 390. There Barker entered into a contract with Ervin, by the terms of which Ervin agreed to pay a certain sum of money to Barker for doing an illegal act. Ervin's promise was evidenced by a bond. After the illegal act had been done, Ervin paid over the money to Parker, who agreed to pay it to Barker, but afterwards refused to do so. Barker brought an action against Parker, and the latter pleaded that the transaction between Barker and Ervin was illegal. But he was not permitted to maintain this defense. The court said: "If the suit had been upon the bond, no doubt but the defense set up in the second plea of defendant, that the bond was executed upon an illegal consideration for services rendered in the abduction of Cloud, would have been a good bar to the action. But the suit was not upon the bond

or the illegal contract. Ervin, the principal in the bond, not choosing to avail himself of the illegality of the transaction to avoid payment, delivered the money due upon the bond to the defendant, to be paid over by him to the plaintiff, etc., and he agreed so to pay it over. This was a contract and undertaking on his part; and, though he was a surety of Ervin in the bond, and a party to the original contract, he was as much bound to pay the money over to the plaintiff as a stranger to the illegal contract would have been. If Ervin was willing to pay the money due on the bond, and delivered it to defendant for that purpose, what right had he to put the money in his own pocket, and to say that Ervin was not legally bound to pay the bond, and therefore he would keep the money? None, we think." We agree with this conclusion. See also *Terry v. Olcott*, 4 Conn. 442.

In closing the argument in their brief, counsel for appellants say: "The cross-examination of witness Davenport was improperly allowed;" but with this we do not agree. We think the evidence adduced well within the rule prescribed in § 8021, Rev. Codes.

The other assignments made in the brief are not argued, and are therefore deemed waived.

The judgment and order are affirmed.

Brantly, Ch. J., and Smith, J., concur.

WASHINGTON SUPREME COURT.

JAMES A. MURRAY, Appt.,
v.

TERRENCE O'BRIEN, Admr., etc., of John Sullivan, Deceased, et al.,

and
MERCANTILE INVESTMENT COMPANY,
Intervener, etc., Resp't.

(56 Wash. 361, 105 Pac. 840.)

Mortgage — tender by co-owner.

1. The owner of a half interest in a parcel of real estate has a right to tender the amount due on a mortgage on the other half

Note. — Effect of tender after maturity but before foreclosure to discharge lien of mortgage.

The earlier cases on this question are gathered in a note to *Parker v. Beasley*, 33 L.R.A. 231. The cases gathered here, therefore, are only those since decided.

It will be noticed from the above note, as to the effect of tender made after maturity, but before foreclosure, there is much conflict of authority. The reason for this conflict seems to be due to the existence of two theories in regard to the nature of mortgages,—one, the common-law theory,

interest, and be subrogated to the rights of the mortgagee, and intervene in the foreclosure suit.

Tender — grounds — protection of owner.

2. The holder of a mortgage on a half interest in a parcel of real estate cannot refuse a tender by the owner of the other half interest, on the ground that he is attempting to gain an advantage over his co-owner.

Same — payment into court — loss of rights.

3. The owner of a half interest in a parcel of real estate will not lose his right to subrogation to the rights of a mortgagee on the other half interest, by paying the amount due into court in a proceeding for the foreclosure of the mortgage, without making a formal tender thereof to the mortgagee.

Same — source of funds.

4. A mortgagee cannot reject a tender of the amount due on the mortgage, because of objections to the source from which the money comes.

Mortgage — tender out of court — effect on lien.

5. The lien of a mortgage cannot be dis-

charged by a tender of the amount due thereon out of court pending an action to foreclose the mortgage.

Same — destruction of lien — removal of cloud.

6. A tender out of court of the amount due on a mortgage in process of foreclosure will not be permitted to destroy the lien of the mortgage as a basis for affirmative relief by removal of the record as a cloud on title, without actual payment of the amount due.

Interest — mortgage — effect of tender.

7. One who refuses an unqualified tender of the amount due on a mortgage, believing it to be to his advantage to do so, will not be allowed interest on the debt after the date of the tender.

(December 16, 1909.)

APPEAL by plaintiff from a decree of the Superior Court for King County in intervenor's favor in a suit to foreclose a mortgage on a one-half interest in certain real estate in which the Mercantile Investment Company, the owner of the other one-half interest, by intervention sought to be subrogated to the rights of the

that a mortgage is an absolute conveyance with the legal title in the mortgagee; and the other, that a mortgage is merely a security for the debt. As was said in *Dickerson v. Simmons*, 141 N. C. 325, 53 S. E. 850, 8 A. & E. Ann. Cas. 301: "In those jurisdictions where the mortgage is treated simply as a security to a debt, the rule is that a mortgage is discharged by a proper tender made at any time before foreclosure, and that a sale under the power is void. In those more numerous jurisdictions where the common-law doctrines prevail, the lien of the mortgage is not discharged by the tender, the only effect being to arrest the accruing of interest and to free the debtor from future costs. If the mortgagor desires by his tender to discharge the lien, when it is not accepted, he must bring his suit by redemption and pay the money into court."

In the *Dickerson Case*, supra, the common-law theory was evidently followed, and it was held that a mere tender of the mortgage debt after maturity does not discharge the mortgage lien.

In *Stone v. Billings*, 63 Ill. App. 371, affirmed in 167 Ill. 170, 47 N. E. 372, it was held that under a trust deed conditioned that the whole debt might be declared due and the trust deed foreclosed upon thirty days' default in the payment of interest and taxes, and containing a provision in regard to releasing certain portions of the property from the lien of the trust deed, no release can be claimed where the tender to obtain such release was made *pendente lite* forty-five days after the bill was filed. It also appeared, from the opinion in the higher court, that there was no offer contained in any of the mortgagor's pleadings keep-

ing the tender good, or to pay the required amount.

However, in *McClung v. Missouri Trust Co.* 137 Mo. 106, 38 S. W. 578, it was said that whatever the law may be elsewhere, it seems that the tendency of the decisions of this court is to the effect that a tender of the debt and interest secured by a mortgage, though made after default, destroys the mortgage lien.

But in *Hudson Bros. Commission Co. v. Glencoe Sand & Gravel Co.* 140 Mo. 103, 62 Am. St. Rep. 722, 41 S. W. 450, the court, after quoting from the *McClung Case* what was there stated to be the general rule, but which in fact was not followed, concluded by saying: "Our opinion is that a tender of the amount due on a mortgage debt, made after default, should not on principle discharge the mortgage, and should have no greater effect on the security than it has on the debt itself, and that the result will be the same whether the mortgagee holds the legal title in trust, or as a mere security."

See in connection with this case *MURRAY v. O'BRIEN*.

In *Knollenberg v. Nixon*, 171 Mo. 445, 94 Am. St. Rep. 790, 72 S. W. 41, the court after reviewing many authorities concluded by saying: "It thus appears that this court, with respect to the effect of a tender after due of a debt secured by a deed of trust or mortgage, adheres to the common-law rule,—that is, its only effect is to stop the running of interest on the debt from that time,—but that in pursuance of statutory enactment (§§ 2937, 2938, Rev. Stat. 1889), and upon principles of equity, it has gone farther, and holds that in order that the tender may extinguish the mort-

mortgagee after alleged tender of the amount due on the mortgage. Reversed.

The facts are stated in the opinion.

Messrs. Hughes, McMicken, Dovel, & Ramsey, with Messrs. Trumbull & Trumbull, for appellant:

The petitioner has not such an interest in the matter in litigation between the original parties as entitles him to intervene.

Westland Pub. Co. v. Royal, 36 Wash. 399, 78 Pac. 1096; McNamara v. Crystal Min. Co. 23 Wash. 26, 62 Pac. 81; Davis v. Flagg, 35 N. J. Eq. 491; Morris v. Tut-hill, 72 N. Y. 575; Lamb v. Montague, 112 Mass. 352; Butler v. Taylor, 5 Gray, 455; Ellsworth v. Lockwood, 42 N. Y. 89; Jones, Mortg. 6th ed. § 792.

The complaint in intervention does not state a cause of action on the theory of subrogation, because subrogation takes place by operation of law, and all the intervenor had to do was to pay the indebtedness or deposit the amount in court, and equity would have subrogated him as far as he had paid the share of the owners of the other undivided half, without any assignment or intervention.

Lamb v. Montague and Ellsworth v. Lockwood, *supra*; 1 Jones, Mortg. 6th ed. § 874; Sheldon, Subrogation, § 45.

The right of subrogation arises by operation of law only when there has been a payment and extinguishment of the mortgage by one entitled to redeem.

Sheldon, Subrogation, §§ 6-45 & 173.

It is an actual payment to the creditor

which raises the equitable right to be subrogated to his remedies.

Insurance Co. of N. A. v. Fidelity Title & T. Co. 123 Pa. 523, 2 L.R.A. 586, 10 Am. St. Rep. 546, 16 Atl. 791; Forest Oil Co.'s Appeal, 118 Pa. 138, 4 Am. St. Rep. 584, 12 Atl. 442.

As it does not appear that the money which it is alleged was tendered to the plaintiff was deposited with the court, the alleged tender would be no defense to the foreclosure of the mortgage.

Landis v. Saxton, 89 Mo. 375, 1 S. W. 359; Knollenberg v. Nixon, 171 Mo. 445, 94 Am. St. Rep. 790, 72 S. W. 41; Hudson Bros. Commission Co. v. Glencoe Sand & Gravel Co. 140 Mo. 103, 62 Am. St. Rep. 722, 41 S. W. 450; Bailey v. Metcalf, 6 N. H. 156; Robinson v. Leavitt, 7 N. H. 73; Snyder v. Quarton, 47 Mich. 211, 10 N. W. 204; Roberts v. White, 146 Mass. 256, 15 N. E. 568; Whiteman v. Perkins, 56 Neb. 181, 76 N. W. 547; Daughdrill v. Sweeney, 41 Ala. 310; Ireland v. Montgomery, 34 Ind. 174; Levan v. Sternfeld, 55 N. J. L. 41, 25 Atl. 854.

If one desires to make a tender which shall destroy the lien of an encumbrance and have, so far as concerns it, the effect of payment, he must make an absolute tender of payment, which, if received, will discharge the debt and the encumbrance.

Frost v. Yonkers Sav. Bank, 70 N. Y. 553, 26 Am. Rep. 627; Tuthill v. Morris, 81 N. Y. 94; Werner v. Tuch, 127 N. Y. 217, 21 Am. St. Rep. 443, 27 N. E. 845; 27 Cyc. Law & Proc. p. 1406.

gage lien it must be kept up, . . . which is practically much the same thing as a bill in equity by the mortgagor or those holding under him to redeem.

"It follows that there is no such thing in this state as the forfeiture of the lien of a deed of trust or mortgage, by tendering the amount due which is secured thereby, although refused by the holder of the mortgage, but the only effect of such tender is to stop the running of interest after that time, unless the tender be kept up, which amounts to nothing more nor less than the payment of the mortgage debt, less the interest, from the time of the tender; for if by the tender the lien is forfeited, it is forfeited *eo instante*, and cannot be reinstated by keeping up the tender."

In Wittmeier v. Tidwell, 147 Ala. 354, 40 So. 983, it was held that a sale under a mortgage containing a clause making the indebtedness secured by the mortgage due immediately upon sale, or transfer by the mortgagor, of the property, is invalid where the amount due upon the mortgage is tendered before any steps are taken to sell under the power.

In Gentles v. Canada Permanent & West-28 L.R.A.(N.S.)

ern Canada Mortg. Corp. 32 Ont. Rep. 428. It was held that a tender of the sum due under a mortgage, which did not reach the person making the sale until a few minutes after the sale had been made, came too late to defeat a suit for specific performance of the contract of sale by the purchaser against the mortgagee.

It should be stated here that there are cases concerning mortgages containing a clause making the indebtedness secured due immediately upon the mortgagor failing to meet a payment or to perform some act, in which the question was raised whether foreclosure could be defeated by a tender, after default, of the amount, not due on the mortgage, but due at the time of the default. These cases, of course, are not in point in this note.

The question of effect of tender after default of amount due under chattel mortgage is discussed in a note to Thomas v. Seattle Brewing & Malting Co. 15 L.R.A.(N.S.) 1165.

Effect of tender before maturity of debt to discharge lien of mortgage, see note to Pyross v. Fraser, 23 L.R.A.(N.S.) 403.

G. V.

A party is entitled to subrogation only after payment, and a tender is not payment.

Hunt, Tender, § 256; Lumsden v. Manson, 96 Me. 357, 52 Atl. 783.

The owner of an undivided half interest in the mortgaged property could not, under the facts in this case, make a tender which, if refused, would destroy the lien of the mortgage.

Harris v. Jex, 66 Barb. 232; Noyes v. Wyckoff, 114 N. Y. 204, 21 N. E. 158; Gibson v. Lyon, 115 U. S. 439, 29 L. ed. 440, 6 Sup. Ct. Rep. 129; Hunt, Tender, § 331; Jones, Mortg. 6th ed. § 895; Rowell v. Jewett, 73 Me. 365.

Where the purported tender is made during the pendency of a suit to foreclose the mortgage by a party to the suit seeking equitable relief, to avail anything it must be kept good.

Hunt, Tender, § 349; 28 Am. & Eng. Enc. Law, 2d ed. p. 20; 1 Jones, Mortg. 6th ed. §§ 891-893.

Unless authorized by statute, a tender must be made before the commencement of the action.

Hunt, Tender, §§ 306, 307; Levan v. Sternfeld, supra; 28 Am. & Eng. Enc. Law, p. 21; Smith v. Woodleaf, 21 Kan. 717; Murray v. Windley, 29 N. C. (7 Ired. L.) 201, 47 Am. Dec. 324; Braumann v. Vanderpoel, 26 Misc. 786, 56 N. Y. Supp. 216; Coghlan v. South Carolina R. Co. 32 Fed. 316; Snyder v. Quarton, supra; Kelly v. West, 4 Jones & S. 304; Sweetland v. Tuthill, 54 Ill. 215; Call v. Lothrop, 39 Me. 434; Hull v. Peters, 7 Barb. 331; Wiltzie, Mortgage Foreclosure, § 255; Astor v. Palache, 49 How. Pr. 231; Bartow v. Cleveland, 16 How. Pr. 364; Thurston v. Marsh, 14 How. Pr. 572; New York F. & M. Ins. Co. v. Burrell, 9 How. Pr. 398.

The tenders were made not as a payment in discharge of the obligation, but for the purpose of assignment and subrogation, and such a tender is a conditional one, and will not have the effect of discharging the lien of the mortgage.

1 Jones, Mortg. § 900; 2 Jones, Mortg. § 1088; Hunt, Tender, §§ 239, 256, 372; Potts v. Plaisted, 30 Mich. 149; Proctor v. Robinson, 35 Mich. 284; Post v. Springsted, 49 Mich. 90, 13 N. W. 370; Dodge v. Brewer, 31 Mich. 227; Waldron v. Murphy, 40 Mich. 668; Ivall v. Willis, 17 Wash. 645, 50 Pac. 467; Thomas v. Seattle Brewing & Malting Co. 48 Wash. 560, 15 L.R.A. (N.S.) 1164, 125 Am. St. Rep. 945, 94 Pac. 116; Noyes v. Wyckoff, 114 N. Y. 204, 21 N. E. 158; Frost v. Yonkers Sav. Bank, 70 N. Y. 553, 26 Am. Rep. 627; Tuthill v. Morris and Werner v. Tuch, supra; Beardsley v. Beardsley, 29 C. C. A. 538, 56 U. S. App. 437, 86 Fed. 16; Lilienthal v. Mc-28 L.R.A. (N.S.)

Cormick, 54 C. C. A. 475, 117 Fed. 89; Union Mut. L. Ins. Co. v. Union Mills Plaster Co. 3 L.R.A. 90, 37 Fed. 286; Selby v. Hurd, 51 Mich. 1, 16 N. W. 180; Day v. Strong, 29 Hun, 505; 27 Cyc. Law & Proc. p. 1406; Lumsden v. Manson, supra; Storey v. Krewson, 55 Ind. 397, 23 Am. Rep. 668; Loring v. Cooke, 3 Pick. 48; Wendell v. New Hampshire Bank, 9 N. H. 404; Forest Oil Co's Appeal, supra; Sanford v. Bulkley, 30 Conn. 344.

An unaccepted tender of money in payment of a debt secured by a mortgage on land, made after the day prescribed for payment, does not impair the lien of the mortgage, being neither a performance of the condition nor a satisfaction of the debt; its only effect is to stop the running of interest, and to put the mortgagor to his remedy in equity.

Merritt v. Lambert, 7 Paige, 344; Bisham, Eq. 5th ed. pp. 219, 220; Jones, Mortg. § 893, note 42; Renard v. Clink, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692; Union Mut. L. Ins. Co. v. Union Mills Plaster Co. supra; 27 Cyc. Law & Proc. p. 1409; Himmelman v. Fitzpatrick, 50 Cal. 650; Perre v. Castro, 14 Cal. 519, 76 Am. Dec. 444; Matthews v. Lindsay, 20 Fla. 962; Alexander v. Caldwell, 61 Ala. 550; Landis v. Saxton, 89 Mo. 375, 1 S. W. 359; Knollenberg v. Nixon, 171 Mo. 445, 94 Am. St. Rep. 790, 72 S. W. 41; Hudson Bros. Commission Co. v. Glencoe Sand & Gravel Co. 140 Mo. 103, 62 Am. St. Rep. 722, 41 S. W. 450; Stockton v. Dundee Mfg. Co. 22 N. J. Eq. 56; Shields v. Lozeau, 34 N. J. L. 496, 3 Am. Rep. 256; Currier v. Gale, 9 Allen, 522; Tishimingo Sav. Inst. v. Buchanan, 60 Miss. 496; Lincoln Sav. Bank v. Ewing, 12 Lea, 598; Rowell v. Mitchell, 68 Me. 21; Smith v. Kelley, 27 Me. 237, 46 Am. Rep. 595; Brown v. Simons, 45 N. H. 212; Crain v. McGoon, 86 Ill. 431, 29 Am. Rep. 37; Parker v. Beasley, 116 N. C. 1, 33 L.R.A. 231, 21 S. E. 955; Greer v. Turner, 36 Ark. 18.

Mr. James B. Howe, for intervener, respondent:

In pleading a tender on the law day in discharge of the condition of the mortgage, the mortgagor is not required to allege continued readiness to pay, nor need he bring the money into court, and the tender, when made, discharges the encumbrance, not conditionally, but absolutely and forever.

Mitchell v. Roberts, 5 McCrary, 425, 17 Fed. 776; Thomas v. Seattle Brewing & Malting Co. 48 Wash. 562, 15 L.R.A. (N.S.) 1164, 125 Am. St. Rep. 945, 94 Pac. 116; Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145; Caruthers v. Humphrey, 12 Mich. 270; Moynahan v. Moore, 9 Mich. 9, 77 Am.

Dec. 468; Jones, Mortg. 5th ed. § 893; Edwards v. Farmers' F. Ins. & Loan Co. 21 Wend. 488; Maxwell v. Moore, 95 Ala. 166, 36 Am. St. Rep. 190, 10 So. 444; 3 Pom. Eq. Jur. 3d ed. § 1188, p. 2354; Dane v. Daniel, 23 Wash. 379, 63 Pac. 268; Jump v. North British & M. Ins. Co. 44 Wash. 599, 87 Pac. 928, 12 A. & E. Ann. Cas. 257; Nelson v. Loder, 132 N. Y. 288, 30 N. E. 369; Cass v. Higenbotam, 100 N. Y. 248, 3 N. E. 189.

A party having a beneficial interest in the decree sought to be obtained has a right to intervene by petition filed for that purpose.

11 Enc. Pl. & Pr. pp. 498, 499.

Intervener upon paying the mortgage,—principal, interest, and costs, to plaintiff, was entitled to have the mortgage kept alive so as to secure repayment of half from its co-owners.

Beach, Modern Law of Eq. Jur. §§ 802, 804; Ohmer v. Boyer, 89 Ala. 273, 7 So. 664; Sheldon, Subrogation, § 173; 27 Am. & Eng. Enc. Law, 2d ed. pp. 227-235; 27 Cyc. Law & Proc. p. 1436; Pease v. Egan, 131 N. Y. 262, 30 N. E. 102.

Upon the payment by the intervener it would become the equitable assignee of the mortgage, and entitled to receive the mortgage uncanceled.

Pom. Eq. Jur. §§ 1211, 1214; Moore v. Smith, 95 Mich. 71, 54 N. W. 701; Kinkhead v. Ryan, 65 N. J. Eq. 726, 55 Atl. 730; Hamilton v. Dobbs, 19 N. J. Eq. 227; Twombly v. Cassidy, 82 N. Y. 157; Cole v. Malcolm, 66 N. Y. 363; Johnson v. Zink, 51 N. Y. 337.

Plaintiff had no right upon being tendered by intervener the full amount of the principal of the mortgage, with interest, costs, and attorneys' fees, to require as condition of acceptance that the intervener should place himself in a position where its co-owners might say that the mortgage was extinguished, that subrogation had not taken place, and that no right of contribution existed.

Jones, Mortg. 4th ed. § 1089, p. 49; Weidner v. Thompson, 69 Iowa, 36, 28 N. W. 422; Chase Nat. Bank v. Hastings, 20 Wash. 436, 55 Pac. 574; Pom. Eq. 3d ed. § 792; Kinkhead v. Ryan, supra; Knoblauch v. Foglesong, 37 Minn. 320, 33 N. W. 865.

Chadwick, J., delivered the opinion of the court:

This appeal involves only matters in controversy between plaintiff and the Mercantile Investment Company, intervener. No reference will be made to other parties.

On the 22d day of April, 1897, one John Sullivan made, executed, and delivered to the United States Mortgage & Trust Com- 28 L.R.A.(N.S.)

pany, of New York, a certain note for the sum of \$75,000. This note was secured by a mortgage of even date, covering lots 4 and 5 in the addition to the city of Seattle, platted by Carson D. Boren and Arthur A. Denny. On the 26th day of September, 1900, John Sullivan died in King county, and the defendant Terrence O'Brien was thereafter appointed administrator of his estate. The estate being without present funds to meet the note and mortgage on the due date, the administrator, acting under the order and direction of the court, obtained an extension of the mortgage until the 1st day of May, 1907. Further extensions were made, so that the note has been at all times a live demand and the mortgage a subsisting lien upon the property charged. On the 30th day of April, 1906, the United States Mortgage & Trust Company, in consideration of the then present worth of the note and mortgage and a bonus of \$500, assigned the securities to James A. Murray, the plaintiff, and he has been at all times since, and is now, the owner and holder thereof. Sullivan in his lifetime had reduced the principal indebtedness in the sum of \$15,000, so that on the 20th day of April, 1908, the date upon which this action was begun, there was due the principal sum of \$60,000, with interest from April 1st, and \$1,500 being the interest from November 1, 1907, to April 1, 1908. The latter amount was evidenced by a promissory note executed by the administrator under the order and direction of the court. Plaintiff asked that the property be sold in accordance with the usual forms in such cases. On March 23, 1909, the Mercantile Investment Company asked leave to intervene. Its petition was granted by the court. Its complaint in intervention sets up, among other things, that ever since the 5th day of December, 1908, it has been, and is now, a corporation duly organized under the laws of the state of Washington, and is authorized to purchase, hold, acquire, sell, and dispose of real and personal property. After reciting the death of Sullivan and the consequent probate proceedings, the execution of the note and mortgage, and plaintiff's claim to be the owner and holder thereof, it is alleged that ever since the 4th day of January, 1909, it has been the owner of an undivided interest in the property, and that the other interest, being one half thereof, is owned by Corwin S. Shank and wife and Edward Corcoran and Charles P. O'Neill and wife; that plaintiff had refused to grant an extension of time for the payment of the note and mortgage, or to assign his securities without recourse or otherwise; that it was ready, able, and willing to take up the mortgage, and to

pay to plaintiff the principal, interest, costs, and attorneys' fees; that the amount thereof had been furnished by attorneys for plaintiff; that it was willing to pay the same if the note and mortgage were assigned to it without recourse against plaintiff, or if, upon its making such payment, it be subrogated to the rights of plaintiff in the note and mortgage and in the foreclosure suit. Intervener further alleged that its co-owners were unable to pay the one half of the amount then due, and that plaintiff, with intent to embarrass and defeat the right of the intervener, had threatened to dismiss his foreclosure suit and satisfy the lien of his mortgage and the debt secured thereby if it paid the whole thereof.

On the 20th day of March, 1909, the intervener had begun an independent action against plaintiff, setting up, in substance, the same matters which are recited in its petition for intervention, and praying for an order enjoining and restraining plaintiff and his attorneys from satisfying the mortgage or dismissing the foreclosure proceeding in the event of payment by the intervener. After formal proceedings had, an order was made by the court restraining plaintiff and his attorneys of record, and all other agents and attorneys then employed or thereafter to be employed by him, from satisfying the note and mortgage, and from dismissing the foreclosure suit, in case a tender of the amount due was made by the intervener, which the order recited it was about to do. Accordingly, on the 25th day of March, 1909, the intervener tendered plaintiff's attorneys, at their office in Seattle, the full sum of \$68,654.67, being the full amount of principal, interest, costs, and attorneys' fees then due upon the mortgage. In this tender the intervener said: "The Mercantile Investment Company has instituted suit against you in the superior court of the state of Washington for King county, and seeks to be subrogated to all of the rights of James A. Murray under the notes and mortgage mentioned in the above-entitled suit, and also in the above-entitled suit. The Mercantile Investment Company has also intervened in the above-entitled suit, and in its complaint in intervention also seeks to be subrogated to all of the rights of James A. Murray under such notes and mortgage and in the above-entitled suit. This tender is made for the purpose of protecting the title of the Mercantile Investment Company in the property described in your complaint in the foreclosure suit, and to obtain subrogation by the Mercantile Investment Company to all of the rights of said James A. Murray." Upon the written offer of tender, attorneys

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for plaintiff indorsed over their signature the following: "Said tender is refused for the reason that it is not made for the purpose of paying and discharging said mortgage." Thereupon a tender was made in all respects similar to the first, omitting only the last sentence. This offer was also acknowledged, and upon the writing the attorneys indorsed the following: "The above refused for the purpose set forth in the notice." A third notice of tender was then written out, in words and figures following: "The Mercantile Investment Company now makes you a third tender of the amount mentioned in the previous tenders this day made, being the full amount of the notes and mortgage,—principal, interest, costs, and attorneys' fees. The Mercantile Investment Company is the owner of an undivided half interest in the property described in the mortgage, is not personally liable for the amount or any part thereof, and now tenders you the above amount without any qualification, and requests you to accept such tender." Upon this offer the attorneys wrote over their signature the one word "Refused." Following these tenders the intervener obtained leave to, and did, file an amended complaint in the intervention, in which, in addition to the allegations contained in its first complaint, it set up the several tenders to which we have alluded, and asked that, because of the refusal to accept them or any of them, the court enter a decree holding that the lien of plaintiff's mortgage be canceled, and, further, that the court decree the debt to be discharged, for the reason that there having been no formal presentation of the debt to the administrator of the Sullivan estate, the lien being lost, the debt was barred by the statute of nonclaim. *Balinger's Anno. Codes & Statutes*, § 6228 (*Pierce's Code*, § 2533).

We have endeavored to epitomize the record so as to point out only the particular facts which moved the trial court to enter its decree in favor of the intervener. Appellant suggests a number of reasons why the decree of the court should not be sustained, among others, that the intervener is not entitled to intervene or to any standing as a party; that the facts set up by it are insufficient to state a cause for intervention; that, being the owner of a one-half of the property, it cannot make a valid tender; that no valid tender was made; that a tender made out of court during the pendency of an action does not discharge the lien of a mortgage; and that, in any event, the court erred in denying his right to recover the debt from the estate of John Sullivan. The first several grounds upon which appellant stands are without merit. The

pleadings and the proofs show that respondent has a valid and subsisting interest in the property, and its right to protect that interest in any manner or by any method sanctioned by the law cannot be questioned. The right of subrogation, under the better rule, applies in cases where a party who has an interest in the property, and who does not stand as a mere volunteer, pays a debt owing in whole or in part by another to protect his own rights or to save his own property. The remedy is no longer limited to sureties and quasi sureties, but is freely applied by courts of equity in all cases where good conscience and equity dictate that a debt paid by one under any sort of legal coercion ought to be paid by another. *Arnold v. Green*, 116 N. Y. 571, 23 N. E. 1; *Parsons v. Urie*, 104 Md. 238, 8 L.R.A.(N.S.) 559, 64 Atl. 927, 10 A. & E. Ann. Cas. 278; *Pom. Eq. Jur.* §§ 798, 799; *Re Bruce* (D. C.) 158 Fed. 123; *Beach*, *Modern Law of Eq. Jur.* 802-804; *Twombly v. Cassidy*, 82 N. Y. 155; *Kinhead v. Ryan*, 65 N. J. Eq. 726, 55 Atl. 730. In *Cottrell's Appeal*, 23 Pa. 294, the court said: "Subrogation is founded on principles of equity and benevolence, and may be decreed where no contract or privity of any kind exists between the parties. Wherever one not a mere volunteer discharges the debt of another, he is entitled to all the remedies which the creditor possessed against the debtor." Chief Justice Marshall said in *Lidderdale v. Robinson*, 2 Brock. 159, *Fed. Cas. No. 8,337*: "Where a purchaser has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted to every equitable intent and purpose in the place of the creditor whose claim he has discharged." Under these rules, respondent had a right to invoke the aid of the court, and, so long as appellant was not asked to take less than the burden of his bond, he cannot complain or question the procedure when the court is acting within its jurisdiction. The interest creates the right and puts in motion the maxim that a court of equity, having acquired jurisdiction of the property, will do complete justice as between the parties interested therein.

The reasons assigned by appellant for refusing the relief sought by respondent are fanciful, rather than real. It is hinted, rather than openly asserted, that it was manifest to him that respondent was undertaking to gain an advantage over its co-owners, and, if he had met the demands of respondent, under the orders of the court, 28 L.R.A.(N.S.)

some damage or prejudice would have resulted to them. Testimony is also cited showing that the co-owners were willing to pay their share of the debt. It is enough to say that the law puts upon appellant no duty to protect others. Reason and experience alike teach us that the courts may be relied upon to apply those general rules of equity ample in all cases to protect the rights of all who invoke them. In this case there is nothing to indicate any outrage upon, or attempted infringement of, the rights of the co-owners; certainly nothing that would warrant the interposition of appellant in their behalf. As for their willingness to pay their share of the debt, the answer is that there is nothing in the record to show that that privilege was, or is now, denied them. On the other hand, we think it was entirely unnecessary for the respondent to approach an attempted settlement of this case in the manner in which it did. It might and should have relied upon the court whose jurisdiction it had also invoked. Respondent might have paid the money into court without the formal declarations of tender, and the court would have been warranted in making such orders as might be necessary for its protection. A satisfaction of the debt by appellant would not have killed the obligation or worked a forfeiture of its rights. The court had jurisdiction of the property, with power to enter an order recognizing the subrogation; for it is not created by the order, but follows as the legal consequence of the acts of the parties. Look *v. Horn*, 97 Me. 283, 54 Atl. 725; *Shaffer v. McCloskey*, 101 Cal. 576, 36 Pac. 196; 2 *Pomeroy, Eq. Jur.* 921, 1211 et seq.; 5 *Pomeroy, Eq. Jur.* 921.

The point is also made that the pleadings and the tender show that they were made in behalf of another, or others who have been induced to loan the amount then due appellant, and might therefore be ignored for that reason. What we have already said disposes of this contention. Where and upon what terms respondent got the money to tender is of no concern to appellant. The law does not give him the right to reject an offer, because he objects to the source from which the money comes. *Eslow v. Mitchell*, 26 Mich. 500.

Being of the opinion that the intervener has a right to maintain its standing in court, we now come to the main issue. The trial court was controlled in its judgment by the case of *Thomas v. Seattle Brewing & Malting Co.* 48 Wash. 560, 15 L.R.A.(N.S.) 1164, 125 Am. St. Rep. 945, 94 Pac. 116, wherein the court held that a tender of the amount due on a mortgage on law day, which by construction has been ex-

tended to any time before suit brought, discharged the lien of the mortgage, and that, having been so made, the tender need not be kept good by bringing the money into court. We are satisfied with that decision, and, unless the contention of the appellant that, action having been begun, the lien of the mortgage cannot be discharged by a tender made out of court, is well founded, the judgment of the lower court must be affirmed. In justice to the trial court we feel bound to say that the decree rendered by it is sustained by the leading case of Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145, and other cases upon which the Thomas Case is made to rest. But a re-examination of that case, and of the other cases referred to in the Thomas decision, and those cited and relied upon by the respondent, convinces us that the reason for the rule ceases when an action is instituted to recover the debt, and that it should be given no application except in those cases where, at common law, a party was entitled to a discharge of a lien upon property by payment or tender of payment *inter partes* before or upon law day. From the first the courts have been fertile in their reasons for refusing to extend the doctrine here invoked to cases where questions other than the mere payment of money were involved. In all the cases cited by respondent to sustain the judgment of the lower court it appears that the primary purpose of the tender was to discharge the debt. But in this case it is not entirely so. In Kortright v. Cady the law was exhausted by the learned judge who wrote the opinion. It was there held that the law day of the common law should be held to be, considering the changed character of the mortgage, any day before foreclosure and sale. Accepting the rule that the tender will be effectual to discharge the lien if made at any time before foreclosure, it becomes material to inquire the meaning of that term,—whether it means the commencement of an action, or a final decree of foreclosure and sale. Considering the reasons upon which the rule of discharge by tender rests,—that is, that the law day continued after the due date of an obligation and until action brought, and that a lien can be defeated by a tender made within that time,—it would seem to follow as of course that “foreclosure” and “law day” are synonymous terms in the sense that it is a time when the mortgagor declares a default and submits his cause to a court of competent jurisdiction. The word “foreclosure,” as it is used in the authorities bearing on this question, must be taken in that meaning which is common and generally accepted by the laity as well as the bar; that is, the institution of a suit, or 28 L.R.A.(N.S.)

the “law day,” as contradistinguished from the “law day” of the common law. The logic of the decisions is that a lien should be discharged by tender only when made before action brought, and that thereafter it ought to be tendered in court, or, if made after the writ has issued, it should be at least kept good by the plea *tout temps prist*.

In speaking of the subject of tender generally, it is said in Coghlan v. South Carolina R. Co. (C. C.) 32 Fed. 316: “But when an action has already been commenced and is pending, if the defendant be disposed to admit the demand in part, it is not only necessary that he should offer to pay the amount admitted in the same way as the tender before suit should be made, but he must go further, and either pay the sum admitted into court, or, at the least, offer to submit to a judgment for that sum.” In the case of Whittaker v. Belvidere Roller Mill Co. 55 N. J. Eq. 674, 38 Atl. 289, a case somewhat similar to the one at bar, it was held that, when a tender is made after suit is begun and is then urged as a defense, the money must be paid into court. In Weeks v. Baker, 152 Mass. 20, 24 N. E. 905, from which quotation is made in the Thomas Case, the court said: “The rights of a party to an action are ordinarily to be determined as of the time of bringing the suit.” We make this distinction between the case of Kortright v. Cady and the rule as we believe it should be. The logic of the Kortright Case is that the law day continued from the due date of the obligation to the final decree of foreclosure and sale; whereas, we hold that the law day within which a lien may be discharged by tender *inter partes* continues only to the time of the issuance of the writ, or, under the Code practice, until the commencement of the action.

Because of the unusual importance of this case, we feel warranted in going further, and calling attention to another limitation upon the rights of a mortgagor, or one claiming under him, to discharge the lien of a mortgage by the tender of the mortgage debt. Although the rule as contended for was originally declared in New York, it has been repeatedly held, even in that state, that it will not avail one who is seeking affirmative relief. Tuthill v. Morris, 81 N. Y. 94; Becker v. Boon, 61 N. Y. 322; Halpin v. Phenix Ins. Co. 118 N. Y. 165, 23 N. E. 482; also, Landis v. Saxton, 89 Mo. 375, 1 S. W. 359. While we cannot indorse all of the reasons upon which some of the foregoing cases are made to rest, they are pertinent at least to show the disposition of the courts to evade the full rigor of the rule as laid down in the Kortright Case.

Counsel for the respondent rightfully contends that his last tender cannot be measured by the two qualified or conditional tenders immediately preceding it, but, the law day having been declared by the institution of the action to foreclose the mortgage in which respondent had appeared as a party, its tender can, and should, in the interest of that equity which shuns the suggestion of a forfeiture, be measured by the prayer of its complaint in the independent action as well as the original petition for intervention. When so considered, it requires no far reach of the imagination to say that it was made in aid of the affirmative relief there sought, and as a basis for the filing of the amended petition in intervention in which a cancellation of the debt was asked and obtained by order of the court. In other words, respondent now asks that, since the substance (the mortgage) has been annihilated, the cloud (the record and the debt) which over-shadows the title be removed. It seeks to turn a shield of defense into a weapon of offense. We feel sure that no cases will be found which carry the rule of tender and discharge of a mortgage lien to this extent. It is not equity. Orderly procedure as well as the assurance that the rights of litigants will be protected to their fullest extent alike require that those who submit their causes to the courts should not go beyond the forum to establish their own case or to destroy that of their adversary.

It does not follow from what we have said in this opinion that respondent did not have the right to tender the amount of the debt, and thereby secure such other advantages as may come to it under the accepted rules of law and equity. While at law the rule that a tender must be kept good by payment in court is well-nigh universal, it is not so in equity. A willingness to pay may be sufficient. Ballinger's *Anno. Codes & Statutes*, §§ 5176, 5177 (*Pierce's Code*, §§ 1113, 1114), provides that money may be paid into court, and thus arrest interest and costs. But, independent of these statutes, courts will apply the rules of equity when it is necessary to do equal justice between the parties. In the following cases the equities were such that the benefit of a tender was not lost by a failure to pay the amount in court: *Whelan v. Reilly*, 61 Mo. 565; *Parker v. Beasley*, 116 N. C. 1, 33 L.R.A. 231, 21 S. E. 955; *Hill v. Carter*, 101 Mich. 158, 59 N. W. 413; *Mankel v. Belscamper*, 84 Wis. 218, 54 N. W. 500. Appellant is here seeking equity. He must do equity. Remembering that respondent has gone into court averring its willingness to pay all that was due appellant, which was followed by an uncondi-

tional tender and appellant's unwarranted refusal to accept it, apparently hoping to gain some personal advantage over respondent, it would seem that in equity he should not claim anything for the use of the money. The law of tender is as much for the benefit of the creditor as the debtor. The creditor cannot refuse a tender believing it to be to his advantage to do so, and thereafter insist in equity that an unqualified tender has not been made good. Under such conditions, willingness to pay is all that the law requires. The plea of willingness being in the record, we hold that appellant is estopped to claim interest from the date of the tender. In the case of *Cheney v. Bilby*, 20 C. C. A. 291, 36 U. S. App. 720, 74 Fed. 52, where similar equities were involved, and many relevant cases are cited, Judge Caldwell said: "Upon the soundest principles of equity and fair dealing, Cheney is estopped, on the facts of this case, from claiming interest on the notes after tender of payment. . . . When he refused payment of the principal of the notes, and, in the hope of winning a great stake, asserted a conscienceless forfeiture, which he could not maintain, even in a court of law, he put the interest on the money tendered to the hazard. He chanced it and lost."

The case is reversed, with instructions to the lower court to enter a judgment and decree of foreclosure for the sum of \$68,654.37, unless such sum be theretofore paid by respondent to appellant, in which event the court will make such order as will protect the equities of all parties to the suit.

Rudkin, Ch. J., and Gose, J., concur.
Fullerton, J., concurs in the result.

Morris, J., specially concurring:

John Sullivan, who made the note and executed the mortgage in controversy, is dead. Such note was never presented as a claim against his estate, and is now barred by the statute. There is none against whom this debt can be enforced as a personal, binding obligation. So that to hold with the court below means a decree of a court of equity wiping out an indebtedness of nearly \$70,000 upon an interpretation of the law which heretofore, so far as I have been able to gather from the books, has been applied only to the extent of destroying the lien of the security, but leaving the debt remaining as an enforceable obligation. Tender has never been held to be payment, yet to hold with respondent here means to so construe tender as applied to mortgages to make it in effect payment. I can find neither equity nor

good conscience in such a rule. If, as in the cases cited in support of respondent's position, the debt still remained and could be enforced as a personal obligation, so that the creditor would not lose his right to seek the payment of his debt, either in this proceeding or in a separate action at law, and the only effect of the tender and its refusal was to destroy the lien given as security for the payment of the debt, I could readily subscribe to the doctrine of *Kortright v. Cady*. In such a case the rule there announced is an equitable one, its logic irresistible, its law uncontroversial, it is the only result of premises always admitted to be true; that the mortgagor has the same right after as before a default to pay his debt and relieve his land from an encumbrance; and, that payment being actually made, the lien thereby becomes extinct. Based upon these two legal principles, *Comstock, Ch. J.*, in his opinion in the *Kortright Case*, adds: "We have, then, only to apply an admitted principle in the law of tender, which is that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities." *Davies, J.*, in his opinion in the same case reasons it out that "it has never occurred to any judge to argue that a pawnee was in great peril and in danger of losing the benefit of his pawn by the enforcement of the well-settled rule that a tender of the amount of the loan and interest, and refusal, extinguished the lien on the pawn. *Littleton* well says that it shall be accounted a man's own folly that he refused the money when a lawful tender of it was made to him. The only effect upon the rights of the mortgagee is that the land or thing pledged is released from the lien, but the debt remaineth." The reason of the rule, then, as given in *Kortright v. Cady*, is that it is only the incidental, the accessorial, thing that is lost by the refusal to accept the tender, not that there was danger "of losing the benefit of the pawn," but only the lien on the pawn. While, if we apply the rule here, not only the incidental and accessorial thing is extinguished, but the thing itself is in effect extinguished. Not only the lien on the pawn is lost, but the danger, which "it has never occurred to any judge to argue," has come to the appellant. He has not only found himself in peril of loss, but he has lost the "benefit of his pawn." What, then, was intended as an equitable rule and one of good conscience would, if extended to cases where not only the security but the debt itself was lost, become a most in-

equitable rule and one of oppression. I am willing to subscribe to the rule, then, in cases where the debt remains and can still be enforced as a personal obligation. I am not willing to subscribe to it where the personal obligation of the debt has been lost and the tender would take effect, not only as destroying the lien, but as likewise destroying all claim and right of the creditor to the debt itself.

This has appeared to me to be the equitable solution of the rule, and for these reasons I concur in the result.

Petition for rehearing denied.

WASHINGTON SUPREME COURT.

R. J. MENZ LUMBER COMPANY, Appt.,
v.

E. J. MCNEELEY & COMPANY, Respt.

(— Wash. —, 108 Pac. 621.)

Sale — f. o. b. — duty to procure cars.

1. Acceptance of an order for goods f. o. b. requires the seller to procure and load the cars.

Same — contract duty.

2. Language in an acceptance of an order for goods, "We accept and enter same for shipment. . . . We anticipate making shipment,"—requires the seller to furnish cars.

Trial — construction of contract — duty of court.

3. The court, and not the jury, must construe a contract all of which is in writing.

Contract — letter heads — incorporated stipulations.

4. Printed matter in the heads of letters upon which a contract is written, which is not referred to in the writing, is not a part of the contract.

Contract — usage — effect.

5. Parol testimony of usage or custom, either general in the community or special between the people engaged in the particular trade or business, is not admissible to show that an unconditional acceptance of an order to ship goods was subject to the exigencies of transportation and to the further condition that if the goods could not be shipped within a reasonable time the contract was no longer to be obligatory.

Sale — failure to ship — mitigating circumstances.

6. In determining the question whether or not a seller has complied with his contract to ship goods ordered within a reasonable time, the fact of difficulty in getting

Note.— See note to *Hurst v. Altamont Mfg. Co.* 6 L.R.A.(N.S.) 928, on the question which party is to furnish cars under a contract to ship goods f. o. b.

cars because of shortage on the part of the carrier should be considered, and also the fact that the goods were to be shipped through mountains in the winter.

Damages — breach of contract — difference in price.

7. The measure of damages for refusal to ship a car load of shingles according to contract is the difference between the contract price and their value at the date of the seller's refusal to comply with a demand for performance.

(Chadwick, J., dissents.)

(May 2, 1910.)

APPREAL by plaintiff from a judgment of the Superior Court for Pierce County dismissing an action brought to recover damages for failure to deliver certain lumber and shingles alleged to have been purchased by plaintiff from defendant. Reversed.

The facts are stated in the opinion.

Messrs. Shank & Smith, for appellant:

The letter head formed no part of the contracts.

Page, Contr. 1st ed. § 600; 9 Cyc. Law & Proc. p. 584, note 24; Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99; Summers Bros. v. Hibbard, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899.

No usage or custom qualifying an absolute contract forms any part thereof.

12 Cyc. Law & Proc. pp. 1091, 1095; 29 Am. & Eng. Enc. Law, 2d ed. pp. 433, 437; Barnard v. Kellogg, 10 Wall. 383, 19 L. ed. 987; Mercantile Bkg. Co. v. Landa (Tex. Civ. App.) 33 S. W. 681; Bigelow v. Legg, 102 N. Y. 652, 6 N. E. 107; McMillan v. American Exp. Co. 123 Iowa, 236, 38 N. W. 629; Scott v. Hartley, 126 Ind. 239, 25 N. E. 826; Sheffield Furnace Co. v. Hull Coal & Coke Co. 101 Ala. 446, 14 So. 673; Charles v. Carter, 96 Tenn. 607, 38 S. W. 396; Partidge v. Phoenix Mut. L. Ins. Co. 15 Wall. 573, 21 L. ed. 229; Benson v. Gray, 154 Mass. 301, 13 L.R.A. 262, 28 N. E. 275; Kendall v. Russell, 5 Dana, 501, 30 Am. Dec. 696; Polhemus v. Heiman, 50 Cal. 438; Miller v. Bean, 13 Wash. 516, 43 Pac. 636; Commercial Bank v. Hart, 10 Wash. 303, 38 Pac. 1114; Vollrath v. Crowe, 9 Wash. 374, 37 Pac. 474; Williams v. Ninemire, 23 Wash. 393, 63 Pac. 534; Lima Locomotive & Mach. Co. v. National Steel Castings Co. 11 L.R.A.(N.S.) 713, 83 C. C. A. 593, 155 Fed. 77; Covington v. Kanawha Coal & Coke Co. 121 Ky. 681, 3 L.R.A.(N.S.) 248, 123 Am. St. Rep. 219, 89 S. W. 1126, 12 A. & E. Ann. Cas. 311.

Where a person promises to do a thing, impossibility of performance, not the act of God, is no excuse for failure to perform.
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9 Cyc. Law & Proc. pp. 625-629; Jones v. Anderson, 82 Ala. 302, 2 So. 911; Fleishman v. Meyer, 46 Or. 287, 80 Pac. 209; Engster v. West, 35 La. Ann. 119, 48 Am. Rep. 232; Stewart v. Stone, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595; Bacon v. Cobb, 45 Ill. 47; Tradewater Coal Co. v. Lee, 24 Ky. L. Rep. 215, 68 S. W. 400.

Where lumber has been agreed to be shipped and the prices are quoted f. o. b. cars at the mill, it is the duty of the seller to procure the necessary railroad cars in which to ship the goods.

Elliott v. Howison, 146 Ala. 568, 40 So. 1019; Cincinnati, S. & C. R. Co. v. Consolidated Coal & Min. Co. 7 Ohio L. J. 200; John O'Brien Lumber Co. v. Wilkinson, 117 Wis. 468, 94 N. W. 337; Vogt v. Schienebeck, 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 A. & E. Ann. Cas. 814; Hurst v. Altamont Mfg. Co. 73 Kan. 422, 6 L.R.A.(N.S.) 928, 117 Am. St. Rep. 525, 85 Pac. 551, 9 A. & E. Ann. Cas. 549.

It was the duty of defendant to fill the orders whether he had cars to fill all orders or not.

Tradewater Coal Co. v. Lee, supra; Hesser-Milton-Renahan Coal Co. v. La Crosse Fuel Co. 114 Wis. 654, 90 N. W. 1094.

Mr. F. A. Huffer, for respondent:

It was the duty of the purchasers to furnish the cars.

Dwight v. Eckert, 117 Pa. 508, 12 Atl. 36; Evanston Elevator & Coal Co. v. Castner, 133 Fed. 409; Chicago Lumber Co. v. Comstock, 18 C. C. A. 207, 34 U. S. App. 414, 71 Fed. 477; Kunkle v. Mitchell, 56 Pa. 100; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836; Vogt v. Schienebeck, 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 A. & E. Ann. Cas. 814; Consolidated Coal Co. v. Schneider, 163 Ill. 393, 45 N. E. 126; Davis v. Alpha Portland Cement Co. 134 Fed. 274; Baltimore & L. R. Co. v. Steele Rail Supply Co. 59 C. C. A. 419, 123 Fed. 655; 24 Am. & Eng. Enc. Law, 2d ed. p. 1071; A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co. 54 Neb. 321, 40 L.R.A. 534, 74 N. W. 670. The availability of cars was an implied condition of the contract.

Stewart v. Stone, 127 N. Y. 500, 14 L.R.A. 220, 28 N. E. 595; 3 Page Contr. § 1370, p. 2123; Singleton v. Carroll, 6 J. J. Marsh. 527, 22 Am. Dec. 95; Lovering v. Buck Mountain Coal Co. 54 Pa. 291; Asplund v. Mattson, 15 Wash. 328, 46 Pac. 341; Howell v. Coupland, L. R. 1 Q. B. Div. 258; Raisin Fertilizer Co. v. J. J. Barrow, Jr. Co. 97 Ala. 694, 12 So. 388.

Performance was prevented by an act of God.

1 Am. & Eng. Enc. Law, 2d ed. p. 585; Black v. Chicago, B. & Q. R. Co. 30 Neb. 197, 46 N. W. 428; Ballantine v. North Missouri R. Co. 40 Mo. 491, 93 Am. Dec. 315.

The printed matter on the letter heads formed a part of the contracts.

Yorston v. Brown, 178 Mass. 103, 59 N. E. 655; Hardie-Tynes Foundry & Mach. Co. v. Glenn Allen Co. 84 Miss. 259, 36 So. 202.

The universal custom and usage among all dealers in lumber and shingles, and especially of plaintiff and defendant, to give and accept orders for such merchandise only upon the condition that the fulfilling of the same was to be contingent upon the exigencies of transportation and causes beyond its control, was binding upon the plaintiff.

Lillard v. Kentucky Distilleries & Warehouse Co. 67 C. C. A. 74, 134 Fed. 175; Renner v. Bank of Columbia, 9 Wheat. 581, 587, 6 L. ed. 166, 167; Bliven v. New England Screw Co. 23 How. 420, 431, 16 L. ed. 510, 513; Robinson v. United States, 13 Wall. 363, 20 L. ed. 653; 2 Page, Contr. § 604, pp. 925, 926; 12 Cyc. Law & Proc. pp. 1082, 1092; Adams v. Otterback, 15 How. 540, 14 L. ed. 807; McKeefrey v. Connellsville Coke & Iron Co. 5 C. C. A. 482, 17 U. S. App. 35, 56 Fed. 212; Luhrig Coal Co. v. Jones & A. Co. 72 C. C. A. 311, 141 Fed. 622; Sharp v. Clark, 13 Utah, 510, 45 Pac. 566; 29 Am. & Eng. Enc. Law, 2d ed. pp. 403, 404.

Gose, J., delivered the opinion of the court:

The appellant, the plaintiff below, commenced this action against the respondent to recover damages for failure to deliver four car loads of shingles and mixed lumber and shingles. The case was tried to a jury, which returned a verdict for the respondent. From a judgment of dismissal entered upon the verdict, the plaintiff has appealed.

The complaint states four causes of action based upon four separate orders. In the third cause of action, which is illustrative of the others except as hereafter noted, it is alleged, in substance, that the appellant and the respondent entered into a contract of purchase and sale as evidenced by an order and the reply thereto, which, omitting immaterial parts, is as follows:

Seattle Wash. Jan. 17, 1907.

E. J. McNeeley & Co.,

Tacoma, Wn.

Order No. 729X. (For conditions upon which this order is accepted, see other side of this sheet.)

Cars to be consigned from R. J. Menz Lumber Co. (Always show us as shippers.)

Bill of Lading to read: Ship to R. J. Menz Lumber Co. at Minnesota Trfr., Minn. Route: N. P. Prices: F. O. B. Mill. 28 L.R.A.(N.S.)

Terms: 90 per cent. advance. Settlement on receipt of consignee's report and expense bill (less usual 2 per cent. discount). All underweights to mill 50 cent rate.

Quantity: One (1) Car.

Description.	Price per M.	Guaranteed. Weight per M
6-2 Plain Dimension R. C. Shingles at Any size—large preferred	\$2.50	160

Please acknowledge acceptance of this order on inclosed postal card, by return mail.

Very Truly Yours.

R. J. Menz Lumber Co.,
per E. B. Day.

Tacoma Wash., Jan. 18, 1907.

R. J. Menz Lumber Co.,
Seattle, Wash.

Dear Sirs:—

Your order No. 729X has been received. We accept and enter same for shipment in accordance with the terms thereon. We anticipate making shipment on or about _____. At prices annexed, we would like to move the following stock: _____.

Yours very truly,
E. J. McNeeley & Company,
per _____.

The order in the first cause of action is for 50,000 described shingles, with directions to "fill car 6-2 Ex. * A * R. C. Shingles." The order in the second cause of action is for 75,000 designated shingles, with directions: "Balance 6-2 extra. * A * R. C. Shgls. And "small car preferred." Shipping directions in the fourth cause of action were: "Ship to order of Bonds Foster Lumber Company, at Aurora, Nebraska. How ship: Billings care B. & M. R. When: Soon as possible. Terms: Regular f. o. b., Aurora, Nebraska. Sixty cent rate." This cause of action was assigned to the appellant. Each of the acceptances, except on the third cause of action, was upon the respondent's stationery, which had printed thereon, above the typewritten acceptance, the name of the respondent, illustration of shingles, capacity of its mills, specialties, etc., including the words: "Quotations subject to change without notice. Contracts made at home office only and contingent upon exigencies of transportation and accidents beyond our control." Similar typewritten matter was upon the letter heads of the appellant. The respondent interposed three affirmative defenses to each cause of action except the third, which in substance are: (1) That it accepted the order by letter upon its letter head, which contained the printed matter just quoted; that at the time of the acceptance of the order and continuing

until April 5, 1907, there was a great shortage of railroad cars in the state of Washington and in the country generally for use in transporting lumber and shingles, and that cars could not be procured for such purpose except in limited numbers inadequate for the handling of the lumber and shingle business of the state and of the country generally; that by reason thereof manufacturers and sellers of such commodities were unable to procure cars, which facts were at all times known to the appellant; that between January 26 and April 5, 1907, by reason of storms, washouts, and other acts of God preventing railway companies operating in this and other lumber producing states, railroads could not furnish any cars for transporting lumber and shingles; that the car embargo could not have been foreseen; that on account thereof, the market price of lumber and shingles appreciated. (2) That there was a general custom and a special one between the appellant and the respondent, that such contracts were contingent upon the exigencies of transportation and accidents beyond the control of the parties; that when delivery of such commodities has been delayed until a reasonable time has expired in which to make delivery, without fault on the part of the seller, and where delivery would inflict a loss upon either of the parties, compliance with the contract is excused; that this custom was well known to the parties, and the contract was made with reference thereto. The car embargo and the rise in the price of lumber and shingles is alleged as in the first defense. (3) That there is a particular custom in the lumber trade known to the appellant, and in giving or accepting an order the parties contracted in reference thereto; that all orders in writing are accepted contingent upon the exigencies of transportation and accidents beyond the control of the parties. The shortage of cars and the rise in the price of lumber is alleged as in the first defense. The first affirmative defense is omitted as to the third cause of action; the acceptance there being on a postcard not containing the printed matter on the respondent's letter head. The failure of respondent to deliver the material is admitted, and it seeks to excuse performance in the manner pleaded.

It now asserts, however, that it was the duty of the purchaser to furnish the cars for loading, and that, failing to do so, there can be no recovery. Notwithstanding the fact that this view is inconsistent with the claim that the acceptance of the order was subject to the exigencies of transportation, we will consider it as it may arise upon a retrial of the cause. Where the contract is 28 L.R.A.(N.S.)

otherwise silent as to who shall furnish the cars, the term "f. o. b. cars," as applied to ordinary commercial commodities, means that the goods shall be free on board the cars, that is, loaded without expense to the purchaser, and that the seller shall procure and load them. *Hurst v. Altamont Mfg. Co.* 73 Kan. 422, 6 L.R.A.(N.S.) 928, 117 Am. St. Rep. 525, 85 Pac. 551, 9 A. & E. Ann. Cas. 549; *Vogt v. Schienebeck*, 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 A. & E. Ann. Cas. 814; *John O'Brien Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337; *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018. In the *Hurst Case*, 73 Kan. 429, 6 L.R.A.(N.S.) 933, 117 Am. St. Rep. 525, 85 Pac. 554, 9 A. & E. Ann. Cas. 549, it is said: "It is our understanding that the phrase or formula 'f. o. b. cars' has by long usage and custom acquired throughout the business circles of this country a definite and specific meaning generally understood by all business people. When such phrase or formula is used in a business contract between a buyer and seller of ordinary commercial commodities, where the use of a common carrier is necessary, the parties intend thereby that the seller will at his own expense do all that may be necessary to accomplish the loading and consignment of the goods to the buyer, including the procuring of cars upon which to load the commodities sold; and, when nothing appears to modify or limit this meaning, courts should enforce the contract so as to effectuate this intent. This rule is reasonable. It harmonizes with existing business conditions, and is the universal practice among business people. It is conceded that, by this phrase, the seller is bound to deliver the goods to the buyer by placing them on board the cars. How can he do this unless he secures the cars? Why say that this duty belongs to the buyer? The language of the contract is silent upon this question. By the letter of the agreement it may be said that neither party has agreed to perform this duty, but it may not be said that there was no understanding upon this subject. Without such an undertaking, the contract would be incomplete and unenforceable. What the parties intended upon this subject can only be ascertained by interpretation, and, to do this, the situation of the parties when the contract was made, the subject-matter thereof, and all the attendant circumstances and conditions, must be considered." In the *Vogt Case*, discussing the meaning of the phrase (122 Wis. 499, 67 L.R.A. 760, 106 Am. St. Rep. 989, 100 N. W. 823, 2 A. & E. Ann. Cas. 814), the court said: "Whether such meaning includes, under the circumstances of this case, the duty of the seller

to procure the cars in place for his use in loading the merchandise,—and evidence is not permissible to show the existence of a custom which the parties contracted with reference thereto,—is not altogether plain, but we are constrained to hold that it does." In the *Elliott Case*, 146 Ala., at page 501, it is said: "In the case at bar the seller undertook to accomplish the delivery of the things sold, free on board the cars. We think it comports with reason to hold that by necessary implication he agreed to supply all means to accomplish such result,—the cars upon which the shipments of piles were to be made." The authorities cited by the respondent, holding that the term implies that the buyer shall procure the cars, are discussed, distinguished, and disapproved in the case of *Hurst v. Altamont Mfg. Co.*, *supra*. It must, however, be conceded that there is a conflict of authority on this question, but we think not only that the rule we have stated is a correct interpretation of the phrase, but that universal usage in this state has given it the meaning which the language imports. The language, however, in this case, "We accept and enter same for shipment. . . . We anticipate making shipment,"—cannot be given any other rational meaning.

The court instructed the jury, in substance, that they should determine from all the evidence what the contract was; that in so doing it was proper for them to consider whether the printed matter on the letter heads forms a part of the contract; that ordinarily such matter, if not repugnant to the contents of the letter itself, may be considered as a part of the contract if the parties make their contract with reference thereto and knowledge thereof. This instruction was erroneous. The order and the acceptance were in writing and constituted the contract, and it was the duty of the court to construe them, if not ambiguous, and, if ambiguous, to receive parol testimony to explain the ambiguities. The printed matter on the letter heads was not referred to in either the order or the acceptance, and is not a part of the contract. 2 Page, Contr. § 600; *Sturm v. Boker*, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99; *Summers Bros. v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899. In the *Sturm Case* the court said that a printed billhead could not control, modify, or alter the terms of the contract, and that, "the contract being clearly expressed in writing, the printed billhead of the invoice can, upon no well-settled rule, control, modify, or alter it." In the *Summers Case*, at page 108 of 153 Ill., the court, in considering the precise question, said: "The mere fact that ap-

pellants wrote their acceptance on a blank form for letters at the top of which were printed the words, 'All sales subject to strikes and accidents,' no more made those words a part of the contract than they made the other words there printed, 'Summers Bros. & Co., Manufacturers of Box-Annealed Common & Refined Sheet-Iron,' a part of the contract. The offer was absolute. The written acceptance, which they themselves wrote, was just as absolute. The printed words were not in the body of the letter, or referred to therein. The fact that they were printed at the head of their letter heads would not have the effect of preventing appellants from entering into an unconditional contract of sale." The construction contended for by the respondent would make that which is an absolute, unqualified acceptance upon its face a conditional one by reference to a letter head which was not referred to by either of the parties. The language of the acceptance, "We accept and enter same for shipment in accordance with the terms thereof," is clear and its meaning plain. The respondent agreed to ship the goods according to the terms of the order, not according to the terms of the printing on the letter heads. The respondent has cited *Yorston v. Brown*, 178 Mass. 103, 59 N. E. 654, and *Delta & P. Land Co. v. Wallace*, 83 Miss. 656, 36 So. 263. In the *Yorston Case* the order on which the plaintiff relied for a recovery specially referred to the printed headlines on the order, and the contract was made by reference thereto. The court ruled that it was competent for the defendant to refer thereto on the blank furnished him by the plaintiff for his use in making the order. In the *Delta Case* it was held that written and printed matter in a contract will be reconciled when it can be done.

The court instructed the jury that, in determining whether there had been a breach of the contract, they should consider whether there was a general custom which formed a part of the contract, whether it was the custom of the respondent to accept such orders only upon the conditions expressed in its letter heads, which was brought to the knowledge of the appellant so that it made the contract in view of the provision and adopted it as a part of the contract; that they should determine when the contract expired, whether in a reasonable time, if the parties were unable to fill it so that it was canceled and no longer obligatory, and, if so, there could be no recovery. This instruction the appellant contends was erroneous. We think it was clearly so. Parol testimony of usage or custom, either general in the community or special between the people en-

gaged in a particular trade or business, is not admissible to vary, modify, or control the terms of the contract. *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534; *Vollrath v. Crowe*, 9 Wash. 374, 37 Pac. 474; *Miller v. Bean*, 13 Wash. 516, 43 Pac. 636; *Commercial Bank v. Hart*, 10 Wash. 303, 38 Pac. 1114; *Covington v. Kanawha Coal & Coke Co.* 121 Ky. 681, 3 L.R.A. (N.S.) 248, 123 Am. St. Rep. 219, 89 S. W. 1126, 12 A. & E. Ann. Cas. 311; *Sheffield Furnace Co. v. Hull Coal & Coke Co.* 101 Ala. 446, 14 So. 672; *Partridge v. Phoenix Mut. L. Ins. Co.* 15 Wall. 573, 21 L. ed. 220; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987; *Mercantile Bkg. Co. v. Landa* (Tex. Civ. App.) 33 S. W. 681; *Scott v. Hartley*, 126 Ind. 239, 25 N. E. 826; *McMillan v. American Exp. Co.* 123 Iowa, 236, 98 N. W. 629; *Bigelow v. Legg*, 102 N. Y. 652, 6 N. E. 107. In the *Covington Case*, 121 Ky. 686, 3 L.R.A. (N.S.) 248, 123 Am. St. Rep. 219, 89 S. W. 1127, 12 A. & E. Ann. Cas. 311, it is said: "But in all cases of this sort the rule for admitting the evidence of usage or custom must be taken with this qualification, that the evidence be not repugnant to, or inconsistent with, the contract; for otherwise it would not go to interpret and explain, but to contradict, that which is written." In the *Sheffield Furnace Co. Case* the contract provided for a sale of coke at a price "f. o. b. cars, Sheffield, Alabama." Sheffield was the point of destination of the coke. The court held that evidence of a general custom in the coke trade was inadmissible for the purpose of showing that the purchaser should advance the freight. In *Barnard v. Kellogg* it was held that usage cannot be allowed to subvert the settled rules of law or defeat the essential terms of the contract; that its office is to explain words or phrases of doubtful meaning, or which may be understood in different senses according to the subject-matter to which they are applicable. In the *Partridge Case* the plaintiff, having been discharged from the employment of the defendant, sought to recover for services rendered as agent, and asserted a right to a commission on the annual premiums paid or to be paid on policies issued through his agency. To establish this, he undertook to prove a usage between insurance companies and their agents. He introduced in evidence a letter of the company in reply to one asking information as to the relation he sustained to the company, which stated: "Concerning your status in Missouri, it is simply this: You are there working up a business for yourself, and are paid the highest commissions which we pay." At page 230 of the *Lawyers' Edition* (21 L. ed.,) the court, speaking through Mr. 28 L.R.A. (N.S.)

Justice Miller, said: "It appears to us, as it did to the circuit court, that the testimony offered would have established a new and distinct term to the contract. It would have established a contract very different from the written one introduced by plaintiff. The language of the letter was neither ambiguous nor technical. It required and needed no expert, no usage to discover its meaning. To have admitted the usage offered in evidence in this case would have been to make a contract for the parties differing materially from the written one under which they had both acted for some time." And that "no such extension of the doctrine is consistent either with authority or with the principles which govern the law of contracts." The respondent has cited in support of this construction *Bliven v. New England Screw Co.* 23 How. 420, 16 L. ed. 510; *Robinson v. United States*, 13 Wall. 363, 20 L. ed. 653; and *Lillard v. Kentucky Distilleries & Warehouse Co.* 67 C. C. A. 74, 134 Fed. 168. These cases recognize the rule which we have stated, but hold that it is inapplicable to the particular facts before the court. The *Bliven Case*, in its application of this principle of law to the facts before it, tends to support the instruction. But, as we read the *Robinson* and the *Lillard Cases*, the facts are so different that they are not pertinent to the issue. In the *Robinson Case* a contractor had agreed to deliver 1,000,000 bushels of barley to the government between certain dates, but the contract did not specify the manner of delivery. After making certain deliveries in the sack, a large quantity was tendered loose in wagons. The tender being refused, it was held, in a suit by the government, that, the contract being silent as to the mode of delivery and there being two modes essentially different, evidence of the customary mode of delivery was admissible. In the *Lillard Case* it was held that, where a distiller had contracted to deliver the total product of slop at a "feeding lot" supplied by him, the contract not expressing the mode of delivery, evidence of custom was admissible to show how a delivery was to be made. In the case at bar it seems to us that the instruction of the court permitted the jury to find a contract wholly different from that made by the parties. The acceptance of the order was unconditional. The time of delivery not being stated, the law would require a delivery within a reasonable time. The instruction permitted the jury to transform an unconditional acceptance into a conditional one, which made the delivery subject to the exigencies of transportation and subject to the further condition that, if the goods could not be shipped with-

in a reasonable time, the contract was no longer obligatory upon either party. This was clearly repugnant to the contract.

A contract definite in its terms cannot be made subject to a custom of trade that, if it cannot be performed in a reasonable time, it need not be performed at all. There is a principle of law that, in contracts where the performance depends on the continued existence of a specified person, animal, or thing, a condition is implied that the impossibility of performance arising from the death of the person or animal, or the destruction of the thing, excuses the performance. This principle has no application to this case. The acceptance required a delivery within a reasonable time. In determining what was a reasonable time, the circumstances of the difficulty or impossibility of getting cars up to April 2, 1907, the date when the car embargo was removed, should be considered. One of the defenses is that there was a great shortage of cars when the contract was made, and that the appellant had knowledge of that fact. If this is true, it would be a circumstance in determining what a reasonable time would be. The fact that the contract called for shipment through the mountains in the winter season would be another circumstance to be considered. We are not dealing with a contract where a fixed date of shipment or delivery was agreed upon. The appellant, however, is not complaining because a delivery was not made during this period, but because of the refusal of the respondent to deliver within a reasonable time after transportation of lumber and shingles was resumed. The question of whether the washouts, deep mountain snows, and slides, preventing transportation for a given period, were the acts of God, need not be considered, because, as we have stated, the appellant is not complaining on account of a failure to deliver while these conditions obtained. 2 Page, Contr. §§ 1375, 1377; Buffalo & L. Land Co. v. Bellevue Land & Improv. Co. 165 N. Y. 247, 51 L.R.A. 951, 59 N. E. 5; 9 Cyc. Law & Proc. p. 627; Summers Bros. v. Hibbard, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899; Jones v. Anderson, 82 Ala. 302, 2 So. 911; Fleishman v. Meyer, 46 Or. 267, 80 Pac. 209; Eugster v. West, 35 La. Ann. 119, 48 Am. Rep. 232.

The respondent contends that, if it could not ship within a reasonable time owing to lack of cars, it was excused from shipping at all, and cites *Stewart v. Stone*, 127 N. Y. 500, 14 L.R.A. 220, 28 N. E. 595, and *Raisin Fertilizer Co. v. J. J. Barrow, Jr. Co.* 97 Ala. 694, 12 So. 388. In the *Stewart Case* a manufacturer of butter and cheese agreed with certain individuals to convert their milk into cheese and butter, sell the products, and divide the proceeds according to 28 L.R.A.(N.S.)

the contract. The factory was destroyed by fire, and a quantity of milk, butter, and cheese was lost. The court recognized the exception that we have noticed, and held that the destruction of the factory, if it occurred without negligence on the part of the owner, relieved it of liability for damages. In the *Raisin Fertilizer Co. Case* the engagement to deliver was conditional upon "water transportation" permitting. Where the order does not specify the size of the car, the damages are assessable on the basis of an average sized car used in shipping such commodities. *Floyd v. Mann*, 146 Mich. 356, 109 N. W. 679; *Bullock v. Finley* (C. C.) 28 Fed. 514. Under the circumstances of the case, the measure of damages is the difference between the contract price and the value of the commodities at the date of the demand and refusal to perform the contract. *Summers Bros. v. Hibbard*, supra; *Roberts v. Benjamin*, 124 U. S. 64, 31 L. ed. 334, 8 Sup. Ct. Rep. 393; *Brown v. Sharkey*, 93 Iowa, 157, 61 N. W. 364; *Trask v. Hamburger*, 70 N. H. 453, 48 Atl. 1087; *United R. & Electric Co. v. Wehr*, 103 Md. 323, 63 Atl. 475. The instructions requested by the appellant state the law of the case applicable to the issue, and should have been given as an entirety. The length of this opinion forbids a statement of the substance of the instructions, but it is sufficient to say that they were in harmony with the view we have taken of the case.

The judgment will be reversed, with directions to proceed in conformity with this opinion.

Rudkin, Ch. J., and Fullerton and Morris, JJ., concur.

Chadwick, J., dissents.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA EX REL.
MT. HOPE COAL COMPANY

v.

WHITE OAK RAILWAY COMPANY.

(65 W. Va. 15, 64 S. E. 630.)

Pleading — mandamus — alternative writ — recitals — sufficiency.

1. In mandamus by a coal operator commanding a railroad company, as required

Headnotes by MILLER, P.

Note. — Power to compel railroad to build, maintain, or connect with, side tracks for accommodation of shippers.

It is quite generally held that, in the absence of constitutional or statutory provi-

by § 2364, Code 1906, to make "reasonable provision" for the transportation of all coal offered it for shipment by him, the recitals in the alternative writ, showing that the things commanded thereby were substantially those which, in prior negotiations between the parties, the railroad company had regarded as reasonable and proper, will, on a motion to quash the writ, be regarded as equivalent to the recital of other facts and circumstances necessary to show the reasonableness of such demand, and as making a *prima facie* case entitling relator to the relief demanded.

Carrier — "reasonable provision" for transportation of freight — determination.

2. What will constitute such reasonable provision for the transportation of coal will depend on the facts and circumstances of each individual case.

Same — provisions previously determined.

3. Provisions which a railroad company had determined before the alternative writ issued were proper to be made for the transportation of relator's coal offered it for shipment, the court will assume on final hearing may reasonably be required by its mandate; at least, until a different showing be made.

sions, a railroad company is not obliged to build sidings or spurs to connect its main tracks directly with the establishment of a private shipper, or to maintain such side tracks when built, or to permit or maintain connection therewith when they are built by the shipper. *Detroit v. Michigan* C. R. Co. 156 Mich. 121, 120 N. W. 592; *People ex rel. Spruance v. Chicago & N. W. R. Co.* 57 Ill. 436; *Jones v. Newport News & M. Valley Co.* 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 736; *Mercantile Trust Co. v. Columbus, S. & H. R. Co.* 90 Fed. 148; *Durden v. Southern R. Co.* 2 Ga. App. 66, 58 S. E. 299; *Harp v. Choctaw, O. & G. R. Co.* 118 Fed. 169, affirmed in 61 C. C. A. 405, 125 Fed. 445.

And some cases hold that to make such a requirement of a railroad company amounts to a taking of its property without due process of law. See *Northern P. R. Co. v. Railroad Commission* (Wash.) 108 Pac. 938, and the cases discussed therein.

In Oklahoma, where there is a statute giving the corporation commission authority to require railroads to furnish facilities and conveniences, the court held, in reversing an order of the commission requiring the railroad to build a side track to a private elevator, that the proceeding should have been under a section of the statute requiring the shipper to pay the expense of constructing such siding, as a railroad is not obliged to provide such facilities as would equalize the disadvantage to a shipper caused by dissimilarity of location. *Chicago, R. I. & P. R. Co. v. State*, 23 Okla. 94, 99 Pac. 901; *St. Louis & S. F. R. Co. v. State* (Okla.) 106 Pac. 818; *St. Louis & S. F. R. Co. v. Haywood* (Okla.) 106 Pac. 862. 28 L.R.A. (N.S.)

Railroad — side track — mandamus to compel building of.

4. Where, in order that reasonable provision be made by it for the transportation of coal and coke offered it for shipment, as required by said § 2364, Code 1906, the facts and circumstances demand it, a railroad company may be compelled by mandamus to construct and operate upon its right of way a side track and switch for that purpose.

Same — due process of law.

5. Requiring such reasonable provision to be made does not amount to a command to enter into a contract therefor with relator, or to build and maintain a permanent structure on such right of way, to be continued indefinitely, nor to the taking of the private property of such railroad company for private use without due process of law, inhibited by article 14 of the Amendments to the Constitution of the United States. It is a mere command of the temporary use by such company, of a part of its right of way for the purpose of performing a duty imposed upon it by law.

Mandamus — alternative writ — right to amend.

6. The alternative writ of mandamus, though regarded as a pleading,—the declaration or complaint,—is nevertheless the

And in *Atchison, T. & S. F. R. Co. v. State* (Okla.) 104 Pac. 908, the court reversed a similar order by the commission requiring a railroad to construct a switch to a flour mill, though the shipper was required to pay the cost of such portion thereof as was off the railroad's right of way.

For a similar construction of the power of the Interstate Commerce Commission to order switch connections, see *Winters Metallic Paint Co. v. Chicago, M. & St. P. R. Co.* 16 Inters. Com. Rep. 587.

In *Railroad Commission v. St. Louis Southwestern R. Co.* 35 Tex. Civ. App. 52, 80 S. W. 102 (rehearing denied in 98 Tex. 67, 88 S. W. 1141), a statute requiring railroads to build sidings and spur tracks sufficient to handle the business tendered such roads was held to refer only to sidings and spur tracks for public use, and an order of the railroad commission requiring the building of a side track for the use of a lumber company, though the latter furnished the right of way, grading, and cross-ties, was held invalid.

In *Northwestern Warehouse Co. v. Oregon R. & Nav. Co.* 32 Wash. 218, 73 Pac. 388, where a statute provided that every railroad company which permitted one shipper to connect its warehouse with its tracks should extend such privilege to all others, it was held that a railroad company which permits the building of a warehouse on its right of way is not obliged to extend its track to the warehouse of another shipper off its right of way.

And in *Lancashire Brick & Terra Cotta Co. v. Lancashire & Y. R. Co.* [1902] 1 K. B. 651, it was held that a statute giving the owner of lands adjoining a railway the right

writ of the court; and where the substantive matter thereof is sufficient to justify a part, but not all, that is commanded by the writ, this court may, in a case of original jurisdiction, so amend the alternative writ as to make it conform to the mandate of the peremptory writ awarded, and that may properly be commanded thereby.

(January 19, 1909.)

PETITION for a writ of mandamus to compel defendant to make "reasonable provision" for the transportation of coal offered it for shipment by relator. Granted.

The facts are stated in the opinion.

Messrs. Price, Smith, Spilman, & Clay and C. R. Summerfield for relator.

Messrs. Dillon & Nuckols, for defendant:

The case stated does not show a legal duty imposed upon defendant by law, common or statutory, owing to relator, which it refused to obey, and in the absence of such showing the relator is not entitled to the relief demanded.

Northern P. R. Co. v. Washington Territory, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; Atchison, T. & S. F. R. Co.

to lay collateral branches, and requiring the railway to connect therewith, does not give an absolute right to such connections, but only if they can be made with safety to the public, and without injury to the railway or inconvenience to the traffic thereon.

But in support of the position taken in STATE EX REL. MT. HOPE COAL CO. v. WHITE OAK R. CO., which holds that a railroad company may be required to connect with a coal mine by a switch upon its right of way, see the following cases:

—Com. ex rel. Brown v. Corey, 2 Pittsb. 445, holding that shippers have a statutory right to connect with lateral railroads, and that mandamus is the proper remedy to compel the proprietors thereof to insert, or permit others to insert, the switches, sidings, and connections necessary, and Reeser v. Philadelphia & R. R. Co. 215 Pa. 136, 64 Atl. 376, holding that this right could not be interfered with by a contract between the railroad and another shipper that no other switch should be built in that locality;

—Olanta Coal Min. Co. v. Beech Creek R. Co. 144 Fed. 150, in which a decree was granted to require a railroad to permit the connection of a switch built by the coal company, and which was affirmed on appeal in 85 C. C. A. 148, 158 Fed. 36, the court, however, ordering the decree reopened, to enable the trial court to investigate further the propriety of the location and manner of making the connection, with special regard to its safety;

—Vincent v. Chicago & A. R. Co. 49 Ill. 33, in which an injunction was granted to 28 L.R.A. (N.S.)

v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Jones v. Newport News & M. Valley Co. 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 736; Florida C. & P. R. Co. v. State, 31 Fla. 282, 20 L.R.A. 419, 34 Am. St. Rep. 30, 13 So. 103; Harp v. Choctaw, O. & G. R. Co. 118 Fed. 169; Vincent v. Chicago & A. R. Co. 49 Ill. 43; People ex rel. Spruance v. Chicago & N. W. R. Co. 57 Ill. 436; Hoyt v. Chicago, B. & Q. R. Co. 93 Ill. 607.

There is no constitutional or statutory provision in West Virginia requiring the shippers of coal to be furnished a private side track on the railway company's right of way, as such right does not exist under § 2364, Code 1906, and that statute must be strictly construed.

Frostburg Min. Co. v. Cumberland & P. R. Co. 81 Md. 28, 31 Atl. 698; Darlston Local Board v. London & N. W. R. Co. [1894] 2 Q. B. 694; State v. Chicago, M. & St. P. R. Co. 36 Minn. 402, 31 N. W. 365; Harp v. Choctaw, O. & G. R. Co. supra.

To compel a railroad or any other public service corporation to furnish even an admittedly obligatory service, at a rate not fairly remunerative, is the taking of property without due process of law.

compel a railroad to deliver freight over a private switch;

—Railroad Commission v. Kansas City Southern R. Co. 111 La. 133, 35 So. 487, in which it was held that a railroad commission, having power to make reasonable and just regulations to govern and regulate railroad traffic, has the power to order, subject to review by the courts, that a switch be not removed;

—North Carolina Corp. Commission v. Sea Board Air Line R. Co. 140 N. C. 239, 52 S. E. 941, where a railroad was required to build a siding to a lumber mill under the order of the commission, the requirement being found to be reasonable;

—Hoyt v. Chicago, B. & Q. R. Co. 93 Ill. 601; Chicago & A. R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824, affirming 27 Ill. App. 404, and Bell v. Midland R. Co. 3 DeG. & J. 673, where the railroad companies were prevented by injunction or mandamus from discontinuing track connections with private establishments;

—Canadian Northern R. Co. v. Robinson. 37 Can. S. C. 541, sustaining an order of the board of railroad commissioners requiring a railroad to replace a siding which it had taken up;

—and Woodruff v. Brecon & M. T. Junction R. Co. L. R. 28 Ch. Div. 190, where a railroad, on being required to make an improved connection with sidings, required the shipper to contribute to the cost of the improvement, and on his refusal removed the junction, they were required to restore the connection.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 594, 41 L. ed. 560, 565, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 496, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Railroad Commission Cases, 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191.

Miller, P., delivered the opinion of the court:

The defendant owns and operates a railroad in Fayette county from Macdonald station on the Loup creek branch of the Chesapeake & Ohio Railway Company to Price-Hill station, a distance of about 3 miles. The relator, the Mt. Hope Coal & Coke Company, has opened up a coal mine on the line of defendant's railway near Mt. Hope station, where it has built a substantial tippie, and is ready to mine and ship coal. The defendant owns its right of way in fee of the width of 100 feet. It is impossible for relator to reach the main track of defendant, as now located, for shipping its coal, except by side track and switch connection therewith constructed, in part at least, upon defendant's right of way. In June, 1907, negotiations were begun between relator and defendant for side track privileges, and on June 25, 1907, the defendant's general manager wrote the relator's attorney, referring to the negotiations begun, saying: "I, at that time, advised you the freight rate was 10 cents per ton. This I beg to confirm. Since looking over the records, I find the rate is 10 cents per ton from the mines operating on this line, and, as the Mt. Hope Coal Company have such a small area and the shipments from that area will be limited, we could not agree to furnish them a side track at our expense. We will, however, if they are willing to do the grading, pay for rails, ties, fastenings, and switch connections, and labor in laying track, permit them to tap our main line; and we will handle the coal from their operation on the basis of 10 cents per ton of coal, distributing the cars on the branch in proportion to the capacity of the mine. It being also understood that this switch connection is made for the purpose of shipping coal, and in default of, at any time, shipping less than one car load of freight per annum for every lineal foot 28 L.R.A.(N.S.)

of track, the White Oak Railway Company reserves to itself the right to remove the switch connection. This for the purpose of preventing dead switches on their main line." After this letter was received, the relator began and completed the building of its tippie, extending the same out over the defendant's right of way some 50 feet, so as to reach the proposed side track, and also did the work of grading, furnished ties, steel rails, frogs, etc., for switch connection, and other material for the purpose of completing said side track and making the proper connection with defendant's main track, expending therein, and in opening its mine, some \$17,000. It does not clearly appear under what special contract or agreement with the defendant, if any, relator extended its tippie over on the defendant's right of way, other than such as may be implied from said letter of June 25, 1907, and the negotiations which seem to have led up to it; but it is alleged in the petition, and not denied, that the work of building and completing the tippie and of grading and providing rails, ties, and other materials for the side track, was carried on by the relator with the knowledge and acquiescence of defendant, and with no objection thereto by it until in the latter part of December of that year, when defendant refused to connect up the switch with its main track except on condition that relator would enter into a contract with it embodying substantially the terms of the Norfolk & Western Railway Company contract. Pending these negotiations, however, a contract was drawn up by defendant's counsel which relator was willing to execute, but which the defendant refused. Relator also proposed a contract in the form required by the Chesapeake & Ohio Railway Company for operators along its line, but this defendant also refused to accept, and refused to make any contract except that proposed by it. Neither of the agreements proposed contained any provision relating to the relator's occupancy of defendant's right of way with its coal tippie; nor does it appear that any of the negotiations contemplated any special provision therefor. Having failed to come to an agreement for such side track and connections, the relator now seeks to compel defendant by mandamus, and by force of the statute, to make reasonable provision for the transportation of its coal offered for transportation. It conceives that reasonable provision to be, according to its petition and the alternative writ, to require defendant to connect the said side track constructed by relator, Mt. Hope Coal & Coke Company, at its mines, with the defendant's railway line, or to permit said relator to make such connection:

to furnish relator its due and proper proportion of the railway cars and equipment available for coal shipments from the region in which petitioner's mine is located; and to place such cars upon said side track and remove the same when loaded in the usual way in which said cars are placed and removed for other shippers along said line; and that it desist from discriminations in favor of other corporations named.

The defendant challenges the sufficiency of the alternative writ, and moves to quash the same, and also files its return in writing thereto. The motion to quash is predicated upon three grounds: First, that the alleged right of relator is not based upon violation of any duty imposed upon defendant by law; second, that the alternative writ does not allege any facts or circumstances upon which it can be determined whether defendant has refused to discharge its legal duty to relator; and, third, because the alleged rights of relator are based wholly upon a duty or obligation arising out of an alleged contract or agreement between relator and railway company, which the court by mandamus has no power to enforce.

The first and third grounds are evidently based upon the erroneous theory that relator rests its right to relief upon its negotiations for a contract, or upon the proposition contained in the defendant's letter of June 25, 1907. We do not so understand relator's position, but, on the contrary, that the right claimed is a statutory right. It is argued for defendant that, where the relator's rights rest wholly on a special contract involving no question of public trust or official duty, the writ will be refused. *Merrill, Mandamus*, § 16. Without contract a railroad company has a public duty to discharge. Our statute (§ 2364, Code 1906) upon which relator especially relies provides that "every railroad corporation along whose line of railroad the industries of mining coal or manufacturing coke is carried on shall, without discrimination between or amongst shippers, and without unnecessary delay, make a reasonable provision for the transportation of all such coal and coke offered for transportation over its railroad, and no such railroad corporation shall discriminate in rates, distribution of cars, or otherwise against or among shippers of coal or coke offered for shipment on its line or lines." Section 2366 imposes a penalty upon such railroad corporation, its officers, and agents who knowingly and wilfully violate any of the provisions of that act. Because the negotiations for a contract failed, has the relator lost any of its statutory rights? We 28 L.R.A.(N.S.)

plate any agreement of the parties. The mandate of the statute is that the railroad company shall, without any unnecessary delay, make a reasonable provision for the transportation of all coal and coke offered for shipment,—a command which the railroad company cannot neglect without incurring the penalty of the statute. What will constitute such reasonable provision will depend, of course, upon the facts and circumstances of each individual case. But the statute makes the industries of mining coal and manufacturing coke the special subject of railroad regulation. The extent and importance of these industries in this state in the judgment of the legislature required this, and we think the statute should be given a construction broad enough to accomplish the purposes plainly intended. On the second ground of the motion, if we understand the purpose of relator in setting forth the prior negotiations for a contract, it was that they might serve as a substitute, in part at least, for allegations of fact necessary to show the reasonableness of the provision required by it, and we think they do serve such purpose. It might have been better, and but for these recitals of the alternative writ it would have been necessary, no doubt, in order to show the reasonableness of such provisions, for relator to have alleged and proven the probable output of its mine, the number of cars it would likely require per day or per month or per annum, the probable expense of making such provisions, and any other facts available,—this for the purpose of showing the extent and nature of its operations and the reasonableness of its demand, for, as we construe our statute, provision that is reasonable must be made. The alternative writ recites relator's ownership of the mine, the preparation made by it for mining and shipping coal, the expenditures incurred by it therein, and that it is ready to mine and ship coal; also, the acreage owned by it, and its readiness to provide the material and pay for the labor of construction of such side track and switch, in view of which it is alleged defendant was willing to have such side track and switch connection made, if only the relator would agree to the terms of a contract which the relator conceived to be unjust and onerous. These recitals of the alternative writ we think present a *prima facie* case entitling relator to relief.

On the merits the return of defendant admits all the facts which we deem material; and in the brief of counsel they say that they are ready to admit that under our statute defendant would be required to make a reasonable provision for the transportation of coal and coke, and under

certain circumstances such reasonable provision would require the putting in of switch connections, but they say that, before defendant can be required to make switch connections with a private side track for relator, it must be alleged and proven that relator has sufficient product to offer for transportation to justify defendant in maintaining and operating such side track and switch, that they can be made and operated safely on a practicable grade, and that relator has made provisions upon its own property to load the product of its mine. As we have said, we think the alternative writ sufficient in this particular.

The defenses relied upon by defendant in its return are, first, that relator seeks to compel defendant to enter into a contract with it, for the use and occupation by it, of a part of the defendant's right of way, with its coal tippie and a side track; second, that, if the first proposition be not involved, another object of the writ is to compel the defendant, against its will and discretion, to construct, or permit relator to construct, on its private right of way a side track for the private use of the relator, and this without showing that such side track can be constructed at the point indicated so as to be safely and profitably operated by the defendant; and, third, that there is no warrant of law therefor, and that the court is without jurisdiction to compel by mandamus performance by the defendant of either of said acts. It is conceded, however, that relator has the right to compel defendant to make suitable provision for shipping of its coal, but that it has not a clear legal right to have this done in the way and manner required, because it involves the taking of its private property for private use, which is not due process of law, and violative of the provisions of article 14 of the Amendments of the Constitution of the United States. In its first proposition we think the defendant wholly misconceives the purposes of the writ. While the writ recites the things done and negotiations had between the parties in the vain endeavor to come to an agreement, it contains no command that defendant enter into any agreement with the relator. The issues presented upon the writ and return do not call upon us to decide, and we do not decide, whether, as an original proposition, the relator could compel defendant by mandamus to permit it to occupy, with its coal tippie, a part of the defendant's right of way. This the relator has already accomplished, if not by express agreement, at least, by the acquiescence and consent of the defendant. The evidence shows that such occupancy by other coal operators has in many instances been

permitted in the same coal field by the Chesapeake & Ohio Railway Company. And in its return to the writ in this case, defendant makes no real objection to such occupancy of its right of way by relator, either with its coal tippie or with the proposed switch and side track, if only relator will accept the terms of the contract proposed by it in relation thereto,—a condition not suggested or required by it in its proposition of June 25, 1907.

The only question of merit presented here is the legal one, covered by the second and third defenses, namely, whether under our statute defendant can be compelled by mandamus, under the facts and circumstances of this case, and upon the conditions proposed by relator, to construct, or permit relator to construct, the side track as proposed. It is conceded that reasonable provision may be commanded. Whether the proposed side track can be operated safely upon a proper grade or with profit to the defendant, and also the question whether the occupancy of a portion of the defendant's right of way therewith as required is reasonable, are questions which it seems to us were practically determined by the parties themselves prior to the issuance of the present writ; for the defendant is shown to have consented thereto, or at least acquiesced therein, and what the parties themselves had determined was such reasonable provision for the transportation of relator's coal we may, it seems to us, properly assume may reasonably be required by the mandate of the court, at least until a different showing be made. The only way in which reasonable provision could be made for transportation of coal delivered from a tippie into cars would be by building a side track connected by a switch to the main track, either upon the right of way of the defendant or upon the private lands of the relator. The parties determined between themselves that the proper place for the location of such switch was on defendant's right of way. The relator claims, and there is evidence to support its claim, that the only feasible and proper place for such side track is on defendant's right of way.

But has the court power by mandamus to compel defendant upon terms to construct and operate the proposed side track and switch connection on its right of way? We think it has. This question we do not conceive to be covered and concluded, as defendant contends, by *Missouri P. R. Co. v. Nebraska*, 104 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130. The question there was whether the railroad company could be compelled by mandamus to enter into a contract with relators, upon like terms and conditions contained in contracts with other

private persons, permitting them to build and maintain a private and permanent warehouse upon the defendant's right of way. The state court, construing the statute of Nebraska as conforming to the Constitution of the United States, had required defendant to enter into such a contract. The supreme court conceded the right of the railroad company to permit its grounds to be occupied by others with structures convenient for the receipt and delivery of freight upon its railroad, so long as a free and safe passage was left for the carriage of freight and passengers,—citing *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356,—but says: "But how far the railroad company can be compelled to do so against its will is a wholly different question." But the court says in that case: "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th article of Amendment of the Constitution of the United States." Many cases are cited for this proposition. This, however, is not the proposition we have before us. Nor do we think *Northern P. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283, a case in point, as defendant contends. The particular point decided in that case was that, without legislative action making it the plain duty of the railroad company, the court was without jurisdiction to compel by mandamus the railroad company to build and maintain a railway station at the particular point commanded. In that case the court quotes extensively from *People v. New York, L. E. & W. R. Co.* 104 N. Y. 58, 66, 67, 58 Am. Rep. 484, 9 N. E. 856. The question in the New York case was whether, without legislative requirement, the defendant company could be compelled by mandamus to build a station house at the particular point commanded by the writ. The statutes of New York permitted railway companies, for public use in the conveyance of passengers, persons, and property, to erect and maintain all necessary and convenient buildings and stations for the accommodation and use of their passengers, freight, and business. But the court said, contrary to the findings of the 28 L.R.A.(N.S.)

railroad commissioners, that, "as the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by mandamus. It cannot compel the erection of a station house or the enlargement of one. . . . As to that the statute imports an authority only, not a command, to be availed of at the option of the company, in the discretion of its directors, who are empowered by statute to manage 'its affairs,'" etc. After that decision in New York the legislature (*Laws 1892, chap. 676, p. 1382*) amended the statute, giving the railroad commissioners general supervision over all railroads, and empowering them to require additional terminal facilities, and the courts power and authority to enforce their just and reasonable decisions and recommendations by mandamus, subject to appeal. It may be proper to note that Justices Brewer, Field, and Harlan dissented in *Northern P. R. Co. v. Washington*. Justice Brewer says in his dissenting opinion: "A railroad corporation has a public duty to perform, as well as a private interest to subserve, and I never before believed that the courts would permit it to abandon the one to promote the other. Nowhere in its charter is in terms expressed the duty of carrying passengers and freight. Are the courts impotent to compel the performance of this duty? Is the duty of carrying passengers and freight any more of a public duty than that of placing its depots and stopping its trains at those places which will best accommodate the public? If the state of Indiana incorporates a railroad to build a road from New Albany through Indianapolis to South Bend, and that road is built, can it be that the courts may compel the road to receive passengers and transport freight, but, in the absence of a specific direction from the legislature, are powerless to compel the road to stop its trains and build a depot at Indianapolis? I do not so benitle the power or duty of the courts." As we have said, the purpose of the present writ is not to command a contract for the building of a permanent structure by the relator on the right of way. The writ contemplates no such object. It commands a reasonable provision for the transportation of relator's coal offered for shipment, which the statute authorizes. Such reasonable provision does not involve the permanent maintenance of the proposed switch and side track. Nor does the writ command defendant to continue the same indefinitely as a permanent

structure. *Jones v. Newport News & M. Valley Co.* 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 739; *Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission*, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803. In *Missouri P. R. Co. v. Nebraska*, supra, the court emphasizes the fact that the "order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way." In *Jones v. Newport News & M. Valley Co.* supra, referring to the latest Illinois case relied upon, the court says: "The supreme court of that state has held that the railroad company has a discretion to say in what particular manner the connection shall be made with its main track, but that this discretion is exhausted after the completion of the switch and its use without objection for a number of years;" but, says the court: "This is very far from holding that there is any common-law liability to maintain a side track forever, after it has once been established." And, referring to other Illinois cases, the same court says: "They depended on statutory obligations, and were not based upon the common law." In *Missouri P. R. Co. v. Nebraska* the court says of that case: "Nor does it present any question as to the power of the legislature to compel the railroad company itself to erect and maintain an elevator for the use of the public, or to compel it to permit to all persons equal facilities of access from their own lands to its tracks, and of the use from time to time of those tracks for the purpose of shipping or receiving grain or other freight, as in *Rhodes v. Northern P. R. Co.* 34 Minn. 87, 24 N. W. 347, in *Chicago & N. W. R. Co. v. People*, 56 Ill. 366, 8 Am. Rep. 690, and in *Hoyt v. Chicago, B. & Q. R. Co.* 93 Ill. 601." We quote from these decisions for the purpose of showing how differently the courts view the subject where there is a demand for the erection of permanent structures for private use on a railroad right of way, and where, as in this case, the demand relates to a temporary structure to be placed thereon under the direction and control of the railroad company. We are of opinion, on the authority of these cases, that our statute requiring that reasonable provision be made justifies in part the writ in this case, and that, unless we give this statute such construction, it will not accomplish the purposes intended by the legislature, and leave the subject entirely within the control and discretion of railroad companies.

But is relator entitled to all the relief
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commanded by the mandamus nisi? It commands, first, "that you connect the side track constructed by relator, Mt. Hope Coal & Coke Company, at its mines, with your railway line, or permit said relator to make said connection;" second, "that you furnish to said relator, Mt. Hope Coal & Coke Company, its due and proper portion of the railroad cars and equipment available for coal shipments from the region in which the mine of said relator is located, and place such cars upon said side track and remove the same when loaded in the usual way in which such cars are placed and removed for other shippers upon your railroad line;" and, third, "that you cease and desist from discriminating against said relator, Mt. Hope Coal & Coke Company, and in favor of the Sherwood Coal & Coke Company and the Price-Hill Colliery Company, in the matter of switch connections, distribution of cars, and other facilities." We find on the pleadings and proofs the relator entitled to only such relief as is covered by the first command of the writ. It is not alleged or proven that the relator has ever demanded of the defendant, or that the defendant has ever refused to furnish, a due and proper proportion of the cars; nor do we think it is sufficiently alleged, and it is not proven, that the defendant has discriminated against the relator in favor of the other companies mentioned in the matter of switch connection, distribution of cars, and other facilities. On the contrary, the return and the evidence show that there is no such company as the Sherwood Coal & Coke Company; that the Price-Hill Colliery Company is not a producer of coal at all, but that the Price-Hill Fuel Company, the owner and operator of two coal mines, known as the Sherwood and Price-Hill mines, has tipples and side tracks upon its own land and premises, and that said Price-Hill Fuel Company has entered into a contract embodying the same terms offered relator, and which it refused to accept; and that, in fact, there has been no discrimination against the relator in this respect. What, then, is the proper disposition to make of the case? The old and rigid rule, still adhered to in some jurisdictions, was that the peremptory writ of mandamus must strictly follow the command of the alternate writ; and that, if all that is asked in the alternative writ cannot be granted, nothing that is asked can be granted. This rule is referred to, and recognized in our own cases of *Fisher v. Charleston*, 17 W. Va. 628, 640; *Doolittle v. County Ct.* 28 W. Va. 158; and *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187. See also 26 Cyc. Law & Proc. pp. 490, 491, and cases cited in notes. But this rule in the

later cases has been very much relaxed, and in those states where, either by statute or by the prevailing rules of practice, the right of amendment of pleadings has been extended to writs of mandamus, the practice now is to direct the mandate of the alternative writ to be so amended as to conform to the command of the peremptory writ. In *Fisher v. Charleston*, supra, the practice followed on writ of error was to set aside the order of judgment awarding the peremptory writ, and remand the case to the lower court with directions to issue a new alternative writ commanding that to be done which was justified by the pleading and proofs,—in legal effect an amendment of the original writ. In this state the rules, including the rules relating to amendments of pleadings, are applicable to mandamus, and, if the alternative writ be amended after service, it need not be then served in its amended form. *Fisher v. Charleston*, 17 W. Va. 628; *Mason v. Ohio River R. Co.* 51 W. Va. 183, 189, 41 S. E. 418. The mandate of the writ is peculiarly within the control of the court. It need not in the first instance conform to the prayer of the petition. The court may fashion it to suit the case made by the petition. *Fisher v. Charleston*, supra, 630. If the court may thus control the writ at the time of directing it, there is no good reason why it may not control it afterwards by amendment, so as to make it conform to the mandate of the peremptory writ. This practice is fully justified by modern decisions and text writers, and we are of opinion it is the proper practice, and should be followed in this state, although resulting in a modification to some extent of the rule heretofore recognized and followed. 2 Dill. Mun. Corp. 4th ed. § 879; High, Extr. Legal Rem. 3d ed. § 519; *State v. Crites*, 48 Ohio St. 142, 173, 26 N. E. 1052; *State ex rel. Pillsbury v. Charleston*, 1 S. C. 30; *State ex rel. Waters-Pierce Oil Co. v. Baggott*, 96 Mo. 63, 71, 8 S. W. 737; *United States ex rel. Hall v. Union P. R. Co.* 4 Dill. 479 (syl. 5), Fed. Cas. No. 16,601; 26 Cyc. Law & Proc. pp. 490, 491.

The pleadings and proofs we think entitle the relator to a peremptory writ of mandamus directed to defendant, commanding it, on condition that, before beginning the work, the relator shall pay or secure to be paid to it the cost and expense thereof, to commence forthwith and to complete as soon as practicable a safe and suitable side track, connecting the same by a switch with relator's mines, using the location graded and prepared by the relator, and the ties, rails, and other materials furnished by it, as far as consistent with proper side track and switch. *con-* 28 L.R.A. (N.S.)

struction, or permit relator to do said work in accordance with said specifications. It will therefore be so ordered; and also that the alternative writ be so amended as to conform in all respects to the peremptory writ directed thereby.

Petition for rehearing denied, May 14, 1909.

WASHINGTON SUPREME COURT.

NORTHERN PACIFIC RAILWAY COMPANY, Appt.,
v.
RAILROAD COMMISSION OF WASHINGTON, Resp't.

(— Wash. —, 108 Pac. 938.)

Railroad — private service — right to compel.

The attempt by the state to compel a railroad company to construct and operate a spur track to a private mill is void, as a taking of property for private use without due process of law.

(Fullerton, J., dissents in part.)

(May 18, 1910.)

APPEAL by the Northern Pacific Railway Company from a judgment of the Superior Court for Pierce County affirming an order of the Washington Railway Commission requiring the construction of a spur track to certain private property. Reversed.

The facts are stated in the opinion.

Mr. George T. Reid, with Mr. B. S. Grosscup, for appellant:

The property of a railroad company is private property, and cannot be invaded or damaged.

State ex rel. North Coast R. Co. v. Northern P. R. Co. 49 Wash. 84, 94 Pac. 907.

An industry track of the kind proposed is for a private use.

Healy Lumber Co. v. Morris, 33 Wash. 491, 63 L.R.A. 820, 99 Am. St. Rep. 964, 74 Pac. 681.

The order of the commission requiring the railroad company to surrender the use of a portion of its property to the use of individuals for a siding deprived the company of its property without due process of law, and was void.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

Messrs. W. P. Bell, Attorney General, and W. V. Tanner, for respondent:

The order of the railroad commission does not constitute a taking of property for a private use.

Note. — See note to preceding case.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 19, 51 L. ed. 941, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398; 22 Am. & Eng. Enc. Law, 2d ed. p. 916; Sedg. Stat. & Const. Law, 434-437; *Mugler v. Kansas*, 123 U. S. 688, 31 L. ed. 212, 8 Sup. Ct. Rep. 273; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 683, 27 L. ed. 442, 445, 2 Sup. Ct. Rep. 185; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677-701, 40 L. ed. 840-859, 16 Sup. Ct. Rep. 714; *North Carolina Corp. Commission v. Seaboard Air Line R. Co.* 140 N. C. 239, 52 S. E. 941; *State v. Missouri P. R. Co.* 81 Neb. 15, 115 N. W. 614; *State ex rel. Farmers Elevator Co. v. Missouri P. R. Co.* 81 Neb. 174, 115 N. W. 757; *State ex rel. Mt. Hope Coal Co. v. White Oak R. Co.* 65 W. Va. 15, ante, 1013, 64 S. E. 630; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

The order of the railroad commission is not arbitrary or unreasonable.

Interstate Commerce Commission v. Louisville & N. R. Co. 118 Fed. 613; *Stenerson v. Great Northern R. Co.* 69 Minn. 353, 72 N. W. 713; *Morgan's L. & T. R. & S. S. Co. v. Railroad Commission*, 109 La. 263, 33 So. 214; *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission*, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905; *North Carolina Corp. Commission v. Seaboard Air Line R. Co.* supra.

Gose, J., delivered the opinion of the court:

This appeal is prosecuted from a judgment of the superior court of Pierce county, affirming an order of the railroad commission requiring the appellant to construct and operate a spur track from its main-line road to the sawmill of one H. A. Burnham. The appellant owns and operates a line of railroad extending from Tacoma easterly and southeasterly through the state, and southerly through Rainier and McIntosh to the Columbia river. Rainier and McIntosh are stations about 4 miles apart. Mr. Burnham owns and operates a sawmill about midway between the stations, and about 300 feet from the appellant's main-line track. He manufactures about six car loads per week of lumber and other sawed timbers, for shipment over appellant's lines of road, and hauls it by means of wagons and teams to Rainier, a distance of about 2½ miles by wagon road, at an expense of about \$40 a car load for hauling and loading. With a spur track to his mill, he could put his products aboard the car for about \$5 per car load. He has demanded

of the appellant that it furnish him with a spur track to the mill, has offered to furnish a right of way for the track, grade the track, and furnish and lay the ties under the direction of the appellant; but it has refused to comply with his demand. Upon a complaint alleging these facts, and also alleging that a spur track can be constructed at small expense to the appellant, extending from the main line of its road to the mill, without endangering or rendering difficult the operation of trains, the case was heard before the railroad commission. The commission found the facts stated, and that a necessity exists for the spur track. Thereafter it entered an order requiring Burnham to construct the grade and furnish proper and necessary ties, and requiring appellant to furnish and lay the rails, construct the spur track, provide proper connections with its main line, and furnish Burnham with cars and facilities for loading his lumber at his mill for shipment over the appellant's lines. The order makes no provision for a right of way, and the evidence does not disclose who owns the land over which the spur track is to be constructed. A compliance with the order would require switching to the extent of about a mile, and would consume from a quarter to a half hour every time a car was taken to or from the mill.

The appellant contends that the order is a taking of its property without due process of law, and that it contravenes the 14th article of Amendment to the Federal Constitution. We think this view must prevail. The sawmill is a private industry, and the effect of the order is to take the private property of the appellant, and devote it to the private use of Burnham. *Healy Lumber Co. v. Morris*, 33 Wash. 491, 63 L.R.A. 820, 99 Am. St. Rep. 964, 74 Pac. 681. A railroad is a public highway and, as such, is subject to regulation; but the regulation must be promotive of the public interest. Notwithstanding the fact that it is a public highway, its property is private. In *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110, speaking of the 14th Amendment, it is said: "It would be difficult, and perhaps impossible, to give to those words a definition at once accurate and broad enough to cover every case. This difficulty, and perhaps impossibility, was referred to by Mr. Justice Miller, in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, where the opinion was expressed that it is wiser to ascertain their intent and application by the 'gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.'" It is true that railroad companies may be required to fence

their tracks, establish proper crossings at points of intersection with public roads, patrol their tracks at thickly populated points, establish depots and stations, provide suitable connection with intersecting lines, adopt suitable safety appliances for the coupling of cars, properly light and heat their cars and depots, and many other things which touch the public business. The sawmill of Mr. Burnham, while an important industry, is no more a public business than a flouring-mill, a dairy, a farm, a livery barn, or a manufacturing plant of any other character or description.

The case at bar falls squarely within the principle announced and applied in *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130. In that case the supreme court of the state of Nebraska had awarded a writ of mandamus to compel the railway company to comply with an order of the state board of transportation, which directed the company to grant to certain private persons the right and privilege of erecting an elevator upon the grounds of the railway company at one of its stations. The complaint upon which the order was based recited that the elevator would be used to store the cereal products of the farms and leaseholds of the complainants as well as the products of other neighboring farms. Upon a writ of error to review the judgment, the court said: "The order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was in essence and effect a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th article of Amendment of the Constitution of the United States."

In *Northwestern Warehouse Co. v. Oregon R. & Nav. Co.* 32 Wash. 218, 73 Pac. 388, a mandamus proceeding to require the railroad company to extend its track 250 feet to a grain warehouse, to afford it loading facilities, this court said: "Under any view of the requirements of the statute, it certainly cannot be contended that appellant could have been required to build a track over land it did not own, or that it was under the duty to go out and buy a right of way for that purpose." In that case the record shows that a deed to the right of way for the extension of the track was tendered the railroad company at the time of the trial.

In *Harp v. Choctaw, O. & G. R. Co.* (C.) 118 Fed. 169, the railroad company had 28 L.R.A. (N.S.)

for a time permitted the owners of coal mines to load their coal from wagons onto the cars on its commercial switches. It was insisted that, if this method were discontinued, it was the duty of the company to put in a spur track for the benefit of the mine owner. In considering that question the court said: "It must be remembered that the plaintiff in this case was not engaged in any public business, but was simply a private citizen operating a coal mine on his own account."

In *Missouri P. R. Co. v. Nebraska*, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, a statute providing that "every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating, grain elevators, or in handling or shipping grain at or contiguous to any station of its road; and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way, and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made shall erect, equip, and maintain a side track or switch of suitable length to approach as near as 4 feet of the outer edge of their right of way when necessary, and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act, must have a capacity of not less than 15,000 bushels,"—and making railroads liable for a fine for failure to obey the command of the statute, was held unconstitutional. The case arose out of two suits based upon the statute. The first was brought by the state of Nebraska to recover a fine of \$500. The second was brought on the relation of the interested party, to compel the extension of a side track and the granting of shipping facilities, the railroad company having refused an application for a site for an elevator on its right of way. *State v. Missouri P. R. Co.* 81 Neb. 15, 115 N. W. 614, and *State ex rel. Farmers' Elevator Co. v. Missouri P. R. Co.* 81 Neb. 174, 115 N. W. 757, were reversed; the court saying: "We are of opinion that this statute is unconstitutional in its application to the present cases, because it

does not provide indemnity for what it requires." The same principle is announced in *Chicago, B. & Q. R. Co. v. State*, 50 Neb. 399, 69 N. W. 955, and *State v. Chicago, M. & St. P. R. Co.* 36 Minn. 402, 31 N. W. 365.

However desirable it may be for Mr. Burnham and others engaged in a like business to have switches and sidings extended to their mills, the 14th Amendment to the Federal Constitution, as construed by the highest Federal court and by this court as well, presents an insuperable barrier against compelling such accommodations.

The contention of the attorney general that the order is promotive of the public convenience, and within the recognized police power of the state, cannot be upheld. We are persuaded, upon both principle and authority, that the Burnham mill is a private business, and that an order requiring the railroad company to extend a switch or spur track beyond its right of way, to afford him better and cheaper shipping facilities, is, in substance and effect, requiring the company to devote its property to the private use of another, and is within the protective clause of the Federal Constitution.

The judgment is reversed, with directions to dismiss the petition.

Rudkin, Ch. J., and Chadwick and Morris, JJ., concur.

Fullerton, J., dissenting:

Since the Supreme Court of the United States holds that a railroad company cannot be compelled without compensation to afford facilities to a private shipper other than it offers at its general public stations, I am constrained to concur in the judgment the majority have directed to be entered in this case. I cannot concur, however, in all that is said in the opinion. I cannot concur in the view that to compel a railway company to stop at points other than its public stations, and take on for carriage the property of a private shipper, is taking its property for the private use of another, in violation of the due process of law clauses in the state and Federal Constitutions. As I understand it, the principal purpose for which a railroad is constructed is to carry from one point to another the private property of the individual; that it is for this purpose it has its existence and is given the vast powers and rights it possesses. This function, then, the state may compel it to fulfil. If, therefore, its public stations do not afford an adequate facility for the shipment of the property of a particular individual, I know of no legal reason why the company cannot be compelled, on due compensation, to furnish that particular in-

dividual with additional facilities, even to the extent of putting in an additional side track for him. For this reason I dissent from the holding that to do so is to take private property for a private use.

CALIFORNIA SUPREME COURT.

HATTIE C. DANIELSON, Appt.,
v.

RICHARD SYKES, Resp't.

(— Cal. —, 109 Pac. 87.)

Dedication — plat — right of lot owner.

1. The right of the grantee of a lot on a recorded plat is not limited to the adjoining street and the connections necessary to reach a public highway, but extends to the use of all the ways appearing upon the plat, and none can be closed against his protest, if it can be of material benefit to his lot.

Same — uncertainty as to benefit.

2. A grantee of the maker of a plat of building lots cannot close an alley against the protest of a grantee of one of the lots, because of uncertainty as to whether or not the alley will ever be of any benefit to the lot.

Injunction — obstruction of way — adverse user.

3. Injunction will lie against the obstruction of a passageway in such a manner as to destroy it by adverse user, although substantial damage has not yet been caused by the obstruction.

(May 11, 1910.)

Note. — Right of purchaser of property according to plat to easements in streets or ways indicated thereon, other than those on which his property abuts.

This note does not deal with the question of the extent of the right acquired by a vendee in the street upon which his property abuts, nor with the general question of the effect of a conveyance which refers to a plat or map to create an easement in favor of the general public. Nor does it include cases where the easement claimed was in parks, squares, or commons, as distinguished from streets and ways.

The decisions upon the question considered by this note are not entirely agreed. Some of the apparent conflict, however, may be reconciled by the difference in the facts present in the several cases.

Where the street or way laid down on the plat is required to afford a convenient mode of ingress or egress to the grantee's lot, it is generally held that he is entitled to an easement in the way, although his property does not abut thereon.

Thus, in *Fox v. Union Sugar Refinery*, 109 Mass. 292, where land was conveyed with

APPEAL by plaintiff from a judgment of the Superior Court for Santa Barbara County in defendant's favor and from an order denying a new trial in a suit to enjoin the obstruction of an alleged street. Reversed.

The facts are stated in the opinion.

Messrs. Canfield & Starbuck, for appellant:

The plaintiff's purchase of her lot by reference to the recorded map of Ocean Side vested in her private right of way along the alley shown on that map, together with a right to the incidental benefits of having the alley kept open for that purpose.

Archer v. Salinas City, 93 Cal. 43, 16 L.R.A. 145, 28 Pac. 839; Schaufele v.

reference to a plan, it was held that the grantee acquired a right to all connecting ways shown on the plat, which enabled him to reach public ways in any direction so far as the grantor owned, although the lot granted did not abut thereon. The court here said: "But the grantee of an interior lot upon such a plan, referred to in his deed, cannot be restricted in his rights to the single passageway upon which he is bounded. The law will imply in his favor the right to use the passageway upon which he is bounded, not only for the purpose of going back and forth upon it, but also for the purpose of reaching the public ways by means of such other avenues as his grantor has, by his plan, represented to exist. If there are two or more of such avenues, it is not for the grantor to say that his grantee shall be restricted to one only. The deed is to be taken most strongly against him, and in furtherance of the beneficial operation of his grant."

And where a tract of land abutting on a highway was laid out into lots, and two parallel streets were run in from the highway and connected at their termini by a third street running at right angles to them, and it was apparent that the owner did not intend to make a restrictive distinction between the use of the two openings upon the highway, one who purchased a lot on one of the streets opening on the highway has a right to have all three of the streets laid down on the map kept open for his use. Downey v. Hood, 203 Mass. 4, 89 N. E. 24.

So, in Kelly v. Penfield, 133 App. Div. 367, 117 N. Y. Supp. 379, where the street in which an easement was claimed did not abut on the grantee's lot, but was so near that the proper use of his lot depended upon the existence of the street, he was held entitled to have it kept open. And see subsequent appeal to the same effect, 122 N. Y. Supp. 811.

And where a grantor sells lots with reference to a plat upon which another street appears to connect the one on which the property sold is situated with other streets, the grantee acquires an easement over such

Doyle, 86 Cal. 107, 24 Pac. 834; Eachus v. Los Angeles Consol. Electric R. Co. 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 125 Am. St. Rep. 47, 92 Pac. 70; Williams v. Los Angeles R. Co. 150 Cal. 592, 89 Pac. 330; Breed v. Cunningham, 2 Cal. 361; Kittle v. Pfeiffer, 22 Cal. 484; Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690; Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417; Currier v. Howes, 103 Cal. 431, 37 Pac. 521; McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 Pac. 1082, 1085; Zearing v. Raber, 74 Ill. 409, Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. 1047, 1052; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep.

street, if the grantor owns it; and where he does not own it, but sells with reference to a plan exhibiting such street, he is liable to his grantee where the true owner of the street vacates it. McCall v. Davis, 56 Pa. 431, 94 Am. Dec. 92.

And in Drew v. Wiswall, 183 Mass. 554, 67 N. E. 666, where a grantee bought according to a plan which showed proposed streets running through a tract, and his lot was bounded by two of them, it was held that he had a right over that portion described as streets, at least to the extent of gaining access to the public ways.

In Burke v. Wall, 29 La. Ann. 38, 29 Am. Rep. 316, where the property in a cemetery lot was sold with reference to a plan showing certain avenues, it was held that one of these avenues which did not abut on the grantee's lot, but which connected with other avenues leading to his lot, could not be closed and the grantee deprived of the way.

It has been held in some cases that where a grantor causes a plat to be made of his property showing streets and ways thereon, and conveys with reference to such plat, his grantees acquire an easement not only in the ways on which their property abuts, but in all ways shown on the map. Johnson v. Shelter Island Grove & Camp Meeting Asso. 122 N. Y. 330, 25 N. E. 484; Re Pearl Street, 111 Pa. 565, 5 Atl. 430; Thaxter v. Turner, 17 R. I. 799, 24 Atl. 829; Cook v. Totten, 49 W. Va. 177, 87 Am. St. Rep. 792, 38 S. E. 491; Edwards v. Moundville Land Co. 56 W. Va. 43, 48 S. E. 754. And the following cases contain *dicta* to the same effect: Derby v. Alling, 40 Conn. 410; Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Rowan v. Portland, 8 B. Mon. 232; Williams v. Poole, 31 Ky. L. Rep. 757, 103 S. W. 336; Bartlett v. Bangor, 67 Me. 460; Wyman v. New York, 11 Wend. 486.

The court in Thaxter v. Turner, *supra*, quoting from Elliott on Roads & Streets, said: "It is not only those who buy land or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of the street or

186, 49 Pac. 178; King v. Dugan, 150 Cal. 258, 88 Pac. 925; Child v. Chappell, 9 N. Y. 246; Banning v. Kreiter, 153 Cal. 33, 94 Pac. 246; Oswald v. Grenet, 22 Tex. 94; Stone v. Brooks, 35 Cal. 489; Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

Whether the plaintiff's rights in the alley were of substantial value or not, she was entitled to have them protected by injunction, because otherwise the defendant's appropriation of them will ripen into an adverse title, whereby she will be wholly deprived of them.

Mendelson v. McCabe, 144 Cal. 230, 103 Am. St. Rep. 78, 77 Pac. 915; Moore v. Clear Lake Waterworks, 68 Cal. 146, 8 Pac. 816; Merced Min. Co. v. Fremont, 7 Cal. 317, 68 Am. Dec. 262; Hicks v. Michael, 15 Cal. 107; Leach v. Day, 27 Cal. 643; More v. Massini, 32 Cal. 590; Richards v. Dower, 64 Cal. 62, 28 Pac. 113; Silva v. Garcia, 65 Cal. 591, 4 Pac. 628; Crescent City Wharf & Lighter Co. v. Simpson, 77 Cal. 286, 19 Pac. 420;

Schneider v. Brown, 85 Cal. 205, 24 Pac. 715; Kellogg v. King, 114 Cal. 378, 53 Am. St. Rep. 74, 46 Pac. 166; Pavkovich v. Southern P. R. Co. 150 Cal. 39, 87 Pac. 1097; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Heilbron v. Fowler Switch Canal Co. 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; Schaufele v. Doyle, supra; Conkling v. Pacific Improv. Co. 87 Cal. 296, 25 Pac. 399; Walker v. Emerson, 89 Cal. 456, 26 Pac. 968; Spargur v. Heard, 90 Cal. 221, 27 Pac. 198; Mott v. Ewing, 90 Cal. 231, 27 Pac. 194; Brown v. Kling, 101 Cal. 295, 35 Pac. 995; Heckman v. Swett, 107 Cal. 276, 40 Pac. 420; Gould v. Eaton, 117 Cal. 539, 38 L.R.A. 181, 49 Pac. 577; Last Chance Water Ditch Co. v. Emigrant Ditch Co. 129 Cal. 277, 61 Pac. 960; Southern California Invest. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767; Allen v. Stowell, 145 Cal. 666, 68

road, but where streets and roads are marked on a plat, and lots are bought and sold with reference to the plat or map, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right in all the public ways designated thereon, and may enforce the dedication. The plan or scheme indicated on the map or plat is regarded as a unity, and it is presumed, as it well may be, that the public ways add value to all the lots embraced in the general scheme or plan. Certainly, as everyone knows, lots with convenient cross streets are of more value than those without, and it is fair to presume that the original owner would not have donated land for public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication."

In Chapin v. Brown, 15 R. I. 579, 10 Atl. 639, it was held that one who purchased with reference to a plan upon which avenues not adjoining his property were laid down had a technical right to pass and repass over these ways, but where it did not appear that he had occasion to use them, a decree for the removal of fences erected across them was refused, since his remedy at law was sufficient.

Other cases refuse to lay the rule down as broadly as those just referred to, and hold that purchasers with reference to a plat take no interest in streets other than those upon which their property abuts, where such streets are unnecessary to the beneficial enjoyment of the property granted. Badeau v. Mead, 14 Barb. 328, and Foerster v. Eilers. 60 Misc. 453, 113 N. Y. Supp. 480; and there are dicta in Re New York, 188 N. Y. 581, 80 N. E. 1109, and Reis v. New York, 188 N. Y. 58, 80 N. E. 573, to a like effect.

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So, in Re East 142d Street, 83 App. Div. 430, 82 N. Y. Supp. 445, where the owner of a tract of land had filed a map and sold lots with reference thereto, stating that the streets and avenues were for convenience only, and not with the intent to dedicate, and later the grantor executed a declaration to his grantee to the effect that the grantor intended that his grantees should have and enjoy free and uninterrupted access over and upon said streets and avenues, it was held in a proceeding to determine who was entitled to damages upon the opening of the street by the city, that the grantees did not acquire easements in all of the streets laid down on the plat, but only a right of way over the street on which their lots abutted, to enable them to reach a public street.

And where a plat is referred to merely for the purpose of description, and the land granted has connection with public ways, the grantee acquires no right of way over private ways laid down on the plat which are remote from his land. Regan v. Boston Gaslight Co. 137 Mass. 37.

And in Pearson v. Allen, 151 Mass. 79, 21 Am. St. Rep. 426, 23 N. E. 731, one who bought land at a seashore resort with reference to a plat showing certain private streets was held not entitled, as against another grantee of their common grantor, to a right of way over a space marked as a street which did not touch his land, and which did not lead to a highway or afford access to the ocean.

As to the right of grantees to claim an easement, implied covenant, or estoppel, as against the grantor, in the way upon which their lots abut, by a call in the deed for a street or alley in which the grantor owns the fee, see note to Talbert v. Mason, 14 L.R.A.(N.S.) 878.

J. T. W.

L.R.A. 223, 104 Am. St. Rep. 80, 79 Pac. 371; Vestal v. Young, 147 Cal. 721, 82 Pac. 383; Winslow v. Vallejo, 148 Cal. 723, 5 L.R.A.(N.S.) 851, 113 Am. St. Rep. 349, 84 Pac. 191, 7 A. & E. Ann. Cas. 851; Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 11 L.R.A.(N.S.) 1062, 88 Pac. 978; Duckworth v. Watsonville Water & Light Co. 150 Cal. 520, 89 Pac. 338; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424; Cowell v. Martin, 43 Cal. 605; Stallard v. Cushing, 76 Cal. 472, 18 Pac. 427; DeGroot v. Peters, 124 Cal. 406, 71 Am. St. Rep. 91, 57 Pac. 209.

A right to an alley is not confined to the right to passage along it, but includes the right to have it kept open *ad cælum*.

Field v. Burling, 149 Ill. 556, 24 L.R.A. 406, 41 Am. St. Rep. 311, 37 N. E. 850.

The right of the plaintiff is a right to the scheme shown on the plat with reference to which she bought "as a unity," and this right is not confined to abutters.

Elliott, Roads & Streets, 2d ed. § 120, p. 132; Thaxter v. Turner, 17 R. I. 799, 24 Atl. 829; Huber v. Gazley, 18 Ohio, 18; Fisk v. Levy, 76 Conn. 295, 56 Atl. 559.

Messrs. Richards & Carrier, for respondent:

Injury to the plaintiff is the test to determine to what extent suits to enforce appurtenant easements in platted streets may be brought.

McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 Pac. 1082, 1085.

When land is sold by a reference to a plan upon which several streets and avenues are laid out, the grantee does not necessarily acquire an easement in all such streets or ways. He acquires an easement in the streets or way upon which his lot is situated, and in such other streets or ways as are necessary or convenient to enable him to reach a highway. He acquires no easement in a street or way which his land does not touch, and which does not lead to a highway, and he is not entitled to an injunction or other remedy by reason of an obstruction to such street or way.

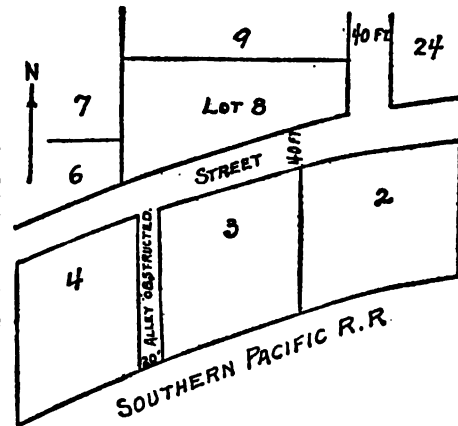
State ex rel. Kincaid v. Hamilton, 109 Tenn. 276, 70 S. W. 619; Jones, Easements, § 347; Diamond Match Co. v. Ontonagon, 72 Mich. 249, 40 N. W. 448; Jacob v. Day, 111 Cal. 571, 44 Pac. 243.

Shaw, J., delivered the opinion of the court:

The plaintiff sued to enjoin the defendant from obstructing an alleged street or way which she claims is appurtenant to her lands. Issues were joined, there was a trial by the court, and the injunction was refused. From the judgment and from an 28 L.R.A.(N.S.)

order denying a new trial, the plaintiff appeals.

The plaintiff is the owner of lot 8 in a subdivision of land into lots and streets. Its situation with reference to the way in question, the streets, and the adjoining lots, is shown by the following diagram:



The tract, comprising about 16 acres, was subdivided in 1893, and the lots were sold by the owner thereof to divers persons who have erected dwelling houses thereon. It constitutes a part of the seaside resort known as "Miramar," in Santa Barbara county. The plaintiff is in possession of lots 8 and 9, and occupies a house on lot 9, the two lots being used in connection with the house as a place of residence. The alley in question lies between lots 3 and 4 and is directly opposite to lot 8. It extends south to the south line of the tract, leading from the street in front of lot 8 to the track and right of way of the Southern Pacific railroad, not far from Miramar station. The defendant obtained from the successor of the original owner of the tract a conveyance of lot 4 and also of the ground included in the adjoining alley. Thereupon he built a fence across the northern end of the alley, where it enters the street, and has ever since maintained the fence and occupied the alley as a part of his premises, completely preventing the use of the alley by plaintiff or others as a way. The plaintiff began this action to enjoin the continuance of the obstruction. The findings state the facts aforesaid, but further state that the alley was of no use or benefit to the plaintiff, that its closing caused plaintiff no damage, and, hence, that she was not entitled to an injunction.

It is a thoroughly established proposition in this state that, when one lays out a tract of land into lots and streets, and sells the

lots by reference to a map which exhibits the lots and streets as they lie with relation to each other, the purchasers of such lots have a private easement in the streets opposite their respective lots, for ingress and egress and for any use proper to a private way, and that this private easement is entirely independent of the fact of dedication to public use, and is a private appurtenance to the lots, of which the owners cannot be divested except by due process of law. *Kittle v. Pfeiffer*, 22 Cal. 490; *Petipierre v. Maguire*, 155 Cal. 250, 100 Pac. 690; *Prescott v. Edwards*, 117 Cal. 304, 59 Am. St. Rep. 186, 49 Pac. 178; *Schaufele v. Doyle*, 86 Cal. 109, 24 Pac. 834; *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 617, 42 Am. St. Rep. 149, 37 Pac. 750; *Cushing-Wetmore Co. v. Gray*, 152 Cal. 122, 125 Am. St. Rep. 47, 92 Pac. 70; *Williams v. Los Angeles R. Co.* 150 Cal. 594, 89 Pac. 330; *King v. Dugan*, 150 Cal. 263, 88 Pac. 925; *Archer v. Salinas City*, 93 Cal. 49, 16 L.R.A. 145, 28 Pac. 839; *Grogan v. Hayward (C. C.)* 6 Sawy. 498, 4 Fed. 163; *Gormley v. Clark*, 134 U. S. 350, 33 L. ed. 914, 10 Sup. Ct. Rep. 554. It is claimed on behalf of the defendants that this private right of way is limited to the use necessary for ingress and egress, and that it embraces only the street which abuts upon the particular lot in question and such other streets as may lead therefrom to some public highway or public place. There are decisions in other states which place these limits upon the private easements, and in § 247 of *Jones on Easements* the rule is so stated. The decisions in this state do not recognize such distinction, and we do not think it is founded in good reason.

When a lot conveyed by a deed is described by reference to a map, such map becomes a part of the deed. If the map exhibits streets and alleys, it necessarily implies or expresses a design that such passageways shall be used in connection with the lots, and for the convenience of the owners in going from each lot to any and all the other lots in the tract so laid off. The making and filing of such a plat duly signed and acknowledged by the owner, as was the case here, is equivalent to a declaration that such right is attached to each lot as an appurtenance. A subsequent deed for one of the lots, referring to the map for the description, carries such appurtenance as incident to the lot. Such we understand to be the true foundation for the rule first above stated. Where streets are laid out and exhibited on the ground and no map is made, but lots are sold upon the representation that such streets exist, the appurtenant right to use the streets is not expressed in the grant, and in such cases it

is declared to rest upon the doctrine of equitable estoppel. *Prescott v. Edwards*, supra. If this implied grant is the foundation of the doctrine in question, where the sale is by reference to a map, it is difficult to perceive any ground for a distinction which would limit the appurtenant way to the streets necessary for access to the outside world. It is obvious that the convenience of the use of the way over the side streets, as compared with those leading to general public highways, is merely a matter of degree, and that it does not affect the technical right. The decisions of other states, for the most part, make no such distinction. The cases which suggest or hold that no such appurtenance is given in side streets are those in which time had shown that the scheme of subdivision and settlement as a part of a town or village had failed, in whole or in part; or where the lots on the closed streets were unoccupied, and where such lots and interlying streets were used for agriculture or other purposes incompatible with use for dwellings or business, and which rendered such streets useless; or where the lot in question was so remote from the closed street that the damage was infinitesimal, and the remedy by injunction was considered inapplicable on the ground that the law does not regard trifles. The prevailing doctrine, however, seems to be that the technical right extends to all the streets, and that it will be enforced in equity with respect to all the streets which the particular lot owner has occasion to use, but that the closing of a remote street which can be of no material benefit to the particular lot in question will not in general be enjoined.

In the present case the alley lies directly opposite plaintiff's lot, it leads toward the ocean beach, and it gives access to the right of way and track of the railroad. This may or may not at the present time be open to the general public for passage to the station, but such passage may be allowed in the future, and in that event the alley would be more valuable to the lot. The defendant has no right to permanently close the alley because of any uncertainty on this point. The plaintiff is entitled to whatever benefit may exist from the prospect that such use may be permitted in the future. The evidence shows that it has been so used in the past.

There is a finding that the alley has not been used for passage to and from the streets of the tract or the houses thereon, to or from said railroad right of way. This is contrary to the evidence. It appears without contradiction that it had been used by the plaintiff and others for passage on foot to such an extent that there was a

path made which was distinctly visible. It is established by the findings and the evidence that the alley was of sufficient benefit to the plaintiff as a private appurtenance to the lot, to support a complaint for an injunction to prevent its obstruction. The conclusion that it is of no use or benefit to plaintiff or to her land, and that its closure causes her no injury, is not sustained by the facts proven.

The rule is that if an obstruction to a private easement is continuous, exclusive, and under claim of right, so that it will eventually destroy the easement by adverse possession thereof, an injunction will be granted against such obstruction, although substantial damage has not yet been caused by the obstruction. In such a case the damage will be substantial when the adverse occupation has extinguished the right of way. This is sufficient to justify the injunction to prevent the continued occupation, which would eventually operate to take a right in real property from the true owner. *Mendelson v. McCabe*, 144 Cal. 232, 103 Am. St. Rep. 78, 77 Pac. 915, and cases there cited. This case also decides that where such trespasses are of a continuing nature, and the damage for each day's obstruction is insignificant, the remedy of successive actions at law for such damages is inadequate, and equity will interpose by injunction.

The judgment and order are reversed.

We concur: *AngeMottl, J.; Sloss, J.*

IDAHO SUPREME COURT.

WILLIAM F. NICHOLLS, et al., Respts.,
v.
LEWIS & CLARK MINING COMPANY,
Appt.

(— Idaho, —, 109 Pac. 846.)

Mine — excessive location — effect.

1. Where an excessive mineral location has been made through mistake, while the locator was acting in good faith, the location will be void only as to the excess; but where the locator has purposely included within his exterior boundaries an excessive area with the fraudulent intent of holding the entire area under one location, such location is void; or, if made so large that the location cannot be deemed the result of innocent error or mistake, fraud may be presumed.

Same — boundaries.

2. Where the exterior boundaries of a

mineral location include such an unreasonably excessive area that such boundary lines cannot be said to impart notice to a prospector of a mineral location or discovery within the reasonable distance of a lawful claim as located under the statute, such location will be held void on the ground that the boundaries of the claim have never been marked and established as required by law.

(May 14, 1910.)

A PPEAL by defendant from a judgment of the District Court for Shoshone County in plaintiffs' favor in a suit in support of an adverse claim to a certain mining claim filed in the United States land office at Cœur d'Alene, Idaho. Reversed.

The facts are stated in the opinion.

Messrs. *Gray & Knight, William K. Shissler, and Therrett Towles*, for appellant:

The locations of the plaintiffs were so excessive in size as to be void.

Burke v. McDonald, 2 Idaho, 683, 33 Pac. 49.

The subsequent locator is at least entitled to the excess.

Ibid.; *Stemwinder Min. Co. v. Emma &*

Note. — Effect of excessive location of mining claim.

The early cases upon this point will be found gathered in a section of the note on the location of mining claims, in 7 L.R.A. (N.S.) 763, and this note includes only the decisions rendered since the writing of that note.

In *Flynn Group Min. Co. v. Murphy* (Idaho) 109 Pac. 851, where, through an innocent error, there was an excess of ground in the location of a lode claim, it was held valid only to the extent called for by the notice, and it was further held that subsequent locators might locate the excess. With reference to Justice McBride's language in *Atkins v. Hendree*, 1 Idaho, 95, to the effect that to claim more than the law allowed was no fraud on others, since they had the same means of ascertaining the attempted fraud as the other had to commit it, the court said: "Chief Justice McBride virtually holds in the case of *Atkins v. Hendree*, supra, that no fraud can be perpetrated where there exists the same means of ascertaining or discovering the fraud that the other parties had to commit it. We cannot assent to that doctrine, for, as we view it, a fraudulent act still remains fraudulent even though there exists very plain and simple means of ascertaining or discovering the fraud. Where a claim is located in good faith and contains some excess of ground, the location is valid except as to the excess, and others who may desire to make a location may measure the ground and confine the first locator to the limits prescribed by law. This

L. C. Consol. Min. Co. 2 Idaho, 456, 21 Pac. 1040; Lindley, Mines, § 362; Snyder, Mines, 397, 398.

Messrs. Kerns & Ryan, for respondents:

The location of a claim excessive in size will only be void as to the excess, if the excess is not attributable to a fraudulent act of the locator, but to an innocent mistake.

27 Cyc. Law & Proc. p. 561; Howeth v. Sullenger, 113 Cal. 547, 45 Pac. 841; Gohres v. Illinois & J. Gravel Min. Co. 40 Or. 516, 67 Pac. 666; Richmond Min. Co. v. Rose, 114 U. S. 576, 29 L. ed. 273, 5 Sup. Ct. Rep. 1055; Lindley, Mines, § 362; McIntosh v. Price, 58 C. C. A. 136, 121 Fed. 716; Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480; Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505; Jupiter Min. Co. v. Bodie Consol. Min. Co. 7 Sawy. 96, 11 Fed. 666; Atkins v. Hendree, 1 Idaho, 95; Stenwinder Min. Co. v. Emma & L. C. Consol. Min. Co. 2 Idaho, 461, 21 Pac. 1040, affirmed in 37 L. ed. 941, 13 Sup. Ct. Rep. 1052.

The sufficiency of each notice of location depends upon the facts and circumstances surrounding it, and will be liberally construed in the light of such facts and circumstances, when it appears that the locations have been made in good faith.

Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. 14 Idaho, 516, 95 Pac. 14.

Allshie, J., delivered the opinion of the court:

This is an adverse suit which was commenced by the respondents claiming to be the owners of the Senator lode claim, with which it was alleged the Louis and Clark lode claims conflicted. On September 4, 1905, W. Z. Pepper, a prospector and the predecessor in interest of the appellant cor-

poration, discovered a vein of mineral-bearing rock in the Hunter mining district, Shoshone county, and thereupon posted two notices of location, one for the Louis and the other for the Clark claim. The validity of the discovery is not questioned. At the time of making the discovery and posting the notices, Pepper met the respondent Gribble, who informed him that he (Gribble) owned certain claims which embraced the ground Pepper was about to locate. It seems that he then stated that he owned ground embraced in four claims in a compact body, being 3,000 feet in length by 1,800 feet in width. These claims were named, respectively, the "Senator," "Lost Booze," "Prize," and "Princess." The claim with which it is urged that Pepper's locations conflicted was the so-called "Senator." At the time of Pepper's discovery and location, he did not know of the existence of the Senator claim, except what Gribble told him. Gribble did not, and apparently could not, show Pepper the stakes to the Senator claim. Pepper testifies that Gribble did not point out or show him any of the stakes or corners or the discovery on the Senator, but that, on the contrary, Gribble told him that the stakes had either been removed or burned down. Gribble, however, testifies that he pointed out the stake at the southeast corner of the Senator and also the east center end stake. He says: "I told him [Pepper] where they were,—two or three of the corners. Only one of them stakes I told him at the southeast corner of the Senator and the center post. I didn't know where the others was; I couldn't find any." After this conversation, Pepper went to the county recorder's office at Wallace, and ascertained from the records the names and descriptions of the claims that Gribble

court therefore holds that a subsequent locator may measure the ground of a prior location from the discovery, and ascertain the extent of such location, and if it contains more ground within its boundaries than is described in the location notice, and more land than can be located under one location, the subsequent locator may locate the excess and maintain his right thereto. This rule applies to locations not fraudulent on account of containing an unreasonable excess of ground, and it has no application to fraudulent locations such as in the case of NICHOLLS v. LEWIS & C. MIN. CO., for, if the location is absolutely void, the ground included therein has not been segregated thereby from the public domain. There is no contention made in the case at bar that the excess in the Snowdrift

location, if there was any, was the result of fraudulent intent, but we think it is conceded that such excess, if there was any, was the result of innocent error."

In Jones v. Wild Goose Min. & Trading Co. — L.R.A. (N.S.) —, 177 Fed. 95, where a placer mining claim for 20 acres actually included 22 acres, but it appeared that the locators had acted in good faith, it was held invalid only to the extent of the excess, and until the locators were given notice of the excess and an opportunity to select and cast off, it was held that such excess was segregated from the public domain and exempt from relocation. And to the same effect are Waskey v. Hammer, 95 C. C. A. 305, 170 Fed. 31, and Zimmerman v. Funchion, 89 C. C. A. 53, 161 Fed. 859.

J. T. W.

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had located in that locality. He found that the location notice of the Senator described that claim as adjoining the Lost Booze on the north and the Princess on the east. He also found that these various location notices claimed ground to the extent of 600 feet in width and 1,500 feet in length for every claim. He thereupon returned to the ground, taking with him a 100-foot tape measure, found the discovery cut or shaft on the Lost Booze claim, measured 900 feet north from this discovery, which allowed 300 feet for the north half of the Lost Booze and a full width of 600 feet for the Senator. He there established the south line of the Louis claim. He thereupon staked his claim, and also located to the east of that claim the Clark lode. These claims as then located and staked on the ground contained substantially the same area and practically identical lines with the same claims as surveyed for patent.

The evidence on the part of the appellant shows that Pepper and his associates and those who worked for him were unable to find any of the stakes on the Senator claim, except one tree that was squared and on which there were no markings, and which Pepper testified that Nichols marked as the east center end of the Senator subsequent to Pepper's location of the Louis. It is conceded by all parties that there was no location notice posted on the Senator at the time of the Louis location.

The testimony of the respondents, Nicholls and Gribble, and their witnesses, shows that the Lost Booze claim was located in 1901, and the Prize, Princess, and Senator were located in 1903. The Lost Booze, the Senator, and the conflict with the Louis and Clark claims, are shown by the following diagram made from the surveyor's notes (see next page):

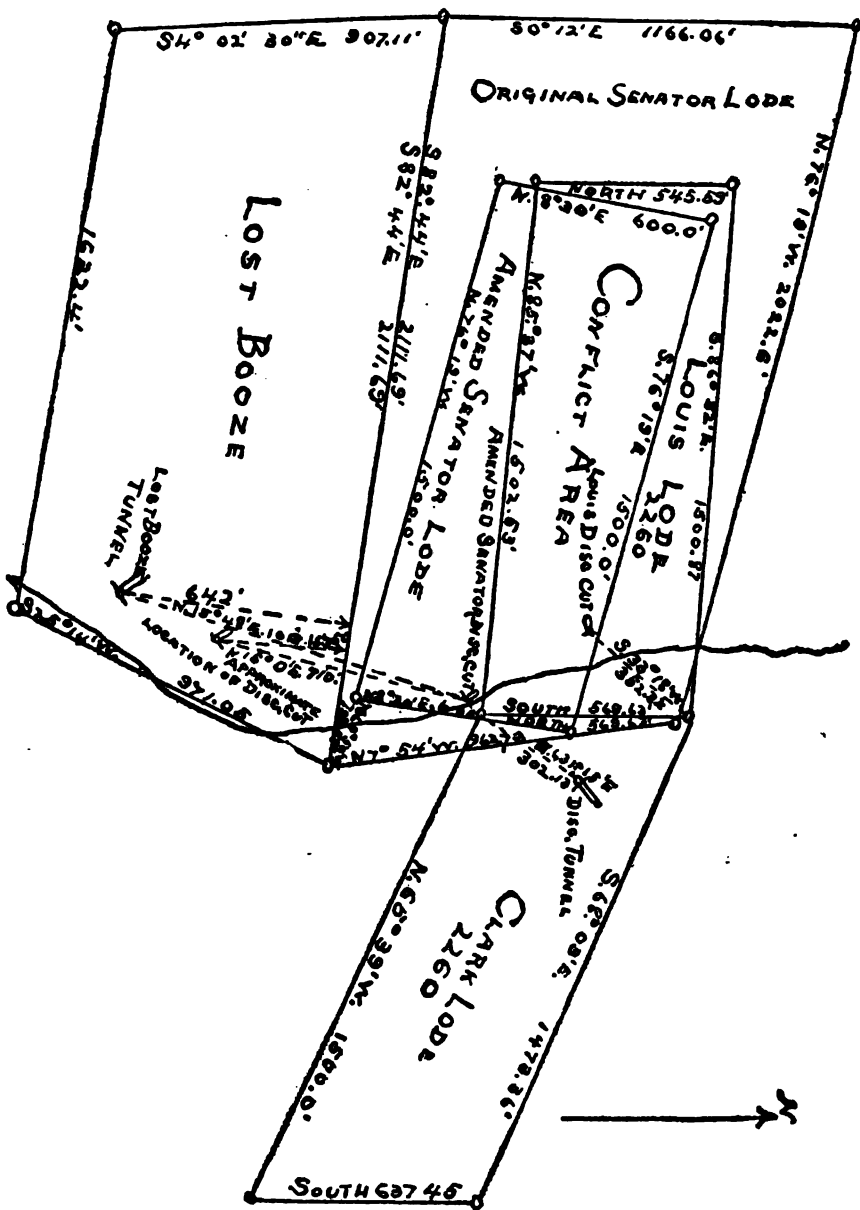
The Prize claim adjoins the Lost Booze on the west, and the Princess adjoins the Prize on the north and the Senator on the west. These two claims, however, are not involved in this case, and only appear as two of the group of claims which the respondents were attempting to hold at the time of the location by Pepper of the Louis and Clark claims. On or about the 18th of September, 1906, the respondents employed an engineer to make a survey of these four claims. It was ascertained from that survey that the ground covered by the four locations comprised a compact area of about 4,649 feet in length by 2,075 feet in width; whereas it could lawfully have embraced in the four locations only an area of 1,200 feet

in width by 3,000 feet in length. It was also shown by that survey that the Senator claim had an average width of about 1,065 feet by an average length of about 2,067 feet. In other words, this claim embraced an area equal to more than two and one-third full claims. The respondents therefore had actual knowledge from September, 1906, of the area and extent of the Senator claim, as they insist that it was staked on the ground. They made no effort, however, toward drawing in their lines or making an amended location, until after the appellant had applied for patent and after the respondents had filed their adverse suit. Their lines were not readjusted until March 31, 1908, on which latter date the surveyor made an amended location, and they staked the ground to conform with the amended location which covers the ground in conflict in this action.

It is contended by the appellant in this case that respondents' locations of the Senator, the Lost Booze, the Prize, and Princess are so excessive in area as to render the locations void. While counsel for appellant do not place their reliance in so many words on failure of the locators to properly mark the boundaries of their claims by establishing at each corner thereof and at any angle in the side lines a monument marked with the name of the claim and corner, etc., as required by the statute (§ 3207, Rev. Codes), still the argument leads to that conclusion and results in that position. It is said in the brief that the location is a fraudulent location by reason of the excessive area embraced within the pretended external boundaries, and that this fraud is further emphasized and established by the fact that, although the locators had positive proof in September, 1906, when the survey was made, of the excessive size of the claims, still no effort was made to adjust the external boundaries, or to re-establish the corners and the stakes and monuments upon the true line as required by law, until after the appellant had applied for a patent and the adverse suit had been instituted.

Considerable discussion has taken place among the courts and text writers, as to the effect of a location which includes within its boundaries an area in excess of the statutory maximum. After an examination of all the authorities that have been called to our attention bearing on this subject, we are inclined to the belief that the more reasonable rule, and one eminently just and equitable, is that adopted by this court in

Burke v. McDonald, 2 Idaho, 679, 33 Pac. 49. The court there said: "Were the boundaries of the Mammoth so large as to render the location void? Easterly of the discovery point it was marked about 150 feet longer than the calls of the notice, and was considerably wider than allowed by law, while the westerly 1,000 feet was marked substantially correct in size. Strict accuracy in the marking of claims cannot be expected or required. The character of the ground over which the locator must make his measurements must be considered; if even, with unobstructed view,



greater accuracy would be required than when the surface is broken, and covered with timber. If a claim is made excessive in size with fraudulent intent, it is void. If made so large that it cannot be deemed the result of innocent error, fraud will be presumed; or if from any cause it be made so large and with such indistinct markings that its boundaries cannot be readily traced, and subsequent locators, after reasonable diligence, cannot find the same, it would be void as against another location made in good faith. Just what excess will be tolerated, or what will vitiate, cannot be defined, but must depend somewhat upon the circumstances of each case. In Montana, it has been held a claim located 1,763 feet long is void, and the tendency there is toward strict accuracy of boundary; while in other courts it has been held that, in the absence of fraud, the claim will be held void only as to the excess. *Stemwinder Min. Co. v. Emma & L. C. Consol. Min. Co.* 2 Idaho, 456, 21 Pac. 1040; *Richmond Min. Co. v. Rose*, 114 U. S. 579, 29 L. ed. 273, 5 Sup. Ct. Rep. 1055; *Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.)* 7 Sawy. 190, 11 Fed. 675. In this case it appears the ground is such that accuracy in measurement could not be expected; also that the Lackawanna was discovered and located mostly on the westerly end of the Mammoth, where the latter was correctly marked. It cannot be presumed, from all the circumstances of the case, the Lackawanna locators were misled by these markings, and the conclusion of the trial court is sustained."

Substantially the same rule was suggested by the supreme court of Oregon in *Gohres v. Illinois & J. Gravel Min. Co.* 40 Or. 516, 67 Pac. 666, wherein that court said: "Where an excessive location has been made through mistake, while acting in good faith, as where the locator sets his stakes and estimates his distances without chain or compass, it is void only as to the excess. This rule is of general application, except, it may be, where the excess is so large as to give rise to an inference of bad faith."

Substantially the same statement was made in *Richmond Min. Co. v. Rose*, 114 U. S. 576, 29 L. ed. 273, 5 Sup. Ct. Rep. 1055. This latter case, however, has been cited by some text writers as supporting the contention that the location of an excessive area will never avoid the claim, but will only render it voidable to the extent of the excess. The question that was being discussed by the Supreme Court in that case, as well as the language used by the 28 L.R.A.(N.S.)

learned justice who wrote the opinion, entirely fails to justify the assertion that this case goes to the extent claimed. The opinion in that case specifically bases the rule announced on the principle of "good faith" in the locator.

It is true, as contended by appellant, that it has been held by the supreme court of Montana in two cases (*Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714, and *Leggatt v. Stewart*, 5 Mont. 107, 2 Pac. 320), that "the location of a mining claim must conform in all respects to the statute authorizing it, and boundaries beyond the extent of the location are no boundaries at all," and accordingly the court held that a claim that was staked and marked on the ground 2,000 feet in length, was in fact and in law not marked and bounded on the ground at all, and was therefore void. We think that rule is too strict and severe, and we would not be willing to go to that extent.

Mr. Lindley, in vol. 1, § 362, of his work on Mines, speaking of this subject, says: "The courts uniformly hold that such a location, where it injures no one at the time it is made, and where it has been made in good faith, is voidable only to the extent of the excess. . . . An excessive location cannot be said to be a fraud upon others. It cannot take away rights already acquired by prior appropriation. A location within the statutory limit cannot accomplish this. As to subsequent locators, they can measure the ground from the preliminary discovery notice, which is universally posted at, or in reasonable proximity to, the point of discovery."

It should be remembered that it takes more than the posting of a "discovery notice" to constitute a valid location of a mining claim. Section 3207, Rev. Codes, and § 2320, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 1424. It is just as essential that the exterior boundaries of the claim be marked by the setting of posts and the erection of monuments as it is that a discovery notice be posted. Indeed, the general rule prevails that courses and distances give way to the actual monuments and markings on the ground. It is eminently fair and reasonable and just to say that an innocent mistake has been made when the exterior boundaries of a claim are marked on the surface of the ground 25, 50 or possibly 100 feet beyond and in excess of the area to which the claimant is actually entitled under the statute, and that such posts and monuments impart notice to a prospector who is looking for vacant, unappropriated public domain on which to locate a mining

claim. These monuments and markings on the surface of the ground may be further said to direct the prospector to look for the location notice and the discovery shaft or tunnel on the claim. In such case, however, he has a right to assume that he will find the location notice and the discovery within the boundary of a statutory claim from the point where he discovers the monuments. If, however, the exterior monuments and boundaries as established by the locator, instead of being 100 feet beyond where it should be located, be 500 feet away, what is to be said of the notice it imparts to the prospector, or as to whether this in fact constitutes the exterior boundary of a valid claim that has been located in conformity with law? But if there still be any doubt about the validity of the claim when the exterior boundary is as remote as 500 feet beyond what the law permits, can there be any doubt about it when it is 5,000 feet beyond the maximum limit allowed by law? Is the prospector in such a case to sweep the country for a distance of 5,300 feet or 6,500 feet, as the case may be, to find the discovery hole and the discovery or location notice on the claim, in order to measure off a statutory claim? In such a case, is it not a fact that no valid location has ever been made for want of established monuments and posts and the marking of the exterior boundaries of the claim? In such case can it be said that there is any valid location? Is it not as much a fraud on the prospector, who is looking for vacant ground on which to locate a mining claim, to hold such an excessive location valid, and thereby exclude him from locating, as it would be to allow the prior would-be locator to exclude him from any other portion of the public domain?

We are perfectly safe, we think, in saying that all the authorities, with the possible exception of the two Montana cases, are in accord in holding that a location in a reasonable excess of the maximum area allowed by law, which is honestly and innocently made, will be permitted and sanctioned by the courts to the extent of a lawful claim. But just the point at which the excess becomes so great as to render the attempted location void has never been definitely enunciated by any of the courts, so far as we are able to find. And yet it is perfectly apparent that we must reach a limit some time, beyond which no court would hold that there had ever been made any valid location, by reason of the stakes and monuments attempting to include such an excessive and enormous area of the public domain as to amount to no markings on the ground at all, and imparting no notice to the prospector, and therefore being a
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total failure to comply with the statute in its requirements that the locator shall "mark the boundaries of his claim by establishing at every corner thereof, and at any angle in the side lines, a monument marked with the name of the claim and the corner or angle it represents," etc. The locator cannot be allowed to stake off a section, or a township, and hold it as one claim. This must necessarily be determined upon the facts of each case. The general character and topography of the country, the conditions and season of the year in which the location was made, the opportunity the locator has had for learning that he has made an excessive location, his facilities for measuring the claim, and his subsequent conduct with reference to the area embraced in the claim, are all proper subjects of inquiry and consideration in determining the good faith of the locator of the excessive claim.

Mr. Snyder, in volume 1 of his work on Mines, at § 397, in considering this question and referring to *Burke v. McDonald*, says: "The supreme court of Idaho, on the other hand, has reached a conclusion somewhat more liberal than the Montana court, holding that if the excessive boundaries are the result of innocent error, the claim should be held valid, except as to the excess, which is rejected; but if the excessive boundaries are laid with fraudulent intent, the entire claim is void. As indicated in the beginning of this section, the latter rule seems the sound one. . . . The principal obstacle to be encountered in applying the doctrine enunciated by the Idaho court, as we view it, is that it would be a very difficult matter to ascertain in a particular case whether the excessive boundaries were laid with fraudulent intent. The court certainly could not say as matter of law that they were so laid, and if the question is considered one of fact, we hardly see just how it would be proved. And, after all, what object has the locator to attempt to include more ground in his location than is authorized by law? When he makes his location he has the statute staring him in the face, and knows that whenever he applies for a patent to his claim he will then be restricted to the amount authorized by law. We think the Idaho court had the correct understanding of the matter, and reached the conclusion, which should have been followed in the later cases, when it said, speaking through Chief Justice McBride: 'If he claims more than the law allows, it is void for the excess. . . . To claim more than the law allows is no fraud on others, for they have the same means of ascertaining the attempted fraud that the other has to commit it.'"

It will be observed that the author here calls attention to the case of *Atkins v. Hendree*, 1 Idaho, 95, in which Chief Justice McBride, speaking for the territorial court, enunciated the rule from which Mr. Lindley has evidently gathered the substance of his text, to which we have heretofore adverted. We desire to say at this time that we are not in accord with the latter portion of the opinion in *Atkins v. Hendree*, which is quoted by the learned author and to which he calls specific attention. We do not think it is the duty of the prospector who finds a post or other monument erected as a part of the exterior boundary of a mining claim, to sweep the country for an unreasonable distance to find a location or discovery notice. If he has any doubt about the monuments properly marking the exterior lines of the claim, it is his duty to examine within the limits and territory which the statute authorizes such a claim to include, and perhaps a reasonable area contiguous thereto. But it would be a clear fraud on him to charge him with notice of the contents of a discovery or location notice at an unreasonable distance beyond the limits or confines of a claim which the monuments found or discovered could properly include.

Coming, now, to the facts of this specific case, we are impelled to hold that the excessive area included in the Senator and Lost Booze locations, when considered in the light of subsequent events, clearly avoids the Senator location and renders it a nullity. The locator of the Senator learned definitely and to a certainty in September, 1906, that he had included within the exterior boundaries of that location an area sufficient for two whole claims and more than one third of another claim, and yet he made no effort to readjust his boundaries,—to set new stakes and monuments,—until after this adverse suit had been filed; and this, too, notwithstanding the fact that the locators of the Louis and Clark claims had been doing their work on those claims and had been developing them, and that their successor in interest had done the work which it claimed sufficient to entitle it to a United States patent for the claims. Finally, when the locators of the Senator claim came to adjust their boundaries, they did the very thing that such excessive locations would permit, and that is to swing the claim; and so they moved the claim on the east so that the southern boundary line would not touch the Lost Booze, and then swung the west end of the claim north until it was removed more than 200 feet from the north line of the Lost Booze. All the while their location notice, as it appeared of record, 28 L.R.A. (N.S.)

had advised appellant and all the world that the Senator was a contiguous and adjoining claim to the Lost Booze on the north. They also adjusted their claim so as to take everything within their original exterior boundaries on the east and thereby threw off more than 500 feet on the west. This, of course, was perfectly proper and legitimate, if it is permissible to locate a claim with so vast an area, and thereafter so adjust the lines within the exterior boundaries of a large location as to take according to the calls of the notice. This amended location was swung so as to include the discovery shaft on the Louis claim. These are the very things against which the law is made to protect prospectors. It should be further observed that, at the time of the location of the Louis and Clark, there was no discovery or location notice posted on the Senator. Indeed, it is admitted by the locators of the Senator that the location notice had been destroyed prior to this time. Of course, the law does not require the locator of a claim to keep his notice up perpetually, but the fact that it was gone shows the difficulty, if not the impossibility, of the locators of the Louis and Clark, discovering the calls or situs of the notice, and thereby fixing the true maximum boundaries of the Senator claim on the ground. It is also clear that if any discovery cut actually existed on the Senator, it was very indistinct. It is the duty of the locator to mark the boundaries of his claim, and it is the duty of the subsequent locator to keep outside of and beyond those boundaries.

Viewed in the light of subsequent events and the evidence of bad faith furnished by the locator himself, it is clear that the Senator location is fraudulent and void, and was not made in good faith. The judgment in this case should be reversed, and it is so ordered, and the cause is remanded. Costs in favor of appellant.

Sullivan, Ch. J., and Stewart, J., concur.

A petition for rehearing having been filed, Sullivan, Ch. J., on June 22, 1910, handed down the following additional opinion:

A petition for a rehearing has been filed in this case. Counsel contends that there was a conflict in the evidence on certain points in which we have reversed the trial court's findings, and also contends that this court erred in holding that if any discovery cut actually existed on the Senator claim, it was very indistinct, and that the measurements referred to should have been made from the discovery point on the Sen-

ator claim instead of the discovery on the Lost Booze claim. After this court held that the Senator location was absolutely void because of the excessive area it contained, it mattered not what the findings of the trial court were with reference to the discovery point on the Senator claim. If the location was absolutely void because of the excess, it could not be sustained under any findings whatever with reference to the discovery, as it takes more than a discovery to make a valid location.

After a careful consideration of the case, we are clearly of the opinion that a rehearing should not be granted. A rehearing is therefore denied.

Allshie, J., concurs.

WEST VIRGINIA SUPREME COURT OF APPEALS.

I. L. PARK for Use of **C. D. Bouman**,
Appt.,

v.

G. W. McCAULEY, Exr., etc., of **Annie R. Russell**, Deceased, et al.

(— W. Va. —, 67 S. E. 174.)

Execution — lien on legacy.

1. A writ of fieri facias in the hands of an officer for execution is a lien upon a legacy given to the debtor.

Same — enforcement.

2. A suggestion and summons to answer it, under §§ 10 and 11, chap. 141, Code 1906, do not create a lien, but are only means of enforcing an execution lien already existing.

Same — payment to debtor — liability to creditor.

3. One paying an execution debtor a debt, with notice of an execution against him, is liable therefor to the execution creditor.

Justice of the peace — execution — lien.

4. An execution issued by a justice has the same effect as a lien as one issued upon a judgment of a circuit court.

(February 15, 1910.)

A PPEAL by plaintiff from a decree of the Circuit Court for Hardy County in defendants' favor in a suit to enforce the lien

Headnotes by **BRANNON, J.**

Note. — A search has failed to disclose any other cases upon the question whether an execution constitutes a lien upon an unpaid legacy in the hands of an executor. This question, it should be noted, is distinct from that as to whether a levy may be made under an execution upon such a legacy; upon which latter question a number of decisions may be found.
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of an execution against the proceeds of a certain legacy. Reversed.

The facts are stated in the opinion.

Messrs. **Benjamin Dailey** and **M. W. Gamble** for appellant:

Messrs. **Gilkeson & McCauley**, for appellees:

An execution issued by the clerk of the circuit court against a judgment debtor, and placed in the hands of a sheriff, is not a lien on funds in the hands of an executor or administrator, that may be due or coming to the judgment debtor.

Brewer v. Hutton, 45 W. Va. 107, 72 Am. St. Rep. 804, 30 S. E. 81; 1 Freeman, Executions, §§ 129-131.

Section 2 of chapter 141 of the Code of 1906 does not apply to executions issued by a justice.

State v. McKain, 56 W. Va. 131, 49 S. E. 20; **Mountain City Mill Co. v. Southern**, 46 W. Va. 754, 34 S. E. 782; **O'Connor v. Dils**, 43 W. Va. 57, 26 S. E. 354; **Bishop**, Statutory Crimes, §§ 126, 126a.

Brannon, J., delivered the opinion of the court:

C. D. Bouman recovered a judgment for money before a justice against **John B. Russell**. **Annie R. Russell** died, having made a will bequeathing her property to **John B. Russell**. Her property consisted of personalty. **Bouman** had an execution issued from the justice on his judgment, and placed in the hands of a constable. The execution was docketed in the execution lien book in the county clerk's office, under § 2, chap. 141, Code 1906. **G. W. McCauley** qualified as executor of **Annie R. Russell**. He had actual notice of the execution, and actual notice of such recordation, and that **Bouman** claimed from it a lien on the legacy in **McCauley's** hands as executor. (I state the fact of recordation, though it does not seem to me that recordation is notice to one paying, but only to a purchaser.) Several months after the recordation and notice of the execution, **McCauley**, denying that the execution bound the money in his hands going to **John B. Russell** under said will, paid the money under it to **John B. Russell**. Then, **I. L. Park**, the constable having the execution, and **Bouman**, brought a chancery suit against **McCauley** as executor to enforce the lien of his execution against any money in the executor's hands going to **Russell**, if any yet was in his hands, and, if not, to compel the executor to pay the debt out of what money he had paid **Russell** after notice of the execution. The answer of **McCauley** admitted the facts alleged in the bill, and admitted notice of the execution before he paid the money to **Russell**, but denied that the execution was a lien on the

legacy, or that he was liable for money which he had paid Russell. The decree absolved McCauley from liability for money so paid Russell, but decreed to complainant against McCauley a small sum yet in his hands, wholly insufficient to pay the execution. Park appeals for use of Bouman.

It is insisted by counsel that the execution is no lien on the legacy, because it is in the hands of the executor, and thus in *custodia legis*. It seems to us unreasonable to say that, under the sweeping broad language of Code 1906, chap. 141, § 2, an execution is not a lien on money going to a legatee. The section says that the execution shall be a lien "upon all the personal estate of which the judgment debtor is possessed, or to which he is entitled, . . . although not levied on, nor capable of being levied on." Is not a legacy "personal estate to which he is entitled?" The legatee has it not in possession, but is entitled to it. What is the object of this provision? To give a lien on all personalty in possession, or to which the debtor is entitled, though not capable of being levied, as a chose in action. A legacy cannot be levied, but it is property known in law as a chose in action. If the execution is no lien, then the creditor is without remedy. To think that a large legacy is not amenable to creditors! What other means has the creditor for enforcement of his debt? Look at the need to be answered, the object. This lien searches for and finds all personalty. It may be a legacy in the hands of a receiver. Even if in *custodia legis*, though not otherwise to be enforced, it may get the creditor his money by application to the court in whose custody the fund is. A lien can be created on a fund in the hands of a court by execution. You have to go to the court for payment; but you have a lien. There are no exceptions to this lien save those in the section specified. I will not reiterate the cases construing this section, given in so many decisions. The language is its own construer. *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Wiant v. Hays*, 38 W. Va. 681, 23 L.R.A. 82, 18 S. E. 807; *Puryear v. Taylor*, 12 Gratt. 401; *Charron v. Roswell*, 18 Gratt. 216. In *Swann v. Summers*, 19 W. Va. 125, this court said that a legacy could not be subjected by garnishment of the executor, he not owing a debt; but said, "this *feri facias* clearly gives him a lien on this legacy." There it is held that suit may be maintained in equity by the motion of the officer or any one interested to enforce the lien,—a pointed case to show that a *feri facias* is a lien on a legacy enforceable in equity. It may even be attached so as to create a lien. *Vance v. McLaughlin*, 8 Gratt. 289; *Sandidge v. 28 L.R.A.(N.S.)*

Graves, 1 Patton & H. (Va.) 101. Then, why not subject to lien by execution? The Code makes anyone liable for the lien paying to the execution debtor with notice of the lien. It is useless to refer to *Brewer v. Hutton*, 45 W. Va. 107, 72 Am. St. Rep. 804, 30 S. E. 81, saying that property in custody of the law is not attachable, and that neither the administrator nor a debtor of the estate can be garnished. Of course not, as that would give one creditor of a dead man preference over others, and hinder the settlement of the estate. When one dies his assets are for payment of all debts, and one creditor cannot, by garnishing a debtor of the decedent, get it out of lawful administration for all. That was an attachment of a debt going to an estate. This is a lien on a legacy payable after payment of debts. Different cases.

It is argued that McCauley, having paid Russell before the chancery suit began, is not liable. This was held by the circuit court, as this is given by the decree as a reason for absolving McCauley from liability. The suit created no lien. Without an antecedent independent lien, the suit would have no ground on which to rest. It is a suit only to enforce the pre-existing lien of the *fi. fa.* Counsel seek to support that holding by saying that § 11 of chapter 141, touching suggestions to enforce execution liens against persons owing the debtor, provides that, if such person is liable at the time of service on him of the summons to answer the suggestion, he shall be required to pay. Counsel say that this position is sustained by the fact that § 11 as in Acts 1872-73, chap. 218, was changed by chapter 127, Acts 1882, to what it now is in the Code of 1906; whereas before it read, "If it appear on such examination that there is any such liability on him, the court may order him to pay any debts, or deliver any estate for which there is such liability," it now reads, under the act of 1882, "If it appear on such examination or answer that there is any such liability on him at the time of the service of the summons, or at any time thereafter and before the time of answering or the return day of the execution, whichever comes first, the court may order him to pay." This theory is answered by the consideration that neither the suggestion nor the summons upon it creates or starts any lien. They are only a means of enforcing the antecedent lien of the execution. I think the act of 1882 made no change on this point. Given an execution lien, and notice of it by a person owing the debtor, that person cannot pay the money to the debtor, and, upon a suggestion, answer that he had discharged himself from liability by such payment, saying that the

money had been paid when the summons to answer the suggestion was served. Neither statute would allow this. If so, what is the worth of § 2 declaring the lien? What the force of its provision that he cannot pay the judgment debtor, if he have notice of the lien? Shall we give § 11 a meaning to enable the stakeholder to do what § 2 says he shall not do? Both sections in the same chapter. If the stakeholder have notice before service of the summons, he is, at the date of service, liable under § 11 at the date of service of the summons upon the suggestion, in the words of the statute. If he pay before notice, then he would not be liable at such service. Section 11 makes the stakeholder liable if when served he is liable, and he is still liable if he has made payment with notice. The suggestion does not destroy the prior lien, but, on the contrary, has for its purpose the enforcement of it. The construction contended for would make the suggestion and the summons to answer it instruments to destroy it. Section 11 does not make the suggestion prejudice a prior lien, but enforces it. Indeed, if the stakeholder has no prior notice, the summons upon the suggestion would operate as notice, and prevent afterpayment to the judgment debtor. I have said that the suggestion is not the parent of the lien, but only a garnishment process to enforce the execution lien. This is held in *Trevillian v. Guerrant*, 31 Gratt. 525. The court said: "The remedies afforded by the other sections of same chapter (188) were designed simply to enforce this lien of the execution. The lien itself is as complete and perfect without them as with them." In *Charron v. Boswell*, 18 Gratt. 225, Judge Moncure said: "These proceedings do not give any lien at all, general or specific. They are merely a means provided by law for the enforcement of a legal lien which already exists." There can be no suggestion without execution lien. The very language of § 10, chap. 141, shows there is no basis for it without such lien, as it reads: "On a suggestion by the judgment creditor that, by reason of the lien of his writ of fieri facias, there is a liability on any person." We so held in *McKay v. McKay*, 33 W. Va. 725, 11 S. E. 213.

Another theory of counsel is that, whilst an execution from a circuit court may have the force above assigned, one from a justice has not such force. There comes, what to my mind seems strong in repulse of that theory, the argument that we ought not give statutes in the same Code act, made for remedy and enforcement of vital rights, a construction discriminative between suitors similarly situated. The law allows a suitor to go either into a circuit or justice's court. One suitor on a promissory note

goes into the circuit court, and his execution has the wide lien given by Code 1906, chap. 141, § 2. It is a lien on choses in action, not liable like chattels; on a legacy; on all personality. Another suitor, on a similar note, goes into a justice's court, but his execution gives him a much narrower relief. He has right to levy on chattels or money, but his execution is no lien on property not physical and leviable. Such is the contention. We cannot sustain it, and thus produce such partiality in the law, such inefficiency of remedy, between suitors alike circumstanced. It is said that the chapter controlling justice's court is here to control as the only law; but we think this is not infallibly so. In some instances we must read it along with other parts of the Code in matters *in pari materia*, as we did in *Livesay v. Dunn*, 33 W. Va. 453, 10 S. E. 808, holding the same statute of limitations applicable to judgments of both circuit and justice's courts. Both that and chapter 141 relate to the lien of an execution. Let us look at the provisions about this matter. Section 135, chap. 50, Code 1906, in the justices' chapter, makes an execution from a justice "command the person to whom it is directed to collect the amount due out of the personal property of the judgment debtor." This is broad. Section 139 makes it a lien on the "personal property of the judgment debtor liable to be seized under it." This, taken alone, imports only tangible, leviable chattels. Going to chapter 141, § 2, we find it saying "every writ of fieri facias" shall be a lien on the debtors' personal estate, whether leviable or not. No good reason—none but the most technical—demands that we exclude a justice's execution from the comprehensive expression "every writ;" but, as suggested above, harmony between remedial sections in the same Code, on the same matter, equality between suitors similarly situated, forbid it. Another clause says that when the execution is docketed it shall be an abiding lien from the time it is delivered to the "sheriff or other officer." What other officer? Why not say a constable holding an execution from a justice? Why not? It seems to me that § 6 of chapter 141 gives strong evidence to show that a justice's execution has the width of lien given by § 2. Section 4 allows interrogatories to be put to the debtor before a commissioner, to find what estate the lien covers. Section 6 requires the commissioner to return papers "to the court in which the judgment is, or, if the judgment be of a justice, to the circuit court." It is suggested that § 118, chap. 50, Code 1906, provides for filing in the circuit court office a transcript of the judgment from the justice's docket, and

execution may be issued thereon with like effect as upon a judgment in the circuit court. From this we are to say that the only way by which execution on a justice's judgment can be issued to have the same effect as a lien as an execution on a circuit court judgment is by filing such transcript in the clerk's office. That provision had no such office. Perhaps the owner of the judgment might prefer to have a sheriff collect over a constable, or have it of more permanent or more accessible record, or have a suggestion, or send execution to another county. For these reasons, perhaps others, this provision was made. We hold that a justice's execution has the same force as a lien as one on a circuit court judgment.

We reverse the decree and remand the case to the Circuit Court, with direction to enter a decree for the plaintiff against McCauley for proper amount and costs.

ARKANSAS SUPREME COURT.

R. H. PORTER et al., Exrs., etc., of S. R. McNutt, Deceased, Appts.,
v.

R. W. HUIE.

94 333
(— Ark. —, 126 S. W. 1069.)

Note — accommodation indorsers — contribution.

The one whose name stands first among those of several persons who place their names on the back of a note before delivery cannot, upon paying the note, compel the others to contribute towards the amount paid, in the absence of any express agreement that they should be equally bound.

(March 28, 1910.)

APPEAL by plaintiffs from a judgment of the Clark Chancery Court dismissing the complaint in an action brought to recover contribution upon a certain promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. J. H. Crawford and T. D. Crawford, for appellants:

Successive indorsers for accommodation of a promissory note are cosureties, and can recover contribution from each other.

Douglas v. Waddle, 1 Ohio, 413, 13 Am. Dec. 630; Greenough v. Smead, 3 Ohio St. 422; Daniel v. McRae, 9 N. C. (2 Hawks.) 590, 11 Am. Dec. 787; Atwater v. Farthing, 118 N. C. 388, 24 S. E. 736; Pitkin v. Flanagan, 23 Vt. 160, 53 Am. Dec. 61; Middleton v. McCartee, 2 Mackey, 420; Machado v. Fernandez, 74 Cal. 362, 16 Pac. 19; Nathan 28 L.R.A.(N.S.)

v. Sloan, 34 Ark. 524; Heise v. Bumpass, 40 Ark. 546; Jones v. Bank of Pine Bluff, 80 Ark. 285, 96 S. W. 1060; Camp v. Simmons, 62 Ga. 82; McDonald v. Whitfield, L. R. 8 App. Cas. 749, 4 Eng. Rul. Cas. 531; Reynolds v. Wheeler, 10 C. B. N. S. 561; 9 Cyc. Law & Proc. p. 796.

Messrs. Callaway & Huie, for appellee:

An accommodation indorser who indorses before delivery of the note to the payee, and in order to give the maker credit, is liable jointly as a comaker, so far as the holder of the note is concerned, but is liable as a technical indorser so far as the other indorsers are concerned in the absence of any special agreement, and is not liable as a cosurety to the other indorsers.

7 Cyc. Law & Proc. pp. 666, 828; Connely v. Bourg, 16 La. Ann. 108, 79 Am. Dec. 568; Aiken v. Barkley, 2 Speers, L. 747, 42 Am.

Note. — Rights inter se of accommodation parties to commercial paper.

This note does not purport to include cases which find that there was an express agreement between the parties to bear the relationship of cosureties, and therefore to be subject to contribution; nor cases involving merely the rights of accommodation parties to commercial paper, where collaterals have been deposited by the principal as securities for the debt.

It is a general rule followed by an overwhelming weight of authority that the relationship between accommodation parties to a note is the same as that existing between the parties to ordinary business paper. Their liability, *inter se*, in the absence of an express agreement to the contrary, is that expressed by the paper itself, and their liability is successive, and not joint; consequently they are not cosureties, and the doctrine of contribution does not obtain.

This rule applies equally well whether the case is one in which a first indorser, who has paid the bill, seeks to enforce contribution against subsequent indorsers, or whether the last indorser seeks to collect the full amount of the paper from a prior indorser. Nor, with the exception of some Ohio decisions, which will be noted hereafter, does it appear that there is any distinction between bills of exchange and ordinary promissory notes or other paper. The only question, in the absence of an agreement to the contrary, is what is the prima facie liability of the parties as shown by the paper itself.

Of course, there can be no question as to the right of any accommodation party to recover from the principal debtor, in the absence of any extrinsic circumstances affecting the rights of the parties.

Some cases proceed as if the liability is joint, and consequently contribution may be enforced without expressly discussing the question presented by the title to this note, or without expressly finding that there was

Dec. 397; *Moody v. Findley*, 43 Ala. 168; *Brahan v. Ragland*, 3 Stew. (Ala.) 247; *Middleton v. McCartee*, 2 Mackey, 420; *Pomeroy v. Clark*, 1 McArth. 606; *Stiles v. Eastman*, 1 Ga. 205; *Wilson v. Stanton*, 6 Blackf. 507; *Crutcher v. Bank of Kentucky*, 4 Litt. (Ky.) 437; *Gasquet v. Oakey*, 15 La. 537; *Westcott v. Stevens*, 85 Me. 326, 27 Atl. 146; *Clarke v. Harris*, 3 Harr. & J. 167; *Shaw v. Knox*, 98 Mass. 214; *Lewis v. Monahan*, 173 Mass. 122, 53 N. E. 150; *McGurk v. Huggett*, 56 Mich. 187, 22 N. W. 308; *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109; *Wolf v. Hostetter*, 182 Pa. 292, 37 Atl. 988; *Marr v. Johnson*, 9 Yerg. 1; *Martih v. Marshall*, 60 Vt. 321, 13 Atl. 420; *Bank of United States v. Beirne*, 1 Gratt. 234, 42 Am. Dec. 551; *Willis v. Wil-*

lis, 42 W. Va. 522, 26 S. E. 515; *McDonald v. Magruder*, 3 Pet. 470, 7 L. ed. 744; *McCarty v. Roots*, 21 How. 432, 16 L. ed. 162; *Williams v. Bosson*, 11 Ohio, 67.

Battle, J., delivered the opinion of the court:

On the 28th day of July, 1888, the Arkadelphia Cotton Mills executed to J. A. Hardage a promissory note as follows:

\$1,000. Arkadelphia, July 28, 1888.

On July 28, 1889, we promise to pay to the order of J. A. Hardage one thousand dollars at 10 per cent interest from date until paid. Value received.

Arkadelphia Cotton Mills,

By S. R. McNutt, President.

an agreement to that effect between the parties. No attempt has been made to collect the cases of that character. It should be stated that in many cases the court, following the general rule, treats accommodation parties as if they were parties to business paper, and in some such, although the parties may in fact be accommodation indorsers, that fact does not appear at all, or at least only incidentally. And this is especially true where there has been a contract that the parties shall be cosureties, and the primary question is whether parol evidence is admissible to prove such contract.

The general rule, that accommodation indorsers are not cosureties in the absence of any agreement between them, but that their liability *inter se* is the same as that of parties to business paper, is followed, or at least recognized, in the following cases:

McDonald v. Magruder, 3 Pet. 470, 7 L. ed. 744; *Phillips v. Preston*, 5 How. 278, 12 L. ed. 152; *McCarty v. Roots*, 21 How. 432, 16 L. ed. 162; *Robinson v. Kilbreth*, 1 Bond. 592, Fed. Cas. No. 11,957; *Law v. Stewart*, 3 Cranch, C. C. 411, Fed. Cas. No. 8,130; *Mason v. Mason*, 3 Cranch C. C. 648, Fed. Cas. No. 9,245; *Mason v. Mason*, 4 Cranch C. C. 401, Fed. Cas. No. 9,246; *Gillespie v. Campbell*, 5 L.R.A. 698, 39 Fed. 724; *Re McCord*, 174 Fed. 72; *Brahan v. Ragland*, 3 Stew. (Ala.) 247; *Sherrod v. Rhodes*, 5 Ala. 683, second trial 9 Ala. 63; *Dunlap v. Clements*, 7 Ala. 539; *Spence v. Barclay*, 8 Ala. 581; *Abercrombie v. Conner*, 10 Ala. 293; *Stodder v. Cardwell*, 20 Ala. 223; *Moody v. Findley*, 43 Ala. 167; *Hawley v. McCredy*, 54 Cal. 388; *Leeke v. Hancock*, 76 Cal. 127, 17 Pac. 937; *Talcott v. Cogswell*, 3 Day, 512; *Post v. Tradesmen's Bank*, 28 Conn. 420; *Kirschner v. Conklin*, 40 Conn. 77; *Pomeroy v. Clark*, 1 McArth. 606; *Buscher v. Murray*, 21 D. C. 612; *Stiles v. Eastman*, 1 Ga. 205; *Wilson v. Stanton*, 6 Blackf. 507; *Dunn v. Sparks*, 7 Ind. 490; *Core v. Wilson*, 40 Ind. 204; *Harshman v. Armstrong*, 43 Ind. 126; *Nurre v. Chittenden*, 56 Ind. 462; *Armstrong v. Harshman*, 61 Ind. 52, 28 Am. Rep. 665; *Knopf v. Morel*, 111 Ind. 570, 13 N. E. 51; 28 L.R.A.(N.S.)

Preston v. Gould, 64 Iowa, 44, 19 N. W. 834; *Hixon v. Reed*, 2 Litt. (Ky.) 174; *Crutcher v. Bank of Kentucky*, 4 Litt. (Ky.) 437; *Smith v. Bacon*, 3 J. J. Marsh. 312; *Eldridge v. Duncan*, 1 B. Mon. 101; *Edelen v. White*, 6 Bush, 408; *Denton v. Lytle*, 4 Bush, 597; *Simpkinson v. Irwin*, 13 Ky. L. Rep. 976; *Soery v. Friend*, 12 La. Ann. 579; *Smith v. Morrill*, 54 Me. 48; *Coolidge v. Wiggin*, 62 Me. 568; *Westcott v. Stevens*, 85 Me. 325, 27 Atl. 146; *Wood v. Repold*, 3 Harr. & J. 125; *Clarke v. Harris*, 3 Harr. & J. 167; *Rhinehart v. Schall*, 69 Md. 352, 16 Atl. 126; *Cornwall v. Gould*, 4 Pick. 444; *Church v. Barlow*, 9 Pick. 547; *Howe v. Merrill*, 5 Cush. 80; *Weston v. Chamberlin*, 7 Cush. 404; *Barker v. Parker*, 10 Gray, 339; *Clapp v. Rice*, 13 Gray, 403, 74 Am. Dec. 639; *Sweet v. McAllister*, 4 Allen, 354; *Woodward v. Severance*, 7 Allen, 340; *Shaw v. Knox*, 98 Mass. 214; *Mansfield v. Edwards*, 136 Mass. 15, 49 Am. Rep. 1; *Mulcare v. Welch*, 160 Mass. 58, 35 N. E. 97; *Moore v. Cushing*, 162 Mass. 594, 44 Am. St. Rep. 393, 39 N. E. 177; *Lewis v. Monahan*, 173 Mass. 122, 53 N. E. 150; *Weeks v. Parsons*, 176 Mass. 570, 58 N. E. 167; *McGurk v. Huggett*, 56 Mich. 187, 22 N. W. 308; *Farwell v. Ensign*, 66 Mich. 600, 33 N. W. 734; *Harrah v. Doherty*, 111 Mich. 175, 69 N. W. 242; *McNeilly v. Patchin*, 23 Mo. 40, 66 Am. Dec. 651; *McCune v. Belt*, 45 Mo. 174; *Stillwell v. How*, 46 Mo. 589; *Hillegas v. Stephenson*, 75 Mo. 118, 42 Am. Rep. 393; *Druhe v. Christy*, 10 Mo. App. 566; *McEntire v. Darley*, 15 Mo. App. 583; *Heintzelman v. L'Amoureux*, 3 Nev. 371; *Johnson v. Crane*, 16 N. H. 68; *Currier v. Fellows*, 27 N. H. 366; *Paul v. Rider*, 58 N. H. 119; *Price v. Truesdell*, 28 N. J. Eq. 200; *Laubach v. Pursell*, 35 N. J. L. 434; *Johnson v. Ramsey*, 43 N. J. L. 279, 39 Am. Rep. 580; *State, Kling, Prosecutor v. Kehoe*, 58 N. J. L. 529, 33 Atl. 946; *Hill v. Buchanan*, 71 N. J. L. 301, 60 Atl. 952; *Brown v. Mott*, 7 Johns. 361; *Keeler v. Bartine*, 12 Wend. 110; *Dybert v. Gros*, 9 Barb. 506; *Easterly v. Barber*, 66 N. Y. 433; *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109; *Palmer v. Field*, 76 Hun, 229, 27 N. Y. Supp. 736; *Moynihan v. McKeon*,

Before the delivery and acceptance of it, the note was signed on the back of it by S. R. McNutt, J. C. Saunders, and R. W. Huie & Company. The Arkadelphia Cotton Mills paid at different times several amounts, aggregating \$300. McNutt paid in his life many sums, amounting in the aggregate to \$960. He died, and his executors paid \$1,391.35, the balance due thereon. His executors brought suit in equity against R. W. Huie, a member of the firm of R. W. Huie & Company, who was the last to sign the note on the back thereof, to recover \$1,175.67, one half of the amounts paid thereon by McNutt in his lifetime and by his executors. The trial court dismissed the complaint for want of equity, and plaintiffs appealed.

In *Killian v. Ashley*, 24 Ark. 511, 91 Am. Dec. 519, the court held that, "where a third party indorses a note in blank at the time it is executed, he is bound as security as fully as if he had written his name on the face under that of the maker." And in *Nathan v. Sloan*, 34 Ark. 524, this court held that "parties who indorse their names in blank upon an obligation to another at the time it is executed by the maker, and for the same consideration, are joint makers with him, and not guarantors." To the same effect it held in *Heise v. Bumpass*, 40 Ark. 546; *Jones v. Bank of Pine Bluff*, 80 Ark. 285, 96 S. W. 1060; *Lake v. Little Rock Trust Co.* 77 Ark. 53, 3 L.R.A. (N.S.) 1199, 90 S. W. 847, 7 A. & E. Am. Cas. 394. In all these cases the court was consider-

16 Misc. 343, 38 N. Y. Supp. 61; *Egbert v. Hanson*, 34 Misc. 596, 70 N. Y. Supp. 383; *Pfugger v. Wilshusen*, 44 N. Y. S. R. 301, 17 N. Y. Supp. 516; *Cogswell v. Hayden*, 5 Or. 22; *Youngs v. Ball*, 9 Watts, 139; *Slaymaker v. Gundacker*, 10 Serg. & R. 75; *Allison v. Purdy*, 6 Pa. 501; *Ross v. Espy*, 66 Pa. 481, 5 Am. Rep. 394; *Slack v. Kirk*, 67 Pa. 380, 5 Am. Rep. 438; *Wolf v. Hostetter*, 182 Pa. 292, 37 Atl. 988; *Crompton v. Spencer*, 20 R. I. 330, 38 Atl. 1002; *Aiken v. Barkley*, 2 Speers, L. 747, 42 Am. Dec. 397; *Simons v. Hort*, 3 Brev. 452; *Bank of the State v. McWillie*, 4 M'Cord, L. 438; *Sloan v. Gibbs*, 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. 408; *McNeill v. Elam*, Peck (Tenn.) 268; *Marr v. Johnson*, 9 Yerg. 1; *Galbrath v. Martin*, 5 Humph. 50; *Wallace v. Greenlaw*, 9 Lea, 115; *Farmers' Bank v. Vanmeter*, 4 Rand. (Va.) 553; *Hogue v. Davis*, 8 Gratt. 4; *Willis v. Willis*, 42 W. Va. 522, 26 S. E. 515.

This question arose in the early case of *McDonald v. Magruder*, supra, and it was there held that where a note made for the accommodation of the maker was indorsed by the payee as a matter of accommodation, and was also subsequently indorsed by a stranger, the payee and the stranger who thus indorsed the note sustained the relation of first and second indorser, and were not to be regarded as joint cosureties as a matter of law, and the right of contribution would not obtain. The court said: "The second indorser gives his name on the faith of the first indorser as well as of the maker. The first indorser gives his name on the faith of the maker only. Unquestionably these liabilities may be changed by contract, but no contract existing between these parties, it is not a case to which the principle of contribution applies."

The general rule is thus laid down by the court in *Willis v. Willis*, supra: "Indorsers of a negotiable note, though it be for accommodation of the maker, while all are responsible to its holder, are responsible, as between themselves, in the order of their indorsement, in the absence of an agreement to be bound jointly and equally."

Therefore an indorser is liable to a subsequent indorser paying it, but not to a prior one."

In speaking of the contract entered into by accommodation indorsers, the court in *Shaw v. Knox*, supra, said: "The legal effect of the contract into which they respectively entered by becoming parties to negotiable paper is that which appears on the face of the bill or note."

So, accommodation indorsers at common law are liable as between each other as indorsers having received value, and the law of contribution does not apply. *Stiles v. Eastman*, 1 Ga. 206.

The well-settled doctrine is that accommodation paper is governed by the same relation as other paper; and that the first accommodation indorser is liable to the second and subsequent indorsers, and the second to the third, and so on to the end of the indorsements. *Connelly v. Bourg*, 16 La. Ann. 108, 79 Am. Dec. 568.

And the judgment upon the note in favor of the holder does not so merge the note as to preclude a subsequent indorser from enforcing his rights as shown by the note. *Crompton v. Spencer*, supra.

The *lex mercatoria* imposes on the indorser of accommodation paper the obligation to pay to every subsequent indorser in the same manner as on business paper. *Knox v. Dixon*, 4 La. 466, 23 Am. Dec. 488; *Gasquet v. Oakey*, 15 La. 537; *Connelly v. Bourg*, supra.

All accommodation parties as between themselves are bound by the obligations which they assume under the law merchant by becoming such parties. *McCune v. Belt*, supra. But there is no reason why successive indorsers may not be cosureties if they so agree among themselves. *Dunn v. Wade*, 23 Mo. 207.

The last accommodation indorser of a note is not released because of the failure of the holder to give a preceding accommodation indorser notice of nonpayment. If the last indorser desired to hold a prior indorser liable, he should have given the notice of nonpayment himself. *Crane v. Trudeau*, 19 La. Ann. 307.

ing the liability of the parties sued to the holder of the notes, and in none of them did it consider the relation of two or more of the indorsers on notes like the one under consideration to each other. In such cases it is held by the great weight of authorities: "When several persons indorse a bill or negotiable note in succession, the legal effect is to subject them, as to each other, in the order they indorse. The indorsement imports a several and successive, and not a joint, obligation, whether the indorsements be made for accommodation or for value received, unless there be an agreement *aliunde* different from that evidenced by the indorsements. When the successive indorsements are for accommodation of other par-

ties, the indorsers for accommodation may make an agreement to be jointly and equally bound; but whoever asserts such an agreement must prove it." Dan. Neg. Inst. 5th ed. § 703; M'Donald v. Magruder, 3 Pet. 470, 7 L. ed. 744. In 7 Cyc. Law & Proc. p. 828, the cases on this subject are collected.

In the case at bar McNutt was first indorser, and, as between himself and those whose names follow his, is liable for the whole amount of the note, and, in the absence of an agreement to the contrary, the other indorsers are not liable to contribute anything to him or his estate. No such agreement was alleged or proved.

Decree affirmed.

An indorser for the accommodation of the maker is entitled to all the privileges of an indorser, and he is equally chargeable to all the persons standing after him on the note. *Brown v. Mott*, supra.

The provision of the negotiable instrument law that, as respects one another, indorsers are liable *prima facie* in the order in which they indorse, was held to apply to accommodation indorsers, in *State Bank v. Kahn*, 49 Misc. 500, 98 N. Y. Supp. 858.

The rule in Alabama was not changed by § 3070 of the Revised Code. *Moody v. Findley*, 43 Ala. 167.

An agreement made after a note has become due and the liability of the parties fixed, to the effect that each of the parties, including the accommodation indorsers, shall pay a certain proportion of the note, is without consideration so far as the last indorser is concerned, and he may recover from a prior indorser what he has paid thereon. *Keeler v. Bartine*, 12 Wend. 110.

The voluntary attempt of the last indorser upon a bill of exchange, to arrange one half of the debt on condition that the drawer of the bill would arrange the other half, is an imposing fact to establish the original agreement or understanding that they were joint and equal cosureties. *Edelen v. White*, 6 Bush, 408.

Where each of three accommodation indorsers agreed with the principal to sign if the others would, there being no agreement as to the order of signing, it was held in *Hagerthy v. Phillips*, 83 Me. 336, 22 Atl. 223, that the jury would be entitled to find that they were joint indorsers and liable to contribution on the note.

A subsequent accommodation indorser cannot enforce contribution from a prior indorser where there has been turned over to him sufficient personal property of the maker as security to indemnify him from all liability upon the note. *Van Patten v. Ulrich*, 59 Hun, 628, 37 N. Y. S. R. 348, 13 N. Y. Supp. 940.

The law of contribution has no application where a person indorsed for the accommodation of both of the makers of a note, although one of them was an accom-

modation maker as to the other. *Hanish v. Kennedy*, 106 Mich. 455, 64 N. W. 459.

An apparent exception to the rule that where several persons in succession indorsed a negotiable note, the act of each respectively imports a several and successive, and not a joint, obligation, is the case of a note payable to the order of two or more persons, and by them respectively indorsed. In the latter case the liability is joint. *Wolf v. Hostetter*, 182 Pa. 292, 37 Atl. 988; *Foster v. Collner*, 107 Pa. 305; *Kerr's Estate*, 17 Pa. Co. Ct. 193.

Where one of two payees in a promissory note indorsed by them for the accommodation of the drawer pays the whole money to the holder after the maturity of the note and protest, he is entitled to recover one-half the money so paid from the other payee. *Steckel v. Steckel*, 28 Pa. 233.

In *Golsen v. Brand*, 75 Ill. 148, it was held that the obligation incurred by two persons writing their names in blank on the back of a note is that of guarantors, and if the first has to pay, he may enforce contribution.

An accommodation indorser who has paid the note is not entitled to contribution from a subsequent guarantor, where the indorsement was made prior to and without reference to the subsequent guarantor. *Phillips v. Plato*, 42 Hun, 189.

Accommodation parties as cosureties.

A few cases, however, hold that accommodation parties to commercial paper are, even in the absence of any express agreement, cosureties, and consequently the law of contribution applies, thus being in conflict with the great weight of authority, which sustains the rule that accommodation parties are liable *inter se* in the same manner as parties to business paper.

Thus, in *Daniel v. McRae*, 9 N. C. (2 Hawks) 590, 11 Am. Dec. 787, it was held that the second accommodation indorser, who had paid the bill, could recover only a moiety against the first accommodation indorser upon a principle of justice and equity

that, as they both stood in the same relation as cosureties, there could be no reason why one should be compelled to bear a greater burden than the other; "their indorsements were both gratuitous, and on that account, when made *prius* or *posterius*, gave no rule of liability."

And the doctrine of the Daniel Case was followed as the law of North Carolina in *Richards v. Simms*, 18 N. C. (1 Dev. & B. L.) 48, distinguishing *Smith v. Smith*, 16 N. C. (1 Dev. Eq.) 173, and *Gomez v. Lazarus*, 16 N. C. (1 Dev. Eq.) 205. But in the *Richards* Case the court said that, were it *res integra*, they could not sanction the principle, as it was not in accord with the principle adopted by "the rest of the mercantile world."

So, in *Hatcher v. McMorine*, 14 N. C. (3 Dev. L.) 228, although the case was decided without the aid of the principle established in the Daniel Case, *Henderson, J.*, said that the reason of the United States Supreme Court (in *McDonald v. Magruder*, 3 Pet. 470, 7 L. ed. 744, *supra*) was far from satisfying him that they were right, and that Daniel v. McRae was wrong.

And in *Dawson v. Pettway*, 20 N. C. 531 (4 Dev. & B. 396), the court, in holding that the indorser of a note is not liable in contribution to one who signed the note as a co-obligor of the principal, recognizes the principle of the Daniel Case, but distinguished that from the case at bar.

But in *Hubbard v. Williamson*, 27 N. C. (5 Ired. L.) 397, it was held that a first indorser was liable to a second indorser, because of the order in which their names appeared upon the bill. The earlier North Carolina cases are not mentioned.

However, in *Atwater v. Farthing*, 118 N. C. 388, 24 S. E. 736, the doctrine of contribution was reasserted, and held to apply for the benefit of the first indorser against a second indorser, upon the authority of the Daniel Case, and no mention is made of the Hubbard Case.

And in *Stovall v. Border Grange Bank*, 78 Va. 188, it was held, citing the Daniel Case, that where successive indorsers all indorse for accommodation of the maker, though at different times, and without communication or mutual understanding, they are in equity cosureties, and subject to common contribution.

And in *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19, it was held that the plaintiff, an accommodation indorser, could enforce contribution against the defendant, who was also an accommodation indorser. No mention is made of any agreement between the parties, nor is the relative position of their names upon the paper shown.

And in *Freeman v. Cherry*, 46 Ga. 14, it was held that the first of several accommodation indorsers, who had paid the bill, could enforce contribution against the others, under the express Code provision, "an accommodation indorser is considered merely as a surety." And to the same effect was the decision in *Hull v. Myers*, 90 Ga. 674, 11 S. E. 653.
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So, in *Douglas v. Waddle*, 1 Ohio, 413, 18 Am. Dec. 630, it was held that indorsers of accommodation notes could recover from each other only a contributable share. This rule was held in *Williams v. Bosson*, 11 Ohio, 67, to be a local rule, and not to be extended beyond promissory notes, to which the local usage had applied it.

In *Pitkin v. Flanagan*, 23 Vt. 160, 56 Am. Dec. 61, it is said that accommodation indorsers are in fact mere sureties for the principal, and will be holden as cosureties only. But the contrary view is apparently accepted in *Farmers' & M. Bank v. Rathbone*, 26 Vt. 19, 58 Am. Dec. 200.

Such also appears to be the English and Canadian rule.

The language used in *Clipperton v. Spetigue*, 15 Grant, Ch. (U. C.) 269, is not very explicit, but the court evidently considered that the doctrine of contribution applied to accommodation indorsers, even if the first indorser knew nothing of his rights in respect to the subsequent indorser, when he executed the paper.

And in *Cockburn v. Johnston*, 15 Grant, Ch. (U. C.) 577, it was held that the doctrine of contribution applied, and even if the second indorser knew that the first indorser was an accommodation indorser, he must contribute.

And in *Mitchell v. English*, 17 Grant, Ch. (U. C.) 303, it was held that accommodation indorsers are to be considered as cosureties, irrespective of the order of their liability upon the paper itself. And to the same effect was the decision in *McKelvey v. Davis*, 17 Grant, Ch. U. C.) 355. And the right to contribution was also asserted in *Re Boutin*, Rap. Jud. Quebec 12 C. S. 186, and in *Vallée v. Talbot*, Rap. Jud. Quebec 1 C. S. 223.

Given an accommodation note, the law implies equal contribution as between accommodation parties. *Stacey v. Stayner*, 3 Ont. Week. Rep. 557.

The leading English case upon this question is *Reynolds v. Wheeler*, 10 C. B. N. S. 561, in which it was held that the accommodation drawer of a bill, who has to pay the same, may sue an accommodation indorser for contribution.

A different rule is laid down in *Janson v. Paxton*, 23 U. C. C. P. 439, where it was held that successive indorsers were, on proof that they were accommodation indorsers, not necessarily to be considered cosureties. The court said that it did not consider *Reynolds v. Wheeler* as expressly deciding the point raised in the case at bar, as there was some evidence to be gathered from the various reports of that case that there was an agreement to the effect that the parties were to be sureties.

And in *Fisken v. Meehan*, 40 U. C. Q. B. 146, the majority of the court approved the *Jansen* Case, citing *McDonald v. Magruder*, 3 Pet. 470, 7 L. ed. 744, *supra*; and the decision in *Poisson v. Bourgeois*, Rap. Jud. Quebec 17 C. S. 94, is to the same effect.

But the decision in *McDonald v. Whitfield*, L. R. 8 App. Cas. 733, 4 Eng. Rul. Cas.

531, is based wholly upon *Reynolds v. Wheeler*, and the authority of *Janson v. Paxton* is repudiated.

Distinction between notes and bills of exchange.

The decision in *Douglas v. Waddle*, *supra*, is to the effect that accommodation indorsers of promissory notes are as between themselves cosureties. This case has not been expressly overruled by any later Ohio decision, but in several the courts have refused to extend the rule to bills of exchange, and upon such paper the accommodation parties are liable as upon business paper. *Williams v. Bosson*, *supra*; *Kelley v. Few*, 18 Ohio, 441; *Barnet v. Young*, 29 Ohio St. 7.

No such distinction was made in the *Douglas* Case, but in the *Williams* Case it was said that the introduction of bills of exchange as a basis for accommodation took place long after the decision in the *Douglas* Case. And in the *Barnet* Case the court said: "It is to be regretted that the general rules of the commercial law are not applicable alike to both classes of business paper in this state, and that a difference in the mere form of the instrument used should operate a difference in the rights and liabilities of accommodation parties thereto as between themselves."

It is to be noted that no such distinction has been found in any other reported case.

Where indorser receives portion of the proceeds.

The fact that the last indorser received a portion of the proceeds in payment of a debt due him from the maker does not change the rule. *Youngs v. Ball*, 9 Watts, 139.

Neither does the fact that part of the proceeds were used toward the payment of other paper upon which the plaintiff was also an accommodation indorser. *Gillespie v. Campbell*, 5 L.R.A. 698, 39 Fed. 724.

But in *Galbrath v. Martin*, 5 Humph. 50, it was held that the first indorser, against whom a judgment for the amount of the note had been taken by the last indorser, was entitled to a credit upon the judgment of the amount which the second indorser had retained out of the proceeds of the discount of the note for his own purposes.

Change in order of names on paper given in renewal.

That the names of the parties upon the notes in renewal of which the notes in suit were given were in a different order than upon the notes in suit constitutes no proof to change the relative position of the two indorsers. *Pomeroy v. Clark*, 1 McArthur, 606.

So, no presumption that the liability of several accommodation indorsers to a note is joint, and not several, can be raised from the fact that the indorsements were

not in the same order as upon the notes for the renewal of which the notes in suit were given. *Palmer v. Field*, 76 Hun, 229, 27 N. Y. Supp. 736.

But the fact that the names on a renewal note are in a different order than on the original note was held in *Dawson v. Pettway*, 20 N. C. 531 (4 Dev. & B. 396), to be some evidence that the parties intended to be cosureties.

And in *Allison v. Purdy*, 6 Pa. 501, it was held to be for the jury whether a party who had been the second indorser upon one note, and became the first indorser upon a renewal, intended to change his position by the change in the order, and the fact that the principal secured the signatures of his accommodation indorsers in the order that he accidentally met them on the street is proper evidence for the jury to consider in that connection.

Where each party has paid a portion of the money.

Although each indorser paid one half of the note at the time it became due, the last indorser may recover from the first the amount he so paid. *Johnson v. Crane*, 16 N. H. 68.

But in *Denton v. Lytle*, 4 Bush, 597, it was held that the fact that the parties themselves adjusted and paid the debt on the basis of equal responsibility as between themselves as sureties, if unexplained, authorizes the inference that they acted in accordance with some previous understanding or agreement rendering it obligatory on them both so to do.

So, if three years elapse after the payment by two accommodation indorsers of a moiety each of the note, that fact constitutes evidence that the parties were cosureties. *Talcott v. Cogswell*, 3 Day, 512.

Knowledge that paper was accommodation paper.

Knowledge on the part of any of the parties to the paper, that it was in fact for accommodation only, does not apparently have any effect upon the liability of the parties.

The mere fact that indorsers are accommodation indorsers, and known to each other to be so, is not sufficient, without proof of an express agreement, to change the general rule, that prior indorsers are liable *in solido* to subsequent indorsers who have paid the bill. *Re McCord*, 174 Fed. 72.

And in *Kirschner v. Conklin*, 40 Conn. 77, the court said: "The claim of the defendant is based upon the bare fact that these parties knew each other to be accommodation indorsers; but this fact falls far short of being sufficient to create an agreement between them to be jointly liable."

An indorser for accommodation of a bill of exchange after its acceptance, who is compelled to pay it when due, may enforce the full liability of an accommodation acceptor thereon, and the fact that when in-

dorsing the bill he knew the acceptance to have been without consideration is immaterial. *Gillespie v. Campbell*, *supra*.

Effect of statute of frauds.

So far as the statute of frauds is concerned, it is satisfied by an indorsement in blank of an accommodation party. *Sloan v. Gibbes*, 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. 408.

So, in *Weeks v. Parsons*, 176 Mass. 570, 58 N. E. 157, it was held that the statute of frauds does not apply in such a case, because the parol agreement related to the obligations of the indorsers *inter sese*, and not to a promise to pay the debt of another.

Admissibility of parol evidence.

In some cases it has been held that parol evidence is admissible to show that there had been an agreement between the accommodation parties to become cosureties upon the note. *Rhodes v. Sherrod*, 9 Ala. 63; *Dunn v. Sparks*, 7 Ind. 490; *Harshman v. Armstrong*, 43 Ind. 126; *Preston v. Gould*, 64 Iowa, 44, 19 N. W. 834; *Smith v. Morrill*, 54 Me. 48; *Weston v. Chamberlin*, 7 Cush. 404; *Clapp v. Rice*, 13 Gray, 403, 74 Am. Dec. 639; *Mansfield v. Edwards*, 136 Mass. 15, 49 Am. Rep. 1; *Weeks v. Parsons*, 176 Mass. 570, 58 N. E. 157; *Farwell v. Ensign*, 66 Mich. 600, 33 N. W. 734; *Paul v. Rider*, 58 N. H. 119; *Easterly v. Barber*, 66 N. Y. 433; *Kelley v. Few*, 18 Ohio, 441; *Ross v. Espy*, 66 Pa. 481, 5 Am. Rep. 394; *Sloan v. Gibbes*, *supra*; *Martin v. Marshall*, 60 Vt. 321, 13 Atl. 420; *Pitkin v. Flanagan*, 23 Vt. 160, 56 Am. Dec. 61.

The contract of indorsement is one implied by the law from the blank indorsement, and can be qualified by express proof of a different agreement between the parties, and is not subject to the rule which excludes the proof to alter or vary the terms of an express agreement. *Ross v. Espy*, *supra*.

Evidence of a mutual contract between indorsers to lend their names for the accommodation of another should be left to the jury. *Love v. Wall*, 8 N. C. (1 Hawks) 313.

In other cases it has been held that parol evidence was not admissible for that purpose. *Johnson v. Ramsey*, 43 N. J. L. 279, 39 Am. St. Rep. 580; *State, Kling, Prosecutor, v. Kehoe*, 58 N. J. L. 529, 33 Atl. 946; *Johnson v. Crane*, 16 N. H. 68.

In *Johnson v. Crane*, *supra*, the court said that the import of the writing being plain by the ordinary rule of evidence, it is not to be contradicted by verbal explanations of the intentions and meaning of the parties upon becoming parties to it.

Where the plaintiff was maker, and the defendant indorser, of a promissory note, the evidence of other indorsers that all the parties had agreed to be mutually liable for the note is not evidence against the defendant. *Slaymaker v. Gundacker*, 10 Serg. & R. 75.

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In connection with this phase of the question, attention should be called to the fact that the cases here cited represent but a small part of the cases passing upon the question of the admissibility of parol evidence to show the relationship of parties to commercial paper to be different from that imported on the face thereof. And the general rule as laid down by later cases not within the scope of this note may be different from that shown by the cases here cited. In consequence the cases are to be considered as bearing upon the application of the general rule as to parol evidence upon the state of facts presented by the title to this note, rather than as indicating what the general rule as to admissibility of parol evidence is in the jurisdictions from which the cases are taken. The knowledge or lack of knowledge of the parties as to the exact relation of the other parties to the note is apparently immaterial.

W. M. G.

KENTUCKY COURT OF APPEALS.

CITY OF LOUISVILLE, Appt.,

v.

CATHERINE C. BECKER.

(— Ky. —, 129 S. W. 311.)

Tax — voluntary payment — recovery.

One who pays an illegal tax to secure the rebate allowed by law for prompt payment cannot recover the money paid where, under the statute, he has a right to test in court the right to enforce the tax, and the taxing district has applied the money to the purposes for which it was collected.

(June 17, 1910.)

Note. — Right of one who pays invalid tax for purpose of obtaining discount to recover amount paid.

A search has disclosed but little authority upon the question whether the fact that a taxpayer pays his tax for the purpose of obtaining a discount will render the payment involuntary, so that he may subsequently recover the amount paid if the tax proves invalid.

The case of *LOUISVILLE v. BECKER* is supported by *Lee v. Templeton*, 13 Gray, 476. In that case one who sought the collector and paid his tax to obtain a discount was held not entitled to recover the amount because the tax was illegal, even if the payment was accompanied by a protest. The court said: "The payment of a tax under such circumstances is necessarily, in view of the provisions of the statute, to be regarded and treated as a voluntary payment. It is so, in substance and effect, declared to be by the express provisions of the statute. The privilege of a discount is given to those persons only who make voluntary payment of the tax imposed upon them. And they who avail themselves of the privilege should not refuse to take also the bur-

A PPEAL by defendant from a judgment of the Chancery Branch, First Division, of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover back certain taxes which were alleged to have been paid under mistake of law. Reversed.

The facts are stated in the opinion.

Mr. Clayton B. Blakey, with Mr. Joseph S. Lawton, for appellant:

Where the taxpayer is entitled to a day in court and can litigate the demand about to be enforced against him, but instead of doing so voluntarily pays it, the payment is considered voluntary.

Louisville v. Anderson, 79 Ky. 334, 42 Am. Rep. 220; Louisville & N. R. Co. v. Hopkins County, 87 Ky. 605, 9 S. W. 497; Louisville & N. R. Co. v. Com. 89 Ky. 531, 12 S. W. 1064; Brands v. Louisville, 111 Ky. 56, 63 S. W. 2; German Security Bank v. Coulter, 112 Ky. 577, 66 S. W. 425, 427; Scott v. New Castle (Ky.) 21 L.R.A. (N.S.) 112, 116 S. W. 788.

In order to constitute an involuntary payment, the payment must have been made under an immediate and urgent necessity to release the person or property from detention, or to prevent an immediate seizure of the person or property.

Louisville v. Anderson, supra; 2 Dill. Mun. Corp. §§ 940, 943, 947; Union P. R. Co. v. Dodge County, 98 U. S. 541, 25 L. ed. 196; Lamborn v. Dickinson County, 97 U. S. 181, 24 L. ed. 926; 2 Cooley, Taxn. pp. 1495-1502; Smith, Mun. Corp. pp. 244-246; Elliott, Mun. Corp. §§ 294-296; 2 Desty, Taxn. pp. 790-797; DeBaker v. Carillo, 52 Cal. 473; Merrill v. Austin, 53 Cal. 379; Dear v. Varnum, 80 Cal. 86, 22 Pac. 76; Falvey v. Hennepin County, 76 Minn. 262,

79 N. W. 302; St. Anthony & D. Elevator Co. v. Bottineau County (St. Anthony & D. Elevator Co. v. Soucie) 9 N. D. 346, 59 L.R.A. 262, 83 N. W. 212; Marietta v. Slocumb, 6 Ohio St. 471; Wilson v. Pelton, 40 Ohio St. 306; Williams v. Stewart, 115 Ga. 864, 42 S. E. 256; Holder v. Gelena, 19 Ill. App. 409; McCrickart v. Pittsburgh, 88 Pa. 133; Carton v. Uinta County, 10 Wyo. 416, 69 Pac. 1013; Preston v. Boston, 12 Pick. 13.

Where the law provides ample means of correcting an illegal assessment before the process of collecting the tax begins, and the taxpayer fails to take advantage of this opportunity to correct the assessment, the taxpayer is without remedy.

Scott v. New Castle, supra.

Messrs. Grubbs & Grubbs, for appellee: Money paid under mistake of law or fact may be recovered.

Scott v. New Castle (Ky.) 21 L.R.A. (N.S.) 112, 116 S. W. 788; Underwood v. Brockman, 4 Dana, 318, 29 Am. Dec. 407; Ray v. Bank of Kentucky, 3 B. Mon. 514, 39 Am. Dec. 479; Louisville v. Anderson, 79 Ky. 334, 42 Am. Rep. 220; Louisville v. Henning, 1 Bush, 381; Newport v. Ringo, 87 Ky. 635, 10 S. W. 2; Brands v. Louisville, 111 Ky. 56, 63 S. W. 2.

Taxes paid under a mistake of law may be recovered unless such payment is voluntary, and a payment is voluntary when it can only be enforced by suit.

Louisville v. Anderson, 79 Ky. 335, 42 Am. Rep. 220; Louisville & N. R. Co. v. Com. 89 Ky. 531, 12 S. W. 1064; Newport v. Ringo and Brands v. Louisville, supra.

The payment made to secure the rebate was involuntary.

Newport v. Ringo, supra.

den of any consequences which are the necessary or legitimate result of the alternative they have chosen. . . . There is nothing in the circumstances attending either of the payments, the amount of which the plaintiff now seeks to recover back, which has any tendency to change or qualify the effect which the provisions of the statute, above cited, attribute and assign to the free and voluntary action of a party who seeks to secure the benefit and discount authorized by the votes of the town. It is true that he accompanied his payments with a formal protest; and it appears that in one instance the collector was induced, upon his solicitation, to say that the payment of the tax was demanded. But whether these formalities of demand and protest were actually observed in the present case is quite immaterial; since they could have no influence upon a clear, certain, and positive rule of law, or be allowed to vary or diminish the force, significance, or effect of the express provisions of the 28 L.R.A. (N.S.)

statute. The several payments made by the plaintiff must be held to have the character and effect assigned to them by these provisions. In conformity to the absolute rule thereby established, they must be considered as his voluntary acts, and must be treated by courts of law as having this and no other character."

But where, in addition to paying for the purpose of obtaining a discount, the payment is also made to prevent the issuance of a warrant, which was threatened, it has been held that the payment is not voluntary, and that recovery may therefore be had.

Thus in *Stowe v. Stowe*, 70 Vt. 609, 41 Atl. 1024, where a tax was paid soon after the taxpayer had received a notice from the treasurer that his taxes must be paid by a given date to obtain the discount and save costs of collection, and that if not paid by that date a warrant would be issued against him, it was held that the payment was not voluntary, and that recovery might be had.

J. T. W.

Settle, J., delivered the opinion of the court:

By this action in equity the appellee, Catherine C. Becker, sought to recover taxes paid by her to the city of Louisville for the years 1907, 1908, and 1909, amounting in the aggregate to \$308.46. It was alleged in the petition that the taxes were assessed upon notes of which she is the owner, amounting to \$6,000, and secured by liens upon real estate situated in the city of Louisville; that for more than five years next before the institution of the action she was a resident of Oldham county, and her notes were not, during the years for which they were assessed and the taxes paid by her, either assessable or taxable in the city of Louisville. The appellant demurred to the petition; but the demurrer was overruled. It declined to plead further, and the circuit court thereupon entered judgment in appellee's favor for the amount claimed in her petition, with interest. The case is now before this court on appeal from that judgment.

The written opinion of the learned special judge so tersely expressed his reasons for overruling the demurrer that we here insert it: "The assessments complained of in the petition were void under § 2080, Ky. Stat. (Russell's Stat. § 905), and Com. v. Northwestern Mut. L. Ins. Co. 32 Ky. L. Rep. 796, 107 S. W. 233, for its situs was in Oldham county, and the payment of a void tax upon a void assessment does not give to the city any right to collect or withhold from the person paying the same the amount paid. Demurrer to petition overruled."

The case of Com. v. Northwestern Mut. L. Ins. Co. was not an action to recover taxes paid, but one to compel the insurance company, a nonresident, to list for taxation in the county of Jefferson, under § 4241, Ky. Stat. (Russell's Stat. § 6170), its notes and choses in action representing loans made by it, secured by mortgages on lands in this state, or by pledge of policies or other collateral owned by persons in this state. In deciding the single question presented, the court held that as the insurance company was a foreign corporation, and the statute did not fix the situs of its notes and choses in action in this state for the purpose of taxation, they were not taxable therein. It does not, therefore, appear to have been held in that case that "the payment of a void tax upon a void assessment does not give to the city any right to collect or withhold from the person paying the same the amount paid."

So, the question decided in that case is only incidentally involved in the case at bar. It is admitted by the appellant city

that appellee's notes were not legally assessable or taxable in the city of Louisville, and that, if she had resisted the assessment or refused to pay the taxes, the court would have relieved her of paying them. She did not, however, pursue that course, but voluntarily, and in order to obtain the rebate allowed by law, paid the taxes before the city could enforce their payment or impose a penalty for their nonpayment, and now seeks to recover them back, upon the ground that they were paid under a mistake of law. In explanation of its alleged action in assessing appellee's property and receiving of her the taxes paid thereon, the city's counsel says that she had previously been a resident of the city, and, as such, from year to year, listed the same property for taxation and paid the taxes thereon, and that the city assessor, not being aware of her removal to Oldham county, continued to assess her property, and the city tax collector to receive the taxes thereon, for the years complained of, believing her to be still a resident of the city and the taxes legally assessed and collectable. This explanation does not affect the legal status of the parties, for, after all is said, the question we are called on to decide is: Can one who has voluntarily and under a mistake of law paid an illegal tax, which the city has paid out and applied to the purposes for which it was assessed and collected, recover it?

While this court has repeatedly held, as in *Ray v. Bank of Kentucky*, 3 B. Mon. 514, 39 Am. Dec. 479, that "whenever, by a clear and palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without cause or consideration, which in law, honor, or good conscience was not due and payable, and which in honor or good conscience ought not to be retained, it was and ought to be recovered back," it has never committed itself to the doctrine that this rule should be invoked to compel the refunding to the taxpayer of taxes, which he, following an assessment by the assessing officer, had voluntarily paid to an officer of the law charged with the duty of collecting the taxes. Hesitancy in so applying the rule may well be indulged when it is considered that the duty to pay taxes does not arise out of contract, but out of an obligation resting upon every citizen to contribute to the support of the government to which he owes allegiance. Moreover, taxes are assessed and collected for purposes of government, and while it is a hardship to a citizen to be refused repayment of a tax, as in this case illegally collected of him, though voluntarily paid, it must be borne in mind, if the city is required to show on every such complaint its right to retain the tax re-

ceived, it could never regard the voluntary payment of a tax as a thing settled, or know whether to apply such taxes as it may have collected to the discharge of its numerous obligations and municipal needs.

In view of what has been said as to the purposes of taxation, it can readily be seen that the principles applicable to transactions between individuals do not apply to an action by a taxpayer against the government for the recovery back of taxes paid voluntarily, though paid under a mistake of law.

It is apparent from the averments of appellee's petition that the taxes for which she sues were voluntarily paid, and this fact bars the recovery sought. Cooley on Taxation, vol. 2, p. 1495, in stating the general rule, "that a tax or assessment voluntarily paid cannot be recovered back, the authorities generally agree," gives the following reason, for its adoption: "The rule of law is a rule of sound public policy; also, it is a rule of quiet as well as of good faith, and precludes the courts being occupied in undoing the arrangements of parties which they have voluntarily made, and into which they have not been drawn by fraud or accident, or by any excusable ignorance of their legal rights and liabilities. All payments are supposed to be voluntary until the contrary is made to appear." p. 1498. On page 1502 of the same volume an excellent definition of "compulsion" is given: "And it has been said in some cases that, when it is sought to recover back a payment as having been made under compulsion, it should be made to appear that payment was made to release either person or property from the power of the officer. And this may be said to express the general sense of the authorities." Smith's Modern Law of Municipal Corporations, vol. 1, § 244, defines "compulsion" as applied to a tax payment as follows: "It is, however, upon the whole well settled that the payment must be made under direct and immediate compulsion, and under such circumstances that the person called upon to pay the tax can save himself or his property only by paying the illegal demand. The stringent application of this rule often results in hardship in individual cases; but, for the reasons already stated, the general beneficence of the rule is undoubted." *Baltimore v. Lefferman*, 4 Gill, 425, 45 Am. Dec. 145; *Dear v. Varnum*, 80 Cal. 86, 22 Pac. 76; 27 Am. & Eng. Enc. Law, p. 760.

While this court has not in terms adopted any of the definitions of "compulsion" as applied to tax payments, referred to, it has in several cases held that taxes illegally paid might be recovered back, where the payments were made involuntarily, and the

tax collector had authority to levy and sell on the refusal to pay. In *Louisville v. Anderson*, 79 Ky. 334, 42 Am. Rep. 220, which was an action to recover back from the city taxes illegally assessed and paid by mistake of law, upon land used for farming purposes, it was alleged that, if the taxes had not been paid, the city would have proceeded, "as it threatened to do, to coerce payment by a sale of the property." The court, though recognizing the rule announced by Cooley, "that a tax voluntarily paid cannot be recovered back," allowed a recovery by the taxpayer on the ground that the tax had been involuntarily paid, because "the money was not paid at the instance of the taxpayer to one who was a mere passive agent without authority to demand or coerce payment, but to one who had not only the authority to receive it, but to exact payment by levying on the property taxed; and, upon the refusal of the appellee to pay, a sale of the property was inevitable. The party charged with payment has been afforded no opportunity of being heard, and knows that the tax gatherer is clothed with the process of the law to enforce his demand if payment is denied. Such a payment, or a payment made in ignorance of the fact that the taxation is void, with a knowledge that compelling process is at hand to coerce the demand, must be regarded as involuntary, and the party entitled to recover his money. Where a party is entitled to a day in court, and can litigate the demand about to be enforced against him, but, instead of doing so, voluntary pays it, he is without remedy. When he can plead and make his defense, a payment made under protest will be regarded as voluntary; or, if he has an option either to litigate the question or submit to the demand and pay the money, in all such cases there is no compulsion, and relief will be denied."

It appears that the city of Louisville, when the taxes were paid by Anderson, had the power under the law to coerce payment of taxes by distraint, or a summary sale of the taxpayer's property upon his refusal to pay, but that the latter was given no opportunity to litigate the matter in the courts. When appellee's taxes were paid, the law was different. Under the present laws, which were also in force when appellee's taxes were paid, the city was authorized to sue or distrain for taxes uncollected, also to collect them by garnishment of rents; but the law also provides (Ky. Stat. § 3008 [Russell's Stat. § 957]) that "the taxpayer may have the right to a day in court to contest any unlawful distraint or garnishment of rent." In other words, no matter by which of the methods allowed the

city might have attempted to collect the taxes of appellee for the years complained of, she had under the law guaranteed facilities for resisting their payment. She, therefore, unlike Anderson, had an opportunity to make defense, litigate the right of the city to the taxes in question, and defeat their collection, but, instead of doing so, elected to pay them, and did in fact pay them each year before their payment could be coerced.

In *Louisville & N. R. Co. v. Hopkins County*, 87 Ky. 605, 9 S. W. 497, the taxes sought to be recovered back were held to have been paid voluntarily. Hence the principle announced in the case at bar was applied as follows: "And such being the fact, we perceive no reason to make in these cases an exception to the general rule laid down in *Louisville v. Anderson*, that a party paying taxes who is entitled to a day in court and can litigate the demand about to be enforced against him, but, instead of doing so, voluntarily pays it, is without remedy."

In discussing the above rule in the case of *Louisville & N. R. Co. v. Com.* 89 Ky. 531, 12 S. W. 1064, the court said: "Considerations of public policy require this rule, and the taxpayer cannot complain with grace, because he has by his own neglect missed the opportunity afforded him by law for his protection."

In the much later case of *Brands v. Louisville*, 111 Ky. 56, 63 S. W. 2, recovery by the appellants of apportionment warrants admittedly illegal, paid the city, was refused. The opinion, after a careful consideration of the question involved, and elaborate review of all the authorities in this state thereon, reaffirmed with marked emphasis the rule stated in the cases of *Louisville v. Anderson* and *Louisville & N. R. Co. v. Hopkins County* and *Louisville & N. A. Co. v. Com.*,—*supra*, as to the necessity for the enforcement of the rule, saying: "But the court is of opinion that the reasons of public policy which sustain the cases above cited apply with equal force to the case before us. Reduced to its last analysis, the case comes to this: The city assessed against the appellants' property for the improvement of the street in front of it an amount larger by 10 per cent than it should have assessed. If a recovery can be had in this case, then one may be had in every case where the burden is wrongfully apportioned, although the assessment has been voluntarily paid. Such a rule would involve the city government in inextricable confusion. The council could not know what liabilities might be anticipated or what taxes should be levied. Under the Constitution the levy of taxes must specify

the purpose for which the tax is to be used, and a tax levied for one purpose cannot be applied to another. The reason for the rule denying a recovery of taxes voluntarily paid is, after all, the security and efficiency of the city government, and every reason which forbids the recovery of municipal taxes that have been voluntarily paid seems to us to apply with equal force to assessments for municipal improvements. The city is required to make the apportionment. If an error is made, it is the duty of the property owner, no less than the city officials, to detect and correct it. If, instead of doing this, he voluntarily pays the assessment, and the city makes other contracts and assumes other obligations on the idea that these matters are all settled, it seems to us that sound public policy requires the loss to fall on the taxpayer, who has acquiesced in the assessment and voluntarily paid the money rather than litigate the right."

Of the cases relied on by counsel for appellee, we find but one that can in any sense be said to conflict with the cases from which we have quoted. The case referred to is that of *Newport v. Ringo*, 87 Ky. 635, 10 S. W. 2, in which it was held that taxes paid under compulsion and a mistake of law could be recovered. The court seems to have expressed its conclusion in the first paragraph of the opinion without a citation of authority. The decision must have been based on some provision of the charter of the city of Newport, though we are not advised by the opinion of the method provided by the charter of the city for collecting taxes, in view of which it is not to be considered as controverting the authoritative-ness of the rule announced in *Louisville v. Anderson*; *Louisville & N. R. Co. v. Hopkins County*; *Louisville & N. R. Co. v. Com.*; and *Brands v. Louisville*,—*supra*.

It is not perceived that appellee's claim of right to recover the taxes sued for finds any support from the case of *Scott v. New Castle* (Ky.) 21 L.R.A. (N.S.) 112, 116 S. W. 788, in which the recovery back of the unearned part of a liquor license paid under a mistake was allowed, for in the opinion of that case it is said: "We do not agree with counsel for appellees that a license such as appellant paid is a mere tax, which, when voluntarily paid, cannot be recovered. It is true that a tax, when voluntarily paid, cannot be recovered, though illegally collected. *Louisville & N. R. Co. v. Com.* 89 Ky. 531, 12 S. W. 1064. But this rule is based upon considerations of public policy and because the law provides ample means of correcting an illegal assessment before the process of collecting the tax begins; but a license such as appellant paid is on a different footing."

Manifestly, appellee paid voluntarily, without dispute, and before their collection could have been enforced, the taxes sued for, and, while the loss of the amount claimed may prove a hardship to her, the law and the sound public policy underlying it compel us to refuse her the relief demanded.

Wherefore, the judgment is reversed, and cause remanded for further proceedings consistent with the opinion.

NEW HAMPSHIRE SUPREME COURT.

ARTHUR E. TAGGART

v.

TOWN OF JAFFREY.

(75 N. H. 473, 76 Atl. 123.)

Water — artificial stream — riparian rights.

1. The rights of an owner of land on an artificial channel made for a stream of water which was evidently intended to be permanent, and has existed for more than sixty years, are the same as though the course was the natural one.

Same — public rights — conflict with riparian right.

2. The public cannot, after granting the bed of the outlet of a pond to private owners, use the water in the pond to the injury of such owners, without making compensation to them, although it retains title to the bed of the pond.

Same — diversion — duty to minimize injury.

3. The fact that proper conservation of the water left in a stream would render it sufficient to serve the purpose to which a complaining riparian owner was putting the stream is no defense to an action by him for wrongful diversion of water from the stream.

(April 5, 1910.)

EXCEPTIONS by defendant to rulings of the Superior Court for Cheshire County made during the trial for an action brought to recover damages for the alleged unlawful diversion of the waters of a natural stream which resulted in the assessment of damages. Overruled.

Plaintiff claimed the rights of a riparian owner in the waters of an artificial channel by which a portion of the waters of Bullet pond was carried to mills below his premises. The channel appeared to be permanent, although it required annual repairing.

Note. — The subject of conversion of artificial into natural water courses is treated in the notes to *Pewaukee v. Savoy*, 50 L.R.A. 836, and *Stimson v. Brookline*, 16 L.R.A.(N.S.) 280, 23 L.R.A.(N.S.)

Further facts sufficiently appear in the opinion.

Messrs. Cain & Benton, for defendant:

The plaintiff had no right to the water in the canal.

Fox River Flour & Paper Co. v. Kelley, 70 Wis. 287, 35 N. W. 744; *Lawson v. Mowry*, 52 Wis. 219, 9 N. W. 280.

The waters in the pond were public waters, and could be used by the state or any particular subdivision of it for any public purpose, without compensation to the plaintiff.

St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 372, 42 L. ed. 505, 18 Sup. Ct. Rep. 157; *Rundle v. Delaware & R. Canal Co.* 14 How. 80, 14 L. ed. 335; *Fox v. Cincinnati*, 104 U. S. 783, 26 L. ed. 928; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 64 L.R.A. 338, 86 Am. St. Rep. 143, 30 So. 645.

Messrs. Doyle & Lucier, for plaintiff:

A water course, though artificial, may have been originally made under such circumstances and have been so used as to give all the rights that the riparian proprietors would have if it had been a natural stream.

Sutcliffe v. Booth, 9 Jur. N. S. 1037; 30 Am. & Eng. Enc. Law, 2d ed. p. 350.

Every owner of land over or through which a stream of water runs is, by virtue of such ownership, entitled to the use of water flowing over it in its natural current without diminution or obstruction.

Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287; *Tyler v. Wilkinson*, 4 Mason, 400, Fed. Cas. No. 14,312; *Gilman v. Tilton*, 5 N. H. 232; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 18 L.R.A. 679, 25 Atl. 718.

Where an artificial water course is constructed under certain circumstances so that it is intended as a permanent structure, rights therein similar to the riparian rights in a natural water course may be acquired by prescription.

28 Am. & Eng. Enc. Law, p. 1040; *Nuttall v. Bracewell*, L. R. 2 Exch. 1; *Beeston v. Weate*, 5 El. & Bl. 986; *French Hoek Comra. v. Hugo*, L. R. 10 App. Cas. 336; *Prescott v. White*, 21 Pick. 341, 32 Am. Dec. 266; *Powell v. Butler*, Ir. Rep. 5 C. L. 309; *Wood v. Waud*, 3 Exch. 743, 10 Eng. Rul. Cas. 226.

Peaslee, J., delivered the opinion of the court:

1. The waters flowing from Bullet pond were diverted from their natural channel more than sixty years ago, and have since flowed in the channel then prepared for them. The change was evidently intended

to be permanent, and the present channel of the stream is now, for all legal purposes, its natural one. "It has often been decided, both in England and America, that water courses made by the hand of man may have been created under such conditions that, so far as the rules of law and the rights of the public or of individuals are concerned, they are to be treated as if they were of natural origin." *Stimson v. Brookline*, 197 Mass. 568, 16 L.R.A. (N.S.) 280, 125 Am. St. Rep. 382, 83 N. E. 893, 14 A. & E. Ann. Cas. 907; *Townsend v. McDonald*, 12 N. Y. 381, 64 Am. Dec. 508; *Magor v. Chadwick*, 11 Ad. & El. 571, 586; *Suteliffe v. Booth*, 9 Jur. N. S. 1037; 3 *Farnham, Waters*, § 827b. Cases involving the rights of proprietors along artificial streams, as distinguished from natural streams running in artificial courses, are not in point. The distinction between the two has often been recognized. *Murchie v. Gates*, 78 Me. 300, 4 Atl. 698; *Stimson v. Brookline*, supra; *Nuttall v. Bracewell*, L. R. 2 Exch. 1; *Wood v. Waud*, 3 Exch. 748, 777, 10 Eng. Rul. Cas. 226. Rights in new courses for natural streams have been supported upon various grounds. "When a stream flowing through a person's land is diverted into a new channel, either artificially or by a sudden flood, affecting the rights of other riparian proprietors favorably, and the owner acquiesces in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, like a public dedication, and the stream cannot be lawfully returned to its former channel." *Gould, Waters*, § 159; *Ford v. Whitlock*, 27 Vt. 265; *Burk v. Simonson*, 104 Ind. 173, 54 Am. Rep. 304, 2 N. E. 309, 3 N. E. 826.

In some cases the mere running of the water for the prescriptive period, under conditions apparently intended to be permanent, has been considered sufficient to warrant a holding that the usual riparian rights along a natural stream have attached. *Murchie v. Gates*, supra; *Gaved v. Martyn*, 19 C. B. N. S. 732.

"There is a much more impregnable foundation [than prescription] upon which to put such decisions, and that is upon the ground of estoppel. If a landowner makes a change in the course of the stream which to all appearances is permanent, and holds out to the world the representation that such condition is permanent, he will be bound by his acts; and after other persons have acquired rights by changing their positions upon the faith of such representations, he will not be permitted to deny that they were true, or claim that the stream is not flowing in its true channel." 3 *Farnham, Waters*, § 827c; *Woodbury v. Short*, 28 L.R.A. (N.S.)

17 Vt. 387, 44 Am. Dec. 344; *Lampman v. Milks*, 21 N. Y. 505; *Lammott v. Ewers*, 106 Ind. 310, 55 Am. Rep. 746, 6 N. E. 636.

"If the landowner, having changed the direction of the natural stream through his land, were to suffer others who are entitled to use the water to expend money in reference to such use, under a belief that the new channel was to be permanent, and this were known to him, he could not afterwards change its course so as to injure the party who had expended his money. In these and like cases, whenever one who owns a water course in which another is interested, or by the use of which another is affected, does any act, or suffers any act to be done, affecting the rights of other proprietors, whereby a state of things is created which he cannot change without materially injuring another who has been led to act by what he himself had done or permitted, the court applies the doctrine of equitable estoppel." *Shepardson v. Perkins*, 58 N. H. 354, 356. Whether this case is fairly open to criticism because of an attempt to sustain the conclusion reached by inconsistent lines of reasoning (3 *Farnham, Waters*, § 827), it is not now necessary to inquire.

The rule is universal that riparian rights may be acquired along the artificial channel of a natural stream. Upon any of the grounds suggested, this plaintiff could maintain his position. There was a dedication. The stream had been changed in a manner to indicate that the alteration was permanent. There are prescriptive rights. It ran in this way for more than twice the period necessary to the presumption of a grant, before the plaintiff purchased his tract of land. There is an estoppel. He relied upon the apparently permanent conditions when he made his purchase; and since that time, and acting upon conditions as they were, he has openly made the improvements which he says are now interfered with. That he has the rights of a riparian proprietor upon a natural water course cannot be open to serious question.

The cases relied upon by the defendant (*Fox River Flour & Paper Co. v. Kelley*, 70 Wis. 287, 35 N. W. 744; *Lawson v. Mowry*, 52 Wis. 219, 9 N. W. 280) are not applicable here. The law of Wisconsin is in harmony with that elsewhere. In a recent case in that state many of the American authorities are quoted with approval, and the court declares the law to be that "the watercourse, though artificial, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to become a natural watercourse prescriptively." *Smith v. Youmans*, 96 Wis. 103,

37 L.R.A. 285, 65 Am. St. Rep. 30, 70 N. W. 1115. While in a case like this the right acquired includes the privilege of taking water for domestic use (*Roberts v. Richards*, 44 L. T. N. S. 271), the defendant is in error in basing its argument upon the proposition that the complaint is for the interference with such right. There is no suggestion in the case that there is not at all times sufficient water in the stream to supply the plaintiff's domestic needs. The complaint is for loss of power to drive the plaintiff's hydraulic ram. The depletion of the water power is the wrong for which compensation is sought.

The defendant also sets up the claim that "the waters in the pond were public waters, and could be used by the state or any particular subdivision of it for any public purpose without compensation to the plaintiff." The law is otherwise. The bed of the pond is the property of the state. "Before the township was granted, the public held not only the basin of the pond, but also the bed, banks, and valley of the brook that flows from the pond to the river. In that position of the title, the public owner could divert the entire pond from its outlet without infringing private rights between the pond and the river. If the original title of the valley had remained unchanged, this suit could not be maintained. But the public owner elected to convert into private property the mill site. . . . The grant of the bed of the brook to private proprietors, whose title has come to the plaintiffs, conveyed rights of air, light, heat, and water. . . . If the original owner had desired to retain an unlimited right to divert the pond and destroy the mill privilege, there should have been an express reservation. A right to the natural flow of the brook, not unreasonably diminished or polluted, was inherent in the land and one of the rights of use and occupation of which the title was composed. . . . By an elementary rule of conveyancing, it passed from grantor to grantee, in the absence of a stipulation to the contrary. The operation of the rule did not depend upon the question whether the water was a natural pond, large or small, before it entered the plaintiffs' lot. . . . If the plaintiffs have been injured by an unreasonable use of the pond, or of any other lot of land or water, there is a legal remedy." *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 20, 18 L.R.A. 679, 25 Atl. 718, 731, 732.

2. Exception was taken to the exclusion of certain evidence. The defendant was urging that the plaintiff ought to conserve the surplus waters for use in dry seasons, and was offering evidence as to how this might be done. It was then suggested that

it did not appear that the plaintiff had any right to control or repair the structures referred to. The court then caused the following statement to be entered upon the record: "The evidence introduced, whereby it is claimed that the plaintiff could have conserved the water at Rugg meadow and Grassy pond, is excluded." The defendant then made the following offer of proof: "We offer the evidence excluded and other evidence tending to show that if the plaintiff, or the persons having control of the canal and the dam at Rugg meadow and Grassy pond, maintained the structures for the conservation of water at those places as they stood several years ago, the stream flowing past Taggart's house would be fed at all seasons of the year so that he would have sufficient water to run his ram. The evidence is offered upon the ground that Taggart's claim to recover is based upon his claim to rights in the canal, and on the further ground that the defendant is entitled to show that the damage of which the plaintiff complains is caused by the acts of the persons having control of the canal, in allowing the same to fall into a lack of repair which did not formerly exist, and is not attributable to the acts of the defendant." The proffered evidence was excluded, subject to exception.

The plaintiff based his case upon evidence that he suffered no shortage until the first drought after the defendant built its waterworks. This was in the fall of 1902. It then became competent for the defendant to show that the shortage at that time was caused by a want of repair in the structures between Bullet pond and the plaintiff's premises. This is manifestly a different proposition from the offer to show that better conservation facilities would improve the plaintiff's water supply. The testimony that the structures were out of repair was not excluded. The offer of proof is said, by those who tendered it, to have been "made with extreme care," and is to be here treated as stating fully what the defendant expected to prove. The presiding justice understood that the offer was merely to show that conservation would have furnished sufficient water to operate the plaintiff's ram. The idea of the defendant seemed to be that the plaintiff's rights were limited to the amount of power he used. His right was to the whole power, less reasonable diminution by the upstream proprietors. There was no offer to show that conservation would have given the plaintiff his full right; and it is no answer for one who has interfered with it to say that, if it had not been for other inter-

ference by third persons, the plaintiff would still have had as much of his right as he desired to use. Neither is it an answer to say that if the plaintiff took care of what the defendant left for him he would have no need for what the defendant had wrongfully taken. This is what the offer of proof amounted to. It was an offer to show that he would have "sufficient water to run his ram." The statement now relied upon, that "the defendant is entitled to show that the damage of which the plaintiff complains is caused by the acts of the persons having control of the canal, in allowing the same to fall into a lack of repair which did not formerly exist, and is not attributable to the acts of the defendant," was not made as an offer to prove these facts. It was stated as a reason why the facts which were offered ought to be received. The record shows that the defendant had been persistently urging the position that because the plaintiff, or those controlling the outlets at Grassy pond and Rugg meadow, did not take care of what water the defendant left in the stream, therefore the defendant was not accountable to the plaintiff for what it took. The offer of proof was the culmination of the discussion of this proposition, and was understood by the presiding justice to have the meaning above indicated. "The court did not exclude, but allowed the defendant to introduce, testimony tending to show that, because of the condition of the dams and canal as they have been since the fall of 1902, the water went to waste and was diverted,—as tending to show that the depletion of the water complained of by the plaintiff was not the taking of the water by the town as aforesaid. The evidence excluded was simply evidence tending to show how the water of the canal might be conserved." The offer of proof was made in such a form that it was not unreasonable for the court to understand it as he did. If counsel had a different understanding, the burden was upon them to state it plainly. *Felch v. Weare*, 66 N. H. 582, 27 Atl. 226. If, as they now seem to claim, the defendant's counsel understood the ruling to prevent them from introducing other evidence upon the facts as to the comparison between the past and present conditions of the structures at Grassy pond and Rugg meadow, their remedy is to apply to the superior court for a new trial upon the ground of accident or mistake. Pub. Stat. 1901, chap. 230, § 1. The exception is overruled.

Case discharged.

All concur.

WASHINGTON SUPREME COURT.

OLIF SHOLIN, Resp't.,

v.

SKAMANIA BOOM COMPANY, Appt.

(56 Wash. 303, 105 Pac. 632.)

Jury — failure to demand — discretion to allow.

1. It is not reversible error for the court to permit a jury trial, although notice of election to try the case to a jury was not given, as required by statute.

Continuance — to secure testimony.

2. The court may grant a continuance to permit the securing of a copy of a contract, proof of which is necessary to the decision of the case, where objection is made to its proof by parol evidence.

Bridge — destruction — special injury — mail carrier.

3. One having a contract with the Federal government to carry mail over a certain route six times a week, who is compelled to take a circuitous route because of the negligent destruction of a bridge, suffers special damages giving him a right of action against the one through whose negligence the bridge was destroyed.

(December 11, 1909.)

Note. — Does the fact that one is prevented by an unlawful obstruction from using a highway cause him a special damage which will sustain an action by him against the wrong-doer.

In general it may be said that an individual traveler on a highway is entitled neither to bring an action to abate an obstruction thereon nor for damages, unless his injury is different in kind and degree from that suffered by the public generally. *Schall v. Nusbaum*, 56 Md. 512.

A traveler upon a highway does not suffer special damage sufficient to support a private action, by reason of an obstruction in the highway which causes delay in his journey, or compels him to take a more circuitous route, or deprives him of his journey altogether, the injury being common to all who attempt to use the highway. *Baier v. Schermerhorn*, 96 Wis. 372, 71 N. W. 600.

Thus, it has been held that an obstruction in a road not upon or adjoining plaintiff's land, but between his land and places to and from which he wishes to travel over the road, which prevented his using the same, does not occasion him special injury so that he may maintain a bill to abate the obstruction. *San José Ranch Co. v. Brooks*, 74 Cal. 463, 16 Pac. 250; *Atwood v. Partree*, 56 Conn. 80, 14 Atl. 85; *Storn v. Barger*, 43 Ill. App. 173.

The special injury which an individual must suffer in order to allow him to maintain an action for obstructing a highway must be different not merely in degree but in kind from that suffered by the public

APPEAL by defendant from a judgment of the Superior Court for Skamania County in plaintiff's favor in an action brought to recover special damages alleged to have resulted from the negligent destruction by defendant of a certain public bridge. Affirmed.

The facts are stated in the opinion.

Messrs. George S. Shepherd and George E. O'Bryon, for appellant:

The mere fact that, by reason of the obstruction, the plaintiff was obliged to travel a longer and more circuitous route, is not such special damage as to entitle him to maintain an action.

Houck v. Wachter, 34 Md. 265, 6 Am. Rep. 332.

The obstruction of a public right of way

is a public, not a private wrong, and therefore is one to be redressed by a public prosecution, and not by a private action for damages.

Jones v. St. Paul, M. & M. R. Co. 16 Wash. 25, 47 Pac. 226; Blood v. Nashua & L. R. Corp. 2 Gray, 140, 61 Am. Dec. 444.

Mr. Virgil A. Crum, also for appellant:

The defendant had neither the power nor the authority, let alone the duty, of repairing the destroyed bridge.

Kirtley v. Spokane County, 20 Wash. 111, 54 Pac. 936; Freedom v. Weed, 40 Me. 383, 63 Am. Dec. 670.

Negligence cannot be predicated on an omission to do what one has no right to do.

Veeder v. Little Falls, 100 N. Y. 343, 3 N. E. 306; Hyams v. Webster, L. R. 4 Q. B.

generally, and the fact that one who has very frequent occasion to use a highway is obliged to use a longer route because of an obstruction does not constitute such special damage. Crook v. Pitcher, 61 Md. 510; Hartshorn v. South Reading, 3 Allen, 501 (injunction).

The fact that a person is obliged, by an obstruction in the highway, to travel a longer and more circuitous route in going with products from his farm to a market town, is not such special damages as will support an action by him to recover the alleged damage. Jacksonville, T. & K. W. R. Co. v. Thompson, 34 Fla. 346, 26 L.R.A. 410, 16 So. 282; Sohn v. Cambern, 106 Ind. 302, 6 N. E. 813.

Nor may an individual maintain an action against a town for damages because of a total obstruction of a highway by snow, in consequence of which the plaintiff was wholly unable to use it, as he had occasion to do, for hauling wood to market and for other purposes, by reason of which he lost the sale of the wood and was unable to perform his engagements. Griffin v. Sanborn-ton, 44 N. H. 248.

In Shaw v. Boston & A. R. Co. 159 Mass. 597, 35 N. E. 92, it was held that the plaintiff had not suffered such special injury as to entitle him to recover damages, where he complained of the obstructing of a public highway in a city due to repair work upon a bridge which he was obliged to cross in delivering milk and garden products to his customers, and the consequent loss of his said business.

In Farrelly v. Cincinnati, 2 Disney (Ohio) 516, it was held that the owner of an omnibus route did not suffer special damages so as to entitle him to maintain an action therefor, because his omnibuses were unable to cover their regular route, due to disrepair of a street.

In Aram v. Schallenger, 41 Cal. 449, a demurrer to a complaint in an action for an injunction was sustained on the ground that no special damage to plaintiffs was shown, although it was alleged that the plaintiffs owned tracts of land adjoining an

obstructed road and had no other means of access to their lands.

Winterbottom v. Derby, L. R. 2 Exch. 316, 12 Eng. Rul. Cas. 511, distinguishing Iveson v. Moore, *infra*, held that no special damage beyond that to the public generally was suffered by a traveler who, on one or two occasions, merely went up to an obstruction and returned, and on one occasion removed the obstruction.

The fact that one lives on an obstructed street, and so has more occasion to pass through it, is not sufficient to entitle him to recover special damages, the inconvenience being in degree only, and not an injury in kind different from that sustained by the public. Bigley v. Nunan, 53 Cal. 403.

The closing of a road which afforded access to a cemetery does not result in special injury to relatives of certain persons buried in the cemetery, so as to entitle them to enjoin the obstruction of the road. Sunderland v. Martin, 113 Ind. 411, 15 N. E. 639.

But it was held in Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914, that averments of a bill in equity that complainant had members of his family buried in a cemetery is sufficient to show special injury to him by the obstruction of a highway leading to the cemetery.

An averment that plaintiff was hindered, obstructed, and prevented from passing along a public way by reason of the erection of a wall thereon, was held insufficient in Holmes v. Corthell, 80 Me. 31, 12 Atl. 730, there being no allegation showing any specific damage, and it not appearing that upon any special occasion he was thereby compelled to make a longer detour, nor that he lost any time, or was put to any expense thereby.

It was held in Baxter v. Winooski Turnp. Co. 22 Vt. 114, 52 Am. Dec. 84, that the liability of the defendant company for "all damages" happening from want of repair of their road was the same as the statutory liability of incorporated towns, and could not be extended to include damages resulting to one who was injured in his business by reason of not attempting to use the road

138; *Beach v. Frankenberger*, 4 W. Va. 712; *Cleveland, C. C. & St. L. R. Co. v. Ballentine*, 28 C. C. A. 572, 56 U. S. App. 266, 84 Fed. 935; *Crane Elevator Co. v. Lippert*, 11 C. C. A. 521, 24 U. S. App. 176, 63 Fed. 942; *Baltimore City Pass. R. Co. v. Nugent*, 86 Md. 349, 39 L.R.A. 161, 38 Atl. 779; *Cusick v. Adams*, 115 N. Y. 55, 12 Am. St. Rep. 772, 21 N. E. 673; *Warsaw v. Dunlap*, 112 Ind. 579, 11 N. E. 623, 14 N. E. 568; *Newark Electric Light & P. Co. v. Garden*, 37 L.R.A. 725, 23 C. C. A. 649, 39 U. S. App. 416, 78 Fed. 74.

Messrs. A. L. Miller and R. M. Wright, for respondent:

The plaintiff is entitled to recover, since he suffered special damages.

Creech v. Humptulips Boom & River Improv. Co. 37 Wash. 172, 79 Pac. 633; *Elliott, Roads & Streets*, p. 500; *Viebahn v. Crow Wing County*, 96 Minn. 276, 3 L.R.A. (N.S.) 1126, 104 N. W. 1089; *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482; *Little Rock, M. R. & T. R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277; *Gates v. Northern P. R. Co.* 64 Wis. 64, 24 N. W. 494; *Reyburn v. Sawyer*, 135 N. C. 328, 65 L.R.A. 930, 102 Am. St. Rep. 555, 47 S. E. 761; *Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co.* 51 N. J. L. 56, 16 Atl.

12; *Dudley v. Kennedy*, 63 Me. 465; *Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co.* 117 N. C. 579, 29 L.R.A. 700, 53 Am. St. Rep. 606, 23 S. E. 43; *Milarkey v. Foster*, 6 Or. 379, 25 Am. Rep. 531.

Rudkin, Ch. J., delivered the opinion of the court:

On the 19th day of May, 1906, the plaintiff entered into a contract with the United States, acting through the Postmaster General, to transport the mail from Collins by way of Home Valley and Carson to Stevenson and return six times each week for the term of four years from the 1st day of July, 1906. At the time this contract was entered into and for some considerable time thereafter, the usual and only route of travel from Carson to Home Valley was along a public highway which crossed Wind river, a rapid mountain stream, on a public bridge constructed and maintained by Skamania county. The defendant is a corporation organized under the laws of this state, and at the times herein mentioned was engaged in driving logs and other timber products down Wind river. On the 19th day of October, 1906, the defendant so negligently conducted its logging operations that the bridge in ques-

because of its general bad condition, or from not being able to travel it as expeditiously and carry as large loads as he otherwise could have done. The court said that if the action were on the case at common law, to recover damages for an obstruction of the highway by some positive act whereby the plaintiff was delayed in passing along it, or compelled to carry less loads than he otherwise might and would have carried, it might well admit of a question whether this would not be such a special damage as to give a private action.

In *Powell v. Bunker*, 91 Ind. 64, the right of an individual to bring an action for damages and for an injunction, because of an obstruction in a road, was denied because it did not appear that the plaintiff was specially injured. It is suggested in the opinion that there would have been a special injury if the plaintiff had abated the obstruction, or, when actually passing along the highway, had been delayed or turned back by such obstruction. Upon this point the court said (p. 68): "To be prohibited by one through whose lands a highway runs from passing upon the highway, and to cease to use or refrain from using the road because of such order, will not constitute a special injury from a public nuisance, or afford a right of action for the loss and inconvenience arising from going a more circuitous and difficult way; and while the injury to the public from an obstruction of a highway may rest in contemplation, there must be an actual hindrance to an individual to entitle him to his private remedy." 28 L.R.A. (N.S.)

The obstruction of a public road or street which affords the only approach to property thereon used for business or other purposes is such special injury to the owner as to support his action for damages. *Cushing-Wetmore Co. v. Gray*, 152 Cal. 118, 125 Am. St. Rep. 47, 92 Pac. 70; *Stricker v. Hillis*, 15 Idaho, 709, 99 Pac. 831; *Brown v. Toronto & N. R. Co.* 26 U. C. C. P. 206; *Ross v. Thompson*, 78 Ind. 90; *Fossion v. Landry*, 123 Ind. 136, 24 N. E. 90.

The same rule holds good in a bill to abate the obstruction as a nuisance. *Miller v. Schenck*, 78 Iowa, 372, 43 N. W. 225; *Hayden v. Stewart*, 71 Kan. 11, 80 Pac. 43; *Gardner v. Stroever*, 89 Cal. 26, 26 Pac. 618; *Ross v. Thompson*, supra.

There was held to have been sufficient special damage to warrant a private action for obstructing a road, in *Pierce v. Dart*, 7 Cow. 609, where the injury was due to a delay and the time spent in removing the obstruction.

A contractor was held to have suffered special damage, in *Anne Arundel County v. Watts*, 112 Md. 353, 76 Atl. 82, where the defendant's failure to repair a bridge on the highway prevented its use, and compelled the plaintiff to transport, by hand cars on a railroad, at large expense, materials to be used for construction work, there being no other highway between the points.

One who has occasion to travel over a highway with teams and wagons to deliver freight, and actually attempts to do so, suffers special and peculiar damages other than those sustained by the public in gen-

tion was carried away and destroyed. On the 17th day of November following, the defendant paid to Skamania county the sum of \$1,000 in full settlement for any and all loss or damage sustained by the county by reason of the destruction of the bridge. After the destruction of the bridge, the plaintiff was compelled to carry the mail down the Columbia river by boat, and thence overland, by a circuitous route, to the several postoffices and places of delivery. The present action was instituted to recover the special damages resulting to him from the destruction of the bridge. The case came on for trial on the 6th day of February, 1908; but, after a portion of the testimony had been introduced, the court sustained an objection to oral testimony tending to show the terms and conditions of the mail contract between the plaintiff and the government. A continuance was thereupon granted on the plaintiff's application, to enable him to procure a certified copy of the mail contract, which was on file in the postoffice department. A second trial was had on the 8th day of November, 1908, resulting in a judgment in favor of the plaintiff in the sum of \$100, from which this appeal is prosecuted.

When the case was called for trial, the

appellant objected to a trial by jury, for the reason that the respondent did not, at or before the time the case was called to be set for trial, serve upon the opposite party or his attorney, and file with the clerk of the court, a statement of himself or attorney that he elected to have the case tried by jury, as required by the act of March 6, 1903 (Laws 1903, chap. 43, p. 50). In answer to a similar complaint in *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209, we said: "It is within the discretion of the trial court to permit a demand for a jury to be made after the case is called to be set for trial, or to submit the issues of fact in a case to a jury of its own motion, and no error can be predicated upon its ruling in that regard." To the same effect, see *Fleming v. Wilson*, 39 Wash. 106, 80 Pac. 1104; *Hart v. Cascade Timber Co.* 39 Wash. 279, 81 Pac. 738. The granting of a continuance of the first trial is also assigned as error. This ruling was clearly within the discretion of the trial court. Had the court refused the continuance, the respondent could have taken a voluntary nonsuit, and the appellant would have gained nothing by such a course, except a recovery of its costs. Perhaps the court would have imposed this burden upon the respondent as a condition

eral, for which he may have a recovery, where he was prevented and delayed for a period of five and a half days by an obstruction placed in the road by the defendant. *Milarkey v. Foster*, 6 Or. 378, 25 Am. Rep. 531.

Where a fence extended into the street and compelled plaintiff to pass around it in order to go to and from his premises situated on that street, he suffered a peculiar injury, for the abatement of which equity gave a remedy. *Crooke v. Anderson*, 23 Hun, 266.

Where an obstruction in a highway is such that one has to use a circuitous route to reach his place of business, he is entitled to recover damages for the special injuries sustained. *Beaudean v. Cape Girardeau*, 71 Mo. 392.

It was held in *Patterson v. Detroit, L. & N. R. Co.* 56 Mich. 172, 22 N. W. 260, that an individual who had been held up by a train of cars standing across the highway upon which he was traveling was entitled to recover for the special injury he suffered by the detention.

There is special injury authorizing a private person to bring a bill to abate a nuisance, where he owns a farm and nursery adjacent to a highway which has been unlawfully obstructed, and such highway affords the only outlet to market for his products. *Smith v. Mitchell*, 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 667.

In *Iveson v. Moore*, 1 Id. Raym. 486, it was held that an action was maintainable for damages due to an obstructed highway, where the special injury was to the owner 28 L.R.A.(N.S.)

of a colliery in not being able to carry coal to his customers.

In *Chichester v. Lethbridge*, Willes, Rep. 71, particular damages were held to have been shown sufficient to support the action, which was for damages for an obstruction, first, because it was expressly laid that the plaintiff was attempting to travel this road several times with his coach, but could not by reason of the obstruction, and, secondly, it was also laid that the defendant in person withstood and opposed him from removing the obstruction.

In *Maynell v. Saltmarsh*, 1 Keble, 847, an allegation was held to show sufficient special damage when it stated that an obstruction of a road prevented plaintiff's removing his corn from the field, with the result that it became corrupted and spoiled.

As to the right of an owner of property where means of access from one direction is shut off or interfered with by the closing of an adjoining street, or a portion of the street on which he is situated, see *Hyde v. Fall River*, 2 L.R.A.(N.S.) 269, and the accompanying note.

As to obstructions in a highway preventing access to property except by a circuitous route, as a special injury entitling the owner to maintain an action for damages or to abate the nuisance, see the note to *Sloss-Sheffield Steel & I. Co. v. Johnson*, 8 L.R.A.(N.S.) 226.

As to what constitutes a sufficient special injury to enable a citizen to sue for a public nuisance obstructing a navigation right, see the note to *Viebahn v. Crow Wing Co.* 3 L.R.A.(N.S.) 1126.

W. A. S.

to the granting of a continuance, had the appellant requested it, but no such request was made.

The remaining assignments of error go to the sufficiency of the complaint and to the sufficiency of the evidence to make out a cause of action. Upon this question there is a conflict of authority, both within and without this state. All the authorities agree that a private action for the obstruction of a public highway is only maintainable by those who suffer some particular loss or damage therefrom, beyond that suffered by the general public. Interference with a common right does not of itself afford a cause of action to the individual, but special or particular damages consequent upon such interference does. There is little difficulty in stating the general rule, but, when we look to the decided cases to ascertain what constitutes particular or special damages within the meaning of the rule, we find a hopeless conflict. Any attempt to review the authorities, or to extract from them a rule which might be said to be sustained by the weight of authority, would be both futile and fruitless. The extreme view on the one side is perhaps taken in Massachusetts, where it has been held in numerous cases that individuals suffering very considerable loss and damage from the obstruction of navigable streams and public highways have no right of action, because their loss differs in degree, and not in kind, from that sustained by the general public. Many of the cases from that state may be found cited in *Jones v. St. Paul, M. & M. R. Co.* 16 Wash. 25, 47 Pac. 220, upon which the appellant chiefly relies. The extreme view on the other side is perhaps taken in Maine, where it has been held that a person stopped by an obstruction in a public highway while returning home with a loaded team, and compelled to return by a more circuitous route, suffered special damages, and had a right of action against the wrongdoer. *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482. A review of many cases bearing upon this general question will be found in *Viebahn v. Crow Wing County*, 96 Minn. 276, 104 N. W. 1089, and in the note to that case in 3 L.R.A.(N.S.) 1126. The rule is thus stated in *Elliott on Roads & Streets*, 2d ed. § 669: "As a general rule, no person can maintain an action for damages from a common nuisance where the injury and damages are common to all. But, if a person sustains a special damage, peculiar to himself, from the obstruction of a highway, whether it be to his person or his property, he may maintain an action therefor. Thus, obstructing and cutting off the access to a person's place of business is a special injury, for which he may recover 28 L.R.A.(N.S.)

damages in an action at law; and ejection or trespass will lie against one who wrongfully places an obstruction of a permanent character upon that part of a highway in which the complainant owns the fee. So, if the complainant, by reason of an obstruction in a highway, is compelled to turn back or go by a more circuitous route, whereby he is specially damaged by being rendered unable to perform a contract, he may maintain an action therefor; and the same is true if, by reason of such an obstruction, he sustains peculiar damage in the labor of himself and his servants to remove the obstruction. So, where an obstruction wrongfully placed by a third person in a highway causes travelers to pass around it over the adjoining land, whereby the crops of the landowner are injured, the latter may have his action against the person creating the obstruction. But mere delay caused by an obstruction, unaccompanied by special injury, does not as a rule give any right to an action for special damages." In *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341, the court said: "The referee found from evidence entirely sufficient that the plaintiff was obliged to use the road in the winter for the purpose of drawing logs, but, on account of the obstruction, he was for several days compelled to take another and much longer route, to his pecuniary damage; that at other times he was obliged to clear the road from the drifts of snow that had accumulated in consequence of the fence, which required time and labor, and that in some other respects he was put to expense in the use of the road for his lawful business by reason of the defendant's acts. . . . These findings bring the case within the principle which permits a private person to maintain an action to abate a public nuisance, and to recover the damages which he sustained, and which were special and peculiar to himself, growing out of necessity on his part to use the road at the time of the obstruction more frequently, perhaps, than his neighbors. The obstruction was, no doubt, an offense against the public, but it was none the less in a special and peculiar sense an injury to the plaintiff." In *Knowles v. Pennsylvania R. Co.* 175 Pa. 623, 52 Am. St. Rep. 860, 34 Atl. 974, it was held that one who contracted to haul dirt at a specified price per load might recover damages from a railroad corporation for thereafter erecting and maintaining a fence across a highway which was the natural route from the place where the dirt was taken to the place of delivery, and over which several loads could have been hauled in the time required to haul one load by the circuitous route which the contractor

was compelled to take because of the obstructions. See also *Milarkey v. Foster*, 6 Or. 378, 25 Am. Rep. 531. In *Jones v. St. Paul, M. & M. R. Co.* supra, this court followed the extreme views of the supreme judicial court of Massachusetts, and held that the owner of a steamboat accustomed to navigate a river could not recover damages caused by an obstruction to navigation compelling him to tie up his boat for several days. This case is in conflict with many decisions of this court, and is opposed to the weight of authority. *Viebahn v. Crow Wing County*, supra, and cases there cited.

Thus, in *Carl v. West Aberdeen Land & Improv. Co.* 13 Wash. 616, 43 Pac. 890, it was held that persons engaged in driving logs might maintain an action to abate a dam which constituted an obstruction to navigation. To the same effect are *Sultan Water & P. Co. v. Weyerhaeuser Timber Co.* 31 Wash. 562, 72 Pac. 114; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 70 L.R.A. 272, 102 Am. St. Rep. 905, 77 Pac. 813; *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807. The rule has been extended to actions to enjoin or abate other nuisances. *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 A. & E. Ann. Cas. 35; *Wilcox v. Henry*, 35 Wash. 591, 77 Pac. 1055. In *Creech v. Humptulips Boom & River Improv. Co.* 37 Wash. 172, 79 Pac. 633, it was held that individuals injured by the obstruction of a navigable slough might recover special damages caused by the obstruction. In *Smith v. Mitchell*, 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 607, it was held that where the only means of ingress and egress to and from the lands of a private person, in order to reach a market for the products of his farm and nursery, is over a public highway, the obstruction of such highway is of such special injury as will sustain an action to enjoin the nuisance, under § 3093, Ballinger's Anno. Codes & Statutes [Pierce's Code, § 1867], which provides that "a private person may maintain a civil action for a public nuisance, if it is specially injurious to himself, but not otherwise." Section 5660, Ballinger's Anno. Codes & Statutes [Pierce's Code, § 1265], provides that "the obstruction of any highway . . . is a nuisance and the subject of an action for damages and other and further relief." The following section, 5661, provides that "such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance." Under these sections and under what we believe to be the weight of authority, the present action is maintainable. A rule that prohibits such actions may tend to discourage liti-

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gation, but does not tend to promote justice.

The judgment of the court below is affirmed.

Fullerton, Chadwick, Morris, and Gose, JJ., concur.

Petition for rehearing denied.

KANSAS SUPREME COURT.

S. F. WALTERS

MISSOURI PACIFIC RAILWAY COMPANY, Appt.

(82 Kan. 739, 109 Pac. 173.)

Carrier — negligence — failure to stop at passenger's destination.

1. It is the duty of a railway company to use the highest degree of care which is reasonably practical in transporting passengers and in setting them down at their destination, and the failure to stop a train at the destination of a passenger and afford him an opportunity to alight with safety is culpable negligence.

Same — direction to alight from moving train — contributory negligence — question for jury.

2. Where the railway company fails to stop its train at the destination of a passenger, and as it is passing the station the conductor of the train advises and directs the passenger to alight from the train while it is moving at a speed of from 3 to 4 miles an hour, the question whether the passenger, who acts on the direction of the conductor and is injured, is guilty of contributory negligence, is one for the determination of the jury.

Trial — verdict — evidence — sufficiency.

3. The special findings of the jury examined, and found not to be without support in the evidence nor contrary to the instructions of the court, and not inconsistent with the general verdict.

(June 11, 1910.)

APPEAL by defendant from a judgment of the District Court for Marshall County in plaintiff's favor in an action

Headnotes by JOHNSTON, Ch. J.

Note.— See note to *Hoylman v. Kanawha & M. R. Co.* 22 L.R.A.(N.S.) 741, on the general question as to negligence of passenger in getting on or off moving train, and cases cited at page 751 of that note, as to the effect of a direction or invitation by those in charge of the train. And see also on this point *Farley v. Norfolk & W. R. Co.* 27 L.R.A.(N.S.) 1111.

brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. W. J. Gregg, James W. Orr, and B. P. Waggener, for appellant:

The mere fact that plaintiff acted upon the advice or command of the conductor would not justify him in attempting to alight from the train when it was obviously dangerous; and the default of the conductor would not relieve the passenger from the consequences of his own reckless acts.

Atchison, T. & S. F. R. Co. v. Hughes, 55 Kan. 495, 40 Pac. 919; Rothstein v. Pennsylvania R. Co. 171 Pa. 621, 33 Atl. 379.

A passenger who steps from a moving train to avoid being carried past his destination is guilty of negligence *per se*.

Barnett v. East Tennessee, V. & G. R. Co. 87 Ga. 766, 13 S. E. 904; Illinois C. R. Co. Able, 59 Ill. 131; Illinois C. R. Co. v. Chambers, 71 Ill. 519; Illinois C. R. Co. v. Lutz, 84 Ill. 598; Dougherty v. Chicago, B. & Q. R. Co. 86 Ill. 467; Reibel v. Cincinnati, I. St. L. & C. R. Co. 114 Ind. 476, 17 N. E. 107; Walker v. Vicksburg, S. & P. R. Co. 41 La. Ann. 795, 7 L.R.A. 111, 17 Am. St. Rep. 417, 6 So. 916; Rothstein v. Pennsylvania R. Co. 171 Pa. 620, 33 Atl. 379; Olson v. Chicago, M. & St. P. R. Co. 94 Minn. 241, 102 N. W. 449; Lynch v. Interurban Street R. Co. 88 N. Y. Supp. 935; Walters v. Chicago & N. W. R. Co. 113 Wis. 367, 89 N. W. 140; Evansville & T. H. R. Co. v. Athon, 6 Ind. App. 295, 51 Am. St. Rep. 303, 33 N. E. 469; Boulfrois v. United Traction Co. 210 Pa. 263, 105 Am. St. Rep. 809, 59 Atl. 1007, 2 A. & E. Ann. Cas. 938; Ohio v. Metropolitan Street R. Co. 125 Mo. App. 710, 103 S. W. 142; Armstrong v. Portland R. Co. 52 Or. 437, 97 Pac. 715; Atchison, T. & S. F. R. Co. v. Hughes, *supra*; Chicago, B. & Q. R. Co. v. Landauer, 36 Neb. 659, 54 N. W. 976; La Pointe v. Boston & M. R. Co. 179 Mass. 535, 61 N. E. 142; Jacob v. Flint & P. M. R. Co. 105 Mich. 450, 63 N. W. 502; Lake Shore & M. S. R. Co. v. Bangs, 47 Mich. 470, 11 N. W. 276; Toledo, St. L. & K. C. R. Co. v. Wingate, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477; O'Toole v. Pittsburgh & L. E. R. Co. 158 Pa. 99, 22 L.R.A. 606, 38 Am. St. Rep. 830, 27 Atl. 737; Jewell v. Chicago, St. P. & M. R. Co. 54 Wis. 610, 41 Am. Rep. 63, 12 N. W. 83; Louisville & N. R. Co. v. Lee, 97 Ala. 325, 12 So. 48.

Messrs. W. W. Redmond and Theodore H. Polack, for appellee:

The boarding or alighting from a moving car is not, under all circumstances, contributory negligence.

Atchison, T. & S. F. R. Co. v. Holloway, 28 L.R.A.(N.S.)

71 Kan. 4, 114 Am. St. Rep. 462, 80 Pac. 31; New York, P. & N. R. Co. v. Coulbourn, 69 Md. 360, 1 L.R.A. 541, 9 Am. St. Rep. 430, 16 Atl. 209; Louisville & N. R. Co. v. Crunk, 119 Ind. 542, 12 Am. St. Rep. 443, 21 N. E. 31; Union P. R. Co. v. Brown, 73 Kan. 237, 84 Pac. 1026.

It was clearly a question for the jury to determine, whether plaintiff was in the exercise of ordinary care when he obeyed the order of the conductor and attempted to alight from the train.

Atchison, T. & S. F. R. Co. v. Hughes, 55 Kan. 500, 40 Pac. 919; Pennsylvania R. Co. v. Lyons, 129 Pa. 113, 15 Am. St. Rep. 701, 18 Atl. 750; Pennsylvania R. Co. v. Kilgore, 32 Pa. 292, 72 Am. Dec. 787.

Johnston, Ch. J., delivered the opinion of the court:

This litigation, instituted to recover for injuries sustained by a passenger while alighting from a train, is here for a second review. Missouri P. R. Co. v. Walters, 78 Kan. 39, 96 Pac. 346. In his petition, S. F. Walters alleged that on July 25, 1903, he was a passenger on a train of the Missouri Pacific Railway Company due to arrive at Bigelow at about 4 o'clock in the morning, and as the train approached his destination the conductor in charge of the train came into the car in which he was riding, and directed him to go out upon the platform of the car and down upon the lower step; and that, relying upon the skill and prudence of the conductor, he did so, and in obedience to the order of the conductor he undertook to alight from the train believing it safe to do so; that just as he was about to alight the conductor "signaled the train to proceed, and, without any notice to plaintiff, said train suddenly jerked forward, and, in consequence of the aforesaid acts of the conductor, plaintiff was jerked and thrown violently from the train, by reason whereof, and the jolt and shock incident thereto, the plaintiff sustained severe injuries to his spine and further injury to his person and nerves in general as to produce hydrocele, by reason of which, and the said injury to his spine, plaintiff has been greatly and permanently injured." At the trial Walters offered testimony tending to show that on the night in question he was a passenger for hire on the train of the railway company, and that as he approached the station the conductor came in and told him: "This is Bigelow! Come on!" That he followed the conductor out of the car, and that the conductor directed him to "get down there on that step, and don't step straight out, but step with the train, so it won't hurt you, and be quick about it." He stated that the night

was cloudy and somewhat dark, and when the coach had passed the depot about 60 feet he stepped off the train, and sustained the injuries for which the action was brought. A witness who came to get the mail sack thrown from the same train testifies that, as the train passed the station, a passenger was standing on the steps and the conductor was above him with a lantern in his hand; that he heard the conductor tell the passenger, who turned out to be Walters, to face the way the train was going or he would fall. The witness said the train did not stop, but was moving at the rate of about 6 miles an hour, and also that the conductor gave the "high-ball" or go-ahead sign over the head of the passenger, who was standing on the lower step. There is also testimony that on the return trip the conductor inquired of the mail carrier if Walters was badly hurt, and that he also made inquiry as to the age and family of Walters. Testimony of a contrary nature was given by the train men; but the general verdict of the jury was in favor of Walters, and with it were returned answers to a number of special questions that were submitted.

It is contended by appellant that the court should have directed a verdict in favor of the railway company. It was the duty of the railway company to exercise the highest degree of care which was reasonably practical in transporting this passenger, and also in setting him down at his destination, and the failure of the company to stop the train long enough to enable him to alight with safety, as the jury found in this case, is culpable negligence. *Atchison, T. & S. F. R. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919; *Missouri P. R. Co. v. Walters*, supra; *Chicago, R. I. & P. R. Co. v. Wimmer*, 72 Kan. 566, 4 L.R.A.(N.S.) 140, 84 Pac. 378, 7 A. & E. Ann. Cas. 756.

It is insisted, however, that, as Walters voluntarily alighted from the train when it was in motion, the trial court should have held as a matter of law that his own negligence barred a recovery. There is, of course, some danger in getting off a moving train, however slow the rate of speed; but it cannot be said as a matter of law that every case of boarding or alighting from a train in motion, without regard to the speed or the circumstances under which it is done, renders the passenger guilty of contributory negligence. In *Atchison, T. & S. F. R. Co. v. McCandliss*, 33 Kan. 366, 6 Pac. 587, it was said that "stepping from a train of cars in motion to a stationary platform, or to the stationary ground, which is more dangerous, is not always culpably dangerous and is not negligence *per se*." In *Atchison, T. & S. F. R. Co. v. Hughes*, supra, 28 L.R.A.(N.S.)

where the conductor failed to bring his train to a stop, but directed the passenger to alight while it was in motion, the contention was made that the attempt to alight, with or without the invitation or order of the conductor, was contributory negligence. It was there said: "It is not contributory negligence *per se* for a passenger to leave a train which is in motion. Of course, a passenger must exercise ordinary care, and if he voluntarily places himself in a perilous position, and incurs a danger so obvious that an ordinarily prudent man would not encounter it, there can be no recovery. Whether the act of Hughes in leaving the train while it was in motion constitutes contributory negligence barring a recovery depends upon whether the danger was so patent that a prudent man under the circumstances would not have made the attempt. We think it was clearly a question of fact for the jury to determine." Along the same line, see *Southern Kansas R. Co. v. Sanford*, 45 Kan. 372, 11 L.R.A. 432, 25 Pac. 891; *Atchison, T. & S. F. R. Co. v. Loewe*, 69 Kan. 843, 74 Pac. 234; *Atchison, T. & S. F. R. Co. v. Holloway*, 71 Kan. 1, 114 Am. St. Rep. 462, 80 Pac. 31. Of course, exceptional cases may be surmised of a passenger jumping from a train where the speed was so great, the danger so obvious, and the circumstances such, that a court would be justified in directing a verdict against the passenger. The present case does not fall within that class. When Walters approached Bigelow and was escorted by the conductor to the platform of the coach, he had a right to assume that the train would be brought to a stop. When he went down upon the lower step of the coach, he must have known that the train was still in motion; but it appears that it was then going at the speed of about 3 to 4 miles an hour. Passing by the station without stopping, and carrying him away from his home, would naturally have a tendency to disturb him. At that time the conductor advised him as to the manner of alighting, and also gave him the imperative direction to get off the train and do it quickly. In view of these circumstances, including the speed of the train and the direction of the conductor to alight, the matter of contributory negligence was a fair question for the determination of the jury. *Cumberland Valley R. Co. v. Mangans*, 61 Md. 53, 48 Am. Rep. 88; *New York, P. & N. R. Co. v. Coulbourn*, 69 Md. 360, 1 L.R.A. 541, 9 Am. St. Rep. 430, 16 Atl. 208; *Louisville & N. R. Co. v. Crunk*, 119 Ind. 543, 12 Am. St. Rep. 443, 21 N. E. 31; *Pennsylvania R. Co. v. Lyons*, 129 Pa. 113, 15 Am. St. Rep. 701, 18 Atl. 759; *Carr v. Eel River & E. R. Co.* 21 L.R.A. 354, and note (98

Cal. 366, 33 Pac. 213); 3 Thomp. Neg. § 3027; 6 Cyc. Law & Proc. p. 643.

It is argued that, whatever may be the true rule on this question, the instructions given by the trial court constituted the law of the case, which the jury were bound to observe, and that the jury in their findings went contrary to the instructions, and therefore there should be a reversal. In one of its instructions the court told the jury in effect that, if an ordinarily careful and prudent person would not, under the circumstances which surrounded Walters when he alighted from the train at the time of the injury, have stepped from the train while it was in motion, the plaintiff was necessarily negligent and cannot recover. In a later instruction the jury were told: "I instruct you as a matter of law that it is contributory negligence for a passenger on a train to undertake to alight from it in the darkness of the night while it is in motion at the rate of from 2 to 6 miles an hour, without any light to guide his steps or movements." The jury found that the train was in motion when Walters alighted, and that it was moving at a speed of from 3 to 4 miles an hour, and it is therefore argued that the finding necessarily violated the instruction of the court. Leaving out of the question the correctness of the instruction quoted, it will be seen that it clearly involves other considerations than that the train was in motion and moving at the rate of speed mentioned by the court. It will be observed, too, that the instruction includes the darkness of the night when the passenger alighted, and when there was no light to guide his steps or movements. While Walters alighted from the train on the morning of July 26th between half past 3 and 4 o'clock, it is also found by the jury that it was not then so dark as to prevent Walters from seeing where he was stepping when he alighted. As the element of darkness is lacking, the argument of appellant that the jury disregarded the instruction is not good.

It is further contended that the jury must have violated an instruction to the effect that the direction or advice of the conductor to the passenger to alight from the train while it was in motion is not sufficient reason to justify him in doing so. That single circumstance may not be sufficient to justify a passenger in stepping from a moving train. The speed might be so great, the danger so palpable, and the surrounding circumstances such, that it would be gross negligence to jump from the train even upon the invitation or direction of the conductor. As we have seen, other circumstances entered into the consideration in this case, and hence it cannot be said that the verdict violated the

instruction of the court in this particular.

Another point of contention in the case was whether the hydrocele from which Walters was suffering resulted from the injury received when he alighted from the train, or from an earlier injury which was inflicted while he was working as a section hand for the railway company, and for which settlement had been made and compensation paid. The court instructed the jury, in substance, that Walters could receive nothing because of that injury or any condition resulting from it. The jury were asked the question whether, on alighting from the train, Walters sustained an injury called "hydrocele," and whether it was originally so caused, or was a recurrence of a former complaint. The answer of the jury was "recurrence." The appellant infers from this answer that the jury awarded damages for the previous injury, for which compensation had been made. Of course, no recovery could be had for that injury; but if Walters had been cured of the disease of hydrocele resulting from the first injury, as the physicians of the railway company had decided when he was discharged from the hospital, and the later injury brought on the same disease or condition, no reason is seen why he could not recover for the consequences of the injury. Apart from that consideration, the jury found that other injuries than hydrocele resulted from the fall, and that, in addition to this disease, there were sprains of the back and the hips. A witness for the railway company who is a physician testified that, when Walters returned to the hospital for treatment after the accident, he was suffering from a sprain of the back and left hip, and that he then complained that the hydrocele had returned, but that the witness found no fluid in the sac and could discover no evidence of hydrocele. It cannot be said that the injury for which appellee recovered was the earlier one, for which the company had settled, nor that it was not the one which resulted from falling from the train. Appellant contends, also, that hydrocele is a disease which may be easily and permanently cured, and that the testimony shows that, if Walters had submitted to a slight surgical operation, he might have got rid of the disease. The court told the jury, in substance, that if, by a reasonable and safe operation, he might have been restored to health, and neglected or refused to submit to it, he would not be entitled to recover as for a permanent disability, but could only recover for the losses sustained up to the time reasonably necessary to perform the operation and to bring about

his recovery. It was not an undisputed fact in the case that the hydrocele with which Walters was afflicted after falling from the train could have been removed by a surgical operation, nor that he could safely have submitted to an operation. A physician who examined him testified at length as to his condition, and stated that an operation could not have been performed with an assurance of a cure; that radical treatment was not advisable and might terminate fatally. On the testimony it cannot be held that the award of damages is excessive, and we discover no error in the proceedings which justifies a reversal. The judgment is affirmed.

All the Justices concur.

Petition for rehearing denied.

CALIFORNIA SUPREME COURT.

JOHN ENGBRETSSEN, Appt.,

v.

JOHN H. GAY et al., Respts.

(— Cal. —, 109 Pac. 880.)

Special assessment — allowing attorney's fee against delinquent.

The legislature may allow an attorney's fee against one whose delinquency makes necessary a proceeding to enforce a special assessment for public improvements against his property, although no such fee is allowed in his favor.

(June 13, 1910.)

APPEAL by plaintiff from a judgment of the Superior Court for San Diego County in his favor for a less sum than was demanded in an action brought to establish a lien on certain real estate to the amount of a certain assessment for street improvements and costs. Modified.

The facts are stated in the opinion.

Messrs. Haines & Haines, for appellant.

The provision for allowance to the successful plaintiff of attorney's fees is valid.

Gillis v. Cleveland, 87 Cal. 214, 25 Pac. 351; Hughes v. Alsip, 112 Cal. 591, 44 Pac. 1027; Reid v. Clay, 134 Cal. 215, 66 Pac. 262; Brown v. Central Bermudez Co. 162 Ind. 452, 69 N. E. 150; Humes v. Missouri P. R. Co. 82 Mo. 221, 52 Am. Rep. 369; Perkins v. St. Louis, I. M. & S. R. Co. 103 Mo. 52, 11 L.R.A. 426, 15 S. W. 320; Briggs v. St. Louis & S. F. R. Co. 111 Mo. 168, 20 S. W. 32; Peoria, D. & E. R. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619; Illinois C. R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618; Kansas P. R. Co. v. Mower, 16 Kan. 573; Missouri River, Ft. S. & G. R. Co. v. Shir-28 L.R.A.(N.S.)

ley, 20 Kan. 660; Jacksonville, T. & K. W. R. Co. v. Prior, 34 Fla. 271, 15 So. 760; Dow v. Beidelman, 49 Ark. 455, 5 S. W. 718; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Johnson v. Chicago, M. & St. P. R. Co. 29 Minn. 425, 13 N. W. 673.

Mr. L. L. Boone for respondents.

Angellotti, J., delivered the opinion of the court:

This is an appeal by plaintiff from a portion of the same judgment as is involved in *Engbretsen v. Gay* (L. A. 2,478) 109 Pac. 879, this day decided, a judgment sustaining plaintiff's claim of a lien on property of defendant to secure payment of the amount of an assessment for street improvements, and directing a sale of such property to satisfy such assessment with

Note. — Validity of statutory provision for attorney's fees in proceedings involving collection of taxes or special assessments.

The general question as to the validity of statutory provisions for attorney's fees was considered in the note to *Builders' Supply Depot v. O'Connor*, 17 L.R.A.(N.S.) 909. As is therein shown, there has been much conflict upon that general question. However, there is no conflict upon the question considered in this note, the courts being agreed that the legislature may impose liability for attorney's fees upon delinquent debtors of the state or its agencies.

The legislature has the undoubted right to prescribe what costs shall be taxed in a case, and when an unsuccessful attempt is made to resist and defeat the collection of a just debt due the state, the general assembly may lawfully visit upon the defendant, not only the costs usually taxed, but further costs by way of a fee to the attorney who represents the state. *United States Electric Power & Light Co. v. State*, 79 Md. 63, 28 Atl. 768.

So, it may compel delinquents to pay attorney fees in actions for the collection of taxes. *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521.

A statute passed in pursuance of such power is purely remedial, and is therefore not open to the objection that it creates a new liability and is retrospective in its operation. *State ex rel. Rosenblatt v. Kerr*, 8 Mo. App. 125.

So, a statute is constitutional which provides that the attorney who represents a tax collector in all proceedings for the reduction of assessments and the collection of taxes, and in all injunction proceedings wherein the tax collector is sought to be restrained from collecting taxes, shall receive a compensation of 10 per cent on the amount collected. *State ex rel. Stempel v. New Orleans*, 105 La. 768, 30 So. 97; *Methodist Episcopal Church, South v. New Or-*

interest and costs. While otherwise in favor of plaintiff, this judgment denied his right to recover the sum of \$15 in addition to the taxable costs, as an attorney fee, and disallowed the same. Plaintiff's appeal is from so much of the judgment as denies him a recovery of such attorney fee.

Section 12 of the act relating to street improvements, the act of March 18, 1885 (Stat. 1885, chap. 153), as amended by Stat. 1889, chap. 151, § 8, in terms provides that, "in all cases of recovery under the provisions of this act, the plaintiff shall recover the sum of \$15 in addition to the taxable costs as attorneys' fees." The theory upon which the lower court disallowed plaintiff's claim was that this provision is invalid under the doctrine of Builders' Supply Depot v. O'Connor, 150 Cal. 265, 17 L.R.A.(N.S.) 909, 119 Am. St. Rep. 193, 88 Pac. 982, 11 A. & E. Ann. Cas. 712. In that case it was held, in regard to liens of mechanics and others on real property for labor or materials furnished in improving the same (Code Civ. Proc. §§ 1183-1203a), that the statutory provision for the allowance of reasonable attorney's fees to each lien claimant whose lien is established (Code Civ. Proc. § 1195) is void, as violative of the provision of the Federal Constitution which guarantees to every person the equal protection of the law, and of the provisions of our own Constitution "which provide that general laws shall be uniform, prohibit special laws, and declare the in-

alienable rights of all men of acquiring, possessing, and protecting property." That ruling has been followed in *Mannix v. Tryon*, 152 Cal. 31, 41, 91 Pac. 983, and *Merced Lumber Co. v. Bruschi*, 152 Cal. 372, 375, 92 Pac. 844, and must now be taken as settled law in this state. The reasoning upon which this conclusion is based in the first case cited (*Builders' Supply Depot v. O'Connor*, supra) was that of the United States Supreme Court in *Gulf C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, wherein a statute of the state of Texas gave an attorney fee of \$10 to any person having a valid bona fide claim against a railroad corporation not exceeding \$50, for personal services rendered or labor done, or for damages, etc. The court said that the effect of this statute was simply to impose a penalty upon railroad corporations for failure to pay certain debts, while individuals or other corporations guilty of similar delinquencies were not thus punished. It was declared that under this statute the railroad corporations were not treated as other debtors "or equally with other debtors;" that they could not appeal to the courts as other litigants under like conditions and with like protection; that, if the litigation terminated adversely to them, they were mulcted in the attorney's fees of the successful plaintiff, while, if successful, they recovered no attorney's fees; that they are therefore discriminated against, and do not stand

leaves, 107 La. 611, 32 So. 101; *Globe Lumber Co. v. Clement*, 110 La. 438, 34 So. 595.

Such statute does not constitute a denial of the equal protection of the laws, and is not obnoxious to a provision of the state Constitution declaring that all courts shall be open, and that every person shall have for injury done to him adequate remedy by due process of law, and without denial or partiality. *Liquidating Comrs. v. Marrero*, 106 La. 130, 30 So. 305.

So, too, a statute is constitutional which provides that if a property owner refuses to pay a special assessment made against his property, the contractor may sue and recover, in addition to the assessment, a reasonable attorney's fee. *Pittsburgh, C. C. & St. L. R. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741, 11 A. & E. Ann. Cas. 808.

For legislative power so to provide can be upheld upon the ground that an assessment is laid by virtue of the state's power to tax, and that the state may impose a penalty upon the property owner for delay in discharging his obligation. *Brown v. Central Bermudez Co.* 162 Ind. 452, 69 N. E. 150.

Such a provision does not make the attorney's fees a part of the assessment, but pertains to the remedy. *Pittsburgh, C. C. & St. L. R. Co. v. Fish*, 158 Ind. 525, 63 28 L.R.A.(N.S.)

N. E. 454. And therefore it cannot be regarded as unconstitutionally invading any vested right because it is made to extend to assessments levied before its enactment. *Dowell v. Talbot Pav. Co.* 138 Ind. 675, 38 N. E. 389; *Lake Erie & W. R. Co. v. Walters*, 13 Ind. App. 275, 41 N. E. 465.

In some cases the courts have allowed attorney's fees in actions for the enforcement of special assessments, without passing upon the question of the validity of the statute in pursuance of which they were allowed: *School Dist. v. Board of Improvement*, 65 Ark. 343, 46 S. W. 418; *Gillis v. Cleveland*, 87 Cal. 214, 25 Pac. 351; *Hughes v. Alsip*, 112 Cal. 587, 44 Pac. 1027; *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262; *McCaleb v. Dreyfus*, 156 Cal. 204, 103 Pac. 924; *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879; *Palmer v. Nolting*, 13 Ind. App. 581; 41 N. E. 1045; *Tuttle v. Polk*, 84 Iowa, 12, 50 N. W. 38; *Montesano v. Blair*, 12 Wash. 188, 40 Pac. 731.

So, attorney's fees in suits for the enforcement of taxes have been allowed in obedience to statutes whose validity was not passed upon. *Files v. Fuller*, 44 Ark. 273; *State ex rel. Bauer v. Edwards*, 144 Mo. 467, 46 S. W. 160; *Harrison v. Johnston*, 109 Tenn. 245, 70 S. W. 414 (inheritance tax).

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equal before the law. The Texas statute was therefore held invalid. This court said, in *Builders' Supply Depot v. O'Connor*, supra: "A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions, where, as in the statute here in question, the distinction is not founded on constitutional or natural differences, is clearly violative of the constitutional provisions above noticed." There is, however, nothing in the opinion in *Gulf, C. & S. F. R. Co. v. Ellis*, supra, or in our own *Builders' Supply Depot v. O'Connor*, supra, to suggest that attorney's fees may not be allowed a successful plaintiff in certain classes of cases, even though no such allowance be made to the defendant in the event that he prevails. The right to classify in this respect, as long as the classification is "based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted," was conceded by the opinion in *Gulf, C. & S. F. R. Co. v. Ellis*, supra (see *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609), and is recognized by all the authorities. The difficulty in the Texas case was that there was no such difference, and the same was held to be true by this court in regard to our mechanics' lien law provision. In *Atchison, T. & S. F. R. Co. v. Matthews*, supra, the United States Supreme Court upheld a statute of the state of Kansas allowing a reasonable attorney's fee to a successful plaintiff in an action against a railroad company for damages by fire caused by the operating of the railroad, on the ground that the same was a reasonable regulation in the nature of a police regulation, to secure the utmost care on the part of railroad companies to prevent the escape of fire, and not simply a provision to secure the payment of debts. Upon the same principle, the United States Supreme Court has sustained a statute imposing a penalty on railroad corporations of \$1.25 per day for failure to pay a laborer what is due him upon discharge, the statute being held to be a reasonable regulation for the protection of servants and employees of railroads (*St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419), and a statute imposing a penalty of \$50 on a common carrier who failed to adjust and pay a valid claim for damages for loss of property within a stated time, it being held that the design was not to penalize the carrier for the nonpayment of a debt, but that the statute was a reasonable regulation to bring about prompt settlement of such

claims (*Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28.) Decisions of state courts along the same lines are numerous. In *Illinois C. R. Co. v. Crider*, 91 Tenn. 489, 19 S. W. 618, an act imposing on unfenced railroads absolute liability for injuries done to live stock by their moving trains, and making them liable for a reasonable attorney's fee in any action brought to recover the amount appraised as due the plaintiff therefor, where the plaintiff recovers the amount of the appraisement, was upheld. The act was held to be a valid exercise of the police power of the state; the object thereof being to compel the inclosure of the track in such manner as to prevent live stock going on the road. As to the provision for an attorney's fee, objection was made that it was the imposition of a burden upon one class of litigants in favor of another, and a violation of the constitutional rule requiring equality of right, privilege, and exemption. To these objections the court said, through Judge Lurton, that they overlooked the fact that the legislation is intended to compel railroad companies to fence in their tracks, and that the state having the right, in the exercise of its police powers, to compel all railroad companies to fence in their tracks, might enforce such policy, not only by making the offending company liable to all sustaining injury by reason of their neglect, but, blending public and private interests, by permitting a recovery in excess of actual damages, by way of punitive damages and reasonable attorney's fees. In *Terre Haute & L. R. Co. v. Salmon*, 161 Ind. 131, 67 N. E. 918, a statute allowed an owner to fence a railroad right of way where the railroad company refused on proper notice to do so, and to recover the cost, with reasonable attorney fee. It was held that the legislature had the right, in the exercise of its police powers, to prescribe this duty and impose penalties for failure to perform, in shape of double actual damages, double costs, attorney fee, and absolute liability in case of injury to animals. The court said that the attorney fee was in the nature of a penalty for damages, imposed by the legislature as a punishment for the neglect and wilful failure of the railroad company to erect said fence as required by the statute, and to compel it to construct the same. See also *Humes v. Missouri P. R. Co.* 82 Mo. 221, 52 Am. Rep. 369; *Perkins v. St. Louis, I. M. & S. R. Co.* 103 Mo. 52, 11 L.R.A. 426, 15 S. W. 320; *Peoria, D. & E. R. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *Dow v. Beidelman*, 49 Ark. 455, 5 S. W. 718, in which the attorney fee provision was upheld as a part of the penalty imposed for noncompliance with the

duty imposed; Jacksonville, T. & K. W. R. Co. v. Prior, 34 Fla. 271, 15 So. 760; note to Dell v. Marvin, 79 Am. St. Rep. 178.

More closely in point, but depending on the same general principle, are decisions upholding provisions for attorney's fees in actions to recover taxes, the validity of which has apparently never been doubted by the courts. In *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521, an action for the recovery of taxes, it was held that a provision of a statute compelling a party delinquent in payment of taxes, if sued, to pay costs and a percentage by way of an attorney fee, in addition to the tax, was not unconstitutional. In *State ex rel. Rosenblatt v. Kerr*, 8 Mo. App. 125, such a provision was upheld; the court saying that it was purely remedial, and stands upon a like footing with any other provision for compelling the delinquent to bear the expenses incident to an enforcement of the state's claim for taxes. See also *United States Electric Power & Light Co. v. State*, 79 Md. 63, 72, 28 Atl. 708. It is the legal duty of every person liable for taxes to pay the same when due, and the power of the state to impose upon the taxpayer penalties for noncompliance with this duty, and such costs as are reasonably incurred in the enforcement of the same, including reasonable attorney's fees, cannot be doubted.

There is no distinction in principle in this regard between ordinary taxes and local assessments for improvements, under such statutes as our street improvement act. The assessment, it is true, is one in favor of the contractor to whom the contract for the improvement has been let by the public authorities, but it is one laid by virtue of the power of the state to tax, and the contractor may properly be regarded as the agent of the state in the matter of the enforcement of the tax against the assessed property. The obligation resting on the property assessed to answer for this tax is as clear and positive as is the duty of a taxpayer to pay the ordinary tax. The nature of the proceedings is such that the expense of collecting the tax on property delinquent, if not recoverable against such property in the proceeding to enforce the tax, would fall in part on those who voluntarily pay their assessments, since contractors, in bidding upon street work, would be compelled to include in their estimates an additional amount sufficient to indemnify them against the probable further expense in this regard. Such expense should equitably be borne only by the property as to which such proceedings are rendered necessary by the delinquency of the owners. It would seem that the legislature should have the power to provide for the payment of such additional

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expense by the property whose owners are responsible therefor. While the precise question has not been presented for determination many times, such rulings as have been made sustain the validity of such a provision. It is declared in *Page & Jones, Taxation by Assessment*, that, if the statute so provides, a penalty may be charged for failure to pay an assessment when due, and an attorney fee may be recovered in a suit to enforce an assessment. §§ 108, 1109, and 1110. The question was determined by the supreme court of Indiana in favor of such a provision for attorney's fees, in *Brown v. Central Bermudez Co.* 162 Ind. 452, 69 N. E. 150; the court saying in reply to a claim that the provision was unconstitutional: "A street assessment is laid by virtue of the power of the state to tax, and we think that a statute providing for the allowance of an attorney fee on foreclosure in such a case can be upheld on the ground that the state may provide for a penalty if the delay of the property owner to discharge such an obligation renders it necessary to commence suit. The enactment upon this subject may be compared to the provisions of statutes made for the benefit of purchasers at tax sale." See also *Pittsburgh, C. C. & St. L. R. Co. v. Taber*, 168 Ind. 419, 422, 77 N. E. 741, 11 A. & E. Ann. Cas. 808.

We are of the opinion that the provision for an attorney fee in this class of cases is not in violation of any constitutional provision, Federal or state, and that the judgment is erroneous in not including the allowance of \$15 asked by plaintiff thereunder.

So much of the judgment of the court below as refuses plaintiff an allowance for attorney fee is reversed, with directions to the court below to modify its judgment by incorporating a provision allowing such a fee as provided by the statute.

We concur: Shaw, J.; Sloss, J.

LOUISIANA SUPREME COURT.

JOHN THIEL, Appt.,

v.

HENRY BUTKER et al.

(125 La. 473, 51 So. 500.)

Note — purchase after maturity — rights.

1. Plaintiff is the holder after maturity and for value of a promissory note, executed by one of the defendants, who gave to his attorney, Maloney, money to pay the note at date of maturity. The attorney paid the note, and without authority sold it to plaintiff, who collected interest from Maloney, who also extended the time of payment for

Headnotes by BREAUX, Ch. J.

one year. When plaintiff acquired it, the note was past due and the attorney could not give it vitality as a negotiable instrument by indorsing on it an extension of the time of payment. The note bore notice of its dishonor on its face sufficient to place anyone on his guard.

Same — acts of agent.

2. The attorney had no authority to cut off the equities by attempting to extend the time of the note; for his authority was merely to pay the note, and his acts beyond this cannot give negotiability to the instrument, already matured. The plaintiff, who purchased it after maturity, acquired merely the rights of a transferee, which are not greater than those of the transferrer, and, as the one from whom he acquired the note had no rights against the defendants, the transferee, the plaintiff, can assert none.

Same — satisfaction — reissue by agent — liability of maker.

3. Where a person places an amount in the hands of an attorney for the purpose of paying a note, and, after so paying, the attorney reissues it without authority, thereby committing a fraud, the maker cannot be held for the payment of the dishonored paper, when such maker has acted in good faith.

Same — commercial law — application.

4. The principle that one who puts another in a position where he may perpetrate a wrong must suffer for the consequent loss has no application to the present case; for the strict rule of the commercial law, adopted in the interest of commerce, must prevail. The loss must fall on the one who trusted the attorney and accepted the note after maturity.

(January 17, 1910.)

A PPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans, Division "A," in defendants' favor in an action brought to recover the amount alleged to be due on a certain promissory note. Affirmed.

The facts are stated in the opinion.

Mr. J. Zach Spearing for appellant.

Messrs. G. G. Kronenberger and J. C. Henriques for appellees.

Breaux, Ch. J., delivered the opinion of the court:

The plaintiff claims that he is the owner for consideration of a promissory note made

by one of the defendants, bearing date November 19, 1902, to his own order and by him indorsed, for the sum of \$2,000, payable in one year, identified by an act of sale and mortgage resting on property described in the petition.

The act imports confession of judgment.

One of the defendants sold this property to the other on May 4, 1906. At the date of the sale one of the defendants assumed this mortgage and interest and fee of attorney to be paid as stipulated in the act of sale.

Plaintiff sued for a writ of seizure and sale on the note and mortgage to pay note, interest, cost, and fee.

The defendant, who had assumed payment of this note at the time that he purchased the property, as before mentioned, sued for an injunction on the ground that the note had been taken up and paid by his attorney with money which he furnished on November 19, 1906.

The plaintiff in the proceedings for foreclosure (made defendant in the petition for an injunction) declared in his answer to the injunction that he in good faith acquired the note in open market.

Going back to the origin of the case, it appears that the plaintiff was informed by an acquaintance that the attorney before referred to as the attorney of one of the defendants had a \$2,300 note for sale, whereupon plaintiff handed this acquaintance a check for the amount. He, the acquaintance, repaired to this attorney's office, took up this note, and handed it to plaintiff on his return.

Instead of being a \$2,300 note, it was a \$2,000 note, but the attorney had made his own note for the additional \$300, which the acquaintance accepted subject to the approval of plaintiff.

The attorney's reputation at that time was good. The plaintiff accepted both notes, as he had no reason at that time to suspect the dishonesty of the attorney, who was also a notary public.

Plaintiff collected interest on this note from the attorney and notary, who indorsed the amount of the interest on the note and extended payment one year.

The plaintiff dealt exclusively with the attorney, and did not know the defendant

Note. — Effect of fraudulent reissue of bill or note which has been paid.

The conclusion reached in the above decision finds specific support in one of the cases cited therein,—State ex rel. Legier v. Sutherland, 111 La. 382, 35 So. 608, in which recovery was refused upon a note which was, after payment, sold by the agent of the maker without authority.

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In Weil v. Enterprise Ginnery & Mfg. Co. 42 La. Ann. 492, 7 So. 622, the other case cited by the court in THIEL v. BUTKER, there was no question of fraudulent reissue of a note by an agent, the specific holding being that payment of a note secured by a mortgage, by one not bound for it and who had no interest in discharging it, would not subrogate him to the rights of the party to whom he paid.

J. A. G.

Perfumo in the transaction at all save that, when the plaintiff took up the note, he was informed by the attorney that Perfumo had assumed the payment. Plaintiff knew nothing of Henry Butker (the other defendant) in this transaction. Butker was the vendor to Perfumo.

On the day that the note fell due, on November 19, 1906, it was in bank for collection for account of Robert E. Rusha.

Someone, whom neither the note clerk of the bank or anyone else could identify, called at the bank, and asked that it be not stamped "Paid." The bank officer telephoned to the holder, Rusha, who replied to collect the amount due, and turn over the note without the stamp "Paid."

The judge *a quo* took it for granted that the person calling and who paid was either Maloney or someone acting for him.

Plaintiff, Thiel, does not contest the judge's conclusion in that respect.

After Maloney or his agent had paid this amount to the bank and had taken up the note, it was reissued by Maloney for his own account. Maloney wrote to Thiel, the plaintiff, that he had examined the title of the property upon which the mortgage rested, and that he guaranteed its validity.

The evidence is that Perfumo had entire confidence in Maloney and intrusted him with the amount with which he took up the note.

Maloney's scheme in this case was to get from Perfumo, the debtor, an amount necessary to pay the note, which he did not use in paying the note, but in taking it up for his own account.

At the time that Maloney took up the note for his own account it was past due, and it therefore was dishonored paper, and it was not in the power of Maloney to give it vitality as a negotiable instrument by indorsing on it an extension of time for payment. The note bore notice upon its face because of its dishonor sufficient to place anyone to whom offered on his guard.

It is true that such paper may be transferred, though not negotiable, but those who take it without inquiry of the maker or the indorser or surety, whom they propose to hold (whether the paper is good and valid), have no recourse in case it has been paid. The transferee after maturity only acquires the right of the transferor. 1 Dan. Neg. Inst. p. 699.

It is subject to all the equities existing prior to the transfer.

This note, for the purpose of illustration, may be compared to a note after maturity that has been stolen or lost or taken up by a bankrupt who has no authority to take up a note. The transferee has no greater right than the thief, the finder, or the bankrupt. 28 L.R.A. (N.S.)

They having no right, the last holder has none.

Here Maloney had no right to this note. He could transfer none to Thiel.

Very much the same principle was laid down in *Weil v. Enterprise Ginney & Mfg. Co.* 42 La. Ann. 492, 7 So. 622, and decisions cited therein.

It may be said further, as relates to the interest indorsed on the note, that he had no authority to receive interest and cut off the equities by attempting to grant time. His only authority was to pay the note. *State ex rel. Legier v. Sutherland*, 111 La. 382, 35 So. 608.

The principle that one must suffer the loss who places it in the power of the wrongdoer to commit a wrong has no application. We are governed by the strict rule of the commercial law adopted in the interest of commerce. Neither the maker nor the original payee, Butker, can be held. The latter could instruct the banker to receive the amount without indorsing or marking the note paid. The fraud committed afterward does not render him liable for a return of the amount he received.

There is no question of bad faith on the part of anyone, plaintiff or defendants. If a person were to act in bad faith and render it possible to commit a wrong on a third person, then the rule would have application. But where a person in good faith places an amount in the hands of an attorney for a particular purpose, and the attorney goes entirely beyond the scope of his authority, and commits a fraud by taking up a note and reissuing it without authority, for which he had paid with the money he held to pay the note, this maker cannot be held as one bound for the payment of the dishonored paper. The attorney's authority was to pay the note. He had money in his hand for that purpose. He could not give it vitality by appropriating it after maturity. The loss falls upon the one who chose to trust him by accepting the past-due note from him.

It was plaintiff's misfortune to have taken the word of Maloney after maturity, even to the extent of accepting his guaranty of the paper in order, it does appear, to provide against any possible defect in the title to the property on which the mortgage rested which secured the note.

The hardship is not one which we can remedy without disregarding one of the plain principles of the commercial law.

For reasons assigned the judgment is affirmed.

Petition for rehearing denied February 14, 1910.

UNITED STATES SUPREME COURT.

MATILDA VON ELLERT SISTARE, Plff.
in Err.,
v.

HORACE RANDALL SISTARE.

(218 U. S. 1, 54 L. ed. 905, 30 Sup. Ct. Rep. 682.)

Foreign judgment — alimony — full faith and credit.

1. A decree for the future payment of alimony is, as to instalments past due and unpaid, within the protection of the full faith and credit clause of the Federal Constitution, provided that no modification of the decree was made prior to the maturity of such instalments, unless, by the law of the state in which the decree was rendered, its enforcement is so completely within the discretion of the courts of that state that

they may annul or modify the decree, even as to overdue and unsatisfied instalments. **Same — deprivation of protection — annulment.**

2. Decrees of the New York courts for the future payment of alimony are not subject to annulment or modification by those courts as to overdue and unsatisfied instalments, so as to deprive such decrees of the protection, as to past-due and unpaid instalments, of the full faith and credit clause of the Federal Constitution.

Judgment — full faith and credit — varied modes of enforcement — effect.

3. A judgment enforceable in the state where rendered must be given effect in another state, under the full faith and credit clause of the Federal Constitution, although the modes of procedure to enforce its collection may not be the same in both states.

(May 31, 1910.)

Note. — Action to recover instalments of alimony accruing under a decree rendered in another state.

The earlier cases on this subject are discussed in the notes to Benton's Succession, 50 L.R.A. 178, and Israel v. Israel, 9 L.R.A. (N.S.) 1168.

While the principle laid down in *Lynde v. Lynde*, 181 U. S. 187, 45 L. ed. 814, 21 Sup. Ct. Rep. 555, that a judgment for future alimony or maintenance which, either by its own terms or by the law of the state in which it is rendered, is subject to modification as to amount by the court rendering it, is not, even as to instalments which have accrued before the bringing of an action in another state to enforce the same, a final judgment within the "full faith and credit" provision of the Federal Constitution, is not impaired by the decision of the United States Supreme Court in *SISTARE v. SISTARE*, yet that case does give additional emphasis to the point that, to bring a case within the principle of the *Lynde* Case, it must appear that the power of modification possessed by the court which rendered the original decree extends to instalments of alimony that have already accrued, as well as instalments not yet due.

The practical importance of this point is apparent from the fact that, upon the supposed authority of the *Lynde* Case, the right to maintain an action in another state, to enforce instalments for alimony that had accrued under New York decrees, was denied by the supreme court of errors of Connecticut in *Sistare v. Sistare*, 80 Conn. 1, 125 Am. St. Rep. 102, 66 Atl. 772 (the case reversed by the United States Supreme Court in the foregoing opinion); and by the United States circuit court of appeals of the third circuit in *Israel v. Israel*, 9 L.R.A. (N.S.) 1168, 79 C. C. A. 32, 148 Fed. 576, 8 A. & E. Ann. Cas. 697, and the Federal circuit court for the district of New Jersey in *Valiquet v. Valiquet*, 177 Fed. 994. Presumably the conclusion 28 L.R.A. (N.S.)

of the United States Supreme Court in the *SISTARE* CASE, as to the law of New York on the subject of modification, was based on the same showing in that respect as the contrary conclusion of the Connecticut court on that point. The evidence or showing as to the New York law before the *Israel* Case does not appear. The opinion merely states that it appears that under the New York statute the judgment or decree, so far as it directed the payment of alimony and maintenance not then accrued or payable, could "at any time thereafter" be annulled, varied, or modified by the court rendering it. The court in the *Valiquet* Case apparently did not consider independently the extent of the power of the New York court to modify, but followed the ruling in the *Israel* Case on that point. Probably, the finding or conclusion in the latter case, that under the New York law the decree was subject to modification at any time by the court which rendered it, was an unconsidered inference drawn from the conceded power of that court to modify, without especially considering the question whether that power might be exercised after as well as before the maturity of the instalments. In this connection, however, it may be observed that the decision of the United States Supreme Court in the *SISTARE* CASE is not necessarily conclusive in all other cases in which an action may be brought in other states to enforce instalments of alimony that have accrued under a New York decree, since, in the absence of a statute of the forum to the contrary, the question as to the law of another state is a matter of proof in the case, and it is conceivable, at least, that in another case the defendant might be able to introduce judicial decisions in New York which would establish, contrary to the finding of the United States Supreme Court in the *SISTARE* CASE, that the power to modify survived the maturity of the instalments of alimony. Of course, if the New York court of appeals should at any time so decide, that decision, if proven

ERROR to the Connecticut Supreme Court of Errors to review a judgment reversing a judgment of the Superior Court for New London County in plaintiff's favor in an action brought to recover certain instalments of alimony alleged to be due under a decree of the Supreme Court of New York. Reversed.

The facts are stated in the opinion.

Messrs. Robert Goeller and Benjamin Slade, for plaintiff in error:

Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.

Barber v. Barber, 21 How. 582, 16 L. ed. 226; Howard v. Howard, 15 Mass. 196;

in the other state, would bring the case within the principle of the Lynde Case, and take it out of the operation of the decision in the SISTARE CASE.

In a recent case in Illinois (Britton v. Chamberlain, 234 Ill. 246, 84 N. E. 895), the court, without discussing the point except to recognize the existence of a conflict, held, on the authority of Dow v. Blake, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761, that an action would lie in Illinois to recover instalments that had accrued under a decree for alimony rendered in New York. This result is in accord with the conclusion reached in the SISTARE CASE, but there was no distinct finding in the Britton Case as to the right of the New York courts to modify the instalments of alimony already accrued.

In Hunt v. Monroe, 32 Utah, 428, 11 L.R.A.(N.S.) 249, 91 Pac. 269, holding that an action could not be maintained in Utah upon an accrued instalment of alimony under a decree of divorce rendered in Colorado, the decision, so far as the law of Colorado on the subject of modification was concerned, rested upon a presumption that it was the same as the law of Utah on that point, which was apparently assumed to permit modification after as well as before the maturity of the instalments.

In Van Horn v. Van Horn, 48 Wash. 388, 125 Am. St. Rep. 940, 93 Pac. 670, holding that an action would not lie in Washington to enforce a decree for temporary alimony and suit money rendered in California, even though such decree is held in California a final decree from which an appeal will lie, the court said that the California supreme court had not, to its knowledge, held that such an order is not subject to change and modification in the discretion of the court in which it is made.

The syllabus by the court in Cureton v. Cureton, 132 Ga. 745, 65 S. E. 65, is that "a decree for alimony of a sister state, providing for future monthly payments, which by its own terms is subject to be revoked or modified, as to the amount to be paid thereunder, by the court rendering such decree, is not such a decree as is enforceable 28 L.R.A.(N.S.)

Clark v. Clark, 6 Watts & S. 85; Wheeler v. Wheeler, 2 Dane, Abr. 310; Knapp v. Knapp, 59 Fed. 641; Trowbridge v. Spinning, 23 Wash. 48, 54 L.R.A. 204, 83 Am. St. Rep. 806, 62 Pac. 125; Arrington v. Arrington, 127 N. C. 190, 52 L.R.A. 201, 80 Am. St. Rep. 791, 37 S. E. 212.

The court's power to modify a decree in respect to alimony does not destroy its finality.

Dow v. Blake, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761.

In the absence of a modification, the courts of Connecticut should be required to give to that decree the same binding force and effect that it has in the state of New York.

Barber v. Barber, *supra*; Kunze v. Kunze,

in this state, under the full faith and credit clause of the Constitution of the United States or upon principles of comity." And the court cites to this proposition the Lynde Case and the Israel Case. The facts as set forth in the opinion, however, would seem to call only for a decision that the court of Georgia should not render judgment for instalments to accrue subsequently,—i. e., subsequently to the time of the Georgia judgment. The trial judge in the Georgia case directed the jury to find a verdict for \$720, the amount due on the judgment in Tennessee up to "this" date (evidently referring to the date of the trial of the Georgia case), but refused to direct that the party against whom the Tennessee decree was rendered was bound by so much of that judgment as provided for future payments of \$40 per month. The assignment of error was to this refusal, and no question seems to have been made as to the right to a verdict for the instalments that had accrued at date of the trial of the Georgia case. Apparently the effort of the wife in the Georgia case was to obtain in Georgia a judgment which should provide for the monthly payments subsequently to accrue, so as to avoid the necessity of further resort to the courts of Georgia from time to time as instalments should accrue under the Tennessee decree. Obviously the principle of the Lynde and the Israel Cases would apply *a fortiori* to prevent such an attempt. It would seem, however, that there would have been a grave question whether the principle of these cases, if invoked, would not have rendered erroneous the direction of the trial judge in the Georgia case, allowing the instalments that had accrued up to the time of the trial in that action, it being conceded that, by the terms of the Tennessee decree, the payments were to continue, within the discretion of the chancellor, only until a reconciliation should be effected.

In Bleuer v. Bleuer (Okla.) 110 Pac. 736, holding that an action would not lie in Oklahoma to recover instalments of alimony which had accrued under an order made in a divorce action in Illinois, it is

94 Wis. 54, 59 Am. St. Rep. 857, 68 N. W. 391; *Trowbridge v. Spinning*, supra; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Fletcher v. Ferrel*, 9 Dana, 372, 35 Am. Dec. 143; *Cheever v. Willson*, 9 Wall. 108, 19 L. ed. 604; *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368; *Youngs v. Carter*, 10 Hun, 194.

The judgment of a state court, if that court had jurisdiction to render it, is entitled to the same full faith and credit in the courts of another state that it has in the state where rendered, as a valid domestic judgment.

Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084.

An action at law will lie in a Federal

court upon a decree of divorce rendered by a state court of equity, to recover the alimony accrued at the time of the filing of the complaint.

Knapp v. Knapp, supra; *McCracken v. Swartz*, 5 Or. 63; *Dubois v. Dubois*, 6 Cow. 494; *Allen v. Allen*, 100 Mass. 374; *Hansford v. Van Auker*, 79 Ind. 302.

The judgment of a sister state is conclusive on the merits for the purpose of pleading and evidence, and is entitled to the full dignity of a record, and the defendant cannot, when sued on a judgment, deny the notice which it recites, or the obligation which it establishes, or impeach its justice.

Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411.

merely stated that no final judgment had been entered in the Illinois court making the claim sued for final, as the statute pleaded in plaintiff's petition provides that the court may, on application from time to time, make such alterations in the allowance of alimony as shall appear reasonable and proper. Apparently, if the court had the point in mind at all, it assumed that the power to modify extended to instalments already accrued as well as those still to accrue.

In *Rogers v. Rogers* (Ind. App.) 89 N. E. 901, it was held that an Ohio decree for alimony, payable in instalments, was entitled to full faith and credit under the Federal Constitution, and that an action would lie thereon in Indiana to recover instalments already accrued. The Ohio decree did not expressly reserve the right of modification, and the Indiana court did not expressly find what the state of the Ohio law on this subject was. From the remark in the opinion, however, that if the defendant wanted the judgment modified, he had his remedy by petitioning the court that rendered it to hear and determine the matter, and that, if modified in any manner, he could set up the modification by way of defense, it may be inferred that the court assumed that there was a right of modification under the Ohio law, at least as to instalments that had not already accrued. The court relied on *Barber v. Barber*, 21 How. 582, 16 L. ed. 226, and seems to have recognized that the *Lynde Case* was an authority to the contrary. In denying a petition for rehearing in this case (*Rogers v. Rogers* [Ind. App.] 92 N. E. 664), the court referred to the *SISTARE CASE*, decided in the supreme court after the original hearing, as additional support for its decision.

In *Mayer v. Mayer*, 154 Mich. 386, 19 L.R.A. (N.S.) 245; 129 Am. St. Rep. 477, 117 N. W. 890, the decision that the court of Michigan would entertain an action for instalments of alimony already accrued under a decree rendered in Oklahoma rested upon the ground that neither by the decree itself nor by statute in Oklahoma was the 28 L.R.A. (N.S.)

power reserved to modify the decree in that respect. The court, however, refused to entertain the action so far as it sought to enforce a provision directing payments in instalments for the support of the children, it appearing that the Oklahoma statute expressly provides that such a provision may be changed whenever circumstances render a change proper. This decision, under the principles laid down in the United States Supreme Court, was doubtless correct as to both points, unless it may be that there was error in finding that the power to modify the decree in respect of support of the children applied to instalments already accrued as well as those to accrue in the future. Apparently that finding was based on the terms of the statute itself.

In *Patton v. Patton*, 123 N. Y. Supp. 329, a demurrer to a complaint in an action to recover accrued instalments of alimony under a decree rendered in the District of Columbia was overruled, the decree being absolute in form, and no reference being made in the complaint to any law of the District of Columbia relative to the power of the court to modify a decree of that character. The court said that, in the absence of proof of the law of the District, there was no presumption that there was a statute in force there similar to the New York statute, and that the jurisdiction of the courts of New York over the subject of divorce was derived exclusively from statute, and therefore the presumption as to the common law did not aid the demurrer.

The case of *Freund v. Freund*, 71 N. J. Eq. 524, 63 Atl. 756 (cited in the note in 9 L.R.A. (N.S.) 1108), was affirmed with out opinion in 72 N. J. Eq. 943, 73 Atl. 1117.

Assuming that, under the law of the state in which the decree for alimony was rendered, it is subject to modification after as well as before the maturity of the instalments, yet, if the court which rendered the decree, acting within its jurisdiction and upon application duly made, determines the amount due at a particular time under instalments already accrued, and fixes that amount beyond further modification, the

An order for the payment of alimony is simply an order for the payment of money.

Blake v. People, 80 Ill. 14; Coughlin v. Ehler, 39 Mo. 285.

An ordinary civil action is all that is necessary to enforce payment of the amount of alimony due at the time of the institution of the action.

Barber v. Barber, *supra*; Brisbane v. Dobson, 50 Mo. App. 176.

The defendant is precluded from attacking the dignity and effect of the judgment in question, until it has been actually reversed or set aside.

Bullock v. Bullock, 57 N. J. L. 508, 31 Atl. 1024; Bennett v. Bennett, Deady, 299, Fed. Cas. No. 1318.

The decree of divorce, valid and effectual by the law of the state in which it is obtained, is valid and effectual in all other states.

Cheever v. Wilson, *supra*.

A judgment of one state does not carry the efficacy of a judgment in another state capable of enforcement by execution, until such judgment is reduced to a new judgment in the place where it is sought to enforce it. After obtaining a judgment in

the place of enforcement, it can only be executed in the latter state as its laws may permit.

First Nat. Bank v. Duel County, 74 Fed. 373; Lamberton v. Grant, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127; Carter v. Bennett, 6 Fla. 214; Thompson v. Whitman, 18 Wall. 457, 463, 21 L. ed. 897, 899; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 292, 32 L. ed. 239, 244, 8 Sup. Ct. Rep. 1370; Bullock v. Bullock, 51 N. J. Eq. 444, 27 Atl. 435.

A judgment recovered in one state is not executory in any other state, in the sense that final process for its enforcement could issue on merely filing or docketing the judgment, as in the case of a domestic judgment.

Carter v. Bennett, *supra*; Leathe v. Thomas, 109 Ill. App. 434; Dunham v. Dunham, 57 Ill. App. 475; Joice v. Scales, 18 Ga. 725.

The constitutional provision for giving full faith and credit to foreign judgments relates only to their effect as evidence or a bar to further litigation.

Claffin v. McDermott, 20 Blatchf. 522, 12 Fed. 375; Chicago & A. R. Co. v. Wig-

decree as to that amount may be enforced by action in another state. This is implied in the following statement of the general rule made in Hunt v. Monroe, *supra*: "But the fact that a sum is not specifically fixed as due from one to the other of the parties to the original suit, and certain sums are to become due in the future and payable in instalments or otherwise, does defeat the right of action, unless the amount due is ascertained and fixed by some appropriate proceeding before the action on the judgment or order or decree is commenced."

The case of De Vall v. De Vall (Or.) 109 Pac. 755, seems to fall within the limitation or distinction just suggested. The Wisconsin decree there involved expressly provided that it was not absolute as to the amount to be paid, but, after the accrual of the instalments for which the Oregon action was brought, it appeared that the Wisconsin court, upon application, had determined the amount due thereon, and had directed that the plaintiff have execution therefor. In this situation the Oregon court, having found that this action by the Wisconsin court was within its jurisdiction, held that the action would lie in Oregon.

The question here considered presupposes, of course, that the original decree was within the jurisdiction of the court which rendered it, and that there was no objection to its enforcement in other states, except that it was subject to modification. The effort to enforce a decree for alimony rendered in another state sometimes fails because the decree was rendered on constructive service, and on that account was not 28 L.R.A.(N.S.)

within the jurisdiction of the court. See, on this point, note in 9 L.R.A.(N.S.) 593. The question as to equitable jurisdiction to enforce a decree for alimony is considered in the note in 9 L.R.A.(N.S.) 1071.

It is apparent from what has already been said that it may become important in this connection to determine the necessity of proving the law of the state in which the decree was rendered, or to ascertain the presumption to be indulged or course to be pursued in the absence of such proof. This general subject is treated in a note to Cherry v. Sprague, 67 L.R.A. 33. It is sufficient, for the purposes of this note, to say that in general, and in the absence of a statute of the forum to the contrary, the courts of one state will not take judicial notice of the law of another whether embodied in statutes or judicial decisions, and that the Federal Supreme Court, upon writ of error to a state court involving the "full faith and credit" provision of the Federal Constitution, will not take judicial cognizance of the law of another state, unless the court from which the case comes takes cognizance thereof. The question whether, in the absence of proper proof of the law of the other state, the presumption is to be indulged that it is the common law or that it is the same as the law of the forum, even though the latter is statutory, is involved in great conflict. As pointed out in the note referred to, some of the cases, without indulging either presumption, apply the substantive law of the forum, upon the ground that it is the only law before the court.

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gins Ferry Co. 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617.

In an action on a foreign judgment awarding alimony to the plaintiff, no other relief can be had than a recovery for past-due alimony.

Wood v. Wood, 7 Misc. 579, 28 N. Y. Supp. 154.

A bill in equity by a woman against her former husband, to enforce a provision of a foreign decree of divorce awarding her a definite and ascertained sum as alimony, is demurrable on the ground that she has an adequate remedy at law by an action of debt on the decree.

Davis v. Davis, 29 App. D. C. 258, 9 L.R.A.(N.S.) 1071.

The allowance in the decree to alimony created a judicial debt of record, and formed a proper foundation for the recovery of said debt in the present action.

Wetmore v. Wetmore, 149 N. Y. 520, 33 L.R.A. 708, 52 Am. St. Rep. 752, 44 N. E. 169; France v. France, 79 App. Div. 291, 79 N. Y. Supp. 579; Barber v. Barber, *supra*.

The decree ought to be enforced as any other judgment out of any property of the husband wherever found.

Bouslough v. Bouslough, 68 Pa. 495; Brisbane v. Dobson and Barber v. Barber, *supra*.

Mr. William J. Brennan, for defendant in error:

An order for future alimony is subject to modification at any time by the court which granted it, independent of statute, and is enforceable only in the method provided by the statute.

Tonjes v. Tonjes, 14 App. Div. 542, 43 N. Y. Supp. 941; Weber v. Weber, 93 App. Div. 149, 87 N. Y. Supp. 519; Branth v. Branth, 20 N. Y. Civ. Proc. Rep. 33, 13 N. Y. Supp. 360.

The courts of one state will not enforce the judgments of the courts of another state which are subject to modification, and are not final judgments for fixed sums of money.

Lynde v. Lynde, 182 N. Y. 405, 48 L.R.A. 679, 76 Am. St. Rep. 332, 56 N. E. 979, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555; Audubon v. Shufeldt, 181 U. S. 577, 45 L. ed. 1010, 21 Sup. Ct. Rep. 735; Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 A. & E. Ann. Cas. 265; Israel v. Israel, 9 L.R.A.(N.S.) 116, 79 C. C. A. 32, 148 Fed. 576, 8 A. & E. Ann. Cas. 697; Arrington v. Arrington, 131 N. C. 143, 92 Am. St. Rep. 769, 42 S. E. 554; Page v. Page, 189 Mass. 85, 75 N. E. 92, 4 A. & E. Ann. Cas. 296.

Mr. Justice White delivered the opinion of the court:

In 1899, by a judgment of the supreme 28 L.R.A.(N.S.)

court of the state of New York, the plaintiff in error was granted a separation from bed and board from her husband, the defendant in error, and he was ordered to pay her weekly the sum of \$22.50 for the support of herself and the maintenance and education of a minor child. The judgment, omitting title, is copied in the margin.†

In July, 1904, at which time none of the instalments of alimony had been paid, the wife commenced this action in the superior court of New London county, Connecticut, to recover the amount then in arrears of the decreed alimony. The cause was put at issue and was heard by the court. As stated by the trial judge, in a "finding" by him made: "The defendant made the following

†This action having been begun by the service of the summons herein on the defendant personally, . . . now on motion of . . . attorneys for the plaintiff, it is

Ordered, adjudged, and decreed that the plaintiff be, and she hereby is, forever separated from the defendant, and from the bed and board of said defendant, on the ground of nonsupport and cruel and inhuman treatment by the defendant. And it is

Further ordered, adjudged, and decreed that from and after the entry of this decree the defendant, Horace Randall Sistare, pay to the plaintiff, Matilda Von Ellert Sistare, for her maintenance and support and the maintenance and education of Horace Von Ellert Sistare, the minor child of the plaintiff and defendant, the sum of twenty-two and 50-100 dollars (\$22.50) per week, such sum to be paid into the hands of her attorneys of record in this action on each and every Monday. And it is further

Ordered, adjudged, and decreed that the sole care, custody, control, and education of said minor child, Horace Von Ellert Sistare, is hereby awarded to the plaintiff, and the defendant, upon complying fully with each and all of the directions of the decree herein, and not otherwise, and during his good behavior, shall, until the further order of this court, be permitted to see said child for the space of two hours, between the hours of 10 and 12 o'clock in the forenoon on Wednesdays and Saturdays, excepting Wednesdays and Saturdays during the months of July, August, and September of each year. And it is further

Ordered, adjudged and decreed that costs are hereby awarded to the plaintiff against the defendant, taxed at the sum of one hundred and seventeen and 67-100 dollars (\$117.67), and that the plaintiff do recover said costs from the defendant and have execution therefor. And it is further

Ordered, adjudged, and decreed that the plaintiff have leave to apply from time to time for such orders at the foot of this judgment as may be necessary for its enforcement and for the protection and enforcement of her rights in the premises.

claims of law as to the judgment to be rendered in this action:

"(a) That the judgment rendered by the supreme court of the state of New York, in requiring the future payment of \$22.50 per week, did not constitute a final judgment for a fixed sum of money, which is enforceable and collectable in this action.

"(b) That said judgment, being subject to modification by the court which granted it, is not a judgment which the courts of this state will enforce.

"(c) That the requirement that said sums of money should be paid as aforesaid does not constitute a debt or obligation from the defendant to the plaintiff which can be enforced in this action.

"(d) That said judgment requiring the said weekly payments cannot be enforced in any other way than according to the procedure prescribed in the statutes of the state of New York, and cannot be enforced in this action.

"(e) That the judgment which is sought to be enforced in this action is not a final judgment, entitled to full faith and credit in this state by virtue of the provisions of the Constitution of the United States.

"(f) That the judgment which is sought to be enforced in this action will not be enforced by the courts of this state through comity.

"(g) That the facts will not support a judgment for the plaintiff."

The court, however, adjudged in favor of the plaintiff, and awarded her the sum of \$5,805, the arrears of alimony at the commencement of the action.

On appeal, the supreme court of errors (80 Conn. 1, 125 Am. St. Rep. 102, 66 Atl. 772) reversed the judgment and remanded the cause "for the rendition of judgment in favor of the defendant;" and such a judgment, the record discloses, was subsequently entered by the trial court. This writ of error was prosecuted.

The supreme court of errors of Connecticut reached the conclusion that the power conferred upon a New York court to modify a decree for alimony by it rendered extended to overdue and unsatisfied instalments as well as those to accrue in the future; that hence decrees for future alimony, even as to instalments after they had become past due, did not constitute debts of record, and were not subject to be collected by execution, but could only be enforced by the special remedies provided in the law, and were not susceptible of being made the basis of judgments in the state of New York in another court than the one in which the decree for alimony had been made. Guided by the interpretation thus given to the New York law, and the character of the

decree for future alimony which was based thereon; it was decided that the New York judgment for alimony which was sought to be enforced, even although the instalments sued for were all past due, was not a final judgment, which it was the duty of the courts of Connecticut to enforce in and by virtue of the full faith and credit clause of the Constitution of the United States. While the ruling of the court was, of course, primarily based upon the interpretation of the New York law, the ultimate ruling as to the inapplicability of the full faith and credit clause of the Constitution was expressly rested upon the decision of this court in *Lynde v. Lynde*, 181 U. S. 187, 45 L. ed. 814, 21 Sup. Ct. Rep. 555.

To sustain her contention that the action of the court below was in conflict with the duty imposed upon it by the full faith and credit clause, the plaintiff in error, by her assignments, in effect challenges the correctness of all the propositions upon which the court below rested its action, and virtually the defendant in error takes issue in argument as to these contentions. In disposing of the controversy, however, we shall not follow the sequence of the various assignments of error, or consider all the forms of statement in which the contentions of the parties are pressed in argument, but come at once to two fundamental questions which, being determined, will dispose of all the issues in the case. Those inquiries are: 1st. Where a court of one state has decreed the future payment of alimony, and when an instalment or instalments of the alimony so decreed have become due and payable and are unpaid, is such a judgment as to accrued and past-due alimony ordinarily embraced within the scope of the full faith and credit clause of the Constitution of the United States so as to impose the constitutional duty upon the court of another state to give effect to such judgment? 2d. If, as a general rule, the full faith and credit clause does apply to such judgments, is the particular judgment under review exceptionally taken out of that rule by virtue of the nature and character of the judgment, as determined by the law of the state of New York, in and by virtue of which it was rendered? We shall separately consider the questions.

First. *The application, as a general rule, of the full faith and credit clause to judgments for alimony as to past-due instalments.*

An extended analysis of the principles involved in the solution of this proposition is not called for, since substantially the contentions of the parties are based upon their divergent conceptions of two prior decisions of this court (*Barber v. Barber*, 21

How. 582, 16 L. ed. 226, and *Lynde v. Lynde*, supra), and an analysis of those cases will therefore suffice. For the plaintiff in error it is insisted that the case of *Barber v. Barber* conclusively determines that past-due instalments of a judgment for future alimony, rendered in one state, are within the protection of the full faith and credit clause, while the defendant in error urges that the contrary is established by the ruling in *Lynde v. Lynde*, and that if the *Barber* Case has the meaning attributed to it by the plaintiff in error, that case must be considered as having been overruled by *Lynde v. Lynde*.

Substantially the controversy in *Barber v. Barber* was this: In the year 1847, the court of chancery of New York granted Huldah B. Barber a separation from Hiram Barber, and directed the payment of alimony in quarterly instalments. Although the separation was decreed to be forever, the power to modify was reserved by a provision that the parties might at any time thereafter, by their joint petition, apply to the court to have the decree modified or discharged. It was provided that unpaid instalments of alimony should bear interest, "and that execution might issue therefor *toties quoties*." The husband failed to pay any of the alimony, and removed to Wisconsin, where he procured an absolute divorce. Subsequently an action was brought by Mrs. Barber upon the common-law side of the district court of the United States in the territory of Wisconsin, to recover the arrears of alimony, but relief was denied "for the reason that the remedy for the recovery of alimony was in a court of chancery, and not at law." A suit in equity to recover the overdue alimony was then commenced by Mrs. Barber, Wisconsin having been admitted into the Union, in the district court of the United States for the district of Wisconsin. Among other things, it was urged in a demurrer by the respondent, as a reason why the relief should be denied, "that the relief sought could only be had in the court of chancery for the state of New York, and that it did not appear that the complainants had exhausted the remedy which they had in New York." The proceedings culminated in a decree in favor of the complainant for the amount of alimony in arrears at the commencement of the suit, and the case was then brought to this court and the questions arising were disposed of in a careful and elaborate opinion. The decree was affirmed. In the course of the opinion it was declared, among other things, that courts of equity possessed jurisdiction to interfere to prevent the decree of the court of another state from being defeated by fraud, and reference was

made to English decisions asserting the power of chancery to compel the payment of overdue alimony. Considering the nature and character of a decree of separation and for alimony, and the operation and effect upon such a decree as to past-due instalments of the full faith and credit clause, it was said (p. 591):

"The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our state courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical courts of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given."

And, again, determining the effect of a decree for future alimony, the court expressly declared (p. 595): "Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is." And it is, we think, clear from the context of the opinion, that the court held that the decree in favor of Mrs. Barber operated to cause an indebtedness to arise in her favor as each instalment of alimony fell due, and that a power to modify, if exerted, could only operate prospectively.

The facts in *Lynde v. Lynde* which are pertinent to this controversy are these: A decree of the court of chancery of New Jersey in favor of Mrs. Lynde was rendered in 1897 for the sum of \$7,840, as alimony due at the date of the decree, with \$1,000 for counsel fees, and payment was directed to be made of \$80 weekly from the date of the decree. An action on this New Jersey decree was brought in May, 1898, in the supreme court of New York, and recovery was allowed by the trial court for the alimony due at the date of the New Jersey decree, with interest, counsel fee, and costs, and for an additional amount representing future alimony, which had accrued from the date of the decree to the commencement of the action in New York. The judgment also directed the payment of future alimony as fixed by the New Jersey decree, and awarded certain remedies for the enforcement of the decree in accordance with the relief which had been awarded in the New Jersey decree, in conformity to the law of that state. The judgment thus rendered by the trial court in New York was ultimately modified by the court of appeals of

New York by allowing the recovery only of the alimony which had been fixed in the New Jersey decree as due at its date, with interest and the counsel fee, and disallowing recovery of the instalments of future alimony which had accrued when the action was commenced in New York, as well as the allowance in respect to alimony thereafter to accrue. In this court three questions were presented: 1. Whether the decree of the New Jersey court was wanting in due process because of the absence of notice to the defendant; 2, whether the duty to enforce the decree for alimony was imposed upon the courts of New York by the full faith and credit clause of the Constitution; and, 3, upon the hypothesis that the full faith and credit clause was applicable, whether that clause required that the remedies afforded by the laws of New Jersey should be made available in the state of New York. Deciding that the New Jersey decree was not wanting in due process, the court came to consider the second and third questions, and held that in so far as the New Jersey decree related to alimony accrued at the time it was rendered and fixed by the decree and the counsel fee, it was entitled to be enforced in the courts of New York; but that, in so far as it related to future alimony, its enforcement was not commanded by the full faith and credit clause. No reference was made to the case of *Barber v. Barber*, the opinion briefly disposing of the issue as follows (p. 187): "The decree for the payment of \$8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the court of chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum." These sentences were followed by a brief adverse disposition of the claim that there was a right to avail, for the enforcement of the New Jersey decree in the courts of New York, of the remedies peculiar to the New Jersey law.

When these two cases are considered together we think there is no inevitable and necessary conflict between them, and, in any event, if there be, that *Lynde v. Lynde* must be restricted or qualified so as to cause it not to overrule the decision in the *Barber Case*. In the first place, in the *Lynde Case* no reference whatever was made to the prior decision, and it cannot be said that such decision was overlooked, because it was referred to in the opinion of the court below and was expressly cited and commented upon in the briefs of counsel submitted in the *Lynde Case*. In the second place, in view of the elaborate and careful nature of the opin-

ion in *Barber v. Barber*, of the long period of time which had intervened between that decision and the decision in *Lynde v. Lynde*, and the fact which is made manifest by decisions of the courts of last resort of the several states that the rule laid down in the *Barber Case* had been accepted and acted upon by the courts of the states generally as a final and decisive exposition of the operation and scope of the full faith and credit clause, as applied to the subject with which the case dealt, it is not to be conceived that it was intended by the brief statement in the opinion in *Lynde v. Lynde* to announce a new and radical departure from the settled rule of constitutional construction which had prevailed for so long a time. And nothing in the mere language used in the *Lynde Case* would justify such a conclusion, because the reasoning expressed in that case was based solely and exclusively on the ground that the portions of the decree for alimony which were held to be not within the purview of the full faith and credit clause were not so embraced, because their enforcement "was subject to the discretion of the court of chancery of New Jersey, which might at any time alter it, . . ." In other words, the ruling was expressly based upon the latitude of discretion which the courts of New Jersey were assumed to possess over a decree for the payment of future alimony. But it is said although this be true, the decision in the *Lynde Case* must be here controlling and treated as overruling the *Barber Case*, since it will be found, upon examination of the New Jersey law which governed the New Jersey decree considered in the *Lynde Case*, that such law conferred no greater discretion upon the New Jersey court of chancery as to the enforcement of past-due instalments of future alimony than will be found to be possessed by the New York courts as to the decree here in question. But this is aside from the issue for decision, since the question here is not whether the doctrine expounded in the *Lynde Case* was there misapplied as a result of a misconception of the New Jersey law, but what was the doctrine which the case announced. And, answering that question, not only by the light of reason, but by the authoritative force of the ruling in the *Barber Case*, which had prevailed for so many years, and by the reasoning expressed in the *Lynde Case*, we think the conclusion is inevitable that the *Lynde Case* cannot be held to have overruled the *Barber Case*, and therefore that the two cases must be interpreted in harmony, one with the other, and that on so doing it results: First, that, generally speaking, where a decree is rendered for alimony and is made payable in future in-

stalments, the right to such instalments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the instalments, since, as declared in the Barber Case, "alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is." Second, that this general rule, however, does not obtain where, by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the instalments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the instalments becoming due.

It follows, therefore, from the statement which we have made of the case, that the New York judgment which was relied upon came within the general rule, and, therefore, that the action of the supreme court of errors of Connecticut in refusing to enforce it was in conflict with the full faith and credit clause, unless it be, as a result of the law of the state of New York, the judgment for future alimony in that state, even as to past-due instalments, was so completely within the discretion of the courts of that state as to bring it within the exceptional rule embodied in the second proposition. A consideration of this subject brings us to an investigation of the second question, which we have previously stated.

Second. *The finality of the New York judgment as to past-due instalments for future alimony under the law of the state of New York.*

The conception of the statute law of the state of New York and of the decisions of the courts of that state, interpreting that law, which led the supreme court of errors of Connecticut to conclude that the enforcement of the judgment before it was so completely subject to the discretion of the court which had rendered it as not to entitle it to enforcement in virtue of the full faith and credit clause, was thus stated in its opinion:

"The nature, operation, and effect, within the state of New York, of orders like that in question, directing payments *in futuro* to a wife by a husband living in judicial separation, and passed in 1899, pursuant to the then provisions of statute, have been well settled by the repeated decisions of the courts of that jurisdiction. They have been declared to be tentative provisions, which re-

main at all times within the control of the court issuing them, and subject at any time to modification or annulment. *Tonjes v. Tonjes*, 14 App. Div. 542, 43 N. Y. Supp. 941. The right of modification or annulment which is thus reserved to the court is one which extends to overdue and unsatisfied payments as well as to those which may accrue in the future. *Sibley v. Sibley*, 66 App. Div. 552, 73 N. Y. Supp. 244; *Goodsell v. Goodsell*, 94 App. Div. 443, 88 N. Y. Supp. 161; *Kiralfy v. Kiralfy*, 36 Misc. 407, 73 N. Y. Supp. 708; *Wetmore v. Wetmore*, 34 Misc. 640, 70 N. Y. Supp. 604. The amount awarded 'does not exist as a debt in favor of the wife against the husband, in the sense of indebtedness as generally understood.' *Tonjes v. Tonjes*, supra. The order is not one 'which simply directs the payment of a sum of money,' and not such an one as can have enforcement by execution. *Weber v. Weber*, 93 App. Div. 149, 152, 87 N. Y. Supp. 519. The special remedies provided in §§ 1772 and 1773 for the enforcement of the orders are exclusive. *Weber v. Weber*, supra; *Branth v. Branth*, 20 N. Y. Civ. Proc. Rep. 33, 13 N. Y. Supp. 300. No judgment in another court can be entered upon them. *Branth v. Branth*, supra."

But we are unable to assent to the view thus taken of the statute law of New York, or to concede the correctness of the effect attributed by the court to the New York decisions which were referred to.

The provisions of the Code of Civil Procedure of New York, pertinent to be considered in determining the scope and effect of judgments for separation and alimony rendered by the courts of New York, are copied in the margin.†

In considering the meaning of these provisions, it must be borne in mind that the settled rule in New York is that the courts

†Provisions of N. Y. Code of Civil Procedure in force in 1899.

Sec. 1762. For what causes action may be maintained.—In either of the cases specified in the next section, an action may be maintained by a husband or wife against the other party to the marriage, to procure a judgment separating the parties from bed and board forever, or for a limited time, for either of the following causes:

1. The cruel and inhuman treatment of the plaintiff by the defendant.
2. Such conduct on the part of the defendant towards the plaintiff as may render it unsafe and improper for the former to cohabit with the latter.
3. The abandonment of the plaintiff by the defendant.
4. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.

Sec. 1763. *Id.*; in what cases.—Such an

of that state have only the jurisdiction over the subject of divorce, separation, and alimony conferred by statute, and that the authority to modify or amend a judgment awarding divorce and alimony must be found in the statute or it does not exist. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, 463; *Livingston v. Livingston*, 173 N. Y. 377, 61 L.R.A. 800, 93 Am. St. Rep. 600, 66 N. E. 123.

Other than the provision in § 1767, authorizing the revocation of a judgment for separation upon the joint application of the parties, the power of the court to vary or modify a judgment for alimony, if it existed in 1899, was to be found in § 1771. It is certain that authority is there given to the courts of New York to modify or vary a decree for alimony by the following:

"The court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, vary or modify such directions. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice, as the court, in its discretion, may deem proper, after presentation to the court of satisfactory proof that

justice requires such an application should be entertained."

But it is equally certain that nothing in this language expressly gives power to revoke or modify an instalment of alimony which had accrued prior to the making of an application to vary or modify, and every reasonable implication must be resorted to against the existence of such power, in the absence of clear language manifesting an intention to confer it. The implication, however, which arises from the failure to expressly confer authority to retroactively modify an allowance of alimony is fortified by the provisions which are expressed. Thus, the methods of enforcing payment of the future alimony awarded, provided by the statute, all contemplate the collection and paying over as a matter of right of the instalments as they accrue, as long as the judgment remains unmodified, or, at least, until application has been made or permission to make one in pursuance to the statute has been accorded. And the force of this suggestion is accentuated when it is considered that it was not unusual in New York to resort to executions as upon a judgment at law to enforce the collection of unpaid instalments of alimony. *Wetmore v. Wetmore*, 149 N. Y. 520, 527, 33 L.R.A. 708, 52 Am. St. Rep. 752, 44 N. E.

action may be maintained in either of the following cases:

1. Where both parties are residents of the state when the action is commenced.
2. Where the parties were married within the state and the plaintiff is a resident thereof when the action is commenced.
3. Where the parties, having been married without the state, have become residents of the state, and have continued to be residents thereof at least one year, and the plaintiff is such a resident when the action is commenced.

Sec. 1768. Support, maintenance, etc., of wife and children.—Where the action is brought by the wife, the court may, in the final judgment of separation, give such directions as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties, and the court may, in such an action, render a judgment compelling the defendant to make the provision specified in this section, where, under the circumstances of the case, such a judgment is proper, without rendering a judgment of separation.

Sec. 1767. Judgment for separation may be revoked.—Upon the joint application of the parties, accompanied with satisfactory evidence of their reconciliation a judgment for a separation forever, or for a limited

period, rendered as prescribed in this article, may be revoked at any time by the court which rendered it, subject to such regulations and restrictions as the court thinks fit to impose.

Sec. 1769. Alimony, expenses of action, and costs; how awarded.—Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion, during the pendency thereof, from time to time, make and modify an order or orders requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. The final judgment in such an action may award costs in favor of or against either party, and an execution may be issued for the collection thereof, as in an ordinary case; or the court may, in the judgment or by an order made at any time, direct the costs to be paid out of any property sequestered or otherwise in the power of the court.

Sec. 1771. Custody and maintenance of children and support of plaintiff.—Where an action is brought by either husband or wife, as prescribed in either of the last two articles, the court must, except as otherwise expressly prescribed in those articles, give, either in the final judgment or by one or more orders made from time to time before final judgment, such directions as justice

169. Indeed, as in principle, if it be that the power to vary or modify operates retroactively and may affect past-due instalments so as to relieve of the obligation to pay such instalments, it would follow, in the nature of things, that the power would exist to increase the amount allowed, it is additionally impossible to imply such authority in the absence of provisions plainly compelling to such conclusion. Beyond all this, when it is considered that no provision is found looking to the repayment by the wife of any instalments which had been collected from the husband, in the event of a retroactive reduction of the allowance, it would seem that no power to retroactively modify was intended.

A brief consideration of the state of the law of New York concerning the power to modify allowances for alimony prior to the enactment of the provisions as to modification in question, and the rulings of the court of last resort of New York on the subject of such power, we think will serve to further establish the impossibility, in reason, of supposing that the statutory provisions in question conferred the broad and absolute power of retroaction as to past-due instalments of alimony which the court below assumed to exist. Prior to 1894, the courts of New York did not possess the

power to modify a judgment in the case either of an absolute divorce or of a judicial separation, except in respect to the custody, etc., of the children of the marriage. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456. In the year 1894, the statute was amended to permit the court to vary or modify the provision for the support of the wife upon her application alone, on notice to the husband. Laws of 1894, chap. 728. Subsequently, § 1771, which, by the amendment of 1894, conferred power upon the application of the wife to vary or modify the allowance, was enlarged to read as it stood in 1899, when the action was brought in which the judgment in question was rendered; that is, so as to confer authority upon the court to vary or modify an allowance of alimony on the application of either party. Laws of 1895, chap. 891.

But in view of the well-settled doctrine prevailing in New York, that no power exists to modify a judgment for alimony, absolute in terms, unless conferred by statute, and the practice of treating the right to collect accrued instalments of alimony as vested and subject to be enforced by execution, and in view of the further fact that decrees for alimony in New York, where authority to modify was not expressly conferred by statute, or was not reserved in

requires between the parties for the custody, care, education, and maintenance of any of the children of the marriage; and where the action is brought by the wife, for the support of the plaintiff. The court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary, or modify such directions. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice, as the court, in its discretion, may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

Sec. 1772. Support, maintenance, etc., of wife and children. Sequestration.—Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner and within such a time as it thinks proper, for the payment from time to time of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has

not given security therefor, or to pay any sum of money which he is required to pay by an order, made as prescribed in § 1769 of this act, the court may cause his personal property, and the rents and profits of his real property, to be sequestered, and may appoint a receiver thereof. The rents and profits, and other property, so sequestered, may be, from time to time, applied, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires.

Sec. 1773. Id.; when enforced by punishment for contempt.—Where the husband makes default in paying any sum of money specified in the last section, as required by the judgment or order directing the payment thereof, and it appears presumptively to the satisfaction of the court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in title third of chapter seventeenth of this act. Such an order to show cause may also be made, without any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual.

the decree at the time of rendition, created vested rights not subject to either judicial or legislative control (*Livingston v. Livingston*, supra), we think it becomes quite clear that the mere enlargement of the power of the court so as to permit modification of the allowance for alimony upon the application of the husband did not confer the authority to change or set aside the rights of the wife in respect to instalments which were overdue at the time application was made by the husband to modify the decree. And although we have been referred to and can find no decision of the court of last resort of New York dealing with the subject, the view we have taken, as an original question, of the Code provision in question, accords with that of the first department of the appellate division of the supreme court of the state of New York, announced in a decision rendered in 1903. *Goodsell v. Goodsell*, 82 App. Div. 65, 81 N. Y. Supp. 806. Nor do we find that the New York decisions relied upon by the lower court, and cited by it to sustain its conclusion that "the right of modification or annulment which is thus reserved to the court is one which extends to overdue and unsatisfied payments as well as to those which may accrue in the future," have even a tendency to that effect. The cases cited and relied on are *Sibley v. Sibley*, 66 App. Div. 552, 73 N. Y. Supp. 244; *Goodsell v. Goodsell*, 94 App. Div. 443, 88 N. Y. Supp. 161; *Kiralfy v. Kiralfy*, 36 Misc. 407, 73 N. Y. Supp. 708; and *Wetmore v. Wetmore*, 34 Misc. 640, 70 N. Y. Supp. 604.

The *Sibley* Case was decided in 1901 by the appellate division of the supreme court of New York, first department. The case was not concerned with a decree for the payment of permanent alimony. It related to the failure, during the pendency of an action for separation, to comply with an order for the payment of temporary alimony and counsel fees. Whether such order was made *ex parte* or upon notice does not appear. Among other things, the appeal presented the question of the propriety of the denial of a motion to modify the order directing the payment of alimony and counsel fees by reducing the amount directed to be paid. The order appealed from was affirmed, without prejudice, however, to the right of the appellant "to renew his application when he returns to this state and subjects himself to the jurisdiction of the court." No intimation is given in the opinion as to whether the power to reduce the amount of alimony and counsel fees could be exerted so as to have a retroactive effect. The decision in the *Goodsell* Case was made in 1904 by the appellate division, first department, and concerned a denial at special

term of a motion to punish the defendant for contempt in not paying the difference between certain payments, made as alimony by agreement between the parties, and the amount ordered to be paid in the final judgment awarding an absolute divorce. The appellate court declined to consider the question of whether the defendant was in contempt until a report had been made by the referee who had been appointed to determine the financial ability of the defendant to pay. There was no intimation as to the extent of the power to modify an allowance of alimony. A year prior, however, in the same litigation (82 App. Div. 65), the same court, as we have already stated, decided that the provisions of the New York Code giving power to modify an allowance of alimony could only have a prospective operation. It was said (p. 70):

"It may, we think, be given full force and effect by ascribing to the legislature the intention of authorizing the courts to vary or modify the allowance of alimony from the time of the adjudication that such variation or modification is proper, without making the same retroactive."

The *Kiralfy* Case was a decision of the New York special term, rendered in December, 1901. The matter acted upon was a motion to amend a final decree of divorce by reducing the amount of alimony to a sum not merely less than that awarded by the decree, but less than the sum which the defendant had been paying under agreement with his wife. The motion was granted, but it was clearly given a prospective operation only. *Wetmore v. Wetmore* was also decided in 1901 by the New York special term. What was held was merely that the court would not relieve the defendant, who had persistently evaded a decree of absolute divorce, in which there had been awarded future alimony for the support of the wife and children. There is no discussion as to the extent of the power to modify decrees of divorce in respect to alimony, and a modification of a decree as to the amount of alimony to be paid, which is referred to in the course of the proceedings, plainly had only a prospective operation.

Contenting ourselves in conclusion with saying that, as pointed out in *Lynde v. Lynde*, although mere modes of execution provided by the laws of a state in which a judgment is rendered are not, by operation of the full faith and credit clause, obligatory upon the courts of another state in which the judgment is sought to be enforced, nevertheless, if the judgment be an enforceable judgment in the state where rendered, the duty to give effect to it in another state clearly results from the full faith and credit clause, although the modes of pro-

cedure to enforce the collection may not be the same in both states.

It follows that the judgment of the Supreme Court of Errors of Connecticut must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

And it is so ordered.

KANSAS SUPREME COURT.

LORENZO E. McDONALD, Impleaded, etc.,
Plff. in Err.,

v.

E. E. KELSON.

(79 Kan. 105, 98 Pac. 772.)

Tax sale — possession — eviction — improvements — reimbursement.

A tax-deed holder in possession was defeated in an action of ejectment, and was given a lien for taxes. At the date of the judgment he did not live on the land, and had no claim for improvements. The landowner did not satisfy the judgment lien, and allowed the land to sell for taxes. The lien holder purchased at the tax sale and was given a tax-sale certificate. Without force, fraud, or collusion, he then moved on the land, took full possession, and made lasting and valuable improvements. Subsequently the landowner redeemed from the judgment and tax sale, and caused a writ of possession to issue in the ejectment suit. Held, the occupant of the land is entitled to an injunction against eviction until his claim for improvements is adjudicated and satisfied.

(December 12, 1908.)

ERROR to the District Court for Ness County to review a judgment granting a temporary injunction preventing plaintiff's eviction from certain lands. Affirmed.

The facts are stated in the opinion.

Mr. John F. Wood, for plaintiff in error:

An action for recoupment on account of improvements to the amount of the rents and profits is the only remedy.

27 Am. & Eng. Enc. Law, 2d ed. p. 954; Barton v. National Land Co. 27 Kan. 634;

Headnote by BURCH, J.

Note. — No additional case has been found passing on the question whether one whose tax deed is set aside by a decree in ejectment which substitutes therefor a lien for the taxes may, under the occupying claimant's act, enjoin or prevent the enforcement of the decree until compensated for improvements made subsequently to the decree, and after taking possession under a purchase at a subsequent tax sale.
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Rounsaville v. Hazen, 39 Kan. 610, 18 Pac. 689; McLaughlin v. Acom, 58 Kan. 514, 50 Pac. 441; Keith v. Keith, 26 Kan. 26; Uhl v. Small, 54 Kan. 651, 39 Pac. 178.

Messrs. A. S. Foulks and A. W. Wilson, for defendant in error:

The complainant had no adequate remedy at law.

Gale Mfg. Co. v. Sleeper, 70 Kan. 806, 79 Pac. 648; Stebbins v. Guthrie, 4 Kan. 353; Douglass v. Dickson, 31 Kan. 315, 1 Pac. 541.

Defendant is the proper party to sue and test the rights of the respective parties at law, and, if he neglects to do so, the injunction will be made permanent.

22 Cyc. Law & Proc. pp. 752, 753n; Echelkamp v. Schrader, 45 Mo. 505.

Burch, J., delivered the opinion of the court:

In an action of ejectment brought by Lorenzo E. McDonald against E. E. Kelson to recover the land in controversy, a tax deed under which Kelson claimed was set aside, and he was given a lien for taxes. The judgment to this effect was rendered in February, 1903. At that time Kelson was not living on the land, and made no claim for improvements. McDonald did not discharge the judgment lien for taxes, and allowed the land to sell at tax sale in September, 1904, for the taxes of 1903. Kelson purchased at this sale, and was given a treasurer's certificate of sale. He then moved on the land, made it his home, erected a dwelling house and other buildings, made other lasting and valuable improvements, and has resided there ever since. He paid the taxes for 1904 and 1905. In October, 1906, McDonald redeemed the land from the judgment and tax sale, and caused a writ of possession to be issued in the ejectment case. Kelson then brought suit for an injunction to prevent eviction until his claim for improvements is adjudicated and satisfied. The probate judge granted a restraining order, which the district court, after hearing a motion to dissolve, continued in force, and a demurrer to the petition was overruled. McDonald prosecutes error upon these rulings.

The petition is criticized for indefiniteness in certain particulars, but indefiniteness is not ground for demurrer if a cause of action be made to appear. Properly interpreted, the petition shows that the plaintiff, having the right of possession and possession in law under the judgment in the ejectment suit, rested upon his legal rights until he purchased the land at tax sale; but that, when he obtained his tax-sale certificate, he entered for the first time into full actual physical occupancy of the land,

and that in the situation he then occupied he made the improvements for which he claims protection. Plainly his possession could not in any view be wrongful as against the defendant when the improvements were made, and the legal question presented is whether the holder of a tax-sale certificate, in quiet and rightful possession acquired and held under the circumstances stated, can be evicted under a judgment in ejectment rendered before the tax-sale certificate was issued, without receiving pay for lasting and valuable improvements made while holding possession under the certificate. The plaintiff was under no obligation to pay taxes because he remained in possession to secure the satisfaction of his judgment lien for taxes. The right to keep possession until reimbursed for such an outlay is burdened with no duty to expend more money to keep the land clear of new tax liens accruing from the land owner's subsequent defaults. Therefore the plaintiff could rightfully purchase at the tax sale. The occupying claimant's act is clear and positive, that no one in possession of lands held under a sale for taxes shall be evicted or thrown out of possession by anyone holding a better title, until he has been paid the full value of all lasting and valuable improvements made under such holding; and a person in possession holding a certificate of sale issued by the county treasurer upon a sale for taxes shall be considered as having sufficient title to demand the value of such improvements. Civ. Code, §§ 601, 602.

In the early case of *Stebbins v. Guthrie*, (1868) 4 Kan. 353, these sections were construed as follows: "One of the conditions pointed out in the first section is: Being in possession of, and holding any land under any sale for taxes authorized by the laws of the state, entitle the occupant to the benefit of the provisions of the statute, if his possession has been obtained without fraud or collusion. It will be seen that in this section it is only made necessary that the occupant holds under any sale for taxes; but lest it should be contended, as it was in this case, that no sale was perfected until the deed was made, thus leaving property unimproved and unproductive for two years, it is further provided in § 2, which is a legislative construction of § 1, that, if the claimant holds a certificate of sale of the lands from a collector of taxes or county treasurer, etc., he shall be deemed to have sufficient title to said land to demand the value of improvements made under provisions of the first section. Now, the plaintiffs in error had such certificate at the time they made the improvements for which they demand compensation, and that, 28 L.R.A. (N.S.)

by the obvious terms of the law, entitled them to its benefits." In another part of this opinion expressions were used indicating that a purchaser at a tax sale becomes the actual owner of the land sold, when he receives a tax-sale certificate. This misapprehension of the effect of a sale for taxes before a tax deed issues was corrected in *Douglass v. Dickson*, 31 Kan. 310, 315, 1 Pac. 541, but the language quoted above has been recognized as a correct statement of the law in numerous subsequent cases dealing with the question. When a tax sale occurs, the land itself is offered for sale, is bid for, and is sold. The certificate issued describes the land purchased, states the amount paid therefor, and the time when the purchaser will be entitled to a deed. This certificate may be assigned, and an assignment has the same force as an assignment of a bond for a conveyance. The certificate may be acknowledged by the treasurer, and, if acknowledged, it may be recorded as an instrument affecting title. Gen. Stat. 1901, §§ 7641, 7643, 7648. The purchaser acquires more than a mere lien for the purchase money. He acquires a kind of title. *Coonradt v. Myers*, 31 Kan. 30, 2 Pac. 858. This title is too inchoate and incomplete to constitute the purchaser an owner. It will not support ejectment, and it is not strong enough to authorize an entry upon land in the actual possession of the owner. But, if the owner has no other possession than that which the law annexes as an incident to his ownership, and the holder of the tax-sale certificate can take full possession in fact without force and without fraud or collusion with anyone, he may do so. Should he do so, his possession is rightful to the extent that he may not be evicted until he is paid for his improvements. See *Stebbins v. Guthrie*, supra; *Millbank v. Ostertag*, 24 Kan. 462, 472; *Coonradt v. Myers*, 31 Kan. 30, 34, 2 Pac. 858.

Of course the adverse judgment in the ejectment action is binding upon the plaintiff, and concludes him in respect to the title and possession ineffectually defended in that action; but under many circumstances there may be a title and possession entirely distinct and wholly disconnected from that involved in the ejectment action, so that there is in fact no privity between the holder and the defeated ejectment defendant. In such cases the judgment extends no further than the title and possession which the parties were able to litigate; and, if a person claiming separate, paramount, and undetermined rights enter pending the ejectment action, a writ of possession may not be executed against him. *Harrod v. Burke*, 76 Kan. 909, 92 Pac. 1128,

123 Am. St. Rep. 179, and authorities there cited; *Smith v. Pretty* (Towle's Motion) 22 Wis. 655; *Howard v. Kennedy*, 4 Ala. 592, 39 Am. Dec. 307; *Clark v. Parkinson*, 10 Allen, 133, 136, 87 Am. Dec. 628; *Irving v. Cunningham*, 77 Cal. 52, 18 Pac. 878; *Atkinson v. Dixon*, 89 Mo. 464, 1 S. W. 13; *Strabala v. Lewis*, 80 Iowa, 510, 45 N. W. 871; *Warvelle, Ejectment*, § 511, p. 569. In *Irving v. Cunningham*, supra, the execution of a writ of possession against a stranger to the suit entering under a tax deed was enjoined.

The plaintiff claims just such a new independent and paramount right. If the defendant's default had continued long enough to allow the tax proceeding to ripen into a valid tax deed, all his rights would have been extinguished. When a landowner fails to discharge his duty to the state, he exposes himself to the penalty inflicted by the tax laws, which is the annihilation of his entire estate and the vesting of it in the tax purchaser. A tax sale will cut across titles and rights of possession established by judgment in ejectment as well as other kinds; and it makes no difference that the tax purchaser is also the defendant in ejectment, so long as he rests under no disability to take a tax deed. The occupying claimant's act is just as rigorous, but not so far reaching. The holder of a tax-sale certificate enjoying a possession which is not wrongful in any respect cannot be evicted until he is paid for his improvements.

The occupying claimant's act is based in part upon a wise public policy, which encourages the improvement of real estate. The interests of the state as a corporation needing revenue are advantaged, and the general welfare of the people is enhanced and promoted. In this case the plaintiff had no semblance of title after the judgment in ejectment, but only barren possession until his lien should be discharged. He could not improve the land except at the risk of loss, and, if the defendant chose not to redeem, it must have remained unimproved at least until the full period of redemption expired and a tax deed issued. Another consideration underlying the act is the inequity and injustice of forfeiting improvements made under a title which the law recognizes. In order to accomplish the purpose of the act, and to carry out the spirit in which it is framed, it must be liberally construed, and the conclusion must be that the facts stated in the petition entitle the plaintiff to an injunction notwithstanding the judgment in the ejectment suit.

The judgment of the District Court is affirmed.

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KANSAS SUPREME COURT.

STATE OF KANSAS EX REL. JOHN S. DAWSON

v.

PARSONS STREET RAILWAY & ELECTRICAL COMPANY et al.

(81 Kan. 430, 105 Pac. 704.)

Street — subway — abutting owner — remedy.

1. If the public officers who are charged with the control of such matters authorize a subway for a car line in a public street, an owner of abutting property, the value of which is thereby diminished, cannot interfere to prevent its construction, however seriously he may be inconvenienced by it. In such case his only remedy, if any, is by an action for the consequential damages.

Street railway — power to enlarge franchise rights — delegation.

2. The legislature, having paramount authority over public streets, may authorize a street car company, which has by ordinance been granted a right to operate only a surface road, to construct a subway beneath the tracks of a railroad. And it may devolve the power to permit and to require this upon the board of railroad commissioners.

Same — subway under railroad track — authorization by railroad commission.

3. Under the statute (Laws 1907, chap. 267, p. 426, § 1; Gen. Stat. 1901, § 5974) giving the board of railroad commissioners power to determine whether there is a necessity for the crossing of a railroad track by a street car line, "and, if so, the place thereof, whether it shall be over or under the existing railroad, or at grade, and in other respects the manner of such crossing," the board can authorize the street

Headnotes by MASON, J.

Note. — Preventive remedy of nonconsenting abutting property owner where use of highway for street railway is authorized by public.

It is not intended to include in this note cases considering preventive remedies of abutting owner where the authority to lay street railway was not lawfully granted by the public; the question considered presupposes that the consent of the public was a valid consent.

Where a street railway is not an additional servitude, and its construction and operation in a public street is not inconsistent with the general and ordinary public highway purposes to which the street was originally dedicated, although injury may result therefrom for which damages may be recovered, yet such construction does not entitle an abutting landowner to injunctive or other relief to prevent same, at least, where the road is constructed and operated

railway company to construct a subway in the street of a city beneath the tracks of a railroad company, in accordance with whatever regulations it may see fit to impose, so that they have relation to the safe operation of both roads and are not unreasonable.

Same — commissioners' plan — conclusiveness.

4. Unless the board acts arbitrarily or capriciously in such matters its determinations are conclusive.

Same — mandamus — necessary parties.

5. In a mandamus brought by the state to require a street railway company to construct a subway beneath the tracks of a railroad, the city is not a necessary party.

Same — subway under railroad track — construction — mandamus.

6. Where a street railway company is operating a continuous line across a city except for a break caused by a number of railroad tracks over which its passengers are transferred, the board of railroad com-

missioners may require it to construct a crossing below grade.

(December 11, 1909.)

APPPLICATION for a writ of mandamus to compel the defendant Parsons Street Railway & Electrical Company to comply with an order of the board of railroad commissioners directing the construction of a subway for its car line under the tracks of the Missouri, Kansas, & Texas Railway Company. Awarded.

The facts are stated in the opinion.

Mr. John S. Dawson, for plaintiff:

The state board of railroad commissioners has jurisdiction of the matter of street railroad crossings over railroad rights of way.

Northern P. R. Co. v. Townsend, 190 U. S. 269, 47 L. ed. 1045, 23 Sup. Ct. Rep. 671; *Pittsburg & C. R. Co. v. South-west Pennsylvania R. Co.* 77 Pa. 173.

with the consent of the proper legislative and municipal authority, and the fee of the street is not in the abutting owner. *Haskell v. Denver Tramway Co.* 23 Colo. 60, 46 Pac. 121; *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777; *Camden Interstate R. Co. v. Smiley*, 27 Ky. L. Rep. 134, 84 S. W. 523; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Stetson v. Chicago & E. R. Co.* 75 Ill. 74; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L.R.A. 485, 40 N. E. 1008; *Doane v. Lake Street Elev. R. Co.* 165 Ill. 510, 36 L.R.A. 97, 56 Am. St. Rep. 265, 46 N. E. 520; *Stewart v. Chicago General Street R. Co.* 166 Ill. 61, 46 N. E. 765; *Spalding v. Macomb & W. I. R. Co.* 225 Ill. 585, 80 N. E. 327; *Parlin v. Mills*, 11 Ill. App. 396; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007; *Budd v. Camden Horse R. Co.* 63 N. J. Eq. 804, 52 Atl. 1130, affirming without opinion 61 N. J. Eq. 543, 48 Atl. 1028; *Taggart v. Newport Street R. Co.* 16 R. I. 669, 7 L.R.A. 205, 19 Atl. 326; *Gray v. Dallas Terminal R. & Union Depot Co.* 13 Tex. Civ. App. 158, 36 S. W. 352; *Mangan v. Texas Transp. Co.* 18 Tex. Civ. App. 478, 44 S. W. 998; *Aycock v. San Antonio Brewing Asso.* 26 Tex. Civ. App. 341, 63 S. W. 953; *Ohio River R. Co. v. Gibbens*, 35 W. Va. 57, 12 S. E. 1093.

In some jurisdictions no distinction has apparently been made as to the remedy of an abutting owner owning the fee of the street and one having only an easement therein, the fee being in the municipality in trust for street purposes; and the cases do not clearly show whether abutting owners seeking preventive relief owned the fee or whether it was in the municipality. In *Haskell v. Denver Tramway Co.* and *Gray v. Dallas Terminal R. & Union Depot Co.* and the Illinois cases cited, the fee of the street was in the public. In *Taggart v. Newport Street R. Co.* the opinion shows that the fee of the street was in the abutting

owners. The other cases, however, do not clearly indicate whether the fee was in the abutting owners or in the public.

It has been held that it is immaterial whether the fee of the street is in the abutting owner or in the municipality; that in either event a street railway is not an additional servitude, and the abutting owner is without a preventive remedy against such use of a street without reference to the ownership of the fee, his remedy being at law for damages. *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007; *Watson v. Fairmont & Suburban R. Co.* 49 W. Va. 528, 39 S. E. 193. To the same effect are *Spencer v. Point Pleasant & O. River R. Co.* 23 W. Va. 406, and *Arbenz v. Wheeling & H. R. Co.* 33 W. Va. 1, 5 L.R.A. 371, 10 S. E. 14.

The question was directly raised in *Gillette v. Chester & M. R. Co.* 2 Pa. Dist. R. 450, and it was there held that an abutting owner who owned the fee of a street was not entitled to an injunction to restrain the construction therein of a street railway where it was being constructed under proper municipal authority. The court said that such use of a street was not a diversion of the use for which it was originally taken, and hence an abutting owner who owned the fee subject to the easement of the public had no right to additional compensation for such taking, and therefore was not entitled to injunctive relief against it.

While the Illinois cases have clearly denied the right of an abutting owner who did not own the fee of the street to injunctive relief against its use for street railway purposes, no case in that state has considered the question as to whether an abutting owner who owned the fee of the street was entitled to preventive relief against the construction therein of a street railway under proper municipal authority.

Chicago, B. & Q. R. Co. v. West Chicago Street R. Co. supra, has been construed

The order of the railroad commissioners to construct a subway does not conflict with the franchise to construct a street railway at grade.

Pittsburg & C. R. Co. v. South-west Pennsylvania R. Co. supra; *Worcester v. Railroad Comrs.* 113 Mass. 161; *Ottawa, O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301, 2 L.R.A. 59, 19 Pac. 661; *Heller v. Atchison, T. & S. F. R. Co.* 28 Kan. 625; *La Harpe v. Elm Twp. Gaslight, Fuel & P. Co.* 69 Kan. 97, 76 Pac. 448.

As the jurisdiction of the railroad commissioners to regulate the manner of crossing the railroads is express, the power to issue the order to build a subway the declining grade of which may extend back a reasonable distance along the street is to be implied.

Throop, Pub. Off. § 542; *Humeston & S. R. Co. v. Chicago, St. P. & K. C. R. Co.* 74 Iowa, 554, 38 N. W. 413; *Toledo, A. A. &*

N. M. R. Co. v. Detroit, L. & N. R. Co. 63 Mich. 645, 30 N. W. 595; *Baltimore & C. Valley Extension R. Co.'s Appeal*, 10 W. N. C. 530; *Illinois C. R. Co. v. St. Louis & N. E. R. Co.* 125 Ill. App. 446.

The railroad commission has the power to appropriate the use of the street for a subway.

Sears v. Crocker, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 327.

If the abutting owners are damaged by the construction of the subway, the law affords them ample remedy.

Kansas, N. & D. R. Co. v. McAfee, 42 Kan. 239, 21 Pac. 1053; *Central Branch Union P. R. Co. v. Twine*, 23 Kan. 589, 33 Am. Rep. 203; *Atchison & N. R. Co. v. Gar-side*, 10 Kan. 552; *Central Branch Union P. R. Co. v. Andrews*, 41 Kan. 370, 21 Pac. 276, 26 Kan. 702; *Leavenworth, N. & S. R. Co. v. Curtan*, 51 Kan. 432, 33 Pac. 297; *Ft. Scott, W. & W. R. Co. v. Fox*. 42 Kan.

both ways upon this question. Some language used in that case would perhaps indicate the view of the court to be that an abutting owner was not entitled to preventive relief against the use of a street for a street railway under municipal authority, even though he was the owner of the fee to the center of the street. The decision of the court, however, was based upon a finding of fact that the railroad company, which claimed to be the owner of the fee of the street, subject to the public easement, was not such owner, but only had an easement therein; and the doctrine therein stated, denying the right of an abutting owner to preventive relief, expressly limits the rule to an abutting owner not owning the fee of the street. It is also worthy of note that the court in this case distinguishes between the remedies of an abutting owner who owns the fee of the street and an abutting owner who has only an easement in the street. This distinction would not have been necessary had the court taken the view that the ownership of the fee was immaterial as affecting the right of an abutting owner to preventive relief in this class of cases.

In some jurisdictions it has been held that an abutting landowner who owns the fee of the street to the center thereof is entitled to compensation for the construction of a street railway in a street abutting his property, and if such compensation is not made he is entitled to restrain the construction until compensated. This is the well-settled doctrine of New York state, wherein the rule prevails that a street railway is an additional servitude. *Craig v. Rochester City & B. R. Co.* 39 N. Y. 404; *Washington Cemetery v. Prospect Park & C. I. R. Co.* 68 N. Y. 591; *Paige v. Schenectady R. Co.* 178 N. Y. 102, 70 N. E. 213; *Spofford v. Southern Boulevard Co.* 15 Daly, 162, 4 N. Y. Supp. 388; *Bernheimer v. Manhattan R. Co.* 26 Abb. N. C. 88, 13 N. Y. Supp. 913. 28 L.R.A. (N.S.)

See also *Lange v. La Crosse & E. R. Co.* 118 Wis. 558, 95 N. W. 952, which holds that an abutting owner who owns the fee to the center of the street, subject only to the public easement, has a right to compensation as a condition precedent to the placing of tracks for a street railway in front of his premises, even though the company has the permission of the proper municipal authorities; and hence he is entitled to enjoin the laying of the tracks until compensated for such use of the street.

Compare with *La Crosse City R. Co. v. Higbee*, 107 Wis. 389, 51 L.R.A. 923, 83 N. W. 701, which holds that a street railway is not an additional servitude, and hence an adjoining property owner who holds the fee to the center of the street has no right to interfere with the construction of such a railway therein, by cutting down supporting trolley wire poles, and will be enjoined from so doing.

An abutting lot owner owning to the center of the street is not entitled to an injunction to restrain the use of the opposite side of the street for a street railway, where such use is with the consent of the abutting owners on that side and also of the proper municipal authorities. *North Pennsylvania R. Co. v. Inland Traction Co.* 205 Pa. 579, 55 Atl. 774.

By the weight of authority the doctrine is settled that where, as a matter of fact or of law, the use of a street for street railway purposes constitutes an additional servitude, an abutting owner who owns the fee of the street is entitled to enjoin such use until compensated therefor.

On this subject in *Hyland v. Short Route R. Transfer Co.* 10 Ky. L. Rep. 900, 11 S. W. 79, the court said that an abutting lot owner, whether he owns the fee of the street subject to the public use or not, has a peculiar private right in it, which attaches to his lot and which the law will protect; and while he is entitled to the reasonable

490, 22 Pac. 583; Atchison, T. & S. F. R. Co. v. Davidson, 52 Kan. 739, 35 Pac. 787; Atchison, T. & S. F. R. Co. v. Church, 53 Kan. 621, 36 Pac. 979; Chicago G. W. R. Co. v. First M. E. Church, 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85.

Messrs. Albert Emanuel and W. D. Atkinson, for defendant Parsons Street Railway & Electrical Company:

If access to the adjoining property is permanently obstructed, the adjoining lot owners have their remedy at law.

Atchison & N. R. Co. v. Garside, 10 Kan. 552; Central Branch Union P. R. Co. v. Twine, 23 Kan. 585, 33 Am. Rep. 203; Ottawa, O. C. & C. G. R. Co. v. Larson, 40 Kan. 301, 2 L.R.A. 59, 19 Pac. 661.

Mr. C. E. Pile, for other defendants:

The order to construct the subway is invalid and void for the reason that it impinges a private right of way upon a part of a street of the city of Parsons, and that it gives the Parsons Street Railway & Electrical Company an exclusive right in said right of way.

Atchison, T. & S. F. R. Co. v. Kansas City, M. & O. R. Co. 67 Kan. 569, 70 Pac. 939, 73 Pac. 899; Smith v. Leavenworth, 15 Kan. 81; Mikesell v. Durkee, 34 Kan. 512, 9 Pac. 278.

The city of Parsons is a necessary party defendant in these proceedings.

Cassatt v. Barber County, 39 Kan. 505, 18 Pac. 517; McCarthy v. Marsh, 41 Kan. 17, 20 Pac. 479; Livingston v. McCarthy, 41

Kan. 20, 20 Pac. 478; Anthony v. State, 49 Kan. 246, 30 Pac. 488; Union Terminal R. Co. v. State Railroad Comrs. 52 Kan. 680, 35 Pac. 224.

Mason, J., delivered the opinion of the court:

The Parsons Street Railway & Electrical Company operates a street railway in the city of Parsons. It desired to cross the tracks of the Missouri, Kansas, & Texas Railway Company in a street of that city. It applied to the state board of railroad commissioners, which body, on October 9, 1909, upon due hearing, ordered it to construct for that purpose a subway under the tracks of the railroad, in accordance with certain plans covering all the details of the work, including the approaches. On October 15th a proceeding by mandamus was brought in this court in the name of the state on the relation of the attorney for the board of railroad commissioners to require the street railway company to comply with the order. The defendant answered expressing its willingness to do so if it has the necessary authority, but stating that the city ordinance under which it operates provides that its tracks shall be laid at the grade of the streets. Several owners of property abutting on the site of the approaches shown in the plan have intervened, and urge various reasons why a peremptory writ should not be allowed. The cause is submitted upon the pleadings.

use of it in all ordinary ways, yet he cannot complain of a mere inconvenience or decline in the value of his property, arising from the use of the street by the public in the way of improved modes of travel, but it is only when the use becomes destructive of the primary purpose, and he is deprived of its reasonable use for such purpose, that he will be heard. And added: "The construction of a railroad over a street is not *per se* an illegal invasion of his right. . . . Whether he can complain depends not upon the existence of the railroad, but the manner of its construction and operation. If he be thereby deprived of the reasonable use of the street, he may apply to the courts for relief; but if he be merely inconvenienced, or suffers some remote consequential injury, it is *damnum absque injuria*. . . . Relief by injunction should not be afforded in such a case unless the evidence clearly shows the existence of the right and its invasion, and that such a remedy is necessary to adequate relief."

A bill by abutting owners for an injunction to restrain the construction of a street railway, which shows that the company has the consent and authority of the municipality so to do, is not maintainable unless it is also shown by proper averments that the railway would be a nuisance in fact, and that complainants would suffer special in-

jury different in kind from that sustained by the general public. Baker v. Selma Street & Suburban R. Co. 135 Ala. 552, 93 Am. St. Rep. 42, 33 So. 685.

In Dilley v. Wilkes-Barre & K. Pass. R. Co. 6 Kulp, 503, where the fee of the street was in a city, an injunction was denied an abutting property owner who did not allege that he would suffer irreparable damage from laying tracks for a street railway in a street abutting his property; the action of the street railway company being with the consent of the municipality.

The use of a street for interurban railway purposes is an additional burden on the fee, and hence abutting lot owners who own the fee of the street are entitled to enjoin the construction of such a railway in the street or its use for such a purpose. Pennsylvania R. Co. v. Montgomery County Pass. R. Co. 167 Pa. 62, 27 L.R.A. 766, 46 Am. St. Rep. 659, 31 Atl. 468; Younkin v. Milwaukee Light, Heat & Traction Co. 120 Wis. 477, 98 N. W. 215; Schuster v. Milwaukee Electric R. Light Co. 142 Wis. 578, 126 N. W. 26; Wilder v. Aurora, D. & R. Electric Traction Co. 216 Ill. 493, 75 N. E. 194.

So, where the municipality owns the fee of the street in trust for public uses, the use thereof for street cars, if within the scope of the trust, gives an abutting owner no right to compensation or injunctive re-

The power of the state over the public streets, whether exercised directly by the legislature, or through the city council or some other body, is absolute. *La Harpe v. Elm Twp. Gaslight, Fuel & P. Co.* 69 Kan. 97, 76 Pac. 448; *Prince v. Crocker*, 166 Mass. 347, 32 L.R.A. 610, 44 N. E. 446; 28 Cyc. Law & Proc. p. 287; 15 Cyc. Law & Proc. p. 626. If the public officers who are charged by the statute with control of the matter have authorized the subway in question, the owners of the abutting property have no standing to object to its construction on their own account, however much inconvenience and injury they may suffer from it. None of their property is actually taken, and the only remedy, if any, which the law affords them for merely consequential damages, is by an action for compensation. *Ottawa, O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301, 2 L.R.A. 59, 19 Pac. 661; *Leavenworth v. Douglass*, 59 Kan. 416, 53 Pac. 123; 15 Cyc. Law & Proc. p. 781. The rights of abutters under somewhat similar conditions are discussed in 1 Lewis on Eminent Domain, 3d ed. §§ 138, 174, 178, 191. Notwithstanding no relief can be given them in this proceeding, it is appropriate that the individuals whose interests are injuriously affected should be heard as friends of the court, especially as no objection to the work is urged from any other quarter. The city has not been made a party, and a majority of the council approve the proposed plans and prefer that it shall not

lief unless his easement of light, air, or access to and from the street, is substantially interfered with. *Oviatt v. Akron Street R. Co.* 2 Ohio N. P. 84.

Where the construction of a railroad in the street of a municipality will work material injury to an abutting owner, such construction may be enjoined at the suit of the owner, until the right to construct same is acquired under proceedings against the owner as required by law for the appropriation of private property; and it is immaterial whether the fee of the street is in the city or in the abutting owner. *Cincinnati & S. G. Ave. Street R. Co. v. Cumminsville*, 14 Ohio St. 524; *Scioto Valley R. Co. v. Lawrence*, 38 Ohio St. 41, 43 Am. Rep. 419; *Root v. Pennsylvania R. Co.* 7 Ohio N. P. 337.

The construction in a public street of a signal tower to be used in connection with a street railway system will be restrained at the suit of an abutting property owner; it not appearing that such tower could not be erected on private property. *Williams v. Los Angeles R. Co.* 150 Cal. 592, 89 Pac. 330.

Injunctive relief will be granted an abutting lot owner against the construction and operation of a street railway system in an alley adjoining his property, where the alley is so narrow that to operate the cars as

intervene. Although the franchise granted by the city to the street car company only authorizes it to lay its tracks at grade, the legislature, as the paramount authority, can enlarge its power in this regard, and this may be done directly or through some other body. 27 Am. & Eng. Enc. Law, pp. 168, 178; 28 Cyc. Law & Proc. p. 848; *Wulf v. Kansas City*, 77 Kan. 358, 373-375, 94 Pac. 207.

The force of the order of the board of railroad commissioners depends wholly upon the statute. In 1907 the jurisdiction of the board was extended to electric lines, which previously had not been under its control. *Kansas City, O. B. & Electric R. Co. v. Railroad Comrs.* 73 Kan. 168, 84 Pac. 755. The amended statute concludes with this provision: "This act shall not be construed to apply to electric street or street railway lines operating exclusively within any county, except as to the crossings of any railroad over any other railroad, as provided in § 5974, General Statutes of 1901." Laws 1907, chap. 267, p. 426, § 1. The section of the General Statutes referred to, so far as here important, reads as follows: "Any railroad company authorized to operate a railroad in this state, desiring to cross or unite its track with any other railroad upon the grounds of such other railway corporation, shall make application in writing to the board of railroad commissioners, stating the place of crossing or intersection; whereupon the

provided in an ordinance permitting the use of the alley for such purpose would amount to a practical appropriation of all of the alley lying between its curbs, and would effectually prevent the passage of other vehicles over the alley, and deprive the abutting owners of the privilege of receiving and discharging freight and goods at the side doors of their buildings fronting on the alleyway. *Watson v. Robberson Ave. R. Co.* 69 Mo. App. 548.

To the same effect as to a steam railway in a narrow street is *Lockwood v. Wabash R. Co.* 122 Mo. 86, 24 L.R.A. 516, 43 Am. St. Rep. 547, 26 S. W. 698.

It has been held that the legislature has not the power, and hence cannot delegate to a municipality power, to permit a street railway to lay an additional track in a public street in which there are already sufficient tracks to meet public needs; and that an owner of land abutting upon such street may enjoin the laying of additional tracks, even though the laying thereof is authorized by the municipality. The right to such relief is not affected by the fact that the municipality owns the fee of the street in trust for ordinary street purposes. *Dooly Block v. Salt Lake Rapid Transit Co.* 9 Utah, 31, 24 L.R.A. 610, 33 Pac. 229.

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board of railroad commissioners shall fix a day for the hearing of such application, and notify the railway corporations interested, at which time, unless further time be granted by the board, the corporations interested shall be heard in regard to the necessity, place, manner and time of such crossing or connection; and upon such hearing either party, or the board, may call and examine witnesses in regard to the matter; and the board shall, after such hearing and a personal examination of the locality where a crossing or connection is desired, determine whether there is a necessity for such crossing or not, and, if so, the place thereof, whether it shall be over or under the existing railroad, or at grade, and in other respects the manner of such crossing and the terms upon which the same shall be made and maintained." Gen. Stat. 1901, § 5974. By the terms of the statute the board of railroad commissioners had power to determine that the crossing should be made at the place indicated, by means of a subway beneath the railroad tracks. But in addition to this it also had power to determine the "manner" of crossing, and we think this fairly implies the right to make any reasonable requirement having relation to the safe operation of both roads, that being a matter committed to its control. 33 Cyc. Law & Proc. p. 296. For instance, the kind of support to be provided for the surface railroad, and the grade and consequent length of the approaches to the subway, are details clearly subject to regulation by the board. Consequently a proper function of the board is to decide upon a plan of the work, as has been done in this case, and its decision in the absence of exceptional circumstances must be final. Of course if its action had been arbitrary or capricious the courts could afford relief. And doubtless the city could insist upon compliance with any conditions it might see fit to impose consistent with the requirements of the board, for the purpose of minimizing any resulting damage and inconvenience.

The interveners complain of public and private inconvenience that will result from the carrying out of the present plans. The situation presents, however, merely a problem in engineering. The wisdom of a particular method of construction is for the determination of the railroad board. There is nothing in the record to suggest remotely any abuse of discretion. The court cannot presume to pass judgment upon the fitness of the plans adopted. The interveners
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also contend that the city should have been made a party to this proceeding and that in its absence there is a defect of parties. Technically in mandamus the only necessary parties are the plaintiff, who asserts the right to have an act done, and the defendant, upon whom the public duty rests to perform it. The practice is common and commendable to bring in other persons who are likely to be injuriously affected by the judgment, in order that they may have an opportunity to be heard in their own behalf, and in a proper case the court will suspend proceedings until this is done. *Livingston v. McCarthy*, 41 Kan. 20, 20 Pac. 478. But such procedure is for the protection of the persons so affected. Here no one authorized to speak for the city asks for a hearing in its behalf, a majority of the officers who, by acting together, could represent it, disclaim any desire for it to be heard, and it is not apparent that any injury will result to it by the decision. Under these circumstances there is neither a technical nor a practical defect of parties.

The further objection is made that the plan involves the exclusive use by the railway company, not only of the subway itself, but of that portion of the street taken up by the approaches. The most suitable arrangement to be made in this regard is a fair matter for the determination of the railroad board. The statute (Laws 1903, chap. 122, p. 189, § 58) giving the mayor and councilmen of cities of the first class authority to regulate public grounds contains a prohibition of any exclusive privilege for a railway in a street, but the restriction applies only to acts of the city officials, as it is a limitation of the power granted to them.

The final objection that is thought to require specific mention is that the writ ought not to issue because, granting that the street railway company must construct the kind of crossing prescribed by the board, or none at all, it is under no public duty to construct any, and therefore is not subject to mandamus in that regard. The allegations of the alternative writ show that the company is now operating a continuous line from one side of the city to the other, save for the break caused by the railroad tracks. This arrangement may be regarded as in effect an operation of the street railway across the railroad by means of a transfer, and it is competent for the railroad commissioners to order this method to be changed.

A peremptory writ will be awarded.

KANSAS SUPREME COURT.**W. B. HENRY**

v.

**ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY, Appt.**

(— Kan. —, 109 Pac. 1005.)

**Appeal — erroneous decision on former
appeal — conclusiveness.**

1. Ordinarily a question considered and determined on the first appeal of a case is deemed to be settled, and not open to re-examination on a second appeal, but it is not an inflexible rule, and if the prior decision is palpably erroneous, it is competent for the court to correct it on the second appeal.

Same — matter not considered on former appeal.

2. If the point, though involved in the record of a first appeal, is not brought to the attention of nor considered by the court, its decision then made does not preclude the consideration and determination of the point when presented on the second appeal.

**Carrier — wrongful refusal to deliver
goods — subsequent damage — liability.**

3. A railway company transported goods to destination, and notified the owner to come and take them away. In response to the notice the owner promptly called at the freight depot, tendered the charges due thereon, and demanded the delivery of the goods, but the railway company refused the demand. One day thereafter an unprecedented flood occurred, which damaged the goods. Held that, by the refusal of the demand and the wrongful detention of the goods, the railway company held them at its own risk, and was responsible for the loss occasioned to them by the flood.

(July 9, 1910.)

A PPEAL by defendant from a judgment of the District Court for Shawnee County in plaintiff's favor in an action brought to recover damages for injury to plaintiff's goods by flood while the goods were in defendant's freight house. Affirmed.

Statement by Johnston, Ch. J.:

In this action W. B. Henry alleged that the Atchison, Topeka, & Santa Fé Railway Company undertook to and did transport his goods of the value of \$2,500 from Topeka to Kansas City, and that when the goods reached destination and he demanded delivery of the same, the railway company wrongfully refused to give him his goods, and that subsequently they were injured and

destroyed. Besides a general denial, the railway company answered that it received the goods and promptly carried them to Kansas City, where they arrived about May 28, 1903; that Henry was then notified of their arrival, but that he neglected to call for or remove the goods from the station, and that on May 31, 1903, they were damaged by an act of God, the unprecedented flood of 1903, and not by the negligence of the railway company. It was also alleged that if a demand was made for the goods on May 30, 1903, it was done upon a legal holiday, and the company's freight office was not open for business or the delivery of freight on that day, and, further, that no demand was made for the goods in business hours on any business day. On the first trial judgment was given for Henry, but for errors committed that judgment was reversed. *Atchison, T. & S. F. R. Co. v. Henry*, 78 Kan. 490, 18 L.R.A. (N.S.) 177, 97 Pac. 465. The last trial was upon a transcript of the testimony given on the first trial, on which the court made the following findings of fact and law:

"(1) I find that on or about the 27th day of May, 1903, the said W. B. Henry shipped by the Atchison, Topeka, & Santa Fé Railway Company certain household goods and furniture, in and for a valuable consideration from the city of Topeka to Kansas City, Missouri, there to be delivered to the said W. B. Henry.

"(2) That the said property was transported by the Santa Fé Railway Company from Topeka to Kansas City, Missouri, arriving in Kansas City, Missouri, upon the 28th day of May, 1903, and that upon the afternoon of May 29th, 1903, notice was sent by the said company to W. B. Henry of the arrival of said property, notifying the said W. B. Henry to call and remove the same from the freight house of said company. That W. B. Henry received said notice of the arrival of said property between the hours of 12 and 1 o'clock upon the 30th day of May, 1903, and, immediately, within one hour, went to the proper offices at the freight depot of defendant company, prepared to remove said property, as notified, and then and there demanded of said company said property, and offered to pay all charges thereon, but that the said company did, at the time of said demand, upon the 30th day of May, refuse, failed, and neglected to deliver said property to the said W. B. Henry.

"(3) I further find that the said 30th day of May, 1903, was a legal holiday in the state of Missouri, and that the said day after 12 o'clock P. M. was a legal holiday in the city of Kansas City, state of Missouri, but that I further find that the said com-

Headnotes by JOHNSTON, Ch. J.

Note. — See note to *Atchison, T. & S. F. R. Co. v. Henry*, 18 L.R.A. (N.S.) 177, 28 L.R.A. (N.S.)

pany's office and place of business was open for the transaction of business, and that said company did not recognize the 30th day of May, 1903, or any part thereof, as a legal holiday at Kansas City, Missouri, in connection with the delivery of freight at its said depot. That the said company had its place of business open, and was transacting business upon said day, as usual, when Henry called and demanded said property.

"(4) I further find that the market value of said property in Kansas City upon the 30th day of May, 1903, was in the sum and value of \$2,220.73.

"(5) I further find that, upon the 31st day of May, there was an extraordinary and unprecedented flood, an act of God, in the Kaw and Missouri rivers at Kansas City, Missouri, and the said property was, on the 31st day of May, wholly destroyed by said flood, while in the freight house of defendant company.

"(6) That upon making application for his shipment of goods to the clerk in the freight office at the time above mentioned, he was informed by the clerk in the freight office of the defendant that he could not obtain the shipment in question on that day, as it was a legal holiday and the cashier was not in his office; plaintiff repeated his demand for the goods, and insisted on obtaining the shipment, and told the said employees that he had the change, and had come prepared to take the goods, and that he wanted them. Plaintiff was not told to call again later in the day, but was informed that he could not obtain the shipment on that day, whereupon plaintiff left the said freight office, and did not return or make other demands upon any other person for the shipment on that date.

"(7) That on the 9th day of June, 1903, the plaintiff received from the defendant, and receipted to it for his shipment of freight in question in a damaged condition, with the understanding that in so doing he waived no legal right or claim that he might have against the defendant for the ruined or damaged condition of the goods.

"(8) I further find that said property was in the freight house of the said company upon the 30th day of May, 1903, when Henry called for and demanded the same, and the said company could have delivered said property to Henry, but, without any just reason or proper cause therefor, wrongfully refused and neglected to deliver the same.

"Conclusion of Law.

"(1) Plaintiff is entitled to recover judgment against defendant company in the sum of \$2,220.73, the reasonable market value of the property destroyed, with interest 28 L.R.A.(N.S.)

thereon at the rate of 6 per cent per annum from May 27, 1903, to date, or \$2,763.48."

The railway company appeals.

Messrs. W. R. Smith, O. J. Wood, and Alfred A. Scott, for appellant:

The proximate cause of the loss and damage to plaintiff's goods having been the act of God, the defendant is not liable.

Atchison, T. & S. F. R. Co. v. Henry, 78 Kan. 490, 18 L.R.A.(N.S.) 177, 97 Pac. 465.

The questions determined upon the former appeal are *res judicata*, and will not be re-examined upon any subsequent appeal.

Headley v. Challiss, 15 Kan. 602; Central Branch Union P. R. Co. v. Shoup, 28 Kan. 394, 42 Am. Rep. 163; A. J. Harwi Hardware Co. v. Klippert, 73 Kan. 783, 85 Pac. 784; Missouri P. R. Co. v. Stone, 80 Kan. 7, 101 Pac. 666.

Mr. Eugene S. Quinton, for appellee:

Where property in the hands of the common carrier has reached its destination, and is then and there in its possession, and rightfully demanded by the owner, and wrongfully refused by the carrier, without any justifiable reason, and thereby subjected to the act of God, the carrier is still liable.

Union P. R. Co. v. Moyer, 40 Kan. 184, 10 Am. St. Rep. 183, 19 Pac. 639; Kansas City, Ft. S. & G. R. Co. v. Morrison, 34 Kan. 502, 55 Am. Rep. 252, 9 Pac. 225; Watt v. Potter, 2 Mason, 77, Fed. Cas. No. 17,291; East Tennessee, V. & G. R. Co. v. Kelly, 91 Tenn. 609, 17 L.R.A. 691, 30 Am. St. Rep. 902, 20 S. W. 312; Louisville & N. R. Co. v. Lawson, 88 Ky. 496, 11 S. W. 511; Loeffler v. Keokuk Northern Line Packet Co. 7 Mo. App. 185; Shellenberg v. Fremont, E. & M. Valley R. Co. 45 Neb. 487, 50 Am. St. Rep. 561, 63 N. W. 859; Judah v. Kemp, 2 Johns. Cas. 411; Clement v. New York C. & H. R. R. Co. 56 Hun, 643, 30 N. Y. S. R. 713, 9 N. Y. Supp. 601; Jeffersonville R. Co. v. White, 6 Bush, 257; Stevens v. Boston & M. R. Co. 1 Gray, 277; Burlington & M. River R. Co. v. Arms, 15 Neb. 69, 17 N. W. 351; McKinney v. Jewett, 90 N. Y. 237; Richmond & D. R. Co. v. Benson, 86 Ga. 203, 22 Am. St. Rep. 450, 12 S. E. 357; 1 Am. & Eng. Enc. Law, 2d ed. p. 595; 1 Enc. L. & P. p. 1111; Seigel v. Eisen, 41 Cal. 109; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Norris v. Savannah, F. & W. R. Co. 23 Fla. 182, 11 Am. St. Rep. 355, 1 So. 475; Richmond & D. R. Co. v. White, 88 Ga. 805, 15 S. E. 802; Michigan C. R. Co. v. Curtis, 80 Ill. 324; Parrill v. Cleveland, C. C. & St. L. R. Co. 23 Ind. App. 638, 55 N. E. 1026; Denny v. New York C. R. Co. 13 Gray, 481, 74 Am. Dec. 645; Jones v. Min-

neapolis & St. L. R. Co. 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893; *Armentrout v. St. Louis, K. C. & N. R. Co.* 1 Mo. App. 158; *Wolf v. American Exp. Co.* 43 Mo. 422, 97 Am. Dec. 406; *Read v. St. Louis, K. C. & N. R. Co.* 60 Mo. 199; *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527; *Vail v. Pacific R. Co.* 63 Mo. 230; *Gratiot Street Warehouse Co. v. Missouri, K. & F. R. Co.* 124 Mo. App. 545, 102 S. W. 11; *New Brunswick S. B. & Canal Transp. Co. v. Tiers*, 24 N. J. L. 607, 64 Am. Dec. 394; *Wing v. New York & E. R. Co.* 1 Hilt. 235; *Michaels v. New York C. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Bostwick v. Baltimore & O. R. Co.* 45 N. Y. 712; *Lamb v. Camden & A. R. Transp. Co.* 46 N. Y. 288, 7 Am. Rep. 327; *Condict v. Grand Trunk R. Co.* 54 N. Y. 500; *Backhouse v. Sneed*, 5 N. C. (1 Murph.) 173; *Charleston & C. S. B. Co. v. Bason*, Harp. L. 262; *Campbell v. Morse*, Harp. L. 468; *Sonneborn v. Southern R. Co.* 65 S. C. 502, 44 S. E. 77; *Nashville & C. R. Co. v. David*, 6 Heisk. 261, 19 Am. Rep. 594; *Atchison, T. & S. F. R. Co. v. Nation* (Tex. Civ. App.) 92 S. W. 823; *McGraw v. Baltimore & O. R. Co.* 18 W. Va. 365, 41 Am. Rep. 696; *Klauber v. American Exp. Co.* 21 Wis. 21, 91 Am. Dec. 452; *Nugent v. Smith*, L. R. 1 C. P. Div. 423, 1 Eng. Rul. Cas. 216.

The decision upon former appeal is not conclusive.

Central Branch Union P. R. Co. v. Shoup, 28 Kan. 395, 42 Am. Rep. 163; *Hastings v. Foxworthy*, 45 Neb. 676, 34 L.R.A. 321, 63 N. W. 955; *Bane v. Wick*, 6 Ohio St. 14; *Bell v. Lamprey*, 58 N. H. 124; *Frankland v. Cassaday*, 62 Tex. 418.

Johnston, Ch. J., delivered the opinion of the court:

The appellant contends that, as the testimony on which the judgment in question rests was exactly the same as upon the earlier trial, the decision on the former appeal necessarily determines the result of this appeal, and requires judgment in its favor. If it be assumed that no new elements were brought into the case on the second trial, it does not follow that the former decision, right or wrong, is conclusively binding upon this appeal. Ordinarily, a question considered and decided on the first appeal is deemed to be settled, and, except for very cogent reasons involving palpable error, will not be re-examined on a second appeal. Some courts hold that a decision, whether right or wrong, is conclusive in all subsequent appeals, but what is called the "law of the case" is not an inflexible rule which requires a court to blindly reiterate a rule of law that is clearly erroneous. In *Central* 28 L.R.A. (N.S.)

Branch Union P. R. Co. v. Shoup, 28 Kan. 394, 42 Am. Rep. 163, the court, after stating generally the importance of stability and uniformity in the interpretation of the law, said: "We do not understand that the rule that a decision once made becomes the established law of the case is a cast-iron rule, and incapable of relaxation in any event. Cases may arise in which it will be very clear that the first decision was erroneous; that not only in the case at bar will wrong result from adhering to the decision, but also other interests through the state will be imperiled; hence we do not doubt the power of the court to reconsider and reverse a prior decision in the same case." In the late case of *Missouri, K. & T. R. Co. v. Merrill*, 65 Kan. 436, 59 L.R.A. 711, 93 Am. St. Rep. 287, 70 Pac. 358, it was insisted that a ruling on the first appeal, however incorrect, was conclusive on the second, but the court again refused to sanction the theory that it was required to readopt and repeat a decision founded in serious error. Mr. Justice Smith answered the contention that a decision once announced by the supreme court must be adhered to, by saying: "This would come to us with more force if we were not now considering the same case with the same parties before the court. If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally. We are fully satisfied that the rule of the former case is shattered by the pressing weight of opposing authority, and that reason is against it." In *Ellison v. Georgia R. & Bkg. Co.* 87 Ga. 691, 13 S. E. 809, the learned Chief Justice Bleckley used the following forcible language: "Some courts live by correcting the errors of others and adhering to their own. . . . Minor errors, even if quite obvious, or important errors, if their existence be fairly doubtful, may be adhered to and repeated indefinitely, but the only treatment for a great and glaring error, affecting the current administration of justice in all courts of original jurisdiction, is to correct it. When an error of this magnitude, and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not *stare decisis*, but *fiat justitia, ruat cælum*."

This being the well-established rule in our own state, it is unnecessary to consider or review the rulings of other states upon the binding force of an erroneous decision on a prior appeal. On the first appeal in this case no account was taken of the distinction between mere neglect of the carrier and its

wilful wrong in refusing to deliver the goods twenty-four hours before the occurrence of the flood. The findings specifically show that the goods arrived at Kansas City on May 28, 1903, and that on the following day Henry was notified to come and remove them from the freight depot. On the next day, and within an hour after receiving the notice, he went to the depot, tendered the amount of charges, and demanded his goods, but the railway company refused to deliver them to him. It is true that May 30th was a legal holiday, but that is not a matter of consequence in this case, as the company did not recognize it as a holiday. Its place of business was open on that day, and it was transacting business as usual when the demand was made and refused. While the testimony is the same as on the former appeal, the findings in the last trial are more specific in regard to the fact that the freight depot was open for business on the day of the demand and as to the refusal of the demand. The wrongful withholding of the goods and its consequences were in the case, it is true, and might have entered into the decision on the first appeal, but the case was tried as one of mere negligence in the performance of a duty by the carrier, like neglect in the forwarding of freight, and, following *Rodgers v. Missouri P. R. Co.* 75 Kan. 222, 10 L.R.A.(N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 A. & E. Ann. Cas. 441, the case was decided on the theory "that, for the negligent failure of a party to perform a duty imposed by his contract, he is liable in damages to the other party for such loss as at the time of the omission would probably, or should reasonably, be expected to flow therefrom, and no other. If one owing a duty neglect to perform it, and a cause which could not have been reasonably apprehended intervene, and loss result, the latter cause, and not the omission of duty, is the proximate cause of the loss." [78 Kan. 494, 18 L.R.A.(N.S.) 179, 97 Pac. 465]. Now, there is directly presented the effect of the tortious detention of the goods before and up to the time of the flood which injured them. The goods were there ready for delivery. The owner was entitled to the possession of them when the demand was made. There was no excuse or justification for withholding them from him, and the refusal of the railway company to deliver them made it guilty of a wilful wrong but for which there would have been no loss. The wrongful detention of the goods is sometimes called a conversion, and, while it is not a conversion in the sense that there was an intention of the company to convert the goods to its own use, yet, upon the refusal, plaintiff at once became entitled to maintain an action to recover the goods or 28 L.R.A.(N.S.)

their value, against which the company would have had no defense. In *Watt v. Potter*, 2 Mason, 77, Fed. Cas. No. 17,291, Justice Story said: "Whoever undertakes tortiously to deal with the property of another as his own, or tortiously detains it from the owner, is in contemplation of law guilty of a conversion of it." The case of *Rodgers v. Missouri P. R. Co.*, supra, so much discussed by counsel, was well decided, and there is no intention to limit the rule there announced or weaken its force as an authority. Even in that case the difference between mere negligence in transporting goods subsequently injured by an act of God and some positive wrongdoing by the carrier was recognized. Referring to cases in which it was held that there was such a departure from the line of duty of the carrier and such misconduct as to make it liable for goods injured by an act of God, and which would not otherwise have been injured, it was said: "That case was one of deviation, a positive misfeasance, which makes the carrier liable as for conversion. 6 Cyc. Law & Proc. p. 383; *Chicago G. W. R. Co. v. Dunlap*, 71 Kan. 67, 80 Pac. 34. Mr. Chief Justice Tindal bases his argument upon the proposition that the wrong of the master in taking the barge out of its proper course was undoubtedly a ground of action. The rule first appears in the law of marine insurance, and was adopted to meet the spirit of dangerous adventure on the part of sea rovers which disregarded the safety of both property and life. Such a tortfeasor is held to take all risks as if they were actually foreseen, and is not allowed to apportion or qualify his wrong." In referring to an argument made in another case, in which a loss resulted from the wrongdoing of the defendant co-operating with an act of God, and where it was impossible to say how far the act of God contributed to the loss, and wherein it was concluded that the act of God was not the sole or proximate cause of the loss, it was said: "No one will dispute the soundness of this argument. It has been decided that if a carrier undertake to transport freight in an unseaworthy ship, it makes no difference that the storm which foundered it was of unusual severity. Hazard existed when the voyage began, and it is not possible to determine the effect of the delinquency upon the final event. *Bell v. Reed*, 4 Binn. 127, 5 Am. Dec. 398. If baggage be put off in the rain without any protection, it makes no difference that the rainfall is unprecedented. It is the carrier's duty to protect property in its custody from exposure to rain. *Sonneborn v. Southern R. Co.* 65 S. C. 502, 44 S. E. 77. In all such cases, and in cases of actual deviation from the usual

route, it is proper to say that an act of God must not combine with human instrumentality; that if a carrier depart from the line of duty, he is liable, though an act of God intervene; and that he must be free from fault in order to claim his exemption." The flood was only the remote cause of the injury and loss in this instance. While it is true that the flood was one not to be anticipated, the railway company by withholding the goods became, as was stated, "a tortfeasor, and is held to take all risks as if they were actually foreseen." The effect of the wrongful taking or withholding of possession of the property of another finally lost through the act of God is shown in *Blaker v. Sands*, 29 Kan. 551, where it was said: "A party not being the owner of personal property, who takes it out of the possession of the real owner without his consent, holds it in his own wrong and at his own risk, and if subsequently judgment is rendered against him for the return of the property or its value, he cannot be excused from satisfying the judgment under the plea that the property has been lost in his hands, even by the act of God." Another case of the same import is *Kansas City, Ft. S. & G. R. Co. v. Morrison*, 34 Kan. 502, 55 Am. Rep. 252, 9 Pac. 225, where a passenger traveling with a trunk arrived at destination, and the check for the trunk was presented to the baggageman and delivery of the same demanded, but he was told that the trunk had not arrived, when in fact it had. Shortly afterwards the depot in which it was kept was broken into by burglars, and the contents of the trunk stolen, and one of the questions in the case was the effect of the refusal of the demand. It was said: "If plaintiff demanded his baggage, as testified to, and the company, having the trunk at its depot at Parsons, refused to deliver it, the company is responsible to the owner for its contents, although the trunk was subsequently broken open and robbed without its fault." In *Union P. R. Co. v. Moyer*, 40 Kan. 184, 10 Am. St. Rep. 183, 19 Pac. 639, the responsibility of the railway company for goods wrongfully withheld from the owner was determined. The goods were shipped from Ohio to Kansas, and after their arrival the owner demanded the delivery of them from the company, and was informed by the agent of the company that they were not there. Two days later the depot was accidentally burned, and it was held that the wrongful withholding of the goods when they were demanded made the railway company liable for the loss.

It is argued that the flood was not only a concurring, but that it was the proximate, cause of the injury and loss. While the wrongful withholding of the goods had noth-

ing to do with the occurrence of the flood, it did in fact cause the loss, as there would have been no loss if there had been no wrongful detention. The fact that the intervention of the flood concurred with its own wrong in the injury of the goods does not relieve it from responsibility for the loss. It was said in *Davis v. Garrett*, 6 Bing. 716, 5 Eng. Rul. Cas. 273, "that no wrongdoer can be allowed to apportion or qualify his own wrong." The effect of the wrongful withholding of goods from delivery, after they have been received, was a subject of comment in *Louisville & N. R. Co. v. Lawson*, 88 Ky. 496, 11 S. W. 511. There, goods were shipped over a railroad, and when they reached destination the railway company notified the owner of their arrival. On the next day the owner demanded the goods, but was informed that they were not there. In the succeeding days several other demands were made and like answers given. The refusal, it was said, should be regarded as a tortious detention, or what is the same thing, a wrongful withholding from the owner. It was said: "We do not mean to decide that a mere delay by a carrier in delivering goods amounts to a conversion. He is not bound to deliver until a demand is made. But, when made, he must know whether the property is at hand; and if it be, and he wrongfully fails to deliver it, he cannot escape the charge of conversion because he did not, in express words, refuse to deliver it, but informs the consignee it has not come to hand, when he is bound by law to know otherwise. Such conduct on his part should be regarded as a misfeasance, and not as a mere nonfeasance." *Richmond & D. R. Co. v. Benson*, 86 Ga. 203, 22 Am. St. Rep. 446, 12 S. E. 357. was a case where goods were directed to be shipped by a particular route, and, instead of sending them directly, the railroad company transported them in a roundabout way, thereby causing a delay of several days. Two days after the goods were received, they were damaged by a flood. For several days before the flood the consignee sent every day to the depot of the railroad company and asked for the goods, but was informed that they had not arrived. The goods, however, were then in the possession of the railroad company, but the agent failed or refused to deliver them. The court held the refusal to deliver and the wrongful detention of the goods made the railroad company liable for the loss sustained. See also *Chicago G. W. R. Co. v. Dunlap*, 71 Kan. 67, 80 Pac. 34; *East Tennessee, V. & G. R. Co. v. Kelly*, 91 Tenn. 699, 17 L.R.A. 691, 30 Am. St. Rep. 902, 20 S. W. 312; *Richmond & D. R. Co. v. White*, 88 Ga. 805, 15 S. E. 802; *Williams v. Grant*, 1

Conn. 487, 7 Am. Dec. 235; New Brunswick S. B. & Canal Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; 1 Hutchinson, Carr. 3d ed. § 313; 5 Thomp. Neg. § 6597; 6 Cyc. Law & Proc. p. 385; 1 Am. & Eng. Enc. Law 2d ed. p. 594; 1 Enc. L. & P. p. 1111.

The findings of fact made by the trial court warranted its conclusion of law, and its judgment must therefore be affirmed.

All the Justices concur.

Petition for rehearing denied.

PENNSYLVANIA SUPREME COURT.

FIDELITY TRUST COMPANY, Committee,
etc., of Marie Louisa Hoffman, Appt.,

v.

MOSES BOBLOSKI.

(228 Pa. 52, 76 Atl. 720.)

Will — defeasible fee — grant with directions.

1. A defeasible fee which becomes absolute on the death of the widow without remarriage is created by a will which, after reciting that testator is fully convinced that his wife will educate the children and administer "our joint property" as well as if testator was living, directs that she shall take possession and enjoy and administrate the property for the time that she remains a widow, with a direction that she assist the children to procure the means best adapted for their future welfare; and it is immaterial that she is forbidden to sell the realty without the consent of the executors or that, in the event of her remarriage, the property is to go to the children.

Same — construction — primary intent.

2. The construction of a will should in case of doubt be in favor of the first rather than of the second taker, and of a general or primary intent rather than of a particular or secondary one.

Same — devisee subject to burden — resolution of doubts.

3. Where a devisee is subject to a charge or burden, doubts as to the *quantum* of the estate should be resolved in his favor.

(April 18, 1910.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Philadelphia County in defendant's favor in an action brought to recover certain real estate to which plaintiff alleged title under the will of Jacob Hoffman, deceased. Affirmed.

The facts are stated in the opinion.
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Messrs. George S. Munson and H. Gordon McCouch, for appellant:

Testator's wife was only given an estate during widowhood, subject to determination and substitution of a different interest therefor in case of her remarriage.

Redding v. Rice, 171 Pa. 301, 33 Atl. 330; Morrison v. Semple, 6 Binn. 98; Drennan's Appeal, 118 Pa. 176, 12 Atl. 348; Kane's Estate, 185 Pa. 544, 40 Atl. 90.

The fact that the widow has a qualified power to dispose of the property does not enlarge her life estate.

Henninger v. Henninger, 202 Pa. 207, 51 Atl. 749; Brockley's Appeal, 2 Sadler (Pa.) 569, 4 Atl. 210; Schmid's Estate, 182 Pa. 271, 37 Atl. 928; Redding v. Rice, 171 Pa.

Note. — Effect of testamentary provision restricting widow to enjoyment during widowhood, upon quantum of estate taken by her.

It is frequently a matter of judicial remark anent the construction of wills, that the diversity of their terms and the variety of the circumstances surrounding the testator are such that ordinarily but little assistance can be had from adjudicated cases, which are rarely more than precedents for the principles they illustrate. But while a decision interpreting one will may not control the construction to be placed upon another, it is believed that a collation of the decisions upon the present question, although not developing any general rule by which the *quantum* of estate devised in any given case may be determined, may prove useful.

The fundamental inquiry upon the result of which the *quantum* of estate taken under any particular devise or bequest must depend is whether the event of not marrying is interwoven into the original gift, thus creating an estate *durante viduitate* only, or whether it is a condition or contingency on which the estate is to be divested and determined. The purpose of this note is to bring together the decisions involving the determination of the question whether a gift to a widow, accompanied by a provision of some sort relative to her remarrying, is to be regarded as giving her a fee, or an absolute interest, defeasible upon her remarriage, or only an estate during widowhood. Although the same fundamental question is involved in the classes of cases pretermitted, namely, whether the provision restricting the beneficiary to enjoyment during widowhood is to be regarded as interwoven into the original gift, or as a condition attached to it, the purpose of this note, which, for reasons indicated in the preceding paragraph, is merely to present cases similar to that reported, is deemed to warrant the exclusion of cases in which the *quantum* of estate taken by the widow is not the subject of controversy, and in which the question is whether the provision relating to her enjoyment of the estate during

301, 33 Atl. 330; Walker v. Quigg, 6 Watts, 87, 31 Am. Dec. 452; Long v. Paul, 127 Pa. 456, 14 Am. St. Rep. 862, 17 Atl. 988; Cooper v. Pogue, 92 Pa. 254, 37 Am. Rep. 681; Nash v. Simpson, 78 Me. 142, 3 Atl. 53.

Mr. John Marshall Gest, for appellee:

The direction that testator's wife shall "take possession, enjoy, and administrate all his real and personal estate," was sufficient to pass the fee without words of inheritance.

Campbell v. Carson, 12 Serg. & R. 54; Ilawkins, Constr. of Wills, 131; McCullough v. Fenton, 65 Pa. 418; Holme v. Harrison, 2 Whart. 283; Van Rensselaer v. Dunkin, 24 Pa. 252.

The consent of the other executors did not limit the estate, as they had no interest and no power of sale as executors.

Snyder v. Baer, 144 Pa. 278, 13 L.R.A. 359, 22 Atl. 897.

A devise of real estate, even expressly for life, with a power of disposition, passes a fee.

Smith v. Fulkinson, 25 Pa. 100; Kiefel v. Keppler, 173 Pa. 181, 33 Atl. 1043; Witmer v. Delone, 225 Pa. 450, 74 Atl. 347; Second Reformed Presby. Church v. Diabrow, 52 Pa. 219.

The direction in the will that the wife shall assist the children when they become of age imposes a duty moral, if not legal, on her, which evinces the testator's intention that she should have the fee in order to fulfil it.

Brooke, Abridgement, Estates, 78; Collier's Case, 6 Coke, 16a; Boraston's Case, 3 Coke, 21a; 25 Eng. Rul. Cas. 579; 1 Fonbl.

widowhood is a condition or a limitation,—a question which, it may be said in passing, is important only where a condition against remarriage is regarded as invalid. Neither does this note include cases in which a limitation over in event of subsequent marriage has been held void as repugnant to the estate primarily devised; nor does it include cases in which, although the testamentary provision under construction restricts the widow to enjoyment during widowhood, the extent of her estate is determined by the power of disposition annexed to the gift.

Qualified or determinable fee.

In Frey v. Thompson, 66 Ala. 287, where a will, which was very sparingly punctuated, was as follows: "I give and bequeath unto my beloved wife Margaret Thompson all my landed estate [describing it] and I also give and bequeath unto my wife as aforesaid [certain personal property] to have and to hold the same during her widowhood the balance of my property I wish my executor or executors to sell and the proceeds thereof to be equally divided among my children. . . . Now should my wife Margaret Thompson marry after my decease she is to have only a child's part of all the above described property that I have bequeathed to her," it was held that, reading all the words of the will together, the testator's intention was plain to make a gift of an absolute estate to the wife, to be divested and determined on this express condition only, that she should marry again; and not a gift to her for life or during widowhood,—especially as any other construction would produce a partial intestacy.

In Bennett v. Packer, 70 Conn. 357, 60 Am. St. Rep. 112, 39 Atl. 739, it was held, construing the following testamentary provisions: "Item 3d. I give, bequeath and devise to my beloved wife, Susan M. Hooker, all the residue of my personal property and real estate owned by me at the time of my decease, for her own separate use and behoof. Item 4th. It is my will that if the

said Susan M. Hooker again marries after my decease, I give, bequeath and devise to her, the said Susan M. Hooker, one third of my real estate and personal property for herself and her heirs," that, reading the third and fourth clauses together, it is clear that as to two thirds of the residue a conditional limitation is imposed by which, upon the subsequent marriage of the widow, her estate will determine.

In Black v. Nolan, 132 Ga. 452, 64 S. E. 647, where a testator provided that his wife and children should "share equal proportions" of his estate after an equalization on account of legacies received by some of the children from their grandfather, and continued: "It is my will that my wife remain on the place of residence where I now reside, during her life or widowhood, and in case she marries, for her to receive a child's part," it was held that the provision last quoted did not have the effect to limit the estate taken by the widow to an estate for life with remainder to the children, but that she took a one-seventh interest in his estate together with the right to occupy the residence during widowhood.

In Becker v. Becker, 206 Ill. 53, 69 N. E. 49, where an informally worded will contained the following provisions: "I wish to leave [certain described property, real and personal] to my wife, Lizzie Becker. . . . My wife, Lizzie, to have full charge of my estate after my death, without any restrictions of any nature. My wife, Lizzie, never to marry again, and if she does, my estate to be divided equally between my brothers [naming them] and my wife," it was held that the latter clause in the will did not have the effect of limiting the estate taken by the widow to an estate for life except in the one-third interest with which the will provided she should be invested in case of her remarriage; but that it was clearly the testator's intention, as disclosed by the entire will, to give to his wife a fee-simple estate subject to be defeated as to a two-thirds interest therein if she should remarry.

In Beatty v. Irwin, 35 Ind. App. 238, 73

Eq. 442, notes; Hawkins, Constr. of Wills, 134; Abrams v. Winshup, 3 Russ. Ch. 350; Doe ex dem. Thorn v. Phillips, 3 Barn & Ad. 753; Wait v. Belding, 24 Pick. 129; Burkart v. Bucher, 2 Binn. 455, 4 Am. Dec. 457; Coane v. Parmentier, 10 Pa. 72; Fahrney v. Holsinger, 65 Pa. 391; Re Jackson, 179 Pa. 77, 36 Atl. 156.

Any burden imposed on or intrusted to the devisee is sufficient.

Lee v. Stephens, 2 Shower, K. B. 49; Re Jackson, supra; Lloyd v. Jackson, L. R. 1 Q. B. 571, L. R. 2 Q. B. 269; Pickwell v. Spencer, L. R. 7 Exch. 105.

The general rule applies in favor of an absolute or vested estate, rather than of a defeasible or contingent one.

Re Jackson, supra.

N. E. 926, the following provision of a very sparingly punctuated will was under construction: "I will, give, bequeath and devise until [sic] my beloved wife, Emma Beatty, in lieu of and instead of and in full of her legal, equitable and lawful interest and absolute rights as my widow in and to my estate and property left by me at my death and upon the conditions following as to said real estate the following real estate [describing it] now owned by me, and of which I may die seised in fee simple together with all my interest, right and title in and to a certain lease and contract affecting a part of the last above described real estate [describing the contract], together with all money and rents due and owing to me or to become due and owing to me or to my estate upon and by virtue of said lease together with all the growing crop or crops whether severed or unsevered that may be on the last above described real estate, and the last above described real estate I so will and devise unto my beloved wife, Emma Beatty, only so long as she shall be and remain my unmarried widow if in the event my said wife, Emma Beatty, shall after my death marry again then all said real estate so willed and devised to her herein is hereby willed and devised," etc. It was held that the phrase "in fee simple" should be read as describing the estate devised, and not the estate of which the testator should die seised; and that, while the language restraining the widow's enjoyment to widowhood if isolated would be construed as giving her no more than a life estate, yet that its effect when taken in connection with the express devise of the fee simple was to create a condition against remarriage,—such construction being fortified by the fact that the qualification of the wife's estate was three times referred to in the will as a condition, and that the provision made for disposition in event of remarriage referred to it three times as a forfeited estate.

In Busby v. Busby, 137 Iowa, 57, 114 N. W. 559, a testator in the first paragraph of his will devised certain realty to his wife 23 L.R.A.(N.S.)

Under the act of April 8, 1833, § 9, P. L. 249, words of inheritance are no longer necessary, the whole estate of the testator passes under the devise, and the burden of proof is upon those who claim that a less estate was intended by the testator.

Fox's Appeal, 99 Pa. 382; Snyder v. Baer, and Kiefel v. Keppler, supra; Redding v. Rice, 171 Pa. 301, 33 Atl. 330; Crosky v. Dodds, 87 Pa. 359; Shirey v. Postlethwaite, 72 Pa. 39.

The fee was not cut down to a life estate by the further provisions in case of the widow's remarriage.

Pickwell v. Spencer, L. R. 6 Exch. 190, affirmed in L. R. 7 Exch. 105; Redding v. Rice, supra; Rohrbach v. Sanders, 212 Pa. 636, 62 Atl. 27; Koble v. Bennett, 40 Pa.

without words of limitation; the second paragraph containing a bequest to her of a sum of money, and the third creating a trust for her benefit. The fourth provided: "These bequests above made in the first, second and third provisions of this my will is on the express conditions and only to be paid to her or title passing, on her remaining my widow, and in case of her remarriage said property is to revert to my children." It was held that, in view of the fact that the first paragraph contained no words of qualification, and the fact that there was no gift over to take effect upon her death, so that, if the will were construed as giving her a life estate, there might be a partial intestacy, she took, subject to the condition of remarriage, the real estate in fee and the personal property absolutely.

In Swope v. Swope, 5 Gill, 225, where testator devised his entire estate to his wife "as long as she continues my widow; but if she intermarries she is to have no more than the law allows her, and the residue to be equally divided among [testator's children], but if she continues my widow, she is to hold, enjoy, or dispose of it at her discretion, as I do at present," it was held that if the devise had stopped after the provision for the division among the children, the wife would have taken only an estate during widowhood, but that in view of the further provision, and in order to give effect to all the words of the will, it was necessary to hold that the wife took a fee simple provided she continued his widow.

In Traphagen v. Levy, 45 N. J. Eq. 448, 18 Atl. 222, a testator gave to his wife all his household furniture and one third of the net income derived from his real estate, going on to designate a portion of this real estate to be occupied by her "free of rent during her natural life or as long as she shall remain my widow, and in the event of her remarrying again then the income to be derived from said estate shall go to and be equally divided among" the children. It was held that, no other disposition being made of the income devised to the widow, or of the undivided third of the principal of the estate which it represented, her interest

Super. Ct. 79; *Scott v. Murray*, 218 Pa. 186, 67 Atl. 47.

Moschzisker, J., delivered the opinion of the court:

The only question raised by this appeal concerns the *quantum* of the estate taken by the widow under the following will:

"I. Fully convinced that my wife, Philippina (*née* Doll), is able as well as willing, after my decease, to instruct and educate our children and to take care and administer our joint property, just as good as if I was still living, I wish and direct that my said wife shall take possession and enjoy and administrate for the time that she remains a widow all of my real and personal estate and effects, including the

shares of the different building associations to which I do belong or might hereafter belong, subject, however, to the condition, that she shall not sell, dispose of, or contract any debt or liabilities of and on, any of my said real estate or city loan, without the consent of executors, hereinafter named.

"II. I wish and direct that my said wife shall assist to the best of her ability, our children, when they become of age, to procure the ways and means best adapted for their future welfare, and position to secure their own means.

"III. At and of the event of my said wife again becoming married, all my real and personal estate shall be divided between herself and our children, according to the laws of this commonwealth, and a guardian

was an equitable fee in one third of testator's estate, subject to be defeated by her remarriage.

In *Foust v. Ireland*, 46 N. C. (1 Jones L.) 184, the following testamentary provision was under construction: "I give and bequeath to my beloved wife, Mary Foust, the plantation I now live on, with all the household and kitchen furniture, with all the horses, cows and stock of every kind, wagon and plantation tools, of every kind, with all the negroes unmentioned, so long as she remain my widow; but, if she marry, she must quit the plantation, and have the half of the household and kitchen furniture and a negro man and a negro woman her lifetime, and they and their offspring, if any, to return to my children, to be equally divided between them, living at that time." It was held that the facts that testator did not use words commonly used in creating a life estate, but went out of the way to get words of less direct signification, that he made no disposition of the reversion, that in the event of her remarriage he gave the widow a life estate and part of the property which she would lose by her marriage, and disposed of the reversion in the part which she would be allowed to retain, except a small part given to her absolutely, showed that he did not intend to restrict her to a life estate if she remained his widow.

In *Redding v. Rice*, 171 Pa. 301, 33 Atl. 330, a testator provided as follows: "I will and bequeath all my real and personal property to my beloved wife, Mary, to have and to hold the same for her own proper use and behoof as long as she shall remain my widow, and if she should get married, then she shall be only entitled to the one third in said property, the balance, being two thirds to my youngest daughter, Kate; if the said Kate should die then I will and bequeath the two thirds to my son William, and if both should die then the residue remaining shall be equally divided among my remaining children." It was held that had the will stopped short of the gift over in event of her remarriage, the widow would have taken only a life estate, but as the various limitations over were evidently in-

tended to be in fee, this certainly implied that the prior estate in the whole was also a fee, subject to a condition that she should not marry again,—such construction being aided by the absence of a devise over after the widow's death if she should not remarry.

In *Rohrbach v. Sanders*, 212 Pa. 636, 62 Atl. 27, in which the following testamentary provision was under construction: "I give and devise unto my beloved wife Sarah Ann and to my son Henry V. Simpson, all my property, both real, personal and mixed to be held for herself and in trust for my said son—provided, however, that if my said wife should again marry then I give and devise the property before mentioned to my son Henry V. Simpson and his heirs forever, and the trust thereby created in favor of my son shall after such marriage be null and void," it was held that, the devise being of the property itself, the words used being apt words for the creation of an estate upon a condition, and there being no limitation over in event of the widow not remarrying, she took a defeasible fee simple in the undivided one half of the real estate, which, upon her death without having remarried, became an absolute fee simple.

In *Scott v. Murray*, 218 Pa. 186, 67 Atl. 47, it was held that, under a devise of all testator's estate to his wife, "and her heirs and assigns forever, so long as she remains my widow," the wife took a defeasible fee, the court saying that the words, "so long as she remains my widow," being susceptible of construction as a condition, could not be regarded as manifesting the clear intent necessary to cut down the *quantum* of estate granted.

In *Koble v. Bennett*, 40 Pa. Super. Ct. 79, a testator made the following provision: "After the payment of the debts and expenses above mentioned, I give and bequeath to my wife, Maggie E. Koble, the residue of my personal property and real estate absolutely, to have and to hold the same for her own use and benefit, so long as she shall remain unmarried and if she shall marry again, then she shall be restricted to such estate therein as she would have been en-

shall be appointed for such of our children as are then not of age.

"IV. To assist my wife in the execution of my real and personal estate as well as in the execution of my last will and testament, I herewith appoint herself, Peter Kohlhas, and my brother, P. C. Hoffman, all of the city of Philadelphia, state of Pennsylvania, as executors of and to this my last will and testament."

The testator, Jacob Hoffman, died seised of certain real estate. The court below held that the widow took a fee in this real estate defeasible upon her remarriage. The question is not entirely free from doubt, but we are convinced that this is the correct interpretation of the will. In case of doubt, the construction of a will should be

titled thereto if I had died without a will." It was held that, in view of the testator's use of the word "absolutely," and of the facts that the testator died without issue, that his wife was the principal object of his bounty, that in disposing of his estate he blended his real estate and personal property in a gift to her, in terms which would carry a fee, and that he made no devise over after her death, it was a plain case for the application of the principle that the absolute estate of the principal object of the testator's bounty is not to be cut down to an estate for life without clear evidence of such intent; and that no such inference could be drawn from the words "so long as she remain unmarried."

In *Squier v. Harvey*, 16 R. I. 226, 14 Atl. 862, the testator directed as follows: "I give and bequeath to my beloved wife, Mary Harvey, all of my estate, real, personal, and mixed, wherever or however situated, together with all my household furniture and family stores, except as hereinafter named, to and for her own use, benefit, and behoof forever, as long as she shall remain my widow. To have and to hold the same, with all the rights and privileges thereof, to her, the said Mary Harvey, her heirs and assigns forever. But in case my said wife shall marry again at any time after my decease, then I give and bequeath all of my real estate, however or wherever situated, to James G. Harvey, to and for his own use, benefit, and behoof forever." It was held that the most reasonable construction of which the will was capable gave the widow the entire estate, less so much thereof as should be necessary to pay debts and legacies, subject to defeasance by her marriage, notwithstanding that the will contained a residuary clause, the beneficiary of which would, under the construction given the will, take nothing except in event of the widow's remarriage.

In *Haring v. Shelton* (Tex.) 122 S. W. 13 (which apparently reverses on this point the decision of the court of civil appeals in 114 S. W. 389), it was held, where a testator devised to his wife "her heirs and assigns forever, the following

in favor of the first rather than of the second taker, of a general or primary intent rather than of a particular or secondary one; and where a devisee is subjected to a charge or burden, doubts as to, the *quantum* of the estate should be resolved in his favor. *Re Jackson*, 179 Pa. 77, 36 Atl. 156.

The testator refers to the estate as "our joint property," and shows an intention to substitute his wife for himself in relation thereto. She appears the first and principal object of his bounty, and his general or primary intent seems to be to give her the property as he had it, trusting her to take care of their children. His expression of confidence that his wife would educate the children, and his direction that she

described tracts of land," and, after describing the land, went on to provide, "It is my will that my said wife, C. C. Shelton and her heirs, shall hold said lands in fee simple forever, or so long as she shall remain a widow," that the wife took a fee-simple estate determinable upon her second marriage.

In *Vaughan v. Vaughan*, 97 Va. 322, 36 S. E. 603, a testator by a will, the whole operative part of which was as follows, directed: "I do hereby bequeath to my wife, Emma Lee Vaughan, and to my children, all my property of every kind, real and personal, and do hereby appoint my wife my sole executrix without security as long as she shall remain my lawful widow; should she marry again the minor children to choose guardians, and my wife in that event to take a child's part, to be hers as long as she lives, and at her death to be distributed amongst my children then living." It was held that the only harmonious construction to be drawn from all the provisions and words of the will, considered together, is that the testator intended to give his wife the entire estate, but if she married again, then she was only to have a child's part for her life. This construction was supported by reference to the fact that the testator considered it necessary that the minor children should have guardians only in case of her remarriage; and the fact that under a different construction the wife would, notwithstanding the manifest affection of the testator for her and his confidence in her judgment and discretion, take only a small part of what the law would have given her had her husband died intestate.

In *Wright v. Wright*, 16 U. C. Q. B. 184, a testator devised as follows: "In the first place, my will is that my beloved wife, Nancy Stockwell, shall inherit [certain described realty]; also all my personal estate, goods and chattels, of what kind and nature soever, I give and bequeath to my loving wife, Nancy Stockwell, during her widowhood; and in case of her marriage or decease, then to be disposed of and equally divided between

should assist them when they became of age, "to procure the ways and means best adapted for their future welfare, and position to secure their own means," tend to demonstrate this primary intent, and go far to show a purpose to give her an estate in fee. It is a well-settled rule that an indefinite devise, coupled with a charge on the devisee, passes a fee. In *Lloyd v. Jackson*, L. R. 1 Q. B. 571, s. c. L. R. 2 Q. B. 269 (before the wills act), the testator directed: "I give and bequeath to my well-beloved wife, . . . all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed, . . . all my children to be educated and settled in business according to my wife's discretion." And it was held that the language indicated

an intention that the wife should take such an estate as would enable her to carry out the wishes of the testator, and that she took an estate in fee. This view was sustained on appeal by the exchequer chamber, L. R. 2 Q. B. 269; Kelly, Chief Baron, saying: "Whether this duty be obligatory or whether it be discretionary, we are of opinion that the effect of this part of the will is to confer the fee simple, and not merely an estate for life." The rule laid down in this English case has always obtained in Pennsylvania. *Burkart v. Bucher*, 2 Binn. 455. 4 Am. Dec. 457; *Coane v. Parmentier*, 10 Pa. 72; *Fahney v. Holsinger*, 65 Pa. 388; *Re Jackson*, 179 Pa. 77, 36 Atl. 156. "Our cases all hold that a devise generally or indefinitely, with power of disposition, car-

my sons and daughters [naming them]; to my son John Stockwell, Jr., I bequeath one hundred acres of land" out of the land given the widow. By a codicil the testator provided that an after-born child should share equally with the rest of his children; "and in case of the death of either of the above named children before the estate be divided, their share to be justly divided among the survivors." It was held, by a divided court, that the widow took a fee in the land devised, and that the codicil did not have the effect of cutting down her estate to one for life.

In *Re Deller*, 6 Ont. L. Rep. 711, it was held, construing the following testamentary provision: "My wife, *née* Catharine Kittel, shall have the whole of my estate which remains at my decease however with the observation that should she marry again then she shall only receive the third part and the residue shall be equally divided between my five children," that there was an absolute gift of the whole residue to the widow, followed by a gift over as to two thirds of it if she should marry again.

In *Re Mumby*, 8 Ont. L. Rep. 283, where a testator directed: "I give, devise and bequeath all my real and personal estate in manner following, that is to say: To my beloved wife Margaret Ann Mumby, her heirs, executors, administrators and assigns to and for her and their sole and absolute use and benefit, according to the nature and quality thereof respectively. The real property being described as follows:" (here followed a description of the real property), "while the said Margaret Ann Mumby remains my widow; but in case my wife Margaret Ann Mumby should again marry I request by executors to sell all my real and personal estate when my youngest child should come of age, and that they, my executors, shall divide the proceeds, after deducting expenses, between my six younger children, share and share alike," it was held that, no disposition having been made of the remainder expectant on the determination the widow's estate in the event of her not marrying again, she would not be held to have taken only an

estate during widowhood, but that her estate and interest were absolute if she should remain a widow.

In *Day v. Dameron*, 12 Sim. 200, a testator devised to his wife certain real estate "for her sole use and benefit after my decease," and also devised to her, for the term of her natural life, the rents and benefits arising from certain other real property, and further gave her all his household goods, plate, linen, books, and wearing apparel, adding: "Nevertheless, if my said wife, Sarah Caley, shall marry after my decease, then this will and testament shall be void and of no effect; but the whole of the above property shall become the property of my daughter, Ann Caley, during her natural life, and, after that, to be divided between her children." In case his wife should remain unmarried, the real property in which he had given her a life estate was similarly limited to the daughter and her children. He further provided: "I also appoint my wife, Sarah Caley, provided she remains unmarried, sole executrix and residuary legatee to all other property I may possess at my decease." It was held, in view of the language of the will, and of the fact that testator made no disposition of the property forming the subject of the first devise to his wife in event of her remarriage, and of the fact that she was made residuary legatee, that she took a fee simple in such property.

In *Pickwell v. Spencer*, L. R. 7 Exch. 105 (affirming L. R. 6 Exch. 190), a testator, after devising to his wife certain real estate without words of limitation, together with all his personal property, then directed that, if his wife should marry again, an inventory should be taken of all the land, goods, etc., before mentioned, by certain persons whom he appointed guardians of his children, with power to take away the goods, chattels, and effects, and to "reserve" them and the land for the benefit of his children until the two youngest should have arrived at an age capable of providing for themselves, and then to sell the whole and divide the proceeds equally among the surviving children. It was held that as the

ries a fee." *Witmer v. Delone*, 225 Pa. 450, 74 Atl. 347. The present will, by clear implication, gives to the widow the power to sell and dispose of the estate. The executors are expressly appointed "to assist my wife in the execution of my real and personal estate." They are given no interest in or power of sale over the real estate, and their function respecting it is made advisory to the widow. The direction that the widow could not sell or dispose of the real estate or city loans without the consent of her coexecutors cannot serve to defeat the fee.

The words of the devise, taken in connection with the other parts of the will, are sufficient to vest a fee in the widow. In *Snyder v. Baer*, 144 Pa. 278, 13 L.R.A. 359, 22 Atl. 897, the words, "I direct that my

beloved wife shall have and hold the property where I now reside," were held to carry a fee. In the present instance the testator directs that his wife shall take possession of and enjoy all of his real and personal estate. In *Campbell v. Carson*, 12 Serg. & R. 54, we held that a devise to a wife of property "to be by her freely possessed and enjoyed" passed a fee; and this was before the act of April 8, 1833 (P. L. 240). "The act of 1833 changes the rule of construction by its command that 'all devises of real estate shall pass the whole estate of the testator in the premises devised . . . unless it appear by a devise over, or by words of limitation, or otherwise, in the will, that the testator intended to devise a less estate.' Starting with this statutory

testator, while providing for his children in the event of his wife's marrying, had not done so in the event of her dying unmarried, his intention was to leave his property in such a way that his wife might, in after years, make such a disposition of it, with reference to the state of things which may then have supervened, as he would have made if he had survived her, securing his family at the same time against the possibility of her putting herself into a condition where she could not be safely trusted to perform that duty, which intention would be entirely defeated if the wife took only an estate for life.

In *Rishton v. Cobb*, 5 Myl. & C. 145, where a testator bequeathed a sum of money to trustees upon trust to invest in securities and to authorize and empower a certain woman "to receive the dividends as they become due, so long as she shall continue single and unmarried; but in case she sells, assigns, or disposes of, or anticipates such dividends, I do hereby revoke the bequest so made for her benefit, and thereupon do will and direct that the said sum of £2,000 shall become part of the residue of my estate," it was held that, had the legatee been single and unmarried, and so remained, she would have been entitled to the dividends without any limitation of time, the court saying: "Her interest would not have been determinable by her death, but (independently of the forfeiture upon alienation) only by her ceasing to be single and unmarried. This is different from a gift of dividends during widowhood. The state of widowhood must determine with the life of the widow; but the gift, so long as the legatee shall remain single and unmarried, must be considered as requiring the act of marriage to determine the interest. This gift, therefore, is of the dividends of stock, without limitation as to time, which carries the stock itself."

The foregoing decision was held binding in *Re Howard* [1901] 1 Ch. 412, in which it was held, construing the following provision: "I desire my said executor and trustee to set aside 200l., and thereout pay to my said wife, the said Amelia Howard, 28 L.R.A.(N.S.)

the sum of 3l. monthly so long as she remains unmarried or until the said sum of 200l. becomes exhausted, the said payment of 3l. monthly to cease on my said wife marrying again," that upon the wife's death without having married again, and before the exhaustion of the 200l., that her estate was entitled to the balance.

This case was in turn held to govern the decision in *Mason v. Mason*, 101 L. T. N. S. 669, in which it was held, where a testator directed the income of a trust to be paid to his daughter "until she shall marry, and after her marriage shall pay to her the legacy or sum of £3,000 free of legacy duty out of the said trust premises, and then divide the balance thereof equally between all my sons surviving me," that, the daughter having died unmarried, her estate was entitled to the *corpus*.

Estate during widowhood.

In *Lester v. Kirtley*, 83 Ark. 554, 104 S. W. 213, a testator provided "2. After the payment of my just debts and funeral expenses, I give to my wife, Elenor Lester, my entire estate, to wit; Moneys, stock, and farm, for her sole use and support, and it is expressly understood that my entire estate is to be controlled and managed by my said executors, that is to say, James T. and Nathaniel T. Lester, or either of them; that they, or either of them, are to manage and control said farm, stock and effects to the best of their judgment and ability for the use of my said wife as aforesaid. 3. If my wife, Elenor Lester, should see proper, after my decease, to marry again, then in that case she shall have one hundred and sixty acres of land, to include the homestead, and one hundred and fifty dollars worth of property out of my estate, the balance to be disposed of as hereinafter provided. 4. After the marriage of my wife, Elenor Lester, or death, if she should not marry, I direct that said executors shall advertise my entire property for sale, and, if it can be, agreeable with all my children, divide the same into such lots and parcels as shall give each one of my children an equal share of my prop-

presumption, the burden of proof is now upon those who claim that a less estate was intended by the testator." *Kiefel v. Keppeler*, 173 Pa. 181, 33 Atl. 1043. There is no devise over in the present will; nor does it appear by words of limitation or otherwise that the testator intended to give his wife an estate less than a fee. The fee given to the wife was not cut down to a life estate by the provision that she was to take possession and enjoy the estate "for the time that she remains a widow," or by the further provision that in the event of her marriage the estate was to be divided between herself and the testator's children according to the intestate law. There are cases where provisions restricting a widow to the enjoyment of the property during

widowhood have been held to limit the estate to her life, and others where the contrary has been ruled. It depends in each instance upon the intent to be gathered from the will as a whole. In *Redding v. Rice*, 171 Pa. 301, 33 Atl. 330, Mr. Justice Mitchell distinguished the former class of cases, particularly *Cooper v. Pogue*, 92 Pa. 254, 37 Am. Rep. 681, and *Long v. Paul*, 127 Pa. 406, 14 Am. St. Rep. 862, 17 Atl. 988, and truly said: "Precedents are of little value in the construction of wills, because, when used under different circumstances with different context, the same words may express different intentions." It was held in that case that a devise to the wife "as long as she remains my widow, and if she should get married then she shall only be

erty; if it cannot be so divided in lots and shares, then they shall sell to the highest bidder and the proceeds be equally divided between them all." It was held that the widow did not take a fee in the real estate, but that the testator's purpose was to devise a life estate in his entire property to his wife for her use and support, subject to be defeated by her remarriage.

In *Batterton v. Yoakum*, 17 Ill. 288, where a testator devised to his wife his entire estate, except such as might be necessary to pay debts, "the said Nancy Batterton, to all and everything over, so long as she, the said Nancy Batterton, remains my widow and no longer, then the estate to be equally divided among my heirs," it was held that the evident intention of the testator was to vest in his widow a life estate in his lands, subject to be defeated by subsequent marriage.

In *Mulberry v. Mulberry*, 50 Ill. 67, where a testator devised to his wife certain real estate "to hold and dispose of the same as she may see proper during her widowhood," it was held that the widow did not take an estate of inheritance, but only a limited estate terminating with her widowhood or at her death.

In *Green v. Hewitt*, 97 Ill. 113, 37 Am. Rep. 105, where a testator directed: "I give and bequeath to my beloved wife, Elizabeth Thompson, the farm on which we now reside, [describing it], also all my personal property of every description, so long as she remains my widow; at the expiration of that time the whole, or whatever remains, to descend to my daughter, Mary Thompson," it was held that the wife took a mere life estate in the entire gift.

In *Rose v. Hale*, 185 Ill. 378, 76 Am. St. Rep. 40, 56 N. E. 1073, in which the following testamentary provision was under construction: "I give, devise and bequeath unto my beloved wife Mariah Church the farm on which we now reside, [describing it] thirdly all the live stock horses cattle sheep hogs by me now owned and kept thereon also all the household furniture wagons, carriages and all my farming implements and all my personal property not

herein enumerated or otherwise disposed of whilst she remains my widow. But if she should marry then it is my will that she divide the farm and give each of my children an equal share after taking her thirds," it was held that the will did not vest in the wife a fee defeasible on condition of her marriage, but that the estate created was not greater than an estate for life.

In *Kratz v. Kratz*, 189 Ill. 276, 59 N. E. 519, where a testator gave and devised to his wife "during her widowhood" all his property "absolutely and unconditionally," going on to direct that after the decease of his wife all the property which his said wife at the time of her death might possess be given, devised, and bequeathed to his only child absolutely, and on condition that all of the wife's just debts and funeral expenses be paid, it was held that the widow took only an estate for life subject to be terminated by her remarriage.

In *Sayer v. Humphrey*, 216 Ill. 426, 75 N. E. 170, where a testator gave his wife the rest and residue of his estate "to hold for the future benefit of herself and children, and which she may dispose of to our children in just and proper proportions as necessity and due regard to prudence may dictate, so long as she remains unmarried and my widow," it was held that the will created in the widow at most a life estate.

In *Harmon v. Brown*, 58 Ind. 207, where a testator gave to his wife "during her widowhood" all his real and personal estate "to be held and freely possessed and enjoyed during her widowhood," it was held that the widow did not take the fee in lands devised to her, but only an estate during widowhood.

In *Tate v. McLain*, 74 Ind. 493, where a testator provided: "I will and bequeath to my beloved wife, Minerva Tate, all the residue of my estate, both real and personal property of every description, to have and hold and use as her own, for the benefit of herself and family, so long as she remains my widow," going on to provide that, in case she should marry again, then she should take as in case of intestacy, and

entitled to one third in said property," gave the widow a fee, and, as she had not remarried, that a conveyance made by her vested an estate in the grantee which became indefeasible after her death. In *Rohrbach v. Sanders*, 212 Pa. 636, 62 Atl. 27, the devise was to a wife, "provided, however, that if my said wife should again marry, then I give and devise the property before mentioned to my son," and it was held that the widow took a defeasible fee which upon her death before marriage became an absolute fee simple. And in *Scott v. Murray*, 218 Pa. 186, 67 Atl. 47, we held

that the words, "so long as she remains my widow," annexed to the grant of a fee, did not indicate an intention to cut down the *quantum* of the estate.

In the present case there is sufficient in the will to show an intention that the widow should take a defeasible fee, and there is not enough to restrict the devise to an estate for life. The widow not having remarried, the fee became absolute upon her death, and the real estate in question passed under her will.

The assignments of error are overruled, and the judgment is affirmed.

that, if she should remain his widow until her death, then all the residue of his estate, including all the real estate, should be sold and the proceeds divided among the children, it was held that the wife did not take a fee in the real estate, but only an estate during widowhood.

In *O'Harrow v. Whitney*, 85 Ind. 140, where a testator devised all the residue of his estate to his wife "so long as she remains my widow," it was held that her estate in point of duration was limited to the period of her widowhood.

In *Levengood v. Hoople*, 124 Ind. 27, 24 N. E. 273, construing the following testamentary provision: "I give and bequeath to my wife Mary and heirs, for her to dispose of as she sees best, sell, bargain and convey, as much so as myself in person, to all intents and purposes, in law and equity, as follows, to wit: [describing certain real and personal property], that is to say, during the time she lives a widow or in my name. Then said land is to be equally divided amongst—" certain persons,—it was held that the widow did not take a fee simple, upon condition that she should not remarry, but an estate during her widowhood only.

In *Stivers v. Gardner*, 88 Iowa, 307, 55 N. W. 516, where a testatrix, after devising to her husband without qualification certain described lands, and directing that at his death all of said lands should go to her son, went on to provide, "If my husband should get married after my death, in that event all of said property, both real and personal, to revert to my said son and daughter," it was held that the husband did not take a fee simple, but only a life estate terminable upon his marriage.

In *Shaw v. Shaw*, 115 Iowa, 193, 88 N. W. 327, where a testator devised and bequeathed the residue of his estate to his wife "to have and to hold to her, my said wife, so long as she remain my widow; then two thirds of what is left to go to my heirs, to be equally divided," it was held that the wife did not take a fee-simple title, but only a life estate subject to be defeated by remarriage.

In *Koonz v. Hempy*, 142 Iowa, 337, 120 N. W. 976, where testator gave and bequeathed to his wife "all of my real estate both real and personal and mixed so long

as she lives or remains my widow, but in case my said wife shall marry and ceases to remain my widow, then, in that case I order and direct that all my estate shall be" divided in manner specified, it was held that such provision did not vest in the widow an estate in fee if she did not remarry.

In *Mohn v. Mohn* (Iowa) 126 N. W. 1127, where a testator gave his wife certain real estate (describing it) "during life or so long that she shall remain my widow," going on to provide that after the death of his wife his son should have the land described, it was held that the widow did not take title in fee simple absolute, but that the will indicated an intention to give the land to the widow only during widowhood.

In *Mudd v. Mullican*, 11 Ky. L. Rep. 417, 12 S. W. 263, 385, where a testator devised all his property to his wife "so long as she remains my widow; but, should she marry or die, I will one half of my property to her, or, in case of her death, to her relations, and the remaining half to go to my relations," it was held that a fee passed to the wife in one half of the property.

In *Mansfield v. Mansfield*, 75 Me. 509, where a testator devised to his wife all his "property and estate of any description and wherever situate, to hold the same so long as she shall remain my widow," going on to devise to a son two thirds of the same property and estate upon the termination of the wife's estate therein, the remaining third being devised to a daughter, it was held that the testator evidently intended to give to his wife, at best, but an estate for life, and to make a devise over in fee upon the wife's death or marriage to the son and daughter above mentioned.

In *Clark v. Tennison*, 33 Md. 85, where a testator devised to his wife his residuary estate so long as she remained his widow, and at her death to be equally divided among the children, it was held that the plain intent was that the widow should have the property no longer than during her widowhood.

In *Russell v. Werntz*, 88 Md. 210, 44 Atl. 219, where a testator bequeathed to his wife all the residue of his estate, "to have and to hold and dispose off (*sic*) as she may see fit, while she remains single, and

at her death or marriage, the remaining property is to be equally divided between my two daughters," it was held that the plain intent of the testator was that the widow should have the property no longer than widowhood.

In *Knight v. Mahoney*, 152 Mass. 523, 9 L.R.A. 573, 25 N. E. 971, a testator devised as follows: "I give and bequeath to my beloved wife, Sabra A. Knight, all my real estate and personal property, of every kind and description, after paying all my debts and legal charges, and paying out to my children the allowances herein-after made, so long as she remains my widow." The will contained no devise of real property except that to the widow. It was held that the true construction of the will was that the testator intended to give to his wife the use of the real estate only so long as she remained his widow.

In *Fuller v. Wilbur*, 170 Mass. 506, 49 N. E. 916, a testator, after giving his children each a trifling legacy, proceeded as follows: "I give and bequeath to my beloved wife, Pella L. Wilbur, all my real and personal estate of whatever name, for her sole use and benefit so long as she remains my widow, except the legacies to my children." It was held that while there was some ground for saying that, with the exception of the legacies to the children, the widow took the entire estate absolutely and in fee, subject to be divested of it if she married again, the better construction, and the one according to the weight of authority, was that she took a life estate determinable on remarriage, the court saying: "The words 'so long as she remains my widow' imply a continuance of the estate during widowhood, and no longer; and at most it could not extend beyond her life. Further, the estate is given to her for her 'use and benefit,' which are apt words in connection with a life estate, but which hardly would be used where the intention was to give an absolute estate, and to render it liable to be defeated on the happening of some future event. Neither are there any words which give her a power of disposition over the estate. It is true that an unqualified gift of the use, income, or improvement of personal property vests the property absolutely in the taker. But the gift here was not unqualified."

In *Haab v. Schneeberger*, 147 Mich. 583, 111 N. W. 185, where a testator devised to his wife a farm "to be enjoyed by her as long as she shall remain my widow. In case of her marriage, my daughter Caroline shall take the said farm, to be enjoyed by her during her life, and after her decease the said farm shall be divided among her issue," it was held that the widow took a life estate terminable upon remarriage.

In *Peck v. Griffis*, 148 Mich. 682, 112 N. W. 722, a testator devised to his wife certain lands "to have and to hold the same as long as she remains my widow; but if she shall marry again, I request and direct that she sell said lot and divide the proceeds of such sale equally between herself 29 L.R.A.(N.S.)

and my sons . . . I also give and bequeath to my wife all my personal property . . . to be used and disposed of by her as she may think best and proper." It was held that, in view of the language employed and the fact that testator disposed of his personal property absolutely, his real estate upon condition, and to the same person, it was his intention to devise to the wife no more than an estate for her life, rather than an estate in fee subject to be divested if she should remarry.

In *Morgan v. Morgan*, 41 N. J. Eq. 235, 3 Atl. 63, where a testator devised to his wife all his household goods and furniture, "also one third of the income or interest of my estate during her widowhood, in lieu of dower," it was held that the widow's interest in the household goods and furniture was subject to the same limitation as the gift of one third of the income, to an estate for life.

In *Dubois v. Van Valen*, 61 N. J. Eq. 331, 48 Atl. 241, where a testator devised as follows: "To my wife, Eliza Van Valen, all my real and personal property for her use and benefit so long as she remains my widow, but should she marry then the property, real and personal, remaining, shall immediately or as soon as possible be equally divided among my children then living," etc., it was held that it was plainly the testator's intention to confine his wife's estate to one for life.

In *Place v. Burlingame*, 75 Hun, 432, 27 N. Y. Supp. 674, (affirmed without opinion in 149 N. Y. 617, 44 N. E. 1128) the will under construction contained the following clause: "I give and bequeath to my wife, Johanna Jones, my real estate in the town of Willett, and appurtenances thereunto belonging, together with all my household furniture, or rather the use thereof during the period that she may live and remain my widow; her furniture, bedding, etc., that she had of her own when I married her is to be at her disposal. I also give to her my cow free and clear. Also, further, I give to her one hundred dollars, said hundred dollars to be paid to her by my executors, hereinafter named, within two years after my decease, and the other property above named she is to have at my decease." It was held that the language of the will limited the wife to the use of the property, both real and personal, during the period of her life, subject to an earlier determination in case of her remarriage,—such construction being aided by the presence of a residuary clause in the will.

In *Rausch v. Rausch*, 64 N. Y. S. R. 490, 31 N. Y. Supp. 786, where a testator devised to his wife all his estate, "to be her own as long as she remains my widow," going on to make provision in the event of her remarrying, it was held that the widow took no more than a life estate.

In *Corbitt v. Corbitt*, 54 N. C. (1 Jones, Eq.) 114, where a testator devised to his wife certain negroes "and all my household and kitchen furniture and farming utensils,

as sees proper, during her widowhood, and a sorrel mare and colt, and her choice of four head of cow cattle, and all my stock of hogs and sheep, and my crop of corn, wheat and oats, to dispose of as she may think proper," the remainder in the slaves being in a subsequent clause given to his "lawful heirs," it was held that the widow did not take an absolute estate in the negroes, but one during widowhood only.

In *Re Brooks*, 125 N. C. 136, 34 S. W. 265, where testator devised to his wife all his property, "to have and possess as long as she remains my widow. Should she remarry, then the law is my will," it was held that the language of the will clearly showed that the intention of the testator was to limit the estate of the widow to a life interest, notwithstanding his failure to dispose of the reversion, which, as is apparent, would go by descent to the same persons to whom the property was limited in event of a remarriage.

In *Sink v. Sink*, 150 N. C. 444, 64 S. E. 193, the following testamentary provision was up for construction: "I give and bequeath to my beloved wife Mahaley the remainder of my land, after selling off, as directed in the tenth item, whatever there may be remaining, to have and to hold to her own proper use and behoof, to embrace my mansion house and other outhouses and improvements of the land I now live on, during the term of her widowhood, and after her marriage to be equally divided between my brother and sisters or their legal representatives share and share alike." It was held that, although there was no general residuary clause in the will, the estate in the land devised to the widow could not endure beyond her life. It appeared, however, that the brother and sisters to whom the property was limited in the event of remarriage were testator's legal heirs, and so would take the remainder not disposed of by the will.

In *Winchester v. Hoover*, 42 Or. 310, 70 Pac. 1035, it was held that under a devise to testator's wife, "to have and hold during her life or while she shall remain unmarried, to pay my debts, to support herself, and to maintain and educate minor children, and at her death or marriage the said property to descend in equal proportions or shares to all my children," the wife did not take title to the property in fee, but only an estate for life.

In *Boyd v. Bigham*, 4 Pa. 102, it was held that under a devise of testator's estate to his wife, "her heirs and assigns forever, and to will the same to whom she pleases (on condition she remain my widow) and in case of marriage or death without a will, I desire my estate real and personal" to be disposed of in manner specified, the widow took an estate for life, with concurrent remainders in fee to her appointees, or the persons designated by the testator, dependent on a contingency with a double aspect.

In *Cooper v. Pogue*, 92 Pa. 254, 37 Am. 28 L.R.A.(N.S.)

Rep. 681, in which the following testamentary provision was under construction: "To my beloved wife, Sarah Pogue (so long as she remains my widow) I give all the income of the home farm, on which I now live, containing two hundred acres, more or less, with all the tenements and appurtenances belonging thereto, together with all the products arising therefrom, also the mansion house in which I live, together with all belonging to it, and all that is in it, or about it, I give to my beloved wife, Sarah Pogue, the same to be hers, and to belong to her forever," it was held that the testator clearly intended to devise to his wife an estate in the land less than a fee, and that the fact that he did not devise the remainder was insufficient to overcome or change the effect of the language giving his wife a life estate only.

In *Long v. Paul*, 127 Pa. 456, 14 Am. St. Rep. 862, 17 Atl. 988, the following testamentary provision was under construction: "I also give devise and bequeath to her my said wife Sarah Maurer all my improvements and income of my messuage and lot and house where I now live and all that peace of land where Samuel Weary lived now deceased bud now occupied by his wido Catharine Weary on which a dwelling house and barn is on containing 93 acres more or less with its appurtenances; and all that piece or parcels of land situated &c here described on the South by Mahanoy Creek on the West by Benjamin Kness and others on the North by land of the estate of Thomas Henninger on the east by lands of Amos Vastine and my beloved wife Sarah Maurer is to pay all my debt and if she cannot pay it she shall sell so much of the land to pay for the rest of the land and keep it for her one youse, as long as she keeps my name and after she marries and dound keep my name any more she shall have the one half of all my real and personel property for her own youse and the other half I beques to my 3 sisters share and shore alike . . . Lastly I appoint my esteemed friend Jarred Henninger to be the executor of this my last will and testament after my beloved wife Sarah Maurer dound keep my name my above executor shall thevide it to my wife the one half of all real and personall property and the other half to my three sisters share and share alike if can be devided without spoyling the hole if spoyling the hole he shall selling it at public sale and divided the money is directed." It was held that taking the whole will together, the testator's intention was reasonably clear to give his wife the use and income of his whole estate so long as she remained his widow, and of half of it in case she remarried, but not in either event to give her more than a life estate in the realty. The court said that, although it was by no means clear that the widow would have taken one half absolutely in event of her remarriage, yet assuming that she would, it could not be said as a matter of law that it was a

larger or more favorable provision for her than that made in case she should not marry again.

In *Patton v. Church*, 168 Pa. 321, 31 Atl. 1079, it was held that under a devise to testator's wife of certain realty and personalty, "to be occupied and used by her as and for a family home during her widowhood," the widow took no more than a life estate.

In *Yetzer v. Brisse*, 190 Pa. 346, 42 Atl. 677, where a testator devised to his wife all his property "for her to have, to hold, and to enjoy during her natural life, or so long as she shall remain my widow," it was held that the estate devised was not an estate in fee.

In *Geist's Estate*, 193 Pa. 398, 45 Atl. 437, where a testator made provision for his widow by giving her "all his household and kitchen furniture, horses, cattle, and farm implements and other goods . . . or as much thereof as she may need during the time she shall remain my widow living and unmarried," going on to direct that all goods not retained or needed by her should be sold by his executor, that she should have the full control of the farm, and that after her death the farm should be sold and the proceeds divided, it was held that, in view of all the provisions of the will, the testator did not make an unqualified gift of his personal estate to his wife, but gave her only so much thereof as she might need during life or while she remained his widow.

In *McGuire's Appeal*, 8 Sadler (Pa.) 177, 11 Atl. 72, where a testator devised to his daughter-in-law, "while she remains the widow of [naming his son] in fee simple the tract of land upon which the said widow now resides," the court said that they were inclined to think that the devisee took but a life estate.

In *Long v. Hill*, 29 Pa. Super. Ct. 606, where a testator gave his wife all his estate, "to be held by her for her own use and benefit so long as she shall remain my widow," and the subsequent portion of the will conferred upon his executors full power and authority to convey any portion of his real estate in fee simple, it was held that the wife took only an estate for life defeasible on her remarriage, as otherwise the power of sale would have nothing to operate on.

In *Schaeffer v. Messersmith*, 10 Pa. Co. Ct. 366, where a testator, after giving to his wife, in words which, standing alone, would be held to import a devise in fee simple, certain described real estate and also an annuity, went on to provide that "should she, my wife Mary, marry again at any time after my decease, then and in that case . . . the said above-mentioned annuity of \$250, and all the other legacies and bequests hereby by me given or intended her, shall cease and be void to all intents and purposes, anything to the contrary notwithstanding," it was held, in view of the omission from the operative clause of the word "forever," used elsewhere where an absolute gift was clearly

contemplated, and the reference throughout the will to the provisions for his wife as "legacies and bequests," and upon the ground that the testator's design was not to prevent the remarriage of his widow, but simply to provide her with the means of support until she should have someone else capable of maintaining and bound to maintain her, and to guard against the employment of his property to maintain the children of the second marriage, by devoting it thereafter to the better provision of his own children,—that the testator meant, not to convey a fee, but simply to limit the estate given the wife to the period of her widowhood.

In *Padfield's Estate*, 10 Kulp, 184, where a testator made the following provision: "I give, devise and bequeath to my wife Ann, all my property, real, personal and mixed, of what nature and kind soever and wheresoever the same shall be at the time of my death. 2. The above shall continue in force so long as my wife remains a widow. 3. Upon the second marriage I direct that all the property that shall remain with her, such as I willed to her, be equally divided among my four children," it was held that the widow took no more than an estate for life.

In *Re Musser*, 12 York Leg. Record 145 (as digested in vol. 9 of the General Digest), it was held that where a testator gave his wife the use, benefit, and control of all his estate so long as she should remain his widow, with power to sell, and after her death or marriage the residue to be divided among his heirs, the widow took a life estate with power of consumption and disposition.

In *Joyce v. Bode*, 74 S. C. 164, 54 S. E. 239, the construction of the following provisions of the will of a rather illiterate testator was in question: "I give, devise and bequeath to my wife Mary Meagher of Charleston and State aforesaid all My Real Estate and Personal Property of which I may die Seized and Possessed of and I Nominate, Constitute and appoint My Wife, Mary Meagher of Charleston and State aforesaid, Executrix of this My last Will and Testament Without Bond as long as she Remains My Widow, but if She gets Married again then her authority must cease and all My Real Estate and Personal Property must be sold and I make the following Bequests: [such bequests being for a monument, the care of cemetery lots, the saying of masses, and for certain charitable purposes] and after My Wifes Death or if She gets Married again then I Nominate, Constitute and appoint the Rev. D. J. Quigley or his Successor Executor of this My last Will and Testament giving him full Power and authority to Sell or any Part of My Estate Real Personal or Mixed and at Such times and Such terms and for Such Purposes as he May deem Well at Public or at Private Sale." It was held that the intention of the testator, as gathered from the various provisions of the will, was to give to the wife but a life estate at most,

and that the bequests and the residue were to become operative upon her remarriage or death.

In *Seaboard Air Line R. Co. v. Garrett* (S. C.) 67 S. E. 903, it was held, construing the following testamentary provision: "I give and bequeath to my beloved wife, Penelope C. Tucker, so long as she remains a widow, all the other property that I may possess at the time of my death; and in case she never marries again the division of the property among our children shall be according to her will. But in case she marries again, then all my property, except the ten-thousand-dollar policy in the Pledmont Life Insurance Company, shall be equally divided between my children and their heirs, to have and to hold forever,"—that the widow took a life estate defeasible on her marriage, with power of appointment in case she never married again, and, in case of her marriage or in default of appointment, the property was to be equally divided between the children and their heirs.

In *Gourley v. Thompson*, 2 Sneed, 387, which involved the construction of the following provisions of an obscurely worded will: "It is my will that my wife, Mary H. Parker, and James R. Walsh, is to live on my farm, and, also, Margaret Gourley to remain in the family free from any charge for board. It is my will that if my wife should marry, that she is then to take one half of my estate, and the remainder to go to my lawful heirs," it was held that the estate of the wife was not absolute in the whole property, or any part of it, except in the event of a division in case she should marry, as the reasons and objects of the testator did not require that she should have a greater estate.

In *Newman v. Newman*, 60 W. Va. 371, 7 L.R.A.(N.S.) 370, 55 S. E. 377, where a testator directed as follows: "I do hereby authorize my beloved widow to dispose of my property real and personal when it shall be for the benefit of the family and in all cases it shall be legal in law for the benefit of my eight children [naming them]. And the court is not to require security for the faithful discharge as I have unbounded confidence in her virtue and love for the interest of those she is left to protect. Subject however to the possibility that she should become the wife of another man; in that event, she is to surrender my childrens' property as before named to my brother-in-laws [naming them] who I do appoint my Executors in that contingency,"—it was held that the will did not vest in the widow an absolute fee estate, but vested in her a life estate, and created a trust in her as trustee for the benefit of her children.

In *Giles v. Little*, 104 U. S. 291, 26 L. ed. 745, a testator's will contained the following

ing sole bequest: "After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give bequeath and dispose of as follows, to wit: to my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seised, the same to remain and be hers, with full power, right and authority to dispose of the same, as to her shall seem meet and proper, so long as she shall remain my widow; upon the express condition that, if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, shall go to my surviving children, share and share alike; and in case any of my children should have deceased, leaving issue, then the issue so left to receive the share to which said child would be entitled." It was held that it was not the purpose of the testator to devise an estate in fee to his wife, but that he intended to give her an estate for life in his property, subject to be divested on her contracting a second marriage, and, on the determination of the wife's interest, either by her death or marriage, then an estate in fee to his children. The force of this decision is, however, considerably impaired by the case of *Roberts v. Lewis*, 153 U. S. 367, 38 L. ed. 747, 14 Sup. Ct. Rep. 945, which involved the construction of the same will, and which, after stating that in the earlier case the effect of certain Nebraska statutes providing that every devise of land should be construed to convey all the devisors' estate therein, unless it should clearly appear that he intended to convey a less estate, and that technical words of inheritance should not be necessary to create or convey an estate in fee simple, was not properly presented for the consideration of the court, refers with approval to the decision of the Nebraska supreme court in *Little v. Giles*, 25 Neb. 321, 41 N. W. 186, in which it was held that the widow took an estate in fee. It not being necessary, however, to go further than to hold that the widow had power to convey in fee, the court declined to express a positive opinion as to the *quantum* of estate taken by her.

Although not strictly within the scope of this note, the case of *Harlow v. Bailey*, 189 Mass. 208, 75 N. E. 259, may be of interest in the present connection. There a testatrix devised to her sister a house "so long as she shall remain unmarried," with authority to the devisee to sell the real estate and "to invest and reinvest safely the proceeds of such sale and to receive and appropriate to her own use the income of such investments so long as she shall remain unmarried." It was held that the devisee did not take a fee, but only a life estate with power of sale, terminable on her marriage.

E. S. O.

ALABAMA SUPREME COURT.

T. W. WELLER et al., App'ts.,
v.
J. T. CAMP.

(— Ala. —, 52 So. 929.)

Bailee — hiring team — conversion.

1. One hiring horses to draw castings along a public road does not convert a team by detaching it from the wagon on which it is working, and attaching it to one of his own which has become stalled on a defective road, to assist in getting it out, so as to render him liable for an accident to it while it is so engaged.

Evidence — injury to horse while in possession of bailee — burden of proof.

2. Where a hired horse injured while in possession of the bailee was at the time in charge of a driver furnished by the owner, the bailee is not bound to establish his freedom from negligence in the first instance, but the burden of showing his negligence is on the owner.

Same — opinions — questions for jury.

3. Upon the question of negligence on the part of a bailee of a horse, which resulted in its injury, opinion evidence is not admissible as to whether or not the vehicle was properly loaded and the driver was acting under the direction of the bailee, such questions being for the decision of the jury.

Same — rejected testimony — failure to show relevancy.

4. It is not reversible error to refuse to permit a question to be put to a witness who was a bystander at a time when a horse was injured, as to a remark which he made to the driver, if it is not made to appear that the expected answer would be relevant to any issue in the case.

(May 12, 1910.)

APPEAL by defendants from a judgment of the City Court of Birmingham in plaintiff's favor in an action brought to recover damages for the alleged conversion of a horse. Reversed.

The facts sufficiently appear in the opinion.

Note. — Liability of hirer for injury to horse while being used for a purpose other than that for which it was hired.

The use of a hired horse for a longer trip than that contemplated in the contract of hiring will render the hirer liable for loss of or injury to the horse, where such loss or injury was the result of the longer trip. *Broussard v. Sells-Floto Show* (Tex. Civ. App.) 128 S. W. 439.

But it has been held that the hirer of a horse, although he violates the contract 28 L.R.A.(N.S.)

Messrs. W. T. Hill and James A. Mitchell, for appellants:

When one hires a horse from another, and, pursuant to the contract of hiring, the owner sends his own servant along to drive the horse while being used for the hirer, the hirer of the horse is not responsible for an injury to it which is caused by the act of the driver.

2 Cyc. Law & Proc. p. 312; *Hughes v. Boyer*, 9 Watts, 556; *De Voin v. Michigan Lumber Co.* 64 Wis. 616, 50 Am. Rep. 649, 25 N. W. 552; *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645.

As the plaintiff's own driver was driving the horse, the burden of proof is on the plaintiff to show that the horse was lost or injured through the negligence of the defendants.

Leach v. French, 69 Me. 389, 31 Am. Rep. 296; *Harrington v. Snyder*, 3 Barb. 380; *Carrier v. Dorrance*, 19 S. C. 30; *Malaney v. Taft*, 60 Vt. 571, 6 Am. St. Rep. 135, 15 Atl. 326; *Cooper v. Barton*, 3 Campb. 5, note; *McDonald v. Miser*, 25 Ohio C. C. 753.

Messrs. London & Fitts for appellee.

Sayre, J., delivered the opinion of the court:

In *Posey v. Hair*, 12 Ala. 567, it was said that the certainty required in declaration or plea is such a statement of the facts constituting the cause of action or ground of defense, as will enable them to be understood by the party who is to answer them, the jury who are to ascertain their truth, and the court which is to give judgment. The later statute (Code, § 5321), which enjoins brevity as far as consistent with perspicuity, and the presentation of facts in an intelligible form, so that a material issue in law or fact can be taken thereon by the adverse party, has not impaired the substance of the requirement stated in the early cases, though it may be admitted that in some late cases the limit has been reached in permitting the allegation of mere conclusions. No fault is to be found with the complaint in question. It is meritorious as a clear statement of

of hiring, is not liable where the loss or injury was not the result of driving the excessive distance. *Carney v. Rease*, 60 W. Va. 676, 55 S. E. 729.

It was held in *Ledbetter v. Thomas*, 130 Ala. 299, 30 So. 342, that the hirer of a team of mules was liable for the death of one of them as for a conversion, by reason of their use on a farming implement other than the one for which they were hired, and for a longer period of time.

The earlier cases upon this question will be found in the note to *Doolittle v. Shaw*, 26 L.R.A. 366.

W. A. B.

plaintiff's case without the encumbrance of unnecessary detail, and, as to substance, meets every requirement of early case or later statute.

There is no dispute but that the plaintiff hired to defendants two teams, each consisting of a wagon and two horses, to be used by the defendants in hauling heavy castings between the Lynn Iron Works and defendants' place of business in the city of Birmingham. Defendants were to load and unload the wagons. Plaintiff furnished drivers for his teams. Defendants were to pay for the teams by the hour. At the same time defendants had teams of their own engaged in the same business. All the teams were driven along the customary route between the points indicated. At a point where the paving had been torn up, one of defendants' wagons got into a hole or ditch from which the team was unable to move it. Thereupon the driver of one of plaintiff's teams, who had just had a similar experience at the same place, unhitched his team and took it back to help defendants' team; and because his team would not work in the lead, hitched them to defendants' wagon with defendants' team in the lead. The driver did this of his own initiative, but it is clear that one of the defendants approved and acquiesced. In the effort to extricate the wagon from the hole or ditch, the casting fell from the wagon upon plaintiff's horse, killing it. There was dispute as to whether the accident resulted from the negligent manner in which, according to plaintiff's contention, the casting had been placed upon the wagon, and whether negligence of the driver in the management of his team did not cause or proximately contribute to the result. These matters of dispute became thereby questions for the decision of the jury, and appellee contends that, upon the facts and tendencies detailed, it was a question for the jury whether there had been a conversion of plaintiff's team as alleged in count A of the complaint. And so the court below ruled. But we are of the contrary opinion. Where the owner of a horse lets him to hire for a certain purpose, any material departure from the contemplated use amounts to a conversion for which the bailee will be liable in trover if the horse is injured or destroyed while being so used. 2 Cyc. Law & Proc. p. 312. But this rule proceeds upon the principle that the bailee becomes a wrongdoer by putting the horse to a use not within the contemplation of the parties when they entered into the contract of hiring. They must be held to have had in mind such contingencies as may and do naturally occur in the course of the use contracted for, unless specifically excluded. The manner of

rightful use to which defendants might put the horse is to be ascertained from the agreement for hire as rationally interpreted. Mr. Schouler, speaking on this subject, remarks that "the leaven of common sense, which keeps our law in constant ferment, is here at work, recalling the injustice of visiting blameworthy and blameless deviation with the same penalties of absolute or insurance accountability. One hires a horse for a given journey, but unexpectedly encounters a friend, and turns off to visit him, using, all the while, a prudent care of the animal; or he finds obstructions in the road, and changes the point of destination to another which must have equally suited his bailor; or he misses his way. Such instances are matters of everyday occurrence." And he suggests that a serviceable defense in such cases lies in a just and reasonable interpretation of the undertaking of bailment itself, which, "if pursued with ordinary prudence, under all the circumstances, ought not to be too literally construed against a bailee who may have found himself in some unforeseen emergency, and, while far from the bailor, obliged to act upon his own judgment. For one who hires may be presumed to have much latitude as to time and methods of enjoyment; and local usage and the good sense of the contract should interpret favorably, where restrictive use was not clearly specified. If hiring be general, any prudent use of the thing is permissible; and even if it be particular, terms not fairly meant for exclusion need not warp the hirer's discretion." Schouler, Bailm. §§ 140, 141. See also Spooner v. Manchester, 133 Mass. 270, 43 Am. Rep. 514. Here the facts were shown without contradiction or contrary inference,—the facts as to which there was dispute not being of consequence in this immediate connection,—and the issue thereupon became one of law for the decision of the court. Assuming the defendants co-operated in the use of the animal charged as a conversion to the extent which would make that use chargeable to them, we are of opinion that their act in temporarily using the horse as one of a team of four instead of as a team of two, to get their wagon over a hard place in the road, under the circumstances shown, did not amount to a tortious breach of the contract of hiring, and that the defendants were entitled to the general charge on the count for trover.

In oral and special written charges, the court told the jury that if the horse was in the possession of the defendants at the time of its injury, the burden rested upon them to show that it had not been injured by their negligence. The court was authorized to assume as facts the bailment, and that

the horse was injured while in the possession of the bailees, for as to that there was no dispute. And on these facts, nothing else appearing, the statement of the burden of proof would have been free of fault. *Higman v. Camody*, 112 Ala. 267, 57 Am. St. Rep. 33, 20 So. 480. But there was a circumstance of material qualification which the charge seems to have overlooked. In proving the bailment the plaintiff proved also, as a part of the contract, an agreement that he was to furnish the driver; and it clearly appeared that he did so. In that situation the presumption must in reason rather be that any injury which came to the animal resulted from the negligence of the driver, if the character of the injury indicated negligence on the part of anyone; for, although the bailee had possession in a certain large and loose sense, that possession was not exclusive. The rule that the burden of proof rests upon a bailee is generally stated of cases in which the bailee has exclusive possession. *Collins v. Bennett*, 46 N. Y. 490. And it rests upon the consideration that in such cases the facts attending loss or injury must be peculiarly within the bailee's own knowledge. On no other principle can a departure from the rule which requires the plaintiff to make out his case be sustained, and, unless the bailor goes with his property or reserves a certain oversight, as where the owner of a horse rides with the hirer, or the guest at an inn puts his watch under his pillow, or a drover goes on the train with his cattle,—instances mentioned in the books,—the bailee must have peculiar knowledge. Here the bailor sent his own driver. The safety of a team depends most immediately upon the driver, as we know from common experience. The case was the same as if the owner had driven his team, and in such case it seems that common sense and sound law would place the burden of proof upon the plaintiff, as it is ordinarily placed where negligence is charged. *Hughes v. Boyer*, 9 Watts, 556. There was error in the charges.

Assignments based upon rulings on the admissibility of evidence need not be treated in detail. It will suffice for a proper disposition of the case here to say that those questions which sought to have witnesses state as mere conclusions—such was the effect of a number of them—whether the casting had been so placed upon the dray as that it would probably fall under circumstances which did intervene and which ought to have been foreseen in the exercise of due care, and whether the driver, to whose negligence the jury were free to refer the accident, was acting under the control of the defendants, were, of course, properly disallowed. Those 28 L.R.A. (N.S.)

questions the jury were brought to decide upon consideration of the facts in detail.

One ruling may be mentioned. Appellants cite *United Teleph. Co. v. Cleveland*, 44 Kan. 167, 24 Pac. 49, to prove that a witness who had been a bystander while the driver was endeavoring to get his wagon out of the foundrous place in the street should have been allowed to testify to a remark made by him to the driver. If the witness had called attention to a fact of the situation which ought to have influenced a careful driver in the management of his team, that would have been allowed to go to the jury under the special plea, as evidence of the driver's knowledge of the danger of the situation; but it may well have been that the remark was irrelevant to any issue involved. The question itself afforded no intimation as to the relevancy of the expected answer. The trial court could not be put in error until the party showed that the expected answer would be relevant. The Kansas case contains nothing to the contrary.

For the errors indicated, we are of opinion that the judgment should be reversed, and the cause remanded for another trial.

Dowdell, Ch. J., and Anderson and Evans, JJ., concur.

ILLINOIS SUPREME COURT.

PERRY J. MASSIE

v.

CHARLES E. CESSNA, Appt.

(239 Ill. 352, 88 N. E. 152.)

Assignment — salary — regulation — validity.

1. A statute making invalid the assignment of any salary unless it is in writing, signed and acknowledged by the assignor and his or her husband or wife, and the as-

Note. — Constitutionality of statute restricting right to assign salary or wages.

This note does not cover the question of the validity of acts regulating the making of contracts, whereby an employee undertakes to accept checks or something other than lawful money in payment for his services.

The cases passing upon the constitutionality of statutes restricting the right to assign one's salary or wages are not numerous. The power, however absolutely, to forbid such right has been upheld.

Thus, in *International Text-Book Co. v. Weissinger*, 160 Ind. 349, 65 L.R.A. 599, 98 Am. St. Rep. 334, 65 N. E. 521, a statute which forbade altogether the assignment of future earnings of an employee

signment entered on the justice's docket and a copy served upon the employer, is invalid as interfering with the constitutional rights of liberty and property of the one earning it.

Same — discrimination.

2. A statute making void assignments of wages or salaries when given as security for loans tainted with usury is invalid where no such provision is made with respect to other instruments or conveyances given to secure such debts.

(April 23, 1909.)

APPEAL by defendant from a decree of the Circuit Court for Cook County canceling certain assignments of wages given him by complainant as security for loans alleged to be tainted with usury, and restraining him from proceeding to enforce any of such assignments. **Reversed.**

The facts are stated in the opinion.

Messrs. Clark & Clark for appellant.

Messrs. Edgar A. Bancroft and Victor A. Remy, with Messrs. Elmer E. Led-

was held constitutional, and not an unreasonable restraint upon the liberty of the citizen, and it was held, further, not to deprive the citizen of his property without due process of law. The court said: "A large proportion of the persons affected by these statutes of labor are dependent upon their daily or weekly wages for the maintenance of themselves and their families. Delay of payment or loss of wages results in deprivation of the necessities of life, suffering, inability to meet just obligations to others, and, in many cases, may make the wage earner a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice at the hands of employers, unscrupulous tradesmen, and others who are willing to take advantage of their condition. Where future wages may be assigned, the temptation to anticipate their payment, and to sacrifice them for an inadequate consideration, is often very great. Such assignments would, in many cases, leave the laborer or wage earner without present or future means of support. By removing the strongest incentive to faithful service,—the expectation of pecuniary reward in the near future,—their effect would be alike injurious to the laborer and his employer. It is clear that the object of the act of 1899, *supra*, was the protection of wage earners from oppression, extortion, or fraud on the part of others, and from the consequences of their own weakness, folly, or improvidence. We cannot say that no just ground existed for such legislative interference for so commendable a purpose."

To the same effect is *Chicago & E. R. Co. v. Fbersole* (Ind.) 87 N. E. 1090.

So, a statute requiring that orders or assignments of wages to be earned in the future, given to secure loans of less than 28 L.R.A.(N.S.)

better and M. B. Wellington, for appellee.

Scott, J., delivered the opinion of the court:

This appeal comes directly from the circuit court of Cook county, and presents the question of the constitutionality of the statute of May 13, 1905 (Laws 1905, p. 79), entitled "An Act in Relation to the Assignment of Wages, Income, or Salary" (Hurd's Rev. Stat. 1908, p. 176), which reads as follows:

"Section 1. No assignment of the wages or salary of any person shall be valid, so as to vest in the assignee any beneficial interest, either at law or in equity, unless such assignment shall be in writing, signed by the assignor and acknowledged in person by the assignor before a justice of the peace in and for the township in which the assignor resides, and entered by such justice upon his docket, and unless, within three days from the date of the execution and acknowledgment of such assignment, a true

\$200, be accepted in writing by the employer, and in case of a married assignor that the written consent of the wife be obtained, and providing, further, that the assignment be recorded, has been held constitutional as a proper exercise of the police power. *Mutual Loan Co. v. Martell*, 200 Mass. 482, — L.R.A.(N.S.) — 128 Am. St. Rep. 446, 86 N. E. 916.

And such statute is not unconstitutional as an unlawful discrimination because it deals only with security for loans, and does not include security for other debts. *Ibid*.

And a provision exempting national banks and banking institutions under the supervision of the bank commissioner, and loan associations established by special charters, from the operation of the act, does not render it invalid as denying the equal protection of the law to other lenders, where there was reason for the legislature to believe that the institutions mentioned need not be subjected to such regulations in order to protect the interests of employees or employers. *Ibid*.

And in *McCallum v. Simplex Electrical Co.* 197 Mass. 388, 83 N. E. 1108, it was held that there was no doubt as to the constitutionality of a statute providing that "no assignment of future earnings, whether made by the assignor in person or by his attorney, shall be valid unless executed in writing, for a period not exceeding two years from the date of said assignment, or of any power of attorney under which said assignment is made."

Generally, as to validity of assignment of wages or salary to be earned, see note in 5 L.R.A.(N.S.) 565, and later case, *Chicago, B. & Q. R. Co. v. Provolt*, 16 L.R.A.(N.S.) 587.

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and complete copy of said assignment and of the certificate of its acknowledgment shall be served upon the person, firm, or corporation from whom such wages or salary is due or is to become due, in the same manner that the summons in chancery is now required by law to be served: Provided, further, that no assignment of wages or salary by a married person shall be valid unless the same is also executed and acknowledged as above, by the assignor's wife or husband, as the case may be.

"Sec. 2. The term 'assignment,' as used in this act, shall include every assignment, transfer, sale, pledge, mortgage, or hypothecation, however made or attempted, of the wages or salary of any person, or of any interest therein.

"Sec. 3. Whenever any assignment of the wages or salary of any person or persons shall be given as security for a loan tainted with usury, or shall be given to secure the payment or fulfillment of a usurious contract, or the payment of the principal or the interest of a usurious debt, such assignment shall be absolutely void.

"Sec. 4. Every assignment of wages to be earned in whole or in part more than six (6) months from and after the making of such assignment shall be absolutely void.

"Sec. 5. Whenever any person, firm, or corporation shall bring or threaten to bring any action or suit to enforce any assignment of wages or salary which has not been duly executed, acknowledged, and served upon the employer in conformity with the provisions of this act, or which is declared invalid by the provisions of this act, courts of equity shall have full power, upon the application either of the assignor of such wages or salary, or of the person, firm, or corporation from whom such wages or salary is, or is to become due, to perpetually enjoin the threatened or attempted enforcement of any such assignment, and the fact that the complainant has a complete and adequate remedy at law shall constitute no defense to the maintenance of a suit in equity for the purposes aforesaid.

"Sec. 6. The invalidity of any portion of this act shall not affect the validity of any other portion thereof which can be given effect without such invalid part."

The appellee filed his bill for an injunction against the appellant, alleging that he had been for a number of years continuously in the employ of the Inter-Ocean Newspaper Company; that about twelve years ago he commenced a course of dealing with the appellant, who loaned money to wage earners and salaried people at exorbitant, illegal, and usurious rates of interest, which dealings had continued until the present time, and all of which had been usurious; 28 L.R.A.(N.S.)

that he had upon a number of occasions borrowed from appellant certain sums of money at 10 per cent interest per month, and had repaid to appellant, by way of interest and other moneys, many large sums for which he had received no credit upon the principal, which sums greatly exceeded the amount of money borrowed, together with legal interest thereon; that there were executed by appellee, at various times, assignments of his wages as security for the payment of the several usurious loans, all of which assignments appellant now holds and has threatened to file with appellee's employer, thereby intending to compel appellee to comply with appellant's unlawful and usurious demands. The bill further alleges that in February, 1907, as a transaction wholly separate and apart from the previous dealings with appellant, the appellee borrowed \$25, for the use of which he agreed to pay \$2.50 per month as interest until said sum was repaid, and he executed to appellant an assignment of wages to be earned until August 18, 1908, as security for the payment of said sum and interest; that this assignment was given as security for a loan tainted with usury, and was never acknowledged in person nor before a justice of the peace nor before any person or official whatsoever, so that, by reason of the statute in such case provided, it is not valid; that appellant has filed with the Inter-Ocean Newspaper Company a copy of this assignment, and now threatens to bring suit to enforce the same, which would result in great and irreparable injury to the complainant; and the appellant, Cessna, will bring said suit unless restrained from so doing. The prayer of the bill was that all of said assignments of wages now in the hands of the appellant or his agents be canceled, and appellant enjoined from proceeding in any manner to enforce any of said assignments. A demurrer to the bill having been overruled, the defendant elected to stand by his demurrer, and a decree was entered in accordance with the prayer of the bill.

The appellant insists that the statute in question violates § 2 of article 2 of the Constitution of the state, which provides that "no person shall be deprived of life, liberty, or property without due process of law." This is the only question for consideration, as the averments of the bill with reference to transactions prior to that of February, 1907, are too indefinite to show the existence of any equity in favor of appellee.

The right to labor for and to render services to another, and the right to dispose of the compensation to be received for so doing, are property rights within the meaning

of the language just quoted from the Constitution. *Frorer v. People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Mallin v. Wenham*, 209 Ill. 252, 65 L.R.A. 602, 101 Am. St. Rep. 233, 70 N. E. 564. It is at once apparent, upon an examination of this statute, that it abridges the right of the man who earns a salary and the right of the man who earns wages to contract with reference thereto. Notwithstanding this fact, appellee contends that the act in question is not prohibited by the Constitution, for the reason that it is referable to the police power of the state. The laws which the legislature may enact in the exercise of that power are laws which have a tendency to promote the public comfort, health, safety, morals, or welfare, or which have a tendency to prevent some recognized evil or wrong. *Ritchie v. People*, 155 Ill. 98, 20 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Chicago v. Netcher*, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *Noel v. People*, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *People v. Steele*, 231 Ill. 340, 14 L.R.A. (N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236.

It is urged that wage earners compose a class of inhabitants of the state who, when they desire to borrow money and secure the same by the assignment of their wages earned or to be earned, become victims of men engaged in the business of loaning money at usurious rates, who are commonly denominated "loan sharks;" that when the wage earner finds it necessary to borrow money upon such security, he is unable to deal with the money lender upon an even footing; that the latter is able to exact usury, and to practise various like wrongs and impositions upon him by reason of his poverty, and sometimes by reason of his improvidence; and that this creates a condition of affairs which the legislature may remedy by the exercise of the police power. While we think this evil exists, it is yet apparent, upon a careful examination of this statute, that it is too broad in its terms to be justified as an exercise of the police power for the purpose of mitigating or remedying the wrong at which it is aimed. It applies not only to wages, but also to salaries. "Wages," in its ordinary acceptation, has a less extensive meaning than "salary." "Wages" is usually restricted to sums paid as hire or reward to domestic or menial servants and to sums paid to artisans, mechanics, laborers, and others employed in various manual occupations, while "salary" has reference to the compensation of clerks, book-

keepers, other employees of like class, officers of corporations, and public officers. 2 Standard Dict. p. 1573; *Re Stryker*, 158 N. Y. 520, 70 Am. St. Rep. 489, 53 N. E. 525. In this state salaries in excess of \$5,000 per annum are not unusual. It cannot be said that an officer of a corporation who is in the enjoyment of a salary of \$20,000 per annum is or may be the victim of the evil at which this statute is aimed, and yet his salary is plainly within the terms of the act. Counsel for appellee intimate that a bank president or the head of a great commercial enterprise requires the same protection in this respect as a wage earner. We have not been able to regard this suggestion as seriously made. A bank president who desires to borrow money does not need protection from a "loan shark," unless he be mentally deficient or morally delinquent. A very limited exercise of the power of observation is sufficient to demonstrate that, as a borrower, he is not in the same class as the laborer who works for \$2 per day.

This statute, in so far as it would tend to make effective the right of the wage earner to receive the full benefit of the wages earned by him, is like unto the statute which prefers laborers' and servants' claims in certain instances, like unto the statute which provides that no personal property shall be exempt from execution issued for the collection of the wages of any laborer or servant, and like unto the statute which provides that, in a suit brought by "a mechanic, artisan, miner, laborer, or servant or employee," for his or her "wages" earned and due, the plaintiff may, under certain conditions, recover, in addition to the wages, an attorney's fee for the prosecution of the suit. It is to be observed that these statutes all pertain to wages, and not salaries. The statute last above referred to is the act of June 1, 1889. *Hurd's Rev. Stat.* 1908, p. 192, chap. 13, § 13. Its validity has been assailed upon the ground that it is special legislation, conferring a right upon persons therein specified to attorney's fees, that was not given to other persons; but this court held that the enumeration, which is broad enough to include all wage earners, and which includes none but wage earners, is an enumeration of persons composing a class, upon which the right given by the statute might be conferred without violation of the Constitution. *Vogel v. Pekoc*, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386. We have recently referred to that case with approval. *Manowsky v. Stephan*, 233 Ill. 409, 84 N. E. 365. The reasoning of the *Vogel Case* would seem to lead to the conclusion that wage earners are the proper objects of leg-

isolation which would tend to protect them from the evil which this statute is designed to obviate. Such an act would not be rendered invalid by the fact that it placed reasonable regulations upon the right to assign wages to secure an indebtedness, and prescribed a reasonable method to be pursued in making the assignment effective. It has been recently so held by the supreme court of Massachusetts in reference to the sections of a statute regulating the assignment of wages. *Mutual Loan Co. v. Martell*, 200 Mass. 482, — L.R.A.(N.S.) —, 128 Am. St. Rep. 446, 86 N. E. 916. It is true that many persons who are salaried receive compensation not greater in amount, by the month or year, than the compensation received by many wage earners. Whether a statute protecting a salary not greater in amount than a certain sum per week or month, or protecting a portion of a salary which portion is not greater than a certain sum per month or week, would be valid, is a question not here presented.

The statute now under consideration is invalid because it violates the provision of our Constitution which has been invoked, by limiting the right of persons earning the higher salaries to assign or transfer their salaries in such manner as they see fit; there being nothing in the public policy of the state requiring or warranting such abridgment of their right, and nothing requiring or warranting a statute giving to such persons the benefit that might with entire propriety be given to wage earners by an act in reference to the assignment of wages. The third section of this statute is unconstitutional for the further reason that it makes the assignment given as security for a loan tainted with usury void, while the law of the state makes no such provision with reference to other instruments or other conveyances given to secure usurious debts. We also point out the fact that it is extremely doubtful whether the act in its entirety could in any event be made effective in the city of Chicago, for the reason that it requires the assignment to be acknowledged before a justice of the peace in and for the township in which the assignor resides, and entered by such justice upon his docket; there being now no justices of the peace in that city, and no law requiring the keeping of such a docket as that which the justice of the peace formerly kept.

The decree of the Circuit Court of Cook County will be reversed, and the cause will be remanded, with directions to sustain the demurrer to the bill.

Vickers and Dunn, JJ., specially concurring:

We concur in holding the statute unconstitutional. 28 L.R.A.(N.S.)

stitutional, but not in the implication that it would be constitutional if restricted to wage earners, if the opinion contains such implication.

ILLINOIS SUPREME COURT.

RE ESTATE OF HARRIET G. McVICKER,
Deceased.

LORD CLARENCE H. E. ZEIGLER, Claimant, Appt.,
v.

ILLINOIS TRUST & SAVINGS BANK,
Exr., etc., of Harriet G. McVicker, Deceased.

(245 Ill. 180, 91 N. E. 1041.)

Appeal — reviewing facts — claim against estate.

1. The appellate court, having no jurisdiction to review facts in an action at law, cannot review the facts upon appeal from the allowance of a claim against a decedent's estate, where the claim is for a legal demand and no defense is made which could not have been interposed in a suit at law.

Trial — finding — law or fact.

2. A finding that a written contract is void as against public policy is one of law, and not of fact.

Evidence — public policy.

3. In determining the public policy of a state, courts are limited to a consideration

Note. — Validity of contract to furnish a patient medical services for life.

A careful search has disclosed but one other case involving the legality of an agreement between a physician and his patient by which the former agrees to render his services to the latter for life, and in that case the court granted relief from such a contract. *Dent v. Bennett*, 7 Sim. 539 (s. c. on appeal, 4 Myl. & C. 278). The opinion of the vice-chancellor upon the legality of the contract was expressed as follows: "It is plain that the existence of such an agreement is a direct premium to the medical adviser to accelerate that death upon the happening of which he is to have £25,000, and it is in vain to say that in fact it did happen that the party who was to give the £25,000 did live four or five years after the agreement. You must look at the agreement as it stood at the time it was made; and it must be admitted that the human mind is so constituted as that this agreement might be a temptation to some persons to do the very thing which it is obvious it was the duty of the party who took the agreement not to do; and my deliberate opinion is that it is totally void in point of law for that reason."

As to contracts for permanent employment and similar agreements, see note in 35 L.R.A. 512.

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of the statutes, Constitution, judicial decisions, and practice of government officers.

Contract — medical services — validity.

4. A contract to furnish one medical attendance during life for a lump sum payable at his death is not void as against public policy, either because furnishing an inducement to threaten his life or as a wagering contract.

Pleading — defense — fraudulent character of contract.

5. That a contract between physician and patient is presumptively fraudulent may be interposed as a defense in an action at law to enforce it.

Contract — physician and patient — independent advice.

6. A physician who enters into a contract with his patient is not bound, in order to sustain the validity of the contract, to show that the patient had independent and competent advice before executing the contract.

Probate — trial — deposition.

7. Depositions may be used in the consideration by the probate court of claims against a decedent's estate, where the statutes provide for the taking of depositions in suits at law and that contested claims shall be tried in the probate court as other suits at law.

Trial — assent to procedure — effect.

8. One offering a deposition against a claim in the probate court cannot complain that depositions are admitted in support of the claim.

Physician — contract for services — performance where he is unlicensed.

9. A physician duly licensed in the state where the contract is made cannot be deprived of the benefit of the contract to furnish medical attendance to a patient by the fact that he temporarily accompanies the patient into a state where he has no license and performs some services for the patient there.

Contract — medical attendance — refusal to change location — effect.

10. A contract to furnish medical attendance to a person is not broken by refusal to accompany him to another state, where the contract was made at his permanent place of residence contains nothing to indicate any intention of a change of domicile.

(April 21, 1910.)

A PPEAL by claimant from a judgment of the Appellate Court, First Division, reversing a judgment of the Circuit Court for Cook County in his favor in an action brought to establish a claim against the estate of Harriet G. McVicker, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Bulkley, Gray, & More, for appellant:

Whether a contract is against public policy is a question of law for the court to

determine from all the circumstances of each case.

9 Cyc. Law & Proc. p. 483; *Brush v. Carbondale*, 229 Ill. 149, 82 N. E. 252, 11 A. & E. Ann. Cas. 121; *Greenhood, Pub. Pol.* p. 123, rule 140; *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063; *Pierce v. Randolph*, 12 Tex. 200.

The design to prejudice the public interest must clearly appear, to warrant a court in denouncing a contract as void.

Greenhood, Pub. Pol. p. 116, rule 129; *Page, Contr.* §§ 326, 506; *Edwards v. Goldsboro*, 141 N. C. 60, 4 L.R.A.(N.S.) 589, 53 S. E. 652, 8 A. & E. Ann. Cas. 479; *Barrett v. Carden*, 65 Vt. 431, 36 Am. St. Rep. 876, 26 Atl. 530; *South Carolina & G. R. Co. v. Carolina, C. G. & C. R. Co.* 35 C. C. A. 423, 93 Fed. 543; *Fox v. Rogers*, 171 Mass. 546, 50 N. E. 1041; *Houlton v. Nichol*, 93 Wis. 393, 33 L.R.A. 166, 57 Am. St. Rep. 928, 67 N. W. 715; *Burdine v. Burdine*, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 992; *McCowen v. Pew*, 153 Cal. 735, 21 L.R.A.(N.S.) 800, 96 Pac. 893, 15 A. & E. Ann. Cas. 630; *Hall v. O'Neil Turpentine Co.* 56 Fla. 324, 47 So. 612, 16 A. & E. Ann. Cas. 738; *Richmond v. Dubuque & S. C. R. Co.* 26 Iowa, 202; *Kellogg v. Larkin*, 3 Pinney (Wis.) 123, 56 Am. Dec. 164; *Walsh v. Fussell*, 3 Moore & P. 457; *Printing & Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 465, 21 Eng. Rul. Cas. 696; *Wakefield v. Van Tassell*, 202 Ill. 41, 65 L.R.A. 511, 95 Am. St. Rep. 207, 66 N. E. 830; *Brown v. First Nat. Bank*, 137 Ind. 655, 24 L.R.A. 206, 37 N. E. 158; *Egerton v. Brownlow*, 4 H. L. Cas. 1; 24 Eng. Rul. Cas. 118; *Gillett v. Logan County*, 67 Ill. 256; *Goodrich v. Tenney*, 144 Ill. 422, 19 L.R.A. 371, 36 Am. St. Rep. 459, 33 N. E. 44; *Crichfield v. Bermudez Asphalt Paving Co.* 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552; *Hawkeye Ins. Co. v. Brainard*, 72 Iowa, 130, 33 N. W. 603.

To be against public policy, the agreement itself must contemplate illegal acts.

Holman v. Johnson, Cowp. pt. 1, p. 343; *Drake v. Lauer*, 93 App. Div. 86, 86 N. Y. Supp. 986.

The alleged incentive to crime is not a ground for holding a contract void as against public policy.

Buchtel College v. Chamberloix, 3 Cal. App. 246, 84 Pac. 1000; *Carnwright v. Gray*, 127 N. Y. 92, 12 L.R.A. 845, 24 Am. St. Rep. 424, 27 N. E. 835; *Worth v. Case*, 42 N. Y. 362; *Root v. Strang*, 77 Hun, 14, 28 N. Y. Supp. 273; *Brady v. Smith*, 8 Misc. 465, 28 N. Y. Supp. 776; *Krell v. Codman*, 154 Mass. 454, 14 L.R.A. 860, 26 Am. St. Rep. 260, 28 N. E. 578; 15 Am. & Eng. Enc. Law, 2d ed. p. 958; *Stone v. Pennock*, 31 Mo. App. 544; *Howe v. Watson*,

179 Mass. 30, 60 N. E. 415; Ramloll Thackoorseydass v. Soojumnul Dhondmull, 6 Moore, P. C. C. 300; Watson v. Mahan, 20 Ind. 223; Brown v. Odill, 104 Tenn. 250, 52 L.R.A. 660, 78 Am. St. Rep. 914, 56 S. W. 840.

A contract for the support or hire of a person for life is valid. The fact that it may give a remote interest in causing the death of such employer is not objection thereto.

Page, Contr. § 396; Pierce v. Tennessee Coal, Iron & R. Co. 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. Rep. 335.

It was not a wager contract.

1 Page, Contr. § 448; Harris v. White, 81 N. Y. 539; Winward v. Lincoln, 23 R. I. 476, 64 L.R.A. 160, 51 Atl. 112; Fareira v. Gabell, 89 Pa. 89; 29 Am. & Eng. Enc. Law. 2d ed. pp. 1082, 1083.

The privilege of contracting is both a "liberty" and a "property right" within the meaning of both the state and Federal Constitutions.

Kelleyville Coal Co. v. Harrier, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927; Harding v. People, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Bailey v. People, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; Mathews v. People, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 3 A. & E. Ann. Cas. 966.

Where a contract has been executed by one of the parties, and it would be a greater breach of morals to refuse relief to the other party than the enforcement of the contract, the court will enforce the contract.

King v. King, 63 Ohio St. 363, 52 L.R.A. 157, 81 Am. St. Rep. 635, 59 N. E. 111; Lester v. Howard Bank, 33 Md. 558, 3 Am. Rep. 211; Fearnley v. De Mainville, 5 Colo. App. 441, 39 Pac. 73; Woodworth v. Bennett, 43 N. Y. 273, 3 Am. Rep. 706; Miltenberger v. Cooke, 18 Wall. 421, 21 L. ed. 864; Dunlop v. Mercer, 86 C. C. A. 435, 156 Fed. 546; Irvin v. Irvin, 109 Pa. 529, 29 L.R.A. 292, 32 Atl. 445; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; Day v. Spiral Springs Buggy Co. 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

Notwithstanding a fiduciary relation, and that the law views with distrust transactions whereby the party having the confidence of the other obtains property, the distrust or suspicion may be shown to be unfounded, and will be removed, and the transaction regarded as valid, if it be made to appear it was entered into with full knowledge of its nature and effect, and was the result

of deliberate, voluntary, and intelligent desires of the party acting, and was not secured by the exercise of the influence engendered as an effect of the relation.

Kellogg v. Peddicord, 181 Ill. 22, 54 N. E. 623; Uhlich v. Muhlke, 61 Ill. 499; Herr v. Payson, 157 Ill. 244, 41 N. E. 732; Bishop v. Hilliard, 227 Ill. 382, 81 N. E. 403; Bowdoin College v. Merritt, 75 Fed. 480; Ralston v. Turpin, 129 U. S. 663, 675, 32 L. ed. 747, 751, 9 Sup. Ct. Rep. 420; Re Sparks, 63 N. J. Eq. 242, 51 Atl. 118; Woodbury v. Woodbury, 141 Mass. 329, 55 Am. Rep. 479, 5 N. E. 275; Coffee v. Ruffin, 4 Coldw. 487; Audenreid's Appeal, 89 Pa. 114, 33 Am. Rep. 731; Hunter v. Atkins, 3 Myl. & K. 113; Pratt v. Barker, 4 Russ. Ch. 507; Villers v. Beaumont, 1 Vern. 100.

Independent advice is not necessary to the validity of a contract between parties where a fiduciary relation exists.

Revels v. Revels, 64 S. C. 256, 42 S. E. 111; Uhlich v. Muhlke; Herr v. Payson; and Kellogg v. Peddicord,—supra.

Messrs. L. D. Condee and L. R. Atkins, with Messrs. James C. Hutchins and Max Baird, for appellee:

A contract affording an incentive to the commission of a crime is void as against sound public policy. The evil tendency of a contract is sufficient to condemn it.

Gillett v. Logan County, 67 Ill. 256; Goodrich v. Tenney, 144 Ill. 422, 19 L.R.A. 371, 36 Am. St. Rep. 459, 33 N. E. 44; Crichfield v. Bermudez Asphalt Paving Co. 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552; Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924; Schreiner v. High Court, C. O. F. 35 Ill. App. 576; Egerton v. Brownlow, 4 H. L. Cas. 1, 24 Eng. Rul. Cas. 118; 15 Am. & Eng. Enc. Law, 2d ed. pp. 933, 934; 9 Cyc. Law. & Proc. p. 481; Wright v. Somers, 125 Ill. App. 256.

A contract between a physician and patient, where the compensation reserved is not to be paid until the death of the patient, and then only if the physician survives, places a premium upon the shortening of the life of the patient, and thus creates a powerful motive for the commission of a crime on the part of the doctor, and is contrary to public policy and void.

Dent v. Bennett, 7 Sim. 539, 4 Myl. & C. 269; Cole v. Gower, 6 East, 110; Re Zeigler, 37 Chicago Leg. News, 351.

The contracts in question tend to create a conflict between duty and self-interest, and are void.

Merritt v. Lambert, 10 Paige, 352; Hawk-eye Ins. Co. v. Brainard, 72 Iowa, 130, 33 N. W. 603; Brown v. First Nat. Bank, 137 Ind. 655, 24 L.R.A. 206, 37 N. E. 158.

Transactions between a party and one bearing a fiduciary relation to him are

held to be prima facie void, to prevent a general public mischief.

Dent v. Bennett, 4 Myl. & C. 269, 7 Sim. 539; *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808; *Unruh v. Lukens*, 166 Pa. 324, 31 Atl. 110; *Allen v. Davis*, 4 De G. & S. 133; *Billage v. Southee*, 9 Hare, 534.

The purpose and desire to make the contracts is presumed to be produced by undue influence on account of the relation of the parties.

Gilmore v. Lee, 237 Ill. 402, 127 Am. St. Rep. 330, 86 N. E. 568; *Baum v. Hartmann*, 226 Ill. 160, 80 N. E. 711; *Huguenin v. Baseley*, 14 Ves. 300, 6 Eng. Rul. Cas. 834.

A physician licensed in one state cannot recover for services performed in another state where he is not licensed. The contract is governed by the law of the place of performance.

Rugg v. Lewis, Rap. Jud. Quebec, 17 C. S. 206; *Graves v. Johnson*, 156 Mass. 211, 15 L.R.A. 834, 32 Am. St. Rep. 446, 30 N. E. 818; *Price v. Burns*, 101 Ill. App. 418; *Alexander v. Barker*, 64 Kan. 396, 67 Pac. 830; *Diamond Glue Co. v. United States Glue Co.* 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206; *Wasserboehr v. Morgan*, 168 Mass. 291, 47 N. E. 126; *Pritchard v. Norton*, 106 U. S. 128, 138, 27 L. ed. 105, 109, 1 Sup. Ct. Rep. 102; *Kentucky v. Bassford*, 6 Hill, 526; 22 Am. & Eng. Enc. Law, 2d ed. p. 1328; *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880; *Roberts v. Levy* (Cal.) 31 Pac. 570.

Cooke, J., delivered the opinion of the court:

The appellant, Dr. L. C. H. E. Zeigler, filed a claim in the probate court of Cook county against the estate of Harriet G. McVicker for \$110,000, which consisted of three items, the first being for \$100,000, based on two written contracts, or, in the alternative, for reasonable compensation as a physician for services and medical attention from December 19, 1899, to April 30, 1904; and the second and third for \$5,000 each, claimed to be due on an oral contract. The probate court allowed the second and third items, but refused to allow the first. The appropriate order was entered, from which both the executor and the claimant appealed to the circuit court. There the two appeals were consolidated and tried as one before a jury. The jury returned a verdict for the claimant for \$100,000. The court entered judgment for this amount and for costs, to be paid in due course of administration. From this judgment, the executor appealed to the appellate court for the first district, where the judgment of the circuit court was reversed, with 28 L.R.A.(N.S.)

a finding of fact that "the contracts in evidence of December 19, 1899, and of July 24, 1901, are void, as being against sound public policy." From this judgment the claimant has prosecuted a further appeal to this court.

The facts as disclosed on the trial in the circuit court are as follows: The appellant is a physician and surgeon and was licensed to practise medicine in this state on January 17, 1899. He is also engaged in the practice of osteopathy. On April 24, 1899, he leased three rooms in the McVicker Theatre building, in the city of Chicago, from Mrs. Harriet G. McVicker, which, so far as the evidence discloses, was the first time he had ever met her. These rooms, which adjoined a room used by Mrs. McVicker as an office, were used by Dr. Zeigler as his office. Mrs. McVicker's exact age is not given, but it appears that at that time she was about seventy-eight or seventy-nine years of age. She had been a sufferer from various maladies, among them being ailments of the heart, stomach, and kidneys, an affliction which caused a stiffness of the knee joints, and some disease peculiar to her sex. She employed Dr. Zeigler, and he began treating her some time during the month of October, 1899. Shortly thereafter one John Janes, now deceased, who was a friend of many years' standing of Mrs. McVicker, presented to appellant, on her behalf, a contract executed by her, whereby appellant was to be paid out of her estate, after her death, the sum of \$100,000, in ten equal annual instalments, in consideration of appellant giving her such medical attention as she should require during the remainder of her lifetime. Appellant objected to the instalment plan of payment, and to other features of the instrument, and refused to execute or accept it. On December 19, 1899, appellant and Mrs. McVicker executed a contract which provided that appellant should give her such medical attention as she should require during her lifetime, and at her death should be paid the sum of \$100,000 out of her estate. This was executed by Mrs. McVicker by the name of "Mrs. J. H. McVicker." Some time thereafter Dr. Zeigler was advised to have the contract re-executed, on account of the fact that Mrs. McVicker, in executing it, had used the initials of her deceased husband instead of her own name. Mrs. McVicker agreed to do this. On July 17, 1901, she sent for Rev. William F. Black, who had been a friend of her husband in his lifetime and whose custom it was to make weekly calls on Mrs. McVicker, to consult with him about the contract. John Janes was the only other person present on this occasion. Rev. Black gave it as his opinion

that the contract was properly executed as it was, but Janes advised the change. Mrs. McVicker insisted upon the writing of a preamble to the rewritten contract, explaining her reasons for executing it anew. This she dictated to Janes, who took it down. This was later returned to Mrs. McVicker by Janes, and a comparison made with the original contract. Appellant was not present on these two occasions. A typewritten copy was then made of the new contract, and the same was executed by Mrs. McVicker and the appellant in the room of the former at the Lexington Hotel on July 24, 1901, in the presence of Mr. and Mrs. Emil Linder, friends of both appellant and Mrs. McVicker, who had been invited by her to come there for that purpose. With the exception of the explanatory part, this contract was identical in language with the contract of December 19, 1899, and is as follows:

Chicago, Illinois, July 24th, 1901.

This agreement or contract by and between Mrs. Harriet G. McVicker of Chicago, Illinois, of the first part, and L. C. H. E. Zeigler, M. D., of Chicago, Illinois, of the second part, witnesseth: That the first party, Mrs. Harriet G. McVicker, first entered into this agreement or contract with Dr. Zeigler, party of the second part, on the 19th day of December, eighteen hundred and ninety-nine (December 19th, 1899). The original contract will be found hereto attached. A second contract was thought to be necessary because of the signature of the first and original contract being signed Mrs. J. H. McVicker instead of Mrs. Harriet G. McVicker. That the party of the second part, having been advised to have the signature changed from Mrs. J. H. McVicker to Mrs. Harriet G. McVicker, presented the first and original instrument to the party of the first part, Mrs. Harriet G. McVicker, for the purpose of getting her consent in its being changed. On being apprised of the possibility of some legal technicality, Mrs. Harriet G. McVicker, party of the first part, immediately acquiesced and caused this, the second contract, to be drawn, which contains the material and relevant clauses of the first and original contract, drawn December 19th, 1899; that the party of the first part, Mrs. Harriet G. McVicker, being aware that some unscrupulous persons have conspired to ruin the doctor's good reputation and business, willingly and unhesitatingly causes the change in signature; that the party of the first part, Mrs. Harriet G. McVicker, was necessitated to have Honorable William E. Hughes to call at her home and investigate the legal aspect of the terrible and cruel conspiracy against Dr. Zeigler.

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ler, led by Mr. L. D. Condee, Miss Jennie Boydston, Mrs. William Cox, Mr. George Graves, Mrs. Mack, with an eye singled to have Mrs. Harriet G. McVicker, party of the first part, to discontinue the services of the party of the second part, L. C. H. E. Zeigler, M. D.; that the party of the first part, Mrs. Harriet G. McVicker, had letters presented to her purporting to be from certain individuals, which, when thoroughly scrutinized and their contents carefully questioned of Mr. L. D. Condee by Honorable William E. Hughes, it was deduced by Mr. Condee's own confession that they had been forged, and not written by the persons whom he at first declared had written them and delivered same in person. To the party of the first part, Mrs. Harriet G. McVicker, to have discontinued the professional services of the party of the second part, L. C. H. E. Zeigler, M. D., would have been equivalent to the canceling of the original contract existing between first and second parties, which is hereto attached, and for which result each of these persons did wrongfully, cruelly conspire. Knowing this by confession from Mr. Condee, also by letter received from him, the party of the first part, Mrs. Harriet G. McVicker, for truth, justice, and right, has made the second contract, in order to avoid the underhandedness of these unscrupulous persons. Persons that the party of the first part have conversed with in reference to this matter are: Mr. William E. Hughes, Rev. W. F. Black, Mr. N. E. Pearse, Mrs. N. E. Pearse, Mrs. J. I. Case, Mr. Emil Linder, Mr. James McInerney.

Contract.

That the party of the first part, Mrs. Harriet G. McVicker, does enter into an agreement and contract for the professional services to be rendered by the party of the second part, L. C. H. E. Zeigler, M. D., at any time or place, during any spell of indisposition which I may be subjected to during the remainder of my natural lifetime; that in the event of sickness such methods are to be employed or adopted as seem best and most expedient; all medicines or other paraphernalia necessary to the discharge of duties in cases of indisposition are to be provided by Dr. Zeigler; that when the critical moment comes, when it is thought that I may pass out, Dr. Zeigler may call the physician or physicians as his judgment may dictate; that the sum which I voluntarily contract to pay for the services thus rendered is to be \$100,000 (one hundred thousand dollars), payable immediately, or as soon as possible, by my estate, which I leave in trust with the Illinois Trust and Savings Bank.

In witness thereof the parties hereto

have set their hands and seals July 24th, 1901.

It is uncontradicted that from the time of the execution of the first contract until the death of Mrs. McVicker at Pasadena, California, August 25, 1904, the appellant attended her constantly, reserving for her exclusively, before going to California, his time from 8 o'clock P. M. to 8 o'clock A. M. of each day, and giving her the right to demand his attention at all other times to the exclusion of his other patients. In October, 1900, Mrs. McVicker removed from her residence in Chicago to the Lexington Hotel, and, at her request, Dr. Zeigler took up his residence there also. In April, 1904, she went to California, accompanied by the doctor, and remained there until the time of her death. A number of witnesses testified that Mrs. McVicker had stated that, in order to induce Dr. Zeigler to go with her to California, she had agreed to pay him \$5,000 per annum and \$5,000 for expenses, in addition to her written contract. This oral agreement was the basis of items 2 and 3 of the claim. After the execution of the first contract, on December 19, 1899, Mrs. McVicker talked with a great many of her friends about the contract and the satisfactory results appellant was accomplishing by his treatment. Prior to that time she had been treated by various eminent physicians, and, according to her oft-repeated statements, with but little success. She repeatedly referred to her contract with appellant when talking to her friends, and stated many times that he had earned the amount agreed to be paid. She gave or offered to him on several occasions large sums of money or checks for large sums, in addition to and independent of the contract, but these were all either refused or returned. On October 29, 1903, in the presence of Linder and his wife, she offered appellant \$100,000 in bank certificates of deposit, as in full payment of the contract, stating that she did so for the reason she feared he might have trouble about it after her death. Appellant refused the certificates on the ground that payment at that time would not be in accordance with the contract. She afterwards expressed regret to a number of her friends that the doctor had thus declined to accept payment under the contract during her lifetime. Mrs. McVicker was a cultured and educated woman, and it is uncontroverted that her mental faculties were unimpaired up until the time of her death. She had large business interests and gave them her personal attention and supervision. She is described by all the witnesses who testified on that point as shrewd and as having ex-

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ceptional business qualifications, as a woman of strong mentality, not easily influenced and accustomed to having her own way. Her only heirs at law were two nieces—one, Minnie Effey, the daughter of a deceased brother, and the other, Clara Belle Game, the daughter of a deceased sister. It is stipulated that at the time of her death her estate consisted of property of the value of \$270,000. By her last will and testament she made various small bequests amounting to about the sum of \$22,000, and devised the residue of her estate in trust to the Illinois Trust & Savings Bank, directing that it pay three fourths of the net revenue therefrom semi-annually to one Horace McVicker, and the remaining one fourth semi-annually to her niece Clara Belle Game, who resided in San Francisco, California. The will further provided that, upon the death of Horace McVicker, three fourths of the residue of the estate should be paid to his heirs at law, and, upon the death of Clara Belle Game, one fourth of the residue was to be paid to her children then living. No provision whatever was made in the will for the niece Minnie Effey.

The record, abstracts, and briefs are all quite voluminous, and both appellant and appellee have presented a large number of points in support of their contentions. We have carefully considered all the points raised and the authorities cited, and will discuss briefly those which, in our judgment, are controlling in the matters in controversy.

It is contended on the part of appellant that this is a suit at law, and for that reason the facts are not open to review in this court, while the appellee insists that, as the probate court and the circuit court upon appeal were required to exercise equitable jurisdiction and to resort to equitable procedure, the case partakes of the nature of a chancery proceeding, and this court should review the facts as well as the law. In *Grier v. Cable*, 159 Ill. 29, 42 N. E. 395, we held that the prosecution of a claim against an estate in the probate court was in no proper sense a suit or proceeding at law or in chancery, but was purely a statutory proceeding, and for that reason an appeal from the judgment of the probate court allowing or disallowing the claim did not lie, under the statute, to the appellate court, but to the circuit court. Upon final appeal to this court, from the judgment of the circuit court allowing or disallowing a claim against an estate, this court will examine into the nature of the claim and the defenses to it, for the purpose of determining whether it has the power to review the facts. In a

claim based on purely legal demands, and where there are no equitable defenses and the probate court is not required to exercise its chancery powers, the judgment of the appellate court is conclusive upon this court as to the controverted facts in the case; but, in the adjustment of claims where the probate court exercises an equitable jurisdiction and resorts to equitable procedure, upon an appeal to this court it is our duty to examine and determine questions of fact as well as of law. *Hobbs v. Ferguson*, 100 Ill. 232; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200, 16 N. E. 210; *Cheney v. Roodhouse*, 135 Ill. 257, 25 N. E. 1019; *Bliss v. Seaman*, 165 Ill. 422, 46 N. E. 279; *Henry v. Caruthers*, 196 Ill. 136, 63 N. E. 629; *Starrett v. Brosseau*, 208 Ill. 408, 70 N. E. 354; *Schell v. Weaver*, 225 Ill. 159, 80 N. E. 95, 8 A. & E. Ann. Cas. 339; *Clemens v. Crane*, 234 Ill. 215, 84 N. E. 884. In this case the claim filed was for a legal demand, and, as no defense was made which could not have been interposed in a suit at law, the probate court did not exercise its equitable jurisdiction. The facts, therefore, are not reviewable here. This question is not of controlling importance in this case, for the reason that there is no conflict in the evidence on any material point. In fact, appellee made but little proof, and none whatever upon any material question of fact involved, but relied wholly upon questions of law. Upon the only questions of fact necessary to be proven to sustain the claim, the evidence of appellant stands uncontradicted and tends to support the claim.

In its judgment the appellate court found, as a question of fact, that upon the allegations and proofs in the record the contracts of December 19, 1899, and of July 24, 1901, are void, as being against sound public policy. This finding is not one of fact, but of law. A similar finding was made by the appellate court in *Brush v. Carbondale*, 229 Ill. 144, 82 N. E. 252, 11 A. & E. Ann. Cas. 121, and, in passing upon that question, we said: "The view of the appellate court seems to have been that the question whether the contract alleged in the declaration was contrary to public policy and void was one of fact. But that is not so." In the *Brush Case* the contract was oral, but, as the facts were conceded, its interpretation, as in the case of written contracts, became a question of law for the court. In this case the contract is a written one, and its construction does not depend upon any extrinsic fact. Its interpretation, therefore, is a question of law.

The position of appellee is that the original and confirmatory contract entered into between Mrs. McVicker and Dr. Zeigler are

void, as against public policy, for the reasons, first, that they furnish an incentive to the commission of a crime; and, second, that they substantially form a wager on the length and continuance of the life of Mrs. McVicker. There is no precise definition of public policy, and consequently no absolute rule by which a contract can be measured or tested to determine whether or not it is contrary to public policy. Each case, as it arises, must be judged and determined according to its own peculiar circumstances. The public policy of the state or of the nation is to be found in its Constitution and its statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of the government officials. *Bell v. Farwell*, 176 Ill. 489, 42 L.R.A. 804, 68 Am. St. Rep. 194, 52 N. E. 346; *Harding v. American Glucose Co.* 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; *Brush v. Carbondale*, supra; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 30 L.R.A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201; *Vidal v. Philadelphia*, 2 How. 127, 11 L. ed. 205; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. Courts will not look to other sources to determine the public policy of a state. As was said in *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* supra: "The public policy of a state or nation must be determined by its Constitution, laws, and judicial decisions,—not by the varying opinions of laymen, lawyers, or judges as to the demands of the interest of the public." That the contract in question does not, in any of its expressed provisions, violate the Constitution or any statute of this state, does not admit of argument. The making of such a contract is not prohibited either by the express terms or any fair implication of the Constitution or of any statute of the state. Neither do we deem it to be contrary to the judicial decisions of the state. The laws and the public policy of the state permit and require the utmost freedom of contracting between competent parties, and it is only when a contract expressly contravenes the law or the known public policy of the state that courts will hold it void.

It is urged that this contract is void chiefly for the reason that it furnished an incentive to appellant to shorten the life of Mrs. McVicker by neglect or improper treatment or by the commission of the crime of murder. Each argument made by appellee in support of this contention involves a breach of the contract, and is not founded on the performance of it. It cannot be seriously contended but that, in order

to comply with the terms of this contract and be entitled to receive the benefits of it, the appellant was bound to give Mrs. McVicker the best treatment within his power and skill, and to prolong her life as long as possible. Should he fail to do this, either through neglect by wilfully treating her in an improper manner or by directly causing her death, appellant would be unable to recover upon the contract. There can be no doubt that a contract to commit murder or any other crime, or a contract to give a reward to one for the commission of a crime, is void, as against public policy. This contract does not contemplate the commission of a crime, or the doing of anything which is unlawful or contrary to good public morals. Even if it be conceded that the contract, under its terms, offered some incentive to appellant to commit a crime, that would not necessarily render it void. "Where the parties to a contract do not contemplate the commission of any crime, the fact that the contract offers an incentive to do so will not render it illegal. This is well shown in contracts in which the benefit to accrue to one of the parties is conditioned on the death of the other party, thereby giving the former an interest in the death of the latter." 15 Am. & Eng. Enc. Law, 2d ed. p. 938. "That it is competent for a party to stipulate for the disposition of his property at the time of his decease is too well settled to admit of doubt or question." *Jenkins v. Stetson*, 9 Allen, 128; *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415. "It is not contended . . . that a contract founded on a sufficient consideration, to make a certain provision by will for a particular person, is invalid in law. The contrary is well settled." *Wellington v. Apthorp*, 145 Mass. 69, 13 N. E. 10. "The owner of property may make a valid enforceable contract binding himself not to dispose of his property by will, and binding himself to permit his possessions to descend according to the laws of intestacy." *Jones v. Abbott*, 228 Ill. 34, 119 Am. St. Rep. 412, 81 N. E. 791.

There have been numerous decisions involving contracts entered into whereby one party has agreed that upon his death his property, or certain specific portions of it, shall go to and become the property of the other party for considerations named, being usually the caring for and maintaining of the grantor during his or her lifetime by the other party; or whereby one party conveyed his property to the other for the consideration of the care, maintenance, and support of the grantor during the remainder of his or her natural life; and these contracts have universally been held to be valid and binding. In every such case, 28 L.R.A.(N.S.)

the incentive to hasten the death of the grantor was present to the same extent as in this case. While such contracts are usually made between parent and child, or between others closely related by blood ties, they have been frequently made between persons who bear no blood relationship to one another, and no distinction has been made by the courts on that ground. In a recent decision, this court held that complainant was entitled to a decree for specific performance against the administrator and heirs of a deceased person who had in his lifetime contracted with complainant orally that, if she would take care of him and provide him with a home as long as he lived, he would give her the house and lot which she was then occupying and which belonged to him; the contract having been fully performed by her upon the death of the promisor. In that case there was no blood or marriage relationship between the contracting parties. *Anderson v. Manners*, 243 Ill. 405, 90 N. E. 728. In this state litigation growing out of the execution of such contracts has usually arisen on account of the nonperformance of the grantee, but in no case has the validity of such contracts been questioned, and their validity has in every instance been recognized by this court. *Frazier v. Miller*, 16 Ill. 48; *Oard v. Oard*, 59 Ill. 46; *Jones v. Neely*, 72 Ill. 449; *Kusch v. Kusch*, 143 Ill. 353, 32 N. E. 267; *Cooper v. Gum*, 152 Ill. 471, 39 N. E. 267; *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559; *Stebbins v. Petty*, 209 Ill. 291, 101 Am. St. Rep. 243, 70 N. E. 673; *Fabrice v. Von der Brelie*, 190 Ill. 460, 60 N. E. 835; *Calkins v. Calkins*, 220 Ill. 111, 77 N. E. 102. It is therefore not contrary to public policy to contract to devise property or to refrain from devising property, for a consideration; or to contract that property shall pass at once or at the decease of the grantor to the other party to the contract, in consideration of the support, care, and maintenance of the grantor during the remainder of his natural life by the other contracting party. So far as the question of an incentive to the commission of a crime is concerned, we perceive no difference between such contracts and the one here involved.

The contention that this contract is void for the reason that it is a wagering contract is not well founded. As we view it, it has none of the elements which would bring it within the designation of a wagering contract. There is a sufficient consideration moving between the parties to support it.

It is contended, further, by appellee that the fiduciary relation of physician and patient having existed between appellant and Mrs. McVicker at the time of the exe-

cution of the original and supplemental contracts, they are presumptively fraudulent and prima facie void. This is the defense which appellee claims required the probate court to exercise its equitable powers. While this contention would constitute grounds upon which to seek affirmative relief in equity, it is one which may be interposed as a defense in an action at law, and, when so interposed, its effect is merely to shift the burden of proof. So, in this case the interposition of this defense made it necessary for appellant to show, by a preponderance of the evidence, that Mrs. McVicker entered into this transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that her consent was not obtained by reason of the power and influence to which the relationship between herself and appellant might be supposed to give rise.

Appellee contends that the burden was not only upon appellant to prove the fairness of the contract and that it was entered into voluntarily and advisedly by Mrs. McVicker, but that it devolved upon him also to show, by a preponderance of the evidence, that she had independent and competent advice before she executed the contract. While the burden was upon appellant by reason of the confidential relations existing between him and Mrs. McVicker, to show by competent proof that the contracts were not executed as the result of undue influence, he is not held to the strict rule contended for by appellee. "To render such a transaction valid, it is only necessary to show that the other party had competent and disinterested advice, or that he performed the act or entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power and influence to which the relation might be supposed to give rise." *Uhlich v. Muhlke*, 61 Ill. 499; *Herr v. Payson*, 157 Ill. 244, 41 N. E. 732. The jury was instructed upon this theory, and the instructions so given were proper.

It is contended by appellee that the trial court erred in allowing depositions of witnesses taken on the part of appellant to be read as evidence on the trial, for the reason, as it claims, that there is no authority, under the statute, for the taking of depositions in the probate court in the matter of any claim there pending. The act on evidence and depositions provides for the taking of depositions of witnesses in suits at law and in suits in chancery. Appellee, relying upon the doctrine as laid down by this court in *Grier v. Cable*, 159 Ill. 29, 42 N. E. 395, insists that, as this proceeding is neither a suit at law or in chancery, the 28 L.R.A.(N.S.)

taking of a deposition in the same is not authorized. Section 60 of the administration act (Hurd's Rev. Stat. 1908, chap. 3) provides that contested claims against the estate of a decedent shall be "tried and determined as other suits at law." This provision, when construed together with the provisions of the act on evidence and depositions, permits of the taking of depositions in claims filed against estates of decedents in the probate court. The appellee is in no position to complain of the action of the court in this regard in any event, as it offered the deposition of a witness on its part and was allowed to read the same in evidence.

Appellee complains of the action of the court in refusing to give certain instructions asked in its behalf, and in giving other instructions asked on the part of appellant. The questions raised on a number of these instructions have been already passed upon in the discussion of other questions involved, and it will not be necessary to deal with them further. Matters raised by some of them, however, have not been noted. About four months before her death, Mrs. McVicker, accompanied by the appellant, went to the state of California, where she died. Under a special arrangement made with Mrs. McVicker, appellant accompanied her to California and attended her there. It is conceded that appellant was not licensed to practise medicine in the state of California, and appellee insists that for that reason he is not entitled to recover anything for his services performed in the state of California, whether rendered pursuant to a contract or otherwise, and that the jury should have been so instructed. Appellant, when in attendance upon Mrs. McVicker, under the terms of his contract, while she was sojourning temporarily in the state of California, was licensed to practise medicine in the state of Illinois, and, so far as the determination of the questions involved here is concerned, it is immaterial whether he had authority to practise medicine in the state of California, or whether the medical attention he gave to Mrs. McVicker while in the state of California was in violation of the laws of that state. He was not engaged in the general practice of medicine in California, but was simply in attendance upon his patient, who was a resident of Illinois, while she was temporarily in California. The instructions asked on the part of appellee on this question were properly refused.

It is also contended by appellee that appellant violated the terms of his contract in refusing to accompany Mrs. McVicker to California in 1903, and for that reason is not entitled to recover on the contract. A

fair and reasonable interpretation of the contract would not require appellant to accompany Mrs. McVicker to any place she might see fit to go temporarily, for the purpose of treating her professionally, but only bound him to treat her at her permanent place of abode. That the parties so understood the terms of the contract is evidenced by the fact that, when appellant did accompany her to California in 1904, it was under a special arrangement whereby he was to receive extra compensation for doing so.

Under the view we take of the case it is not necessary to pass upon the question of the right of appellant to recover upon a *quantum meruit*.

Objections are urged by appellee to the action of the court in excluding and admitting evidence, but upon examination of the record we do not find any reversible error in that regard. From a consideration of the whole record we are of the opinion that the contract entered into by Mrs. McVicker and appellant is a valid and binding one. Appellant, having fully performed it on his part, is entitled to an affirmance of the judgment of the circuit court.

For the reasons assigned, the judgment of the Appellate Court is reversed, and the judgment of the Circuit Court affirmed.

Petition for rehearing denied June 8, 1910.

IOWA SUPREME COURT.

JAMES CAHILL, Appt.,

v.

ILLINOIS CENTRAL RAILWAY COMPANY.

(— Iowa, —, 125 N. W. 331.)

Master — railroad — fellow servant — statutory abolition — repair gang.

1. The act of a repair gang on a railroad in removing a hand car from the track to permit a train to pass is connected with the operation of the road, within the meaning of a statute abolishing the fellow-servant rule in case of accidents connected with such operation.

Same — negligence — dropping hand car.

2. The jury may find negligence where one of the men lifting a hand car from the track prematurely drops it without warning, to

Note. — Upon the question, What is a railroad hazard within the statute abolishing or restricting the fellow-servant rule as to railroad employees, see notes to Johnson v. Great Northern R. Co. 18 L.R.A. (N.S.) 477, and Hanson v. Northern P. R. Co. 22 L.R.A. (N.S.) 969.

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the injury of a coservant, in violation of the custom not to drop the car until ordered to do so after all are ready to act together.

Evidence — presumption of negligence — exclamation.

3. The mere exclamation of a track hand immediately after he had dropped his corner of a hand car which a repair gang was removing from the track, that he did not mean to do so, is not sufficient to overcome the presumption of negligence arising from his act.

(March 15, 1910.)

APPEAL by plaintiff from a judgment of the District Court for Buchanan County entered upon a directed verdict for defendant in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. Cook & Cook, for appellant:

The foreman of a section gang is a fellow servant of his helpers, within the meaning of § 2071 of the Code.

Houser v. Chicago, R. I. & P. R. Co. 60 Iowa, 230, 46 Am. Rep. 65, 14 N. W. 778; Foley v. Chicago, R. I. & P. R. Co. 64 Iowa, 644, 21 N. W. 124; Larson v. Illinois C. R. Co. 91 Iowa, 81, 58 N. W. 1076.

A servant propelling a hand car upon a railroad track is engaged in the use and operation of a railroad.

Larson v. Illinois C. R. Co. supra; Mike-sell v. Wabash R. Co. 134 Iowa, 736, 112 N. W. 201; Frandsen v. Chicago, R. I. & P. R. Co. 36 Iowa, 372; Smith v. Chicago & G. W. R. Co. (Iowa) 80 N. W. 658; Lombard v. Chicago, R. I. & P. R. Co. 47 Iowa, 494; Chicago, M. & St. P. R. Co. v. Artery, 137 U. S. 507, 34 L. ed. 747, 11 Sup. Ct. Rep. 129; Steffenson v. Chicago, M. & St. P. R. Co. 45 Minn. 355, 11 L.R.A. 271, 47 N. W. 1068; Lakey v. Texas & P. R. Co. 33 Tex. Civ. App. 44, 75 S. W. 566; Texas & N. O. R. Co. v. McCraw, 43 Tex. Civ. App. 247, 95 S. W. 82; Texas & P. R. Co. v. Hervey (Tex. Civ. App.) 89 S. W. 1095; Houston & T. C. R. Co. v. Jennings, 36 Tex. Civ. App. 375, 81 S. W. 822; Seery v. Gulf, C. & S. F. R. Co. 34 Tex. Civ. App. 89, 77 S. W. 950; Thompson v. Chappell, 91 Mo. App. 297; Galveston, H. & S. A. R. Co. v. Perry, 38 Tex. Civ. App. 81, 85 S. W. 62; Hardt v. Chicago, M. & St. P. R. Co. 130 Wis. 512, 110 N. W. 427.

Messrs. Kenyon, Kelleher & O'Connor and T. J. Fitzpatrick for appellee.

Weaver, J., delivered the opinion of the court:

The plaintiff was a section foreman in

the service of defendant at Winthrop, Iowa. In the work of repairing and mending the railway track, he and his gang of three men were supplied with a push car on which tools or materials were transported or moved from place to place. It was their duty to be on the lookout for trains, and in proper time before the arrival of one to remove the push car from the track. On the day in question, plaintiff and his men were, in the line of duty, moving their car with their tools and repair material along the track to the eastward, when they discovered the approach of a train and set about the work of clearing the track. The car was furnished with a convenient handle at each of its four corners, and the gang, following the usual method, each laid hold of a handle, and, lifting the vehicle, carried it to the north side of the track. The snow at that point was about eighteen inches deep. It was the custom in thus removing the car to let it down at the word or call of the foreman or some other member of the gang, when it had been carried to a safe distance from the track. On this occasion, when the car had cleared the north rail but a short distance, and while the plaintiff was carrying the northwest corner, someone of the other three men either purposely or accidentally let go his hold, causing plaintiff to fall in such manner that he was struck by the handle or frame of the car, receiving injuries which disabled him for a year or more. Immediately as he fell, and while still under the car, which had fallen on him, one of the men came to his assistance, saying: "I dropped the car and didn't mean to. Are you hurt?" This is the case as made by the plaintiff, and, as he was denied the right to go to the jury, we are required to give the testimony the construction most favorable to him.

The single question presented is whether, upon such construction of the record, we can say that a verdict for the plaintiff could be upheld. This depends in a degree upon the nature of the service in which he was employed and of the negligence of which he complains. If the negligence (if any there was) can fairly be said to have been "connected with the use and operation of the railroad on or about which he was employed," then he comes within the protection of Code, § 2071, and the fellow-servant rule will not prevent his recovery of damages. The "operation of a railway" includes something more than the transportation of freights and passengers, and the army of employees connected with its "use and operation" includes within its ranks more than those who are engaged in the moving of trains. A very appreciable proportion of the operation of a railway has to

do with its maintenance and repair, and especially where such work involves the movement of engines or of cars of various kinds and uses. For instance, the statute has been held to include within its protection the shoveler unloading gravel from a gravel car (*McKnight v. Iowa & M. R. Constr. Co.* 43 Iowa, 406); the shoveler in the gravel bank loading a car (*Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 52); one engaged in operating a derrick erected on a flat car (*Nelson v. Chicago, M. & St. P. R. Co.* 73 Iowa, 576, 35 N. W. 611); clinker man (*Butler v. Chicago, B. & Q. R. Co.* 87 Iowa, 206, 54 N. W. 208); coal handlers while coaling a standing engine (*Akeson v. Chicago, B. & Q. R. Co.* 106 Iowa, 54, 75 N. W. 676); track men distributing rails with the aid of an engine and cable (*Williams v. Iowa C. R. Co.* 121 Iowa, 270, 96 N. W. 774); section men in the use of a hand car (*Mikesell v. Wabash R. Co.* 134 Iowa, 736, 112 N. W. 201; *Larson v. Illinois C. R. Co.* 91 Iowa, 81, 58 N. W. 1076); construction car moving over a temporary track (*Mace v. H. A. Boedker & Co.* 127 Iowa, 721, 104 N. W. 475). In the *Larson Case* this court cited with approval *Chicago, M. & St. P. R. Co. v. Artery*, 137 U. S. 507, 34 L. ed. 747, 11 Sup. Ct. Rep. 129, in which it was held that the use of a hand car by section men was an employment connected with the operation of a railway, within the meaning of our statute. See also *Smith v. Chicago & G. W. R. Co.* (Iowa) 80 N. W. 658, and *Frandsen v. Chicago, R. I. & P. R. Co.* 36 Iowa, 372.

It is generally held by all courts where statutes similar to our Code, § 2071, have been enacted, that the provision is intended for the benefit of those railway employees, no matter in what department of service, whose duty for the time being exposes them to dangers and hazards peculiar to the operation of railways. And surely when a man, in pursuance of his employment, rides or pushes or manages a hand car along the rails to transport tools or material or men, his service is as certainly "connected with the operation of a railway" as is the man who handles the throttle upon an engine which pulls or pushes a car loaded with gravel or other road-building material. So, also, the danger to which the section hand is exposed in moving his car along the track from the approach of trains having the right of way is danger peculiar to railroading, and as his duty requires him, under such circumstances, to remove his car from the rails until the train has passed, and then to replace it and proceed, such service never ceases to be connected with the operation of the railroad, and, so far as any

danger attends such service, it must be classed with the hazards of railroad operation. If the railway company should provide side tracks and switches for the benefit of section men and their hand cars, their work in taking to such side tracks for the passing of trains would be so obviously connected with the operation of the railway that few would think of questioning it; and when the company obviates the necessity of side tracks and switches for such use by furnishing a car which the men can carry, and requires them to do their "switching" by lifting it bodily from the rails and replacing it when the danger has passed, we are very clear that in so doing they are still assisting in the operation of the road. This conclusion finds support in cases from other states as well as our own. *Hardt v. Chicago, M. & St. P. R. Co.* 130 Wis. 512, 110 N. W. 427; *Steffenson v. Chicago, M. & St. P. R. Co.* 45 Minn. 355, 11 L.R.A. 271, 47 N. W. 1068.

There is nothing in *Dunn v. Chicago, R. I. & P. R. Co.* 130 Iowa, 580, 6 L.R.A. (N.S.) 452, 107 N. W. 616, 8 A. & E. Ann. Cas. 226, inconsistent with the view here expressed. In that case no question of the use of a hand car arose. The only inquiry there was whether the injury caused by a passing engine striking an iron bar negligently left on the track, and hurling it against a section hand standing on the right of way, was of the class covered by Code, § 2071, and a majority of this court held that it was not. Until the majority recedes from that holding, it remains the law of this state for cases of that kind; but neither in fact or principle is the case at bar within the rule of that precedent. In this connection we may as well refer also to the case of *Andrews v. Chicago G. W. R. Co.* 129 Iowa, 162, 105 N. W. 404, which is cited by appellee as having an important bearing on the questions presented by the present appeal. In that case plaintiff was injured by the falling or dropping of a hand car which he and others were carrying. No negligence was charged against the fellow workman who dropped the car, nor was the question raised whether in carrying the car they were engaged in the operation of a railroad, within the meaning of our statute. The negligence alleged was the act or omission of the foreman in permitting the coming train to get too near before clearing the track, whereby the work had to be done in such a hurry that it caused one of the men to stumble and lose his hold on the car. We held that there was no sufficient showing that the delay by the foreman was the proximate cause of the injury. The decision has little, if any, bearing upon the issue now under consideration.

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We turn now to the question whether there was any evidence upon which the jury could find that there was negligence on the part of plaintiff's fellow workman in dropping the car without warning. Counsel for appellee say that no presumption of negligence arises from the mere happening of an accident. A better statement of the rule is that no presumption of negligence arises from the mere fact of injury to the plaintiff. Such presumption may and often does arise from the nature of the cause or manner of the injury. For instance, the mere fact that a train man is injured while engaged in the line of his duty will not justify an inference of negligence on the part of his employer; but if it appear that the injury was received in a collision between two trains of the same company moving in opposite directions on the same track, an inference of negligence does arise. The fact that a workman in a mine or quarry suffers injury from the explosion of a blast will not alone entitle him to recover damages from his master; but if it further appear that he was entitled to a warning and opportunity to escape before the blast was fired, and that no warning was given, a very different rule prevails. There may have been no negligence in either case. In the one, control of an engine may have been lost from causes against which reasonable care could not have provided, and, in the other, the blast may have been prematurely ignited without fault of anyone; but the injured party suing for damages has never been held to negative all such possible explanations. As is said in *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475: "In proving the injury, the plaintiff . . . may and often does prove such circumstances under which the injury was received, as raise a presumption of carelessness or negligence, and in such a case the burden of disproving the presumption, by explaining the circumstances so as to render their existence consistent with the absence of any negligence, would devolve upon the defendant." This rule has been applied to cases where a railway switch has been found open (*International & G. N. R. Co. v. Johnson*, 23 Tex. Civ. App. 160, 55 S. W. 772); where a car escapes and runs wild (*Tennessee Coal, Iron & R. Co. v. Hayes*, 97 Ala. 201, 12 So. 98); where a stone is being lifted over a workman and it falls upon him (*Smith v. Baker*, 65 L. T. N. S. 467); where a girder falls from a building in the course of construction (*Wright Fire Proofing Co. v. Poczekai*, 130 Ill. 139, 22 N. E. 543); where a bucket used in hoisting coal is prematurely tripped (*Cummings v. National Furnace Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665); where a steel rail was

thrown from a pile without warning to those below (Atchison, T. & S. F. R. Co. v. Koehler, 37 Kan. 463, 15 Pac. 567); where a piece of timber was being handled by fellow servants, one of whom turned the stick prematurely, to the injury of another (Atchison, T. & S. F. R. Co. v. Brassfield, 51 Kan. 167, 32 Pac. 814); where section hands were carrying a heavy steel rail, and one of them suddenly let go his hold, causing injury to his fellow workman (Blomquist v. Great Northern R. Co. 65 Minn. 69, 67 N. W. 804). Many others of similar nature might be cited.

In the case at bar the evidence tended to show that, in lifting the car from the track, it was the custom of the gang to give a word of warning when ready to set it down. The plaintiff was foreman, and the one from whom the word would naturally be expected, though under the evidence it might perhaps be given by anyone of the gang. The foreman was at the northwest corner, substantially in the direction the car was being carried. He was faced away from the car with the handle lifted about his hip and somewhat behind him. The man Penny was at the southwest corner, and it was he, as plaintiff testifies, who let go his hold, or dropped the car, no word of warning having been given by anyone. These facts are, in our opinion, sufficient to make the question of due care on the part of Penny one for the consideration of the jury. The fact that he dropped his corner of the car and did it without warning is shown. There is nothing, except his exclamation or statement to which we shall soon refer, to show that his act was not voluntary or due to his carelessness. Such being the case, and no explanation or denial appearing, the jury could rightfully find, if indeed it was not bound to presume, that the act was a voluntary one or one of pure heedlessness.

Does the statement made by Penny: "I dropped the car. I didn't mean to. Have I hurt you?"—introduce any element into the case which obviates the result above indicated? We think not. Independent of this statement, there is evidence that he is the one who dropped the car, and the effect of that proof is not neutralized by his declaration that he did not mean to do it. But even conceding the literal truth, it is not inconsistent with his alleged negligence. Counsel is not correct in the assumption that, if an act is inadvertent, it is therefore not negligent, for, generally speaking, the very essence of negligence is inadvertence. Only the malignant or vicious intend injury to others, and such intentional injury is wilful, but not negligent in the proper sense of the word. Were there any evidence here that Penny lost his hold by reason of slip-

ping or stumbling, or other cause consistent with due care on his part, the cases of Bolsem v. Iowa C. R. Co. 140 Iowa, 73, 117 N. W. 1098, and Tibbitts v. Mason City & Ft. D. R. Co. 138 Iowa, 178, 115 N. W. 1021, and other precedents of that class, cited by appellee, would be pertinent; but the record discloses nothing except that Penny, whose duty it was to hold up his corner until the word was given, dropped it. Presumptively such act was voluntary, and, being a violation of the duty which he owed to others engaged in lifting the car, it was negligent. His statement after the injury that he "did not mean to" may have been, and probably was, competent evidence as a part of the *res gestæ*; but it would be going entirely too far to say it was conclusive of the question of his due care.

For the reasons stated, it was error to direct a verdict, and the judgment appealed from is therefore reversed.

Petition for rehearing denied.

WISCONSIN SUPREME COURT.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY

v.

CITY OF JANESVILLE, Impleaded, etc.

(137 Wis. 7, 118 N. W. 182.)

Special assessment — railroad property.

1. A freight depot and spur tracks of a railroad company, although part of its entire system, are subject to special assessment for local improvement, under a statute providing that the property of railroad companies shall be in all respects subject to all special assessments for local improvement in the same manner and to the same extent as the property of individuals.

Same — frontage — benefit.

2. The legislature may, under the police power, provide for the assessment of a fixed proportion of the cost of a public sanitary sewer upon abutting property by the front-foot rule, so that each parcel pays for the cost of its local service sewer without regard to the benefits actually accruing to the property.

(November 10, 1908.)

Note. — Assessments for improvements by the front-foot rule.

I. Scope of note, 1125.

II. The power to impose special assessments.

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b. The custodian, 1127.

c. Nature.

1. The taxing power, 1129.

2. The power of eminent domain, 1130.

3. The police power, 1132.

CROSS APPEALS from a judgment of the Superior Court for Douglas County in an action brought to enjoin the collection of a special assessment against property of plaintiff; plaintiff appealing from so much as upheld a portion of assessment and defendant appealing from so much as rejected a portion. Reversed on defendant's appeal.

The facts are stated in the opinion.

Mr. C. H. Van Alstine, with Messrs. Jackson & Jackson, for plaintiff:

The franchises of a railroad with its main track, branch, spur, and side tracks, rights of way, depot grounds, depot buildings, and other property used in operating its railroad, constitute an entirety.

Yellow River Improv. Co. v. Wood County,

81 Wis. 554, 17 L.R.A. 92, 51 N. W. 1004; Fond du Lac Water Co. v. Fond du Lac, 82 Wis. 322, 16 L.R.A. 581, 52 N. W. 439; Chicago, M. & St. P. R. Co. v. Milwaukee, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417; State ex rel. Milwaukee Street R. Co. v. Anderson, 90 Wis. 550, 63 N. W. 746; Chicago & N. W. R. Co. v. Forest County, 95 Wis. 80, 70 N. W. 77; Pittsburg Testing Laboratory v. Milwaukee Electric R. & Light Co. 110 Wis. 633, 84 Am. St. Rep. 948, 86 N. W. 592; Merrill R. & Lighting Co. v. Merrill, 119 Wis. 249, 96 N. W. 686; Washburn v. Washburn Waterworks Co. 120 Wis. 575, 98 N. W. 539; Chicago & N. W. R. Co. v. State, 128 Wis. 553, 108 N. W. 557.

The entirety of the property of the rail-

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6. Requirement that taxation shall be ad valorem and imposed by uniform rule, 1139.

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XIX. The proper method of assessing according to the front-foot rule, 1204.

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XXI. Conclusion, 1206.

I. Scope of note.

The subject of this note being exclusively one of American constitutional law, no foreign cases have been available. The deci-

way company, including the freight depot and spur tracks, was, in 1905, exempt from taxation and from assessment for local improvements.

Merrill R. & Lighting Co. v. Merrill, 119 Wis. 253, 96 N. W. 686; *Chicago, St. P. M. & O. R. Co. v. Douglas County*, 122 Wis. 273, 99 N. W. 1030; *New York & N. H. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534; *Pittsburg Testing Laboratory v. Milwaukee Electric R. & Light Co.* *supra*; *Buncombe County v. Tommey*, 115 U. S. 122, 29 L. ed. 305, 5 Sup. Ct. Rep. 626, 1186; *Duluth, S. S. & A. R. Co. v. Douglas County*, 103 Wis. 75, 79 N. W. 34; *Chicago & N. W. R. Co. v. Morehouse*, 112 Wis. 14, 56 L.R.A. 240, 88 Am. St. Rep. 918, 87 N. W. 849; *Weeks v. Milwaukee*, 10 Wis. 243;

Soens v. Racine, 10 Wis. 271; *Hale v. Kenosha*, 29 Wis. 599; *Milwaukee & St. P. R. Co. v. Milwaukee*, 34 Wis. 271; *Chicago, M. & St. P. R. Co. v. Crawford County*, 48 Wis. 666, 5 N. W. 3; *Chicago, St. P. M. & O. R. Co. v. Bayfield County*, 87 Wis. 188, 58 N. W. 245.

The entirety of the property of the railway company cannot be broken up without express legislative authority.

Yellow River Improv. Co. v. Wood County; *Fond du Lac Water Co. v. Fond du Lac*; *Chicago, M. & St. P. R. Co. v. Milwaukee*; *Chicago & N. W. R. Co. v. Forest County*; and *State ex rel. Milwaukee Street R. Co. v. Anderson*,—*supra*; *Merrill R. & Lighting Co. v. Merrill*, 119 Wis. 249, 96 N. W. 686.

sions of the Federal and state courts which involved applications of the front-foot rule of apportioning special assessments for local improvements naturally all belong, and have been included, in the note, in so far as they contained aught of value, however slight, to the exposition of the law of the subject; and, in order that nothing necessary to a complete display of the case law shall be lacking, some additional cases in which assessments had been imposed in proportion to the superficial area of the burdened property or *ad valorem* have been cited and discussed. There are indeed numerous cases in which the front-foot rule was used in apportioning the assessment under review, but in which it was accepted as legal without a question, and in which the assessment was sustained or annulled upon unrelated grounds. These cases throw no light upon the rationale of the rule and hence have been generally omitted. To have included them would simply have added to the confusion in which the conflicting decisions have involved the subject, and unduly extended a work already long. There is scarcely any department of the law, said Shiras, J., in the opinion of the court in one of the leading assessment cases, *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, in which it is easier to collect one body of decisions and contrast them with another in apparent conflict than that which deals with the taxing and police powers.

From time to time there have been published, in the first and present series of these reports, notes which it will be of advantage to the reader to consult in connection with this subject, as much of the matter in them is in point here, and has not been repeated in the same form. The following notes may be particularly mentioned as worthy of perusal: That to *Birmingham v. Klein*, 8 L.R.A. 369, on the constitutional restriction of the power of taxation, and valuation, equality, and uniformity; that to *Ulman v. Baltimore*, 11 L.R.A. 224, on constitutional law and the protection of property rights; that to *Re Madera Irrig. Dist. Bonds*, 14 L.R.A. 755, on the necessity of special bene- 28 L.R.A.(N.S.)

fit to sustain assessments for local improvements; that to *Raleigh v. Peace*, 17 L.R.A. 330, on the constitutionality of frontage rule of assessment; that to *Davis v. Litchfield*, 21 L.R.A. 563, on the validity of assessments upon abutting property made by charging each piece the cost of the improvement in front of it; that to *Chicago v. Blair*, 24 L.R.A. 412, on street sprinkling as a local improvement; that to *Chicago, M. & St. P. R. Co. v. Milwaukee*, 28 L.R.A. 249, on the liability of railroad right of way to assessment for local improvements; that to *Asberry v. Roanoke*, 42 L.R.A. 636, on the doctrine of special benefits as a necessary basis for local assessments; that to *Shriveport v. Prescott*, 46 L.R.A. 193, on the liability of street railway for paving assessment; that to *Heffner v. Cass & Morgan Counties*, 58 L.R.A. 353, entitled, Who is liable for the expense of drainage; that part of the note to *State ex rel. Hallauer v. Gosnell*, 61 L.R.A. 33, on the establishment and regulation of municipal water supply, embraced in division II., subdivision c, section 2, subsection (b) respecting frontage assessments, pp. 54-56; the note to *Doughten v. Camden*, 3 L.R.A.(N.S.) 817, on the imposition of the cost of laying water mains in a city street upon the abutting property; and the note to *Arnold v. Knoxville*, 3 L.R.A.(N.S.) 837, on the question whether a special assessment is a tax, within constitutional provisions relating to uniformity of taxation.

II. The power to impose special assessments.

a. In the abstract.

The existence in general of power in an American state to assess private property in order to defray the costs of certain classes of public work, however questioned in the past, is in the present unchallenged.

Examples of local assessments for partial improvements, said the court in *Palmyra v. Morton*, 25 Mo. 593, are familiar in the legislation of states and municipal corporations. The subject has been thoroughly

The tracks, rights of way, depots, and depot grounds of a railway company, actually used by it in the operation of its road, are not, under ordinary conditions, benefited by local improvements, and are not liable to be assessed for the cost of such improvements.

Chicago, M. & St. P. R. Co. v. Milwaukee, supra; Junction R. Co. v. Philadelphia, 88 Pa. 424; Chicago, M. & St. P. R. Co. v. Milwaukee, 89 Wis. 516, 28 L.R.A. 249, 62 N. W. 417; Pittsburg Testing Laboratory v. Milwaukee Electric R. & Light Co. supra; Allegheny v. Western Pennsylvania R. Co. 138 Pa. 375, 21 Atl. 763.

If the freight depot and tracks were actually benefited by the construction of the sewers, assessments for such benefits, tending to destroy the entirety of the property of the railway company, would not be enforced.

Wilkinson v. Hoffman, 61 Wis. 637, 21 N. W. 816; Yellow River Improv. Co. v. Wood

County and Fond du Lac Water Co. v. Fond du Lac, supra; Chicago, M. & St. P. R. Co. v. Milwaukee, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417; State ex rel. Milwaukee Street R. Co. v. Anderson; Pittsburg Testing Laboratory v. Milwaukee Electric R. & Light Co.; Merrill R. & Lighting Co. v. Merrill; and Washburn v. Washburn Waterworks Co.,—supra.

Mr. H. L. Maxfield, for defendant:

The lots owned by a railroad in fee, abutting on the street in which such sewer is laid, are liable to assessments for same.

Minneapolis & St. L. R. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103; Chicago, R. I. & P. R. Co. v. Ottumwa, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074; Weeks v. Milwaukee, 10 Wis. 243; Blount v. Janesville, 31 Wis. 648.

When sewerage is laid in streets, all the abutting property and all real estate benefited by the construction of same is liable to assessment, and the benefits are deter-

discussed, and every principle bearing on it severely analyzed in almost every state in the Union where the power has been exercised; and it is now as firmly established as any other doctrine of American law.

It is not open to doubt, in the opinion of the Supreme Court of the United States, that it is in the power of a state to require local improvements to be made which are essential to the health and prosperity of any community within its borders. Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

Abutting owners may undoubtedly be burdened with special assessments upon their property to meet the expenses of opening public highways in front of such property. Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 137.

And special taxes for local improvements, such as the construction of sewers, may properly be imposed by the authority of the state upon property specially benefited by such improvements. Rutherford v. Hamilton, 97 Mo. 543, 11 S. W. 249.

b. The custodian.

This power of the state is necessarily committed to the legislature. It is included in the general grant of legislative power. Reeves v. Wood County, 8 Ohio St. 333.

The power of the legislature to impose special taxes for purely local improvements is, like the power to impose taxes generally, plenary. Woodbridge v. Detroit, 8 Mich. 274.

It rests with the legislature, if unconstrained by constitutional provisions, to determine in what manner the means to defray the cost of a public work or local improvement authorized shall be raised. Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

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The power of apportionment of assessments for local improvements upon the property benefited, like the power of taxation, belongs exclusively to the legislature, when not restricted by constitutional provisions limiting such imposts or prescribing a rule of apportionment. Burnett v. Sacramento, 12 Cal. 76, 73 Am. Dec. 518.

The legislature, in exercising the taxing power in assessing property for local improvements, and apportioning the burden, has a wide latitude of discretion. St. Joseph use of Gibson v. Farrell, 106 Mo. 437, 17 S. W. 497.

The legislature has the widest discretion to direct the manner in which assessments shall be laid and collected upon property benefited specially by a public improvement, to defray its cost. Allman v. District of Columbia, 3 App. D. C. 8.

The mode of apportionment, and the extent of territory which may be assessed for the cost of a local improvement, are necessarily matters of legislative discretion. State, Sigler, Prosecutor, v. Fuller, 34 N. J. L. 227.

The legislature has discretionary power to direct the assessment of the entire or any part of the cost of a local improvement upon the land it benefits. Bauman v. Reas, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966.

It is not now debatable but that the legislature may authorize the imposition of special assessments for special road or street improvements at will. Mattingly v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098.

It is well-settled law, according to Chancellor Nicholson, of Delaware, that the whole subject of taxing districts belongs to the legislature; that the apportionment between the public and the local owners is within the power of the legislature; and that the legislature may fix upon the basis of apportion-

mined by whether the property so assessed can be drained by said sewerage.

Chicago & A. R. Co. v. Joliet, 153 Ill. 649, 39 N. E. 1077; *New York, N. H. & H. R. Co. v. New Britain*, 49 Conn. 40; *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096; *State, Paterson & H. River R. Co., Prosecutor, v. Passaic*, 54 N. J. L. 340, 23 Atl. 945.

Property is liable for benefit assessment for street paving, sewers, etc., under a constitutional provision exempting it from taxation of any kind.

Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425, 74 S. W. 979; *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L.R.A. 668, 17 S. W. 212.

The freight and passenger depot are benefited by the reason of the construction of sanitary sewerage in the streets in front of same.

Atchison, T. & S. F. R. Co. v. Peterson, 5 Kan. App. 103, 48 Pac. 877; *Mt. Pleasant*

v. Baltimore & O. R. Co. 138 Pa. 365, 11 L.R.A. 520, 20 Atl. 1052.

Winslow, Ch. J., delivered the opinion of the court:

The city of Janesville, having adopted those provisions of the general city charter law relating to the building of sewers (§§ 925-208 to 925-239, Stat. 1898), proceeded to construct sanitary sewers in certain streets of the city, and levy assessments against adjoining real estate at the uniform rate of 40 cents per linear foot to pay a part of the expense. The railroad company owns and operates a railroad running through the city upon a right of way 100 feet in width, and also owns several tracts of land adjoining said right of way and fronting on certain of the streets in which sewers were laid. Upon one of these tracts is a freight depot, and upon others are warehouses and other buildings rented by the company to private parties, which are

ment between individuals. *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158.

It is competent for the legislature to provide for the expense of local improvements either by general taxation upon all the local property or by special assessments upon property adjacent to and benefited by such improvements. *Burnett v. Sacramento*, supra; *Re Van Antwerp*, 56 N. Y. 261.

It is within the power of the legislature to require that the expense of constructing drains, sewers, and the like, should be met, in whole or in part, by local assessments upon persons or property benefited or deemed to be benefited. *English v. Wilmington*, supra.

The legislature may provide for local improvements of a degree of public utility or in a sense of a public character, and impose the cost thereof on the property or district to be specially benefited in any manner not manifestly unfair or unequal. *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826.

It is competent for the legislature by statute to authorize the assessment of the entire cost of a street improvement upon property fronting thereon, provided such assessment does not exceed the benefits conferred upon such property by the improvement. *State v. Bayonne*, 56 N. J. L. 297, 28 Atl. 713.

But the legislature is not limited in assessing the cost of a local improvement upon property adjacent thereto, to the actual increase in the value of the property assessed resulting from such improvement. *Rolph v. Fargo*, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049; *Webster v. Fargo*, 9 N. D. 208, 56 L.R.A. 156, 82 N. W. 732.

A state legislature has the constitutional power to create special taxing districts, and direct the cost of local improvements in such 28 L.R.A.(N.S.)

districts to be assessed, wholly or partly, upon the property therein. *Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; *Seattle v. Kelleher*, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44.

In exercising the taxing power for local improvements, the legislature may create special taxing districts, without regard to the boundaries of counties, townships, or municipalities. *Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124.

The legislature may declare conclusively that only the property within a taxing district it has created by law shall be specially assessed on account of a local improvement within that district. *Adams v. Shelbyville*, 154 Ind. 467, 49 L.R.A. 797, 77 Am. St. Rep. 484, 57 N. E. 114; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021.

The matter of assigning districts to be assessed for the cost of a local improvement belongs to the legislature, and its judgment must control unless it has plainly and manifestly passed beyond the constitutional limits of the legislative power. *Newman v. Emporia*, 41 Kan. 583, 21 Pac. 593.

The Congress of the United States has constitutional power, in providing for the opening and extension of streets in the District of Columbia, and the condemnation of lands for the purpose, to require the cost thereof to be assessed, to the extent of one half or more, arbitrarily upon the abutting lands and lands benefited by the improvement. *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616.

The legislature may, instead of fixing and prescribing the taxing district itself, refer the matter to commissioners or local boards or bodies to ascertain and determine; and in such case the delegated bodies possess and exercise legislative functions, and their action must be deemed as conclusive upon the subject as if the legislature itself had

reached by short spur tracks branching off from the main line. The city levied sewer assessments at the uniform rate aforesaid against all of these parcels which fronted on the line of the sewers outside of the 100-foot right of way. The company paid the assessments so made against those parts of such parcels upon which the warehouses were located, but declined to pay the assessments against the freight depot property and the strips 17 feet wide, upon which the spur tracks were located, and brought this action in equity to set aside the last-named assessments on the ground that such property was not subject to assessment. After trial the court sustained the assessments against the freight depot property and against all but two of the strips on which

the spur tracks are situated, but set aside the assessments as to the last-named strips, because they were found not to be actually benefited, and each party appealed from that part of the judgment adverse to its contention.

The leading contention made by the plaintiff is that the lands on which its freight depot and spur tracks are situated are not subject to assessment for local improvements, because they are a part of an entirety composed of the whole property, real and personal, of a public service corporation, and hence are not severable. The general doctrine that the franchises of such a corporation, together with the property owned by it which is necessary for its use in order to accomplish the purposes of its

directly exercised the authority. *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2.

The legislature has the constitutional power to authorize municipal corporations to assess the cost of local improvements upon property benefited. *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615.

The legislature has the power to authorize a municipality to make repairs and renewals of streets within the corporate limits, and assess the costs thereof upon the lots and parts of lots fronting upon the work done. *Covington v. Boyle*, 6 Bush, 204.

c. Nature.

1. The taxing power.

A formidable array of cases, and at the present day the great weight of authority, attribute the power to impose special assessments for local improvements to the taxing power. There were in earlier times several dissentients from this view, but in most of the jurisdictions to which it was not subscribed changes in the Constitutions have given it ascendancy. Illinois is the conspicuous example in this respect.

It is now quite generally conceded, said the court in *Allman v. District of Columbia*, 3 App. D. C. 8, that special assessments, though savoring in some measure of the exercise of the right of eminent domain, are nevertheless included in and governed generally by the principles of the sovereign power of taxation.

No good can result from a discussion of the nature of special assessments, or the fundamental difference between such assessments and ordinary taxation, said the court in *Hackworth v. Ottumwa*, 114 Iowa, 467, 87 N. W. 424. But the foundation of the power to levy special assessments is the right of taxation, rather than the police power or the right of eminent domain.

There is much discussion in the books, said the court in *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2, as to whether an assessment for local improvements is a

tax or not, but whatever may be the true doctrine it must be conceded the authority to make such an assessment is necessarily lodged in the taxing power. This has been held so often that the controversy must be held as closed.

The power to make assessments on abutting lands to pay for the improvement of streets has been, according to the court in *Independence v. Gates*, 110 Mo. 374, 19 S. W. 728, the prolific source of much discussion, and difficulty seems to have existed in tracing it to its true source; but it is settled in Missouri and generally elsewhere that it is referable to the taxing power.

It is now a settled law in this court, it was declared in *Meier v. St. Louis*, 180 Mo. 391, 79 S. W. 955, that special assessments for local improvements are referable to the taxing power.

Under the law of the state, said the court in *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. 172, 12 L.R.A.(N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 A. & E. Ann. Cas. 630, as declared by the higher courts, it is well settled that special assessments for local improvements are a constitutional exercise of the taxing power.

A special tax upon property in a designated district, to be paid for the construction or purchase of a high road laid by statute, is an assessment, of benefit to the persons and property taxed, made by the legislature in the exercise of the sovereign power of taxation. *Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124.

An assessment to pay for a local improvement must rest for its validity upon its being a legitimate exercise of the taxing power. *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518.

The authority to lay special assessments springs from the general power of taxation. *Taylor v. Palmer*, 31 Cal. 240.

Local assessments are special and individual taxation. *Parker's Appeal*, 169 Pa. 433, 32 Atl. 574.

Their imposition is an exercise of the taxing power. *Denver v. Knowles*, 17 Colo. 204, 17 L.R.A. 135, 30 Pac. 1041.

An assessment for a local improvement is

existence, constitute an entirety, which is not ordinarily subject to division by sale of a part on court or tax process, is firmly established in this court. *Chicago & N. W. R. Co. v. Forest County*, 95 Wis. 80, 70 N. W. 77, and cases cited. This principle, however, is subject to the exception that such sale and division may be authorized by special legislative authority. Ordinary statutory provisions, merely general in their nature, will not be construed as intended to apply to such property, but the legislature has full power over the subject, and may by specific provisions accomplish the result. The general principle is well illustrated in the case of *Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417, where the city

had attempted to assess a strip of the right of way of the company for the paving of an adjoining street. It was contended in that case that the provisions of subdivision 14, § 1038, Rev. Stat. 1878 (being the same as subdivision 14, § 1038, Stat. 1898), exempting railway property from general taxation, "excepting that the same shall be subject to special assessments for local improvements in cities and villages," made the right of way subject to assessment under the general provisions of the city charter authorizing assessments against adjoining real estate. It was held, however, that the exception in the exemption statute was not an affirmative declaration making railroad property subject to special assessment, but simply confined the

a species of tax. *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *Whiting v. Quackenbush*, 54 Cal. 306; *Rich v. Woods*, 118 Ky. 865, 82 S. W. 578; *Re Van Antwerp*, 56 N. Y. 261.

It is a branch of or included within the taxing power. *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158; *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437; *Monroe County v. Harrell*, supra; *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Baltimore v. Boyd*, 64 Md. 10, 20 Atl. 1028; *Howe v. Cambridge*, 114 Mass. 388; *Weed v. Boston*, 172 Mass. 28, 42 L.R.A. 642, 51 N. E. 204; *Dexter v. Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379; *White v. Gove*, 183 Mass. 333, 67 N. E. 359; *Harwood v. Street Comrs.* 183 Mass. 348, 67 N. E. 362; *Williams v. Detroit*, 2 Mich. 560; *Woodbridge v. Detroit*, 8 Mich. 274; *Daily v. Swope*, 47 Miss. 367; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Edwards House Co. v. Jackson*, 91 Miss. 429, 45 So. 14; *Neenan v. Smith*, 50 Mo. 525; *St. Joseph use of Gibson v. Farrell*, 106 Mo. 437, 17 S. W. 497; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014; *Heeman v. Allen*, 156 Mo. 534, 57 S. W. 559, affirmed in 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645; *State, Sigler, Prosecutor, v. Fuller*, 34 N. J. L. 227; *State, Agens, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *Litchfield v. Vernon*, 41 N. Y. 123; *Genet v. Brooklyn*, 99 N. Y. 296, 1 N. E. 777; *People ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L.R.A. 372, 62 N. E. 662, affirming 64 App. Div. 316, 72 N. Y. Supp. 191; *Hilliard v. Asheville*, 118 N. C. 845, 24 S. E. 738; *Kinston v. Loftin*, 149 N. C. 255, 62 S. E. 1069; *Rolph v. Fargo*, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Jones v. Holzapfel*, 11 Okla. 405, 68 Pac. 511; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Re Centre Street*, 115 Pa. 247, 8 Atl. 56; *Winoona & St. P. R. Co. v. Watertown*, 1 S. D. 46, 44 N. W. 1072; *Adams v. Roanoke*, 102 Va. 53, 45 S. E. 881; *Weeks v. Milwaukee*, 10 Wis. 243.

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A statute providing for local improvements in public streets, the expense of which shall be borne partly by those immediately interested and whose estates are thereby benefited, is a mode of taxation which the legislature is constitutionally competent to adopt. *Howe v. Cambridge*, 114 Mass. 388.

It is a legitimate exercise of the taxing power for the legislature to authorize the whole cost of a local improvement, such as opening, grading, and paving streets, to be assessed upon lands which by reason of their peculiar location may be regarded as benefited. *State, Sigler, Prosecutor, v. Fuller*, 34 N. J. L. 227.

In all cases of assessments for improvements, whether the sum to be raised is apportioned according to benefits, or according to value, upon the front foot, square foot, square acre, or where each owner is required to pay for the improvement in front of his own land, the assessment must be referred to the taxing power, and not the power of eminent domain,—the different modes being but different ways of apportioning the tax, and not the exercise of different sovereign powers. *Emery v. San Francisco Gas Co.* 28 Cal. 345; *Emery v. Bradford*, 29 Cal. 75; *Walsh v. Mathews*, 29 Cal. 123.

2. The power of eminent domain.

As long as the Constitution of 1848 of the state of Illinois remained unchanged, it was the doctrine of the courts of that state that special assessments for the cost of local improvements were sustainable only under the power of eminent domain.

The leading case in which this doctrine was expounded and applied as a controlling principle of decision was that of *Chicago v. Larned*, 34 Ill. 203.

The position taken by the court in that case was that the property of a citizen of a constitutional state can be taken from him by the power of the state in one of four ways only, viz.: (1) For taxes; (2) for the public use; (3) as a penalty for the infraction of public law; and (4) to satisfy

exemption to the subject of general taxation, and that the general provisions of the city charter providing for special assessments did not show a legislative intention that a portion of a railroad right of way should be so assessed and severed by sale for nonpayment of the assessment. In the discussion of the question it was said that the principle is established that "such a result cannot be effected under the power of taxation without express legislative authority, and that general language in such statutes will not be held to authorize such a result." Since the decision of that case, however, the legislature has in no uncertain terms made express provision for the levying of such assessments against such property. Chapter 425, p. 688, Laws 1903, pro-

vides, among other things, that the property of railroad corporations "shall be in all respects subject to all special assessments for local improvements, in the same manner and to the same extent as the property of individuals." This is an express and unambiguous declaration by the legislature upon a subject over which it has full power, which closes the question. It is instructive, also, to note that, by the same law, it is provided that such assessments may be collected by ordinary action at law, thus obviating all practical danger of a sale and consequent severance of a part of the corporate property. It must therefore be held that all of the property assessed in the present case was subject to assessment, although it was a part of the entirety.

his debts; and that power of every description must be referred to some source. The power to make special assessments must therefore be referred to the power either of taxation or of eminent domain; and whether referred to the one or the other, it must of necessity be exercised under the constitutional restraints, if any, that hedge the employment of either one. If, then, such assessments are taxes, they must, under the Constitution of the state, be uniform and equal in incidence, and imposed upon property *ad valorem*, but this they are not, especially if arbitrarily laid according to the frontage of the assessed property in a limited area. If they rest upon the right of eminent domain, then, by the Constitution, compensation must be made to those from whom they are exacted.

It is, said the court, the element in special assessments of compensatory benefits, which has reconciled this court to their imposition, and induced the court to range the power to make them under the power of eminent domain, the "just compensation" being the benefit flowing to the property holder from the improvement, and which is required to be estimated together with the damages. No case can be found, it continued, decided by this court on a principle variant from this,—the equation of benefit and burden forming the ground work of all of them.

The decision was followed in *Chicago v. Home Bank*, 34 Ill. 283, a case identical in principal in every respect; and the doctrine was adhered to in *Ottawa v. Spencer*, 40 Ill. 211, wherein an assessment for a sidewalk was vacated because being apportioned by the front-foot rule, it violated one or both of the aforementioned constitutional provisions.

The doctrine was again recognized and applied in *Bedard v. Hall*, 44 Ill. 91, the court there saying: We do not deem it necessary to go over the ground again occupied in the *Larned Case*. We have recognized that case, and the principles therein established, in the case of *Ottawa v. Spencer*, *supra*.

Later, however, the Constitution of Illinois was changed, and thereafter the courts 28 L.R.A. (N.S.)

attributed the laying of special assessments to the taxing power. Under the Illinois Constitution of 1848, it was said in *Chicago & A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077, the power to levy and collect special taxes was held to have its source in the constitutional provisions relating to the right of eminent domain; but under the present Constitution special taxation of contiguous property and special assessments for local improvements are held to be branches of the taxing power.

In virtually all of the other states of the Union it has been denied from the beginning that the power of imposing special assessments to pay for local improvements is any part of the power of eminent domain.

Some confusion of ideas, said the court in *Emery v. San Francisco Gas Co.* 28 Cal. 345, may formerly have arisen from a supposition that an apportionment of the cost of a local improvement according to benefits involved the principle of specific compensation for property taken, and still more from not separating and keeping distinctly in view the operation of the two powers of taxation and eminent domain in the class of cases involving both, as where land had been taken for a new street, and at the same time an assessment made upon the owners of the property in the district embracing the new street, including the owner of the land taken to pay for the land thus appropriated.

The taxing of estates especially benefited by a local improvement in a public street, to defray the expense of making it, is an exercise of the power of taxation, and distinguishable from an exercise of the right of eminent domain. *Howe v. Cambridge*, 114 Mass. 388.

Constitutional provisions forbidding the appropriation of private property to public use or to be taken for public improvements in cities and villages without the consent of its owner, unless just compensation is made, do not apply to special taxes or assessments laid upon property to pay for local improvements. *Williams v. Detroit*, 2 Mich. 560.

The second contention of the railroad company is that the assessments are invalid because made for arbitrary sums by the front-foot rule, and not in proportion to benefits actually received. The sections of the general charter law under which they were made (§§ 925-216 to 925-218, Stat. 1898) provide for the making of assessments against adjoining lots at an even rate not exceeding \$2 nor less than 25 cents per linear foot on the whole frontage of each lot. There are no provisions for the ascertainment of actual benefits nor for the limitation of the assessments to the amount of actual benefits received. So the contention becomes primarily a contention against the validity of the law, and, if the law be valid, the assessments them-

selves are valid, because they were made in accordance with the terms of the law. This court has held that where assessments for local improvement are required to be assessed according to the benefits accruing to each parcel, an assessment of a level rate by the front-foot rule, while not necessarily void, will be held invalid, unless it appears that the assessing board has considered the matter and determined that the benefits are in fact proportionate to the frontage of each parcel. *Hayes v. Douglas County*, 92 Wis. 429, 31 L.R.A. 213, 53 Am. St. Rep. 926, 65 N. W. 482; *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983; *Sanderson v. Herman*, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141. These cases, however, have no bearing on the question

Special assessments upon abutting property to defray the cost of street improvements are not affected by constitutional restrictions upon the power of eminent domain. *Edwards House Co. v. Jackson*, 91 Miss. 429, 45 So. 14.

The imposition of special assessments to defray the cost of a local improvement upon property benefited by such improvement is in no sense a taking of property by right of eminent domain. *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615.

It is not in any proper sense a taking of property for public use without just compensation. *Re Dorrance Street*, 4 R. I. 230.

The legislature, in authorizing the whole cost of a local improvement to be assessed upon lands benefited by it, does not violate a constitutional prohibition against taking private property for public use without just compensation. *State, Sigler, Prosecutor, v. Fuller*, 34 N. J. L. 227.

Whether the taking of private property in the opening of a street, and apportioning the expenses among the owners of adjacent property, would be within the prohibition of a constitutional provision forbidding private property to be taken for public use without just compensation, said the court in *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518, it is unnecessary to determine. This question does not properly arise in the case at bar. Here there has been no exercise of the right of eminent domain. No private property has been taken for public use from the plaintiff. His land remains untouched. The street was previously opened, and it is that which has been improved by grading. The assessment is the tax levied to meet the expenses of the improvement.

An assessment laid upon abutting property for the cost of a local improvement is not an exercise of the power of eminent domain. *Hayden v. Atlanta*, 70 Ga. 817; *Speer v. Athens*, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802; *Williams v. Detroit*, 2 Mich. 560; *Woodbridge v. Detroit*, 8 Mich. 274.

It does not come within the purview of 28 L.R.A.(N.S.)

such power. *Weed v. Boston*, 172 Mass. 28, 42 L.R.A. 642, 51 N. E. 204.

It is not referable to it. *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Hilliard v. Asheville*, 118 N. C. 845, 24 S. E. 738; *Kinston v. Loftin*, 149 N. C. 255, 62 S. E. 1069.

The power of eminent domain is not the foundation of the power to levy special assessments. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074.

Nor the source. *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437.

The two powers are wholly unrelated. *Palmyra v. Morton*, 25 Mo. 593.

We consider, said the court in *Palmer v. Way*, 6 Colo. 106, the decided weight of authority is opposed to the doctrine that special benefits accruing from a public improvement can be assessed against the property so benefited under the power of eminent domain.

That the imposition of a tax or assessment after the repaving of an existing city street is an exercise of the taxing power, and not of the law of eminent domain, said the court in *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1, has been so frequently decided not only by this court, but by the courts of other states, that the controversy which may once have existed upon the subject must be regarded as closed.

3. The police power.

There are certain local improvements made in the exercise of the police power. The theory, for example, upon which a sewer system is provided by the public is that it is a sanitary measure. The drainage of adjacent lands is merely incidental; the primary object is the promotion of the general health of the public. *Toledo use of Gates v. Lake Shore & M. S. R. Co.* 4 Ohio C. C. 113.

Whether the means to pay for improvements of this sort are raised by general taxation or by special assessments upon property immediately concerned, it is gen-

before us, because the statute before us does not require the assessment to be in proportion to benefits received. The simple question here is whether a law is constitutional which provides for the assessment of a fixed proportion of the cost of a public sanitary sewer against adjoining lots by the front-foot rule.

The decisions upon the general question of the validity of special assessment laws which do not provide for assessments to be made in proportion to the benefits received are very numerous and conflicting. A treatise might easily be written upon the subject, but no attempt will be made to write such a treatise here, as the writer fears that such attempt might result in a collection of words without knowledge, which

erally agreed that in providing the required funds the taxing power is invoked.

The power to levy special assessments in general is not founded in the police power of the state. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074.

General police powers are not enforced by special taxation or assessment. *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067.

An assessment for the cost of a sidewalk or a sewer, apportioned upon the assessed property according to the frontage upon the line of the improvement, or according to the area of the property within the prescribed district, may be sustained as an exercise of the police power, the province of which is the preservation of order and the making of rules and regulations conducive to the health, comfort, and protection of society, and not primarily for revenue. *Palmer v. Way*, 6 Colo. 106; *Keese v. Denver*, 10 Colo. 112, 15 Pac. 825.

The right of a municipal corporation to require a landowner to pave the sidewalk in front of his property may be derived from its duty to protect the public health and to prevent nuisances, and is a mere police regulation. *Palmyra v. Morton*, 25 Mo. 593.

A municipal ordinance requiring lot owners along a given street to construct sidewalks in front of their respective lots, at their own cost, is constitutional and valid when made under express legislative authority, and is not an exercise of the power of taxation, but is a police regulation in the nature of the abatement of a nuisance. *Franklin v. Maberry*, 6 Humph. 368, 44 Am. Dec. 315; *Washington v. Nashville*, 1 Swan, 177.

The police power may justify requiring a landowner to construct, at his own expense, a sidewalk in front of his land, or a lateral connection between his dwelling and a sewer, and, perhaps, to tap a water main for domestic use, and therefore will sustain arbitrary assessments for any of these purposes; but it will not support arbitrary assessments, beyond or in disregard of the special and peculiar benefits conferred upon the property charged, for construct-

merely darken counsel. It is well settled that assessments against adjoining property are not limited to benefits received, where such assessments are properly made under the police power. Thus, the court has held that the entire cost of a sidewalk may be properly assessed against the adjoining lot without reference to or ascertainment of actual benefits. *Hennessey v. Douglas County*, supra; *Lisbon Ave. Land Co. v. Lake*, 134 Wis. 470, 113 N. W. 1099. In the last case it was held that, inasmuch as the presence of a defective and dangerous sidewalk constituted a serious public inconvenience and danger, the city might, under the police power, be clothed with the right to build or repair it at once without notice, and to charge the entire expense

ing the highway, a trunk sewer, or a water main for the public. *Doughten v. Camden*, 72 N. J. L. 451, 3 L.R.A. (N.S.) 817, 111 Am. St. Rep. 680, 63 Atl. 170, 5 A. & E. Ann. Cas. 902.

The assessment of lands along the line of municipal water mains, according to frontage and without regard to value, to pay bonds issued to construct the water system, cannot be sustained as an exercise of the police power. *Stehmeyer v. Charleston*, 53 S. C. 259, 31 S. E. 322.

A local assessment for the cost of a sidewalk, if invalid as an exercise of the taxing power or the power of eminent domain, either for want of equality and uniformity in apportioning it and lack of foundation ad valorem, or because not compensated for by special benefits to the assessed property, cannot be sustained as an exercise of the police power. *Ottawa v. Spencer*, 40 Ill. 211.

The court cited this case, and reaffirmed the proposition that local improvements of either sidewalks or streets could not be compelled under the general police power, in *Gridley v. Bloomington*, 88 Ill. 554, 30 Am. Rep. 566. And followed the latter case again in *Chicago v. Crosby*, 111 Ill. 538.

Under the Colorado Constitution the power to make special assessments for local improvements must be confined to purposes within the domain of police regulations. *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899.

The decisions in Colorado are to the effect that assessments against property specially benefited by local improvements cannot be upheld under the uniformity rule of taxation, according to the court in *Pueblo v. Robinson*, supra, unless the improvements are clearly within the domain of police regulations.

III. Distinction between taxes and assessments.

All the courts, in varying but strikingly similar language, have recognized a distinction between taxes in the generic sense and assessments to pay for local improvements,

to the abutting lot upon which it stands, regardless of the question of the amount of benefit actually conferred. A defective sidewalk is a menace to the public safety, and its presence in a public street is quite analogous to the presence of a disease-breeding cesspool upon private property, which, under well-established principles, may be removed by the public authorities, and the expense thereof charged to the property, if the statute so authorize. The decisions are quite unanimous upon this question, and may be found collated in 2 Cooley on Taxation, 3d ed. pp. 1128-1130. Upon the last-named page Judge Cooley proceeds as follows: "There seems to be no legal impediment to a requirement under the police power that lot owners in cities and villages shall

be at the expense of constructing that portion of the public sewer in front of their respective premises,"—citing *Van Wagoner v. Paterson*, 67 N. J. L. 455, 51 Atl. 922. See also *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249. There certainly is no fault in this line of reasoning. The preservation of public health from danger resulting from the accumulation of sewage upon private property in cities is fully as persuasive a justification for the exercise of the police power as the preservation of life and limb from the dangers resulting from defective or snow-covered sidewalks. So far as this court has spoken on the subject, it has sustained the right to make sewerage assessments upon the front-foot rule, without regard to the extent of bene-

but they have been content to assert the existence of such a distinction and to catalogue the principal characteristics of the two forms of exactions without explaining why, upon principle or in reason, a distinction should be made, except by general references to peculiar compensatory benefits flowing from improvements, on account of which assessments are made.

The power of assessment, though springing from it, is not to be confounded with the general power of taxation. *Taylor v. Palmer*, 31 Cal. 240.

Assessments to pay for the improvement of streets in a city, though referable to the taxing power, are not taxes in the sense that that word is usually employed. *Independence v. Gates*, 110 Mo. 374, 19 S. W. 728.

Special assessments for local improvements are not taxes in the strict sense of that term. *Adams County v. Quincy*, 130 Ill. 566, 6 L.R.A. 155, 22 N. E. 624.

The words "taxation" and "assessment" represent different modes of exercising the taxing power, and indicate different objects and purposes in aid of which the taxing power may be invoked. *Taylor v. Palmer*, *supra*.

In origin and legal or constitutional complexion, "taxes" and "assessments" are the same; but in the method of imposing them, and in the effect of their imposition upon the taxpayer, they are essentially different, and should in these respects be considered and treated as separate and distinct. *Ibid*.

There is, according to the court in *Neehan v. Smith*, 50 Mo. 525, a broad distinction, and one of universal recognition, between the foundation upon which is based the right of general taxation for governmental purpose and that which supports the right of local assessment. The authority to impose either is referred to the taxing power. The object of one widely differs from that of the other.

The principles that govern the general burdens imposed for state and municipal purposes do not apply to that peculiar species of taxation, local assessments. *Sands* 28 L.R.A.(N.S.)

v. Richmond, 31 Gratt. 571, 31 Am. Rep. 742.

The words "tax" and "taxation" and the term "special assessment" have well-understood meanings in the courts and by the public, differing from each other. *Winona & St. P. R. Co. v. Watertown*, 1 S. D. 46, 44 N. W. 1072.

Assessments for local improvements are not within the meaning of the term "taxation" as usually employed in Constitutions and statutes. *Allen v. Galveston*, 51 Tex. 302.

While the question has heretofore been the subject of much controversy in the courts, said the court in *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557, we think the doctrine is well established at this time that the general use of the term "taxes" in the Constitution does not necessarily include what is meant by the term "assessments" in connection with street and other local improvements, but applies only to the larger exercise of the sovereign power of the state, either directly or through its inferior instrumentalities of county, city, town, school districts, etc., in raising general revenues for the support and maintenance of government.

Assessments upon the owners of adjacent property, to pay the expenses incident to the paving of streets in cities, are not taxes in the ordinary sense of the term, but rather charges upon the land inseparably incident to its location in respect to other property. *Baltimore v. Boyd*, 64 Md. 10, 20 Atl. 1029.

That a distinction exists between local assessments and taxes levied for the general purposes of revenue, said the court in *Denver v. Knowles*, 17 Colo. 204, 17 L.R.A. 135, 30 Pac. 1041, is now recognized by an almost unbroken line of decisions and by the consensus of opinion of all text writers upon the subject; local assessments are upheld upon the theory that the property against which the assessment is made is specially benefited by the improvement, while taxes refer more particularly to those burdens imposed for revenue.

Taxes are imposed upon persons; assessments upon property. Taxes differ from

fts. *Meggett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566. See also *Blount v. Janesville*, 31 Wis. 648. The provisions of the general charter in question evidently contemplate that all the property drained by the system shall be assessed at an even rate, so that each parcel shall pay approximately its proportionate share of the cost of what may be called merely a service sewer, while the additional expense of main or trunk sewers, made necessary in order to conduct away the combined output of the minor service sewers, shall be borne by the entire district. If this be, as we hold it is, a legitimate ex-

ercise of the police power, there are no constitutional objections, either national or state, which stand in the way. See *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

It follows from these considerations that the assessments in question should all have been sustained.

Those parts of the judgment from which the plaintiff appeals are affirmed, and those parts from which the city appeals are reversed, with directions to enter judgment in accordance with this opinion, the city to recover one bill of costs in this court.

assessments for local improvements. Taxes are burdens upon all persons and property alike, and are compensated for by equal protection to all; while assessments are not burdens but equivalents laid for local purposes upon local objects, and compensated for, to some extent, in local benefits to the property assessed. *Hayden v. Atlanta*, 70 Ga. 817.

A special assessment is unlike an ordinary tax, because its proceeds must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property on which it is imposed. *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451.

All the cases decided by this court, so far as we have examined, it was said in the opinion in *Chicago v. Larned*, 34 Ill. 203, hold that special assessments are not taxes, for the reason, as plainly appears from the opinions delivered, that, when laid in the ratio of benefits, they are not burdens.

Special assessments and special taxes imposed for local improvements, unlike general taxes, are based upon benefits to the property against and upon which they are assessed and levied, arising from its increased value in consequence of the improvement. *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69.

Special taxation in Illinois differs from the assessment of special benefits only that, in the one, the benefits are ascertained in a mode prescribed by law; in the other, they are determined by the municipal authorities. *Davis v. Litchfield*, 145 Ill. 313, 21 L.R.A. 563, 33 N. E. 888.

Special taxes are not regarded as burdens, but are imposed as an equivalent or compensation for the enhanced value, real or presumptive, from the public improvement for which they are assessed. *Ibid.*

In the case of *Taylor v. Palmer*, 31 Cal. 240, Sanderson, J., in delivering the opinion of the majority of the court, commented upon the previous decision in *Emery v. San Francisco Gas Co.* 28 Cal. 345. In that case we held, said he, that the word "assessment" as employed in the Constitution, while it represented in part the general power of taxation vested in the government, was used to designate a particular branch of that power, specifically different

in its purpose and mode of working from that intended by the more general and comprehensive term of "taxation." That, by the latter, the power of imposing taxes upon the property of the citizen generally for the support of the government was intended, and by the former, the power of imposing a tax, for the purpose of improving the streets of cities and incorporated villages, upon the property bordering upon or in the vicinity of the improvement. That the power of taxation, as contradistinguished from assessment, was intended to be exercised upon the ad valorem principle, and in such a manner as to secure equality and uniformity; but that the power of assessment, as contradistinguished from that of taxation, need not be exercised upon the ad valorem principle, but, on the contrary, that the legislature was at liberty to adopt a different mode or basis of apportionment,—such as frontage, benefit received, or superficial contents.

IV. Constitutional limitations of the power of arbitrary assessment.

a. The taxing power.

1. In general.

The power of the legislature to lay taxes for public purposes is unlimited, where it is not specifically restrained by the Constitution. *Re Van Antwerp*, 56 N. Y. 261; *Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124.

That a statute is unjust does not make it unconstitutional. *Praigg v. Western Paving & Supply Co.* 143 Ind. 358, 42 N. E. 750.

Constitutional limitations upon the power of the legislature to levy taxes do not restrict its power to authorize municipalities to impose special assessments for street improvements. *Storrie v. Woessner* (Tex. Civ. App.) 47 S. W. 837; *Harrell v. Storrie* (Tex. Civ. App.) 47 S. W. 838.

A restriction or regulation in the organic law, upon the right or manner of levying taxes, does not apply to special assessments or the mode of imposing them. *Winona & St. P. R. Co. v. Watertown*, 1 S. D. 46, 44 N. W. 1072.

2. Requirement that taxation shall be equal.

In almost every one of the state Constitutions there is some limitation upon the taxing power, and as the impositions of special assessments to defray the cost of a local improvement are generally recognized to be exercises of the taxing power, the question of their constitutionality is often a vital one. One of the simple limitations upon the power to tax is a requirement that all taxation shall be equal.

But all taxation is declared to be more or less unfair and in any proper sense even unequal. *Re Dorrance Street*, 4 R. I. 230.

No law for the assessment of taxes has ever been framed, or ever will be while man continues in his present imperfect condition, according to the court in *Williams v. Detroit*, 2 Mich. 560, which will operate with perfect equality and justice upon all.

Equality of public burdens cannot be attained, according to the court in *Washington v. Nashville*, 1 Swan, 177, by any device that the wit of man has ever yet suggested.

In spite of all the precautions that the wit of man has ever been able to devise, taxation cannot be made to operate equally and justly on every individual. *People ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L.R.A. 372, 62 N. E. 662, affirming 64 App. Div. 316, 72 N. Y. Supp. 191.

An equality of burden is no more attainable through special assessments than by general taxation.

The courts have repeatedly declared absolute equality to be unattainable when assessments are imposed for the expense of local improvements, and that all that is necessary to their validity is that equality shall be approximated. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899; *Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467; *Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114; *Davis v. Litchfield*, 145 Ill. 313, 21 L.R.A. 563, 33 N. E. 888; *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69; *Lexington v. McQuillan*, 9 Dana, 513, 35 Am. Dec. 159; *Howell v. Bristol*, 8 Bush, 493; *Ludlow v. Cincinnati Southern R. Co.* 78 Ky. 357; *Edwards House Co. v. Jackson*, 91 Miss. 429, 45 So. 14; *State, Sigler, Prosecutor, v. Fuller*, 34 N. J. L. 227; *State, VanSolingen, Prosecutor, v. Harrison*, 39 N. J. L. 51; *People ex rel. O'Reilly v. Kingston*, 114 App. Div. 326, 99 N. Y. Supp. 657; *Connor v. Cincinnati*, 5 Ohio C. D. 199.

Absolute and exact equality in apportioning an assessment for a local improvement is neither expected nor required. *Kansas City v. Gibson*, 66 Kan. 501, 72 Pac. 222.

Exact equality of benefits among those taxed is never attainable. *Louisville v. Bitzer*, 115 Ky. 359, 61 L.R.A. 434, 73 S. W. 1115.

It is impossible to form any general rule of assessment that will produce exact uniformity and equal justice in all cases. *Har-* 28 L.R.A.(N.S.)

risburg v. McCormick, 129 Pa. 213, 18 Atl. 126.

While a local assessment or tax for a local benefit should be distributed among and imposed upon all equally in the like relation, that equality can never be but an approximation. *Allen v. Drew*, 44 Vt. 174.

An assessment for the cost of a local improvement can never be computed upon any hypothesis with exact equality and fairness. *Donovan v. Oswego*, 90 App. Div. 397, 86 N. Y. Supp. 155.

A constitutional requirement of equality of taxation has no intrinsic application to a special assessment laid for a local purpose, and apportioning such an assessment according to the front-foot rule is not repugnant to such requirement. *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447.

Taxation according to benefits received does not conflict with constitutional provisions protective of property against unjust and unequal taxation. *Re Washington Ave.* 69 Pa. 352, 8 Am. Rep. 255.

A constitutional declaration that the burdens of the state ought to be fairly distributed among the citizens is not infringed by legislation providing for the assessment of local taxes to defray the cost of benefits derived from local improvements. *Re Dorrance Street*, supra.

Neither does it invalidate a local assessment by the front-foot rule imposed for such a purpose. *Cleveland v. Tripp*, 13 R. I. 50.

The only basis upon which any method of apportioning an assessment for the cost of a local improvement can be sustained is that it is reasonably calculated to bring about a substantial proportional distribution of the burden according to benefits. *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2.

Whatever rule for apportioning benefits in levying assessments for constructing sewers the legislature may prescribe, that rule must be one which it is legally possible to apply justly and equally to the persons assessed. *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535.

No plan of apportionment can be adopted in laying assessments for the cost of local improvements which will result in gross inequality of taxation. *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175.

A statute providing that a definite portion of the expense of a local improvement in a public street shall be assessed upon the abutters in just proportion, deducting from the assessments all sums which may have been previously paid to the city by the taxpayer for previous improvements of such street, plainly requires the assessment to be made equally upon the abutting estates, which, from the nature of the work, must be immediately benefited; and is a rule of proportionment, uniform without the taxing district, that sufficiently approaches equality. *Howe v. Cambridge*, 114 Mass. 388.

It was decided in *Lexington v. McQuillan*, supra, according to *Covington v.*

Worthington, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038, that the special tax upon lots bordering upon a street improvement, according to the number of front feet in each, was universal in its application and produced a constitutional equality of burden, when directly authorized in express terms by a municipal charter granted by the legislature.

The levy of a tax for the improvement of a highroad in a limited territory upon abutting land, rated by the number of acres in each owner's tract, approaches equality as nearly as specific taxation can be expected to approximate equality, and therefore, cannot be adjudged unconstitutional. *Malchus v. District of Highlands*, 4 Bush, 547.

3. Requirement that taxation shall be uniform.

A not uncommon constitutional provision is one requiring all taxes to be uniform. Such a provision does not differ essentially from one requiring all taxation to be equal. Uniformity in taxation, it has been said, implies equality in the burden of taxation, and this equality in the burden constitutes the very substance designed to be secured by a constitutional requirement that the rule of taxation shall be uniform. *Weeks v. Milwaukee*, 10 Wis. 243.

A constitutional provision requiring the rule of taxation to be uniform extends to all taxation, whether imposed by the state directly or by subordinate governmental corporations acting under delegated authority. *Ibid.*

The courts have frequently declared in general terms that special taxes or assessments laid upon property to meet the cost of local improvements must be uniform. They mean, however, that they must bear alike upon all property within the assessment district. That uniformity must be the principle of apportionment among the parcels of property subject to assessment. *Chicago, R. I. & P. R. Co. v. Moline*, 158 Ill. 64, 41 N. E. 877; *Ware v. Jerseyville*, 158 Ill. 234, 41 N. E. 736.

An assessment upon abutting property for the expense of improving a street, either apportioned according to frontage or ad valorem, must be uniform, operating alike upon all the parcels of land so abutting and assessed. *Corry v. Folz*, 29 Ohio St. 320.

For whatever sum an assessment is made for a street improvement upon abutting property, it must, to be valid, be levied at a uniform rate upon all the property assessed. *Jaeger v. Burr*, 36 Ohio St. 164.

A constitutional requirement that all taxes shall be uniform does not limit the general power to make local assessments to pay for local improvements. *Denver v. Knowles*, 17 Colo. 204, 17 L.R.A. 135, 30 Pac. 1041.

A constitutional provision requiring all taxation to be uniform upon the same class of subjects within the territorial limits of

the authority levying the tax, and to be levied and collected under general laws, has no application to assessment for local improvements. *Anderson v. Lower Merion Twp.* 217 Pa. 369, 66 Atl. 1115; *Merrifield v. Scranton City*, 5 Pa. Co. Ct. 388.

Constitutional provisions respecting uniformity of taxation do not apply to special assessments to pay for local improvements, but only to taxation in the general and ordinary sense of the term. *Meier v. St. Louis*, 180 Mo. 391, 79 S. W. 955; *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. 172, 12 L.R.A.(N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 A. & E. Ann. Cas. 630.

An act of the legislature authorizing a municipality to assess the cost of grading and paving streets against abutting properties according to the front width thereof, to the middle of every improved street, is not in conflict with a constitutional provision that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. *Beaumont v. Wilkes-Barre*, 142 Pa. 198, 21 Atl. 888.

Neither is the assessment for such an improvement of a city street, laid upon abutting property according to the front-foot rule, obnoxious to such a constitutional provision. *Shoemaker v. Harrisburg*, 4 Pa. Co. Ct. 86; *Merrifield v. Scranton City*, 5 Pa. Co. Ct. 388.

A constitutional requirement that revenue laws shall have uniform effect on all private property does not apply to an annual assessment laid, on account of a city water main, upon abutting property on the street through which it runs, which makes no use of the water. *Richmond & A. R. Co. v. Lynchburg*, 81 Va. 473.

But an assessment upon a city lot on which no water is used, laid on account of a water main through the street in front of it, is simply a general tax, which falls within the scope of a constitutional requirement that taxation shall be uniform. *Jones v. Water Comrs.* 34 Mich. 273.

A constitutional requirement for the legislature to provide a uniform rule of taxation does not affect special assessments laid upon property benefited to defray the cost of local improvements, pursuant to a statute enacted prior to the adoption of the Constitution, until the legislature has complied with the constitutional requirement, and enacted a statute providing a uniform rule of taxation. *Williams v. Detroit*, 2 Mich. 560.

A provision in a municipal charter empowering the common council to cause the streets to be graded and paved, and assess the whole expense of so doing in front of any particular lot, to the centre of the street, upon such lot, and making the assessment a lien upon the premises and a personal charge against the owner, is unconstitutional because, considered as an exercise of the taxing power, it disregards uniformity of apportionment, and it cannot be

sustained as an exercise of the police power, because individuals cannot be compelled under that power to make such improvements at their own expense. *Motz v. Detroit*, 18 Mich. 495.

4. Requirement that taxation shall be both equal and uniform.

A constitutional provision met with more frequently is one which requires taxation to be both equal and uniform throughout the state.

Such a provision is held to apply only to that charge or imposition upon property which it is necessary to levy to raise funds to defray the expenses of the state and local governments, and to have no reference or application to special assessments for local improvements, by which private persons are chiefly benefited through the increased value of their property. *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518; *Emery v. San Francisco Gas Co.* 28 Cal. 345; *Taylor v. Palmer*, 31 Cal. 240; *Chambers v. Satterlee*, 40 Cal. 497; *New Orleans v. Elliott*, 10 La. Ann. 59; *Re Casacalvo & M. Streets*, 20 La. Ann. 497; *Barber Asphalt Paving Co. v. Cogreve*, 41 La. Ann. 251, 5 So. 848; *Rosetta Gravel, Paving & Improv. Co. v. Jollisaint*, 51 La. Ann. 804, 25 So. 477.

Special assessments for local public improvements are not within a constitutional provision requiring taxation to be equal and uniform. *Edwards House Co. v. Jackson*, 91 Miss. 429, 45 So. 14; *Warren v. Henly*, 31 Iowa, 31; *King v. Portland*, 2 Or. 146.

The line of decisions seemed to the court, in *King v. Portland*, supra, to be unbroken in establishing the conclusion that the word "taxation," as used in constitutional provisions commanding equality and uniformity in the levying of taxes, is limited to the means of raising money to meet the general expenses of the government.

But, while this is true, uniformity in the manner of assessment of special taxes, and approximate equality in the amount of the exactions, are attainable and are essential to the constitutionality of such taxation. *Howell v. Bristol*, 8 Bush, 493.

Although an assessment for a local improvement is not governed by a constitutional provision requiring property to be taxed ad valorem, it is still a tax, and must rest equally and uniformly upon all the assessed property, and therefore must be laid according to some rule of apportionment. Such an assessment may be apportioned by the number of feet fronting on the improvement, or by any other standard, but it must approximate equality and uniformity. *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *Whiting v. Quackenbush*, 54 Cal. 306.

Whichever mode of assessment is adopted by a municipality empowered by the legislature to choose either the frontage rule or the ad valorem rule, it must, in either case, make the assessment uniform

and equal upon all the property assessed. *Jaeger v. Burr*, 36 Ohio St. 164.

It is an underlying and fundamental principle in the exercise of the power of assessment that, whatever rule be adopted to make the assessment, it must be uniform and equal according to the benefits, so that all will be treated alike under the law. *Bailey v. Zanesville*, 20 Ohio C. C. 236.

A constitutional requirement of a uniform and equal rate of assessment and taxation is satisfied when the rate of assessment for a local improvement is uniform and equal throughout the locality where it is imposed. *Palmer v. Stumph*, 29 Ind. 339.

The imposition of a personal liability upon a landowner for an assessment upon his property for a street improvement violates a constitutional provision for equality and uniformity of taxation, and is therefore void. *Asberry v. Roanoke*, 91 Va. 562, 42 L.R.A. 636, 22 S. E. 360.

5. Requirement that taxation shall be ad valorem.

An ordinary constitutional provision requiring all taxes levied upon property to be laid in proportion to its value does not apply to special assessments for the cost of local improvements. *Birmingham v. Klein*, 89 Ala. 461, 8 L.R.A. 369, 7 So. 386; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *Whiting v. Quackenbush*, 54 Cal. 306.

An assessment upon abutting property for the improvement of a street does not fall within a constitutional provision requiring all taxation to be uniform upon the same class of subjects and ad valorem on all taxable property within the territorial limits of the authority levying the tax. *Hayden v. Atlanta*, 70 Ga. 817; *Speer v. Athens*, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802.

The authorities are uniform, said the court in *Jones v. Holzapfel*, 11 Okla. 405, 68 Pac. 511, to the effect that assessments against abutting lots for the purpose of defraying the cost of local improvements are not part of the general taxes imposed for the purpose of carrying on the ordinary expenses of the state, and therefore do not come within the provision of the organic law which requires that all taxes shall be ad valorem.

The objection to the validity of an assessment for a street improvement, that it is not made upon the estate proportionally and equally in reference to the value of the several lots to which the improvement is appurtenant, based upon principles of constitutional and statute law applying more particularly to taxation for general purposes of state, county, and town expenditures, and having no direct bearing upon special assessments for local improvements authorized by special statute, is not well founded. *Lowell v. Hadley*, 8 Met. 180.

Yet in South Carolina it has been held that a system of special assessments upon lands abutting on city streets in which water mains are laid, imposed according to frontage and without regard to the value of

the assessed property, to pay bonds issued to construct the municipal waterworks, violates a constitutional provision commanding taxes to be laid upon all taxable property according to its value. *Stehmeyer v. Charleston*, 53 S. C. 259, 31 S. E. 322.

6. Requirement that taxation shall be ad valorem and imposed by uniform rule.

A constitutional provision requiring laws to be passed taxing, by uniform rule, all property according to its true value in money, has no application to special assessments for the cost of local improvements, but relates solely to general taxation. *Rolph v. Fargo*, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Ernst v. Kunkle*, 5 Ohio St. 520; *Reeves v. Wood County*, 8 Ohio St. 333; *Ridenour v. Saffin*, 1 Handy (Ohio) 464.

Constitutional provisions requiring a uniform rule of taxation and a cash valuation of property assessed for taxation do not apply to local assessments for street improvements, but relate only to the valuation of property and its taxation for general purposes. *Motz v. Detroit*, 18 Mich. 495.

An act of the legislature chartering a city, and providing that each street or part of a street improved shall be a taxing district for the purpose of meeting the cost of the improvement, and directing an assessment of a part of such cost upon the abutting property according to its frontage, does not violate a constitutional provision requiring all taxes to be uniform and enjoining a uniform rule for taxing real estate ad valorem. *Hilliard v. Ashville*, 118 N. C. 845, 24 S. E. 738; *Kinston v. Loftin*, 149 N. C. 255, 62 S. E. 1069.

Charges for the cost of a local improvement against the property benefited by the improvement, although an exercise of the taxing power, are not such taxes as are referred to, nor are they embraced or intended to be embraced, in constitutional provisions requiring taxes to be levied and collected only for public purposes, to be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and requiring all property subject to taxation to be taxed ad valorem. *Farrar v. St. Louis*, 80 Mo. 379.

A different opinion as to the effect of such a constitutional provision upon special assessments laid without regard to the value of the assessed property has been expressed by the courts in New Jersey, Arkansas, and Colorado. The leading case in Arkansas has been much criticized elsewhere, and the Colorado courts have retreated from the position first assumed.

A constitutional provision that property shall be assessed for taxes under general laws and by uniform rules, according to its value, operates to prevent any tax being laid upon property which is not determined either by a special benefit derived, or by a valuation of the property at its

true value according to a uniform rule. *Jersey City v. State*, 43 N. J. L. 638.

Under the New Jersey Constitution it is not within the power of the legislature to lay an arbitrary assessment for a specific part of the cost of a public improvement upon an abutting landowner. *Van Wagener v. Paterson*, 67 N. J. L. 455, 51 Atl. 922.

A legislative grant of power to a municipality to impose an arbitrary burden upon abutting land for the expense of laying a water pipe in a public street, a part of a system for supplying water both for public purposes and to citizens for a price paid, cannot be sustained under the general power of taxation, when the Constitution provides that property shall be assessed for taxes under general laws and uniform rules according to its true value. *Doughten v. Camden*, 72 N. J. L. 451, 3 L.R.A.(N.S.) 817, 111 Am. St. Rep. 680, 63 Atl. 170, 5 A. & E. Ann. Cas. 902.

If, according to the court in that case, a legislative grant of power to impose an arbitrary assessment for such an expense upon abutting property ever could have been held a constitutional exercise of the taxing power, that ceased to be the case upon the adoption of such constitutional provision. *Ibid.*

A Constitution that requires laws to be passed taxing by a uniform rule all real and personal property according to its true value in money; that commands legislation respecting municipal corporations restricting their powers of taxation and assessment to prevent abuse; and denies to the legislature power to authorize any municipality to levy any tax upon real or personal property in excess of a stated percentage of its assessed value, renders invalid and void a municipal assessment for the cost of grading, curbing, and paving a city street, upon abutting property, in proportion to the number of feet fronting on the line of the improvement. *Peay v. Little Rock*, 32 Ark. 31.

The decision in *Peay v. Little Rock*, supra, that municipal assessments for street improvements must be ad valorem, and not according to frontage, was thus stated and relied upon in *Monticello v. Banks*, 48 Ark. 251, 2 S. W. 852, as the sole authority for nullifying a municipal assessment for paving a street, for want of uniformity and disregard of the element of value in the assessed property.

The case of *Peay v. Little Rock*, supra, was cited in *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557, as the only case holding under a constitutional provision requiring equality and uniformity and ad valorem taxation, similar in terms of the Constitution of the state of Washington, that an assessment according to frontage was not lawful. This case, said the Washington court, shows that the supreme court of Arkansas based its decision mainly upon the older cases in Illinois and Wisconsin, some of which have since been overruled in the states where they were made, and the argument in it is

so clearly, as we think, based upon the theory that there can be no valid local assessment, that the value of the decision, as one of authority, is destroyed.

Upon a careful examination of the authorities, and upon principle, we are satisfied, declared the court in *Palmer v. Way*, 6 Colo. 106, that the taxing power does not extend, under the Constitution of this state, to local or special assessments, except under the constitutional rule. That is to say, it was the opinion of the court that the provision of the Colorado Constitution requiring all taxes to be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and to be levied and collected under general laws prescribing rules and regulations designed to secure a just valuation of the property taxed, embraced local assessments to defray the cost of local improvements.

This doctrine commanded the approval of the court in *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901, in which an assessment for street gutters and curbstones was declared void for conflict with the Constitution in the respects mentioned.

The objection that the assessments are illegal because not based upon value, benefits, or improvements, said the court in *Keese v. Denver*, 10 Colo. 112, 15 Pac. 825, raises the question of the validity of the provision of the statute authorizing the cost of sewers to be assessed upon the property in the district according to area. The doctrine announced in *Palmer v. Way*, supra, is decisive of the question.

Afterwards, however, in the case of *Denver v. Knowles*, 17 Colo. 204, 17 L.R.A. 135, 30 Pac. 1041, this doctrine was repudiated and the cases announcing it were overruled. Chief Justice Hayt, who delivered the opinion of the majority of the court (Elliott, J., dissented), put it thus: Turning to the case of *Palmer v. Way*, supra, said he, we find the contention there to have been with reference to an assessment for the cost of a sidewalk in front of certain lots. The assessment was upheld as properly within the police power of the city. This was the only determination necessary to support the judgment there the subject of attack. The court did, however, go beyond this in the opinion filed, and say that special assessments against the abutting lots, for street improvements, were in violation of the constitutional rule requiring uniformity of taxation, and could not be upheld under the taxing power. This decision was followed in *Wilson v. Chilcott*, supra, without question and without the examination that would otherwise have been given it. And thus an opinion upon a matter not necessary to the determination of the case under consideration at the time has been accepted as the law in this state for ten years upon the principle of *stare decisis*. . . . We feel constrained by strong logical reasons, as well as by the overwhelming weight of authority, to say that the uniformity of taxation enjoined 28 L.R.A.(N.S.)

by the Constitution does not prohibit the legislature from authorizing the levy of special assessments in cities and towns for local improvements in the nature of benefits to the abutting property.

7. Requirement that taxation shall be equal, uniform, and ad valorem.

A constitutional provision requiring taxation to be equal and uniform throughout the state, and all property to be taxed in proportion to its value, to be ascertained as directed by law, does not apply to special assessments upon property benefited, to defray the cost of local improvements. *Daily v. Swope*, 47 Miss. 367; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Norfolk v. Ellis*, 26 Gratt. 224.

A constitutional provision requiring taxation to be equal and uniform, and all property to be taxed in proportion to its value, does not prevent the legislature from authorizing assessments upon abutting property for street improvements, to be made according to frontage. *Emery v. San Francisco Gas Co.* 28 Cal. 345; *Emery v. Bradford*, 29 Cal. 75; *Walsh v. Mathews*, 29 Cal. 123.

An assessment for a local improvement, made by a municipal corporation conformable to a provision in its charter, upon lands benefited by the improvement, according to their frontage upon the line of the work, is not in contravention of a constitutional provision requiring all taxes to be equal and uniform, and to be laid according to value. *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557.

A constitutional provision requiring the legislature to prescribe by law a uniform and equal rate of assessment and taxation, and such regulations as shall secure a just valuation for taxation of all property, both real and personal, does not prohibit the laying of assessments for local improvements upon property benefited thereby, provided they are equal and uniform within the locality covered by the assessed property. *Palmer v. Stumph*, 29 Ind. 339.

The distinction under a Constitution requiring taxation to be equal and uniform, and all property to be taxed ad valorem, between an assessment for a local improvement and a general tax, said the court in *Chambers v. Satterlee*, 40 Cal. 497, "may be said to have already become firmly fixed in the constitutional jurisprudence of the state" of California, "and we think it too late to question its soundness now, even if we really entertained a doubt of its correctness in the abstract, which we do not."

A tax for opening and improving a street, or for another local improvement, is a municipal tax for a corporate purpose; and under a Constitution authorizing the legislature to empower municipalities to assess and collect taxes for corporate purposes, but requiring such taxes to be equal, uniform, and ad valorem, the levy of special assessments upon property benefited by a local improvement to meet its cost is pro-

hibited when such property is charged with more than its proportionate share of the burden as measured by the benefits conferred. *Adams County v. Quincy*, 130 Ill. 566, 6 L.R.A. 155, 22 N. E. 624.

Water rates paid by consumers under a statute incorporating water commissioners of a city cannot be classed as either local assessments or specific taxation, and therefore must be governed by the constitutional rule of uniformity of taxation and assessment according to the cash value of the property burdened. Therefore, when such rates are charged upon lots in proportion to their frontage, they are unconstitutional and void even if specifically authorized by the act of the legislature. *Jones v. Water Comrs.* 34 Mich. 273.

In *McBean v. Chandler*, 9 Heisk. 349, 24 Am. Rep. 308, it was held that the then existing Constitution of Tennessee, in expressly commanding property to be taxed ad valorem and upon the principle of equality and uniformity, and tax in counties and incorporated towns to be laid upon the same principle established in regard to city taxation, regulated the whole subject of taxation, both general and special, inclusive of assessments for local improvements, and therefore that an assessment upon the basis of the frontage of lots upon a street, to pay for the cost of improving such street, is absolutely void. The case was subsequently overruled in *Arnold v. Knoxville*, 115 Tenn. 195, 3 L.R.A.(N.S.) 837, 90 S. W. 469, 5 A. & E. Ann. Cas. 881.

In some of the states, as Illinois, Wisconsin, Tennessee, and Alabama, under their earlier Constitutions, according to the court in *Austin v. Seattle*, *supra*, in which there was no particular mention of assessments or special taxes, but only a general provision that taxes should be equal and uniform and according to value, it was held by the courts of those states that there could be no such thing as a special local assessment upon a portion of the property within the limits of a municipal corporation, to defray the expenses of local improvements peculiar to such local areas, the theory of those courts being that any improvement made by a municipal corporation which would authorize taxes of any kind to pay for it must be a public improvement, and therefore must be paid by the public generally, through the levy of taxes on the whole community.

8. The Constitutions of Illinois.

By the Illinois Constitution of 1848 taxation in the state was required to be ad valorem, and local taxes to be uniform with respect of persons and property within the jurisdiction of the taxing authorities. Under that Constitution a section of a municipal charter authorizing the assessment of the cost of improving any street or highway upon the abutting real estate, to be made in such a manner as nearly as may be that each separate block, lot, etc., on either side should bear the cost of making

or completing the improvement upon the half of the way directly adjacent to or in front of it, was held void. *Chicago v. Larned*, 34 Ill. 203; *Chicago v. Home Bank*, 34 Ill. 283.

In the first of these cases the court laid stress upon the fact that it was engaged in construing and applying provisions of the Constitution of the state of Illinois that were different in language from the somewhat similar provisions in the Constitutions of other states, and that in some states,—New York, for example,—constitutional requirements of uniformity and equality of taxation were wholly wanting. The decisions, therefore, of other states ought not, in the court's esteem, to control its judgment.

The doctrines of these cases, and the conclusions announced in them, were unreservedly accepted and followed in the subsequent case of *Ottawa v. Spencer*, 40 Ill. 211.

And conformably to these cases an assessment upon the size or width of a parcel of land, without reference to its value, was held invalid in *Holbrook v. Dickinson*, 46 Ill. 285, because it was deemed repugnant to the constitutional requirement of equality, uniformity, and ad valorem taxation.

Following its previous decisions, and upon their authority, the court in *St. John v. East St. Louis*, 50 Ill. 92, held unconstitutional and void a municipal ordinance assessing the total cost of a street improvement upon property fronting upon it, without regard to actual resulting benefits; and again, in *Crete v. Chicago*, 56 Ill. 422, that evidence that an assessment for a street improvement had been apportioned according to the frontage of the lots assessed on the street improved ought to be received in a litigation over the assessment, because it would go to show that the constitutional requirement of equal uniform and ad valorem taxation had been violated.

In *Lee v. Ruggles*, 62 Ill. 427, the court adhered to its prior opinions, and consistently held unconstitutional and void a tax assessed upon lands to provide for the drainage of a district containing them, because it was laid according to the acreage alone, without regard either to their value or the benefits they might derive from the drainage system.

These, and other decisions to the same effect, rendered while the Constitution of 1848 remained in force, ceased to be authorities when the organic law was changed in 1870. *White v. People*, 94 Ill. 604.

In 1870 there was introduced into the Constitution of Illinois a provision (art. 9, § 9) reading as follows: The general assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise.

Property in contiguity to a local improvement may, since then, be charged in Illinois with the whole or a part of the cost of such improvement, in either of two ways,

viz., by a special assessment, or by special taxation. *Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471.

If it is specially assessed, rather than specially taxed, it must and only can be assessed in proportion to the special benefits conferred upon it by the improvement. *Ibid.*

Under that provision the legislature may authorize local improvements to be made by special assessments to the extent that the assessed property shall be benefited, or by special taxation of the assessed property according either to its frontage or value. *Adams County v. Quincy*, 130 Ill. 566, 6 L.R.A. 155, 22 N. E. 624.

A municipal ordinance requiring the cost of improving a street to be met by special taxation of abutting real estate in proportion to its frontage has, since the adoption of the Constitution of 1870, been lawful. *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261; *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437.

In *Springfield v. Green*, *supra*, such an ordinance was objected to as unconstitutional. This objection, said the court, citing *Chicago v. Larned*, *supra*, would have been good under the Constitution of 1848, but the reverse of this is now the rule where the cost of the improvement is to be met by special taxation. The change in the ruling upon the question is based primarily upon the difference between the present Constitution and the Constitution of 1848, and, also, in part, upon the construction of the present statute relating to local improvements by municipal corporations,—a construction that recognizes a difference between a special assessment and special taxation in respect of the right of the owners of the property assessed to have the question of benefits passed upon by a jury.

9. The Constitutions of Alabama.

It was held in *Mobile v. Dargan*, 45 Ala. 310, and *Mobile v. Royal Street R. Co.* 45 Ala. 322, that an assessment for the cost of a street improvement, laid upon abutting property in proportion to its frontage, violated a provision of the then state Constitution that expressly commanded all taxes levied in the state upon property to be assessed in exact proportion to the value of such property, and therefore was void. These decisions were afterwards overruled upon the distinct ground that special assessments laid against abutting property, to pay for street improvements which benefit and enhance the value of such property, are in no sense taxes within the meaning of such a constitutional provision. *Birmingham v. Klein*, 89 Ala. 461, 8 L.R.A. 369, 7 So. 386.

Alabama has since incorporated in her Constitution a section (No. 223) which provides that "no city, town, or other municipality shall make any assessment for the cost of sidewalks or street paving, or for the cost of the construction of any sewers, against property abutting in such

street or sidewalk so paved or drained by such sewers, in excess of the increased value of such property by reason of the special benefits derived from such improvements."

That provision has been held not to restrict the method, nor to inhibit the adoption of any particular standard of measurement in laying special assessments to meet the cost of local improvements, so long as the stated limitation is observed and respected. *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678.

That provision does not prevent assessments by the front-foot rule, provided the constitutional limit is respected and the property owner is afforded proper opportunity to be heard upon the question of benefits. *Harton v. Avondale*, 147 Ala. 458, 41 So. 934.

But an assessment for a local street improvement laid upon the abutting property, no matter what rule of apportionment is adopted in laying it, can, under such provision, in no case exceed the increased value to the assessed property due to special benefits that result from the improvement. *Ibid.*

If, in the assessment of abutting property to pay for a local street improvement the special benefits of the improvement to the assessed property in enhancing its value are ignored, and the constitutional limit in this respect is exceeded, the property owner may resort to the courts for redress. *Ibid.*

10. Review of constitutional requirements of equal, uniform, and ad valorem taxation in relation to assessments.

In *Arnold v. Knoxville*, 115 Tenn. 195, 3 L.R.A.(N.S.) 837, 90 S. W. 469, 5 A. & E. Ann. Cas. 881, the court, in overruling the case of *McBean v. Chandler*, 9 Heisk. 349, 24 Am. Rep. 308, reviewed that decision very fully, and said, granting the premises therein laid down as the controlling feature in the case, and the conclusion reached is inevitable and irresistible. This controlling feature may be briefly stated to be that special assessments for local purposes fall within the meaning of taxes in the sense in which that term is used in our Constitution, and hence they cannot be maintained, because they are not imposed upon the entire property of a state, county, or municipality, but only upon real estate in a particular locality, that they are not equal and uniform within the state, county, or municipality, as the case may be, and not laid according to value.

If we grant that special assessments for local purposes fall within the provisions of article 2, §§ 28 and 29, of the Constitution, and are taxes within the meaning of those sections, then they cannot be sustained as constitutional, and the present act must be declared invalid.

The *McBean* Case, and the other cases based upon it, are founded upon the ruling that special assessments do fall within the provisions of these sections, and the pro-

visions of the statute authorizing them not being in conformity with the fundamental principle of equality, uniformity, and generality, such statute is invalid.

This question is therefore the crucial one in the case; and with it decided there remains but little ground for controversy.

Briefly stated, it was held in the McBean Case that taxes could be laid for public purposes only and according to some rule of apportionment, and that equality was of the essence of the power. Hence a state burden of taxation could not be laid upon any territory less than the whole state, a county tax must be laid upon the entire county, and a city tax upon the whole of the city, and these requirements are denominated as fundamental.

It was further held that the Constitution of Tennessee does not recognize the principle that taxation may be apportioned according to benefits received, but that all taxation must be imposed upon the fundamental principles of equality and uniformity, and this necessarily and expressly excludes the power to levy a tax upon any other basis or principle, either for general or local purposes.

It was also held that the constitutional provision provided the only legitimate means and modes of providing revenues for the state, counties, and municipal corporations, and such revenues could only be raised under that authority, and in the manner prescribed by it; and that no change in name, such as calling the imposition a special assessment, could change the essential nature of the thing, so as to escape constitutional regulation by a mere play upon words, or by giving the laying of taxes a different name or designation.

It was further held that apart, from the exercise of the taxing power, property cannot be taken to satisfy what is called a "special assessment," unless under the exercise of eminent domain, and then by making just compensation to the individual, and not to the public generally.

It was also held that an assessment for improvements, based on the frontage of lots on the streets to be improved, was absolutely void, and contained no element of equality and uniformity, if considered as a tax, and gave no compensation to the lot owners, if considered as an exercise of eminent domain.

The text-books on constitutional and municipal law present an unbroken line in opposition to the doctrines thus laid down, and are based upon the view that there is a material and fundamental difference between special assessments for local purposes and general taxation for governmental purposes, as provided in the Constitutions of the various states.

The court, after quoting from the standard authors, added: Leaving the realm of the text-writers, and coming to the adjudications of the courts, we find that, with the exception of Tennessee and possibly South Carolina, from the Supreme Court of the United States, through an unbroken

line of more than forty states, the legality and validity of special assessments for local purposes has been sustained.

Of these states, Arkansas, Illinois, Minnesota, and Nebraska have constitutional provisions authorizing special assessments, although in Arkansas and Illinois they were recognized before the adoption of the present Constitutions.

Florida, Kansas, and Wisconsin have Constitutions which require equality and uniformity, but do not require taxation according to value.

Constitutions requiring taxation to be uniform within certain territorial limits or on the same class of subjects are Colorado, Georgia, Missouri, Nebraska, New Hampshire, Pennsylvania, and Virginia.

Constitutions requiring equality, uniformity, and taxation according to value are Arkansas, Georgia, Indiana, Louisiana, South Carolina, Tennessee, Texas, West Virginia, Michigan, and Mississippi.

Constitutions requiring taxation according to value, with or without uniformity and equality, are Alabama, Arkansas, California, Georgia, Indiana, Kentucky, Louisiana, Maine, Michigan, Mississippi, Nebraska, North Carolina, North Dakota, Ohio, Oregon, South Carolina, Texas, Washington, and West Virginia.

It will be seen that there are three Constitutions requiring uniformity or equality, or both, and not expressly taxation by value, all of which have been construed as permitting special assessments; although the rule is qualified in Wisconsin; second, that there are ten Constitutions requiring equality, uniformity, and taxation according to value, eight of which have been construed as permitting special assessments, the exceptions being South Carolina and Tennessee; third, that there are twenty-one Constitutions which expressly require taxation according to value, nineteen of which have been construed as permitting special assessments, the exceptions being South Carolina and Tennessee.

While special assessments are in the nature of taxation, still they are not taxation for general governmental purposes, in the sense provided for in the Constitution. They are different in many respects. Some of these differences are pointed out in the cases. By an unbroken line of authorities, except Tennessee, it has been held that the legislature may authorize municipalities to make such assessments. The cases hold that such assessments, based upon a special benefit accruing to the assessed property, do not fall within the constitutional inhibition against taking private property for public use without compensation. See the authorities collated in 25 Am. & Eng. Enc. Law, 2d ed. pp. 1177-1183, inclusive.

And it is likewise held that the burden may be apportioned between the property owners themselves, according to actual benefits expected, or according to value, or, in some jurisdictions, according to area or frontage, as the legislature may direct. The most equitable plan of apportionment

appears to be an assessment according to value and benefits received, and it has been held that in assessments based upon value, the worth of the improvements should be deducted. These features of the case are also discussed fully in 25 Am. & Eng. Enc. Law, 2d ed. pp. 1197-1201, inclusive, and the cases there collated.

As to the other details of making such assessments, to what extent they may go, what provisions may be valid, and what not, we refer again to the excellent article in 25 Am. & Eng. Enc. Law, 2d ed. pp. 1166-1245.

These details are not now before us, but we have before us only the general question of the constitutional right to make special assessments for local purposes.

Notwithstanding this array of authority two of the justices, McAlister and Neil, dissented.

b. The power of eminent domain.

The language of the Constitutions in some few states, restraining the power of eminent domain, is different from the prevailing and conventional verbiage employed elsewhere, and is such that the courts of those states have held it to impose limits upon the power to assess property for local improvements.

It has been decided in Texas that a statute authorizing a municipality to improve the public streets at the cost of the owners of abutting property, in proportion to frontage, and without regard to special benefits conferred, violates constitutional provisions against taking, damaging, or destroying property for the public use without the consent of its owner and without adequate compensation, and against the destruction of property except by the due course of the law of the land. *Hutcheson v. Storrie*, 92 Tex. 685, 45 L.R.A. 289, 71 Am. St. Rep. 884, 51 S. W. 848.

The provisions of the Kentucky Constitution declaring all freemen equal, and no man or set of men entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services, and prohibiting any man's property to be taken or applied to public use without the consent of his representatives and just compensation, were held in *Sutton v. Louisville*, 5 Dana, 28, to have been violated by an act of the legislature empowering a municipal corporation, in opening or extending streets, to assess and collect as well the value of advantages as of damages which would accrue to any of the citizens in consequence of such improvement upon adjoining property, and by an assessment made by the corporation under the authority of such act.

The argument of the court upon which it based its conclusion was that an assessment for a street opening could not properly be considered as of the nature of a public tax, because it was not a duty or contribution levy by a fixed rule, and because also it was not common, but was

restricted to the owners of one particular lot of ground. Therefore, that it must be considered as an attempt to take private property for public use without a just compensation paid or secured to be paid to the owner, and only on the unsubstantial opinion of twelve men that an equivalent would in some way and at some time be enjoyed by such owners in the enhancement of the vendable price of their ground.

A statute conferring upon a municipality power to assess property abutting on streets for the improvement thereof in proportion to its frontage is not in conflict with a constitutional provision declaring that when private property is taken for public use in making or repairing roads the owners shall be compensated therefor in money, without deduction for benefits. *Ridenour v. Saffin*, 1 Handy (Ohio) 464.

c. The Federal Constitution.

The imposition of special assessments upon landed property within limited areas, to pay for neighborhood improvements, apportioned by arbitrary rules, has been assailed as contrary to the terms of the 1st section of the 14th Amendment to the Constitution of the United States, forbidding any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or to deprive any person of life, liberty, or property without due process of law; or to deny to any person within its jurisdiction the equal protection of the laws.

Of this section, Mr. Justice Swayne, in his dissent in the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, well said: No searching analysis is necessary to eliminate its meaning. Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established signification. There is no room for construction. There is nothing to construe. . . . "Due process of law" is the application of the law as it exists in the fair and regular course of administrative procedure. The "equal protection of laws" places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty, and property, and the pursuit of happiness. The success of the assault has not been conspicuous.

Naturally one turns first to the decisions of the Federal courts upon the subject. The Supreme Court has declared broadly that the fact that an assessment for the cost of a local improvement is unequal as regards the benefits conferred is not a matter in which state authorities are controlled by the Federal Constitution. *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192.

And in the same case it was specifically decided that a state statute empowering a municipality to open and construct streets, avenues, roads, lanes, and alleys at the exclusive cost of abutting lot owners, equally apportioned according to the num-

ber of square feet owned by them respectively, except that corner lots shall pay 25 per centum more, does not deprive the assessed landowners of their property without due process of law, nor deny them the equal protection of the laws. *Ibid.*

The Supreme Court, however, did decide in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, that when a municipality condemns a strip of land for a new street, through the property of a single landowner, and then arbitrarily by the front-foot rule assesses back upon the land he has left on each side of the strip appropriated the entire sum awarded him as damages for the land taken, together with all the costs and expenses of the condemnation proceedings, in legal effect, it deprives the landowner of his property without compensation and without due process of law, and denies to him the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States, and therefore that the assessment is illegal and void.

That is to say, as a court elsewhere in following that decision put the case: Any statute which authorizes a municipal corporation to take private property for a public highway in such a manner as will not only exempt the municipality from compensating the owners for the property taken, but will also impose upon such owners, under the form of an assessment by the front foot, the burden of compensating themselves, or of returning to the city all that they may be entitled to receive as compensation for their property appropriated, lacks that due process of law required by the Federal Constitution, and is therefore, so far as the assessment is concerned, void. *Scott v. Toledo*, 1. L.R.A. 688, 36 Fed. 385.

The case of *Norwood v. Baker*, *supra*, was an extreme one. The village of Norwood, Ohio, exercising the right of eminent domain, appropriated for a new street a strip of land 50 feet wide and 300 feet long, running wholly through a tract of land belonging to the plaintiff, Mrs. Baker. For the land taken she was awarded and paid \$2,000 damages. Her remaining land abutted on each side of the new street, and comprised the only land which did abut upon it. The village assessed this remaining land, and none other, arbitrarily according to the front-foot rule, without giving any consideration whatever to the question of benefits, and charged the property with the total cost of the entire improvement, including the compensation which had been paid for the strip of land appropriated and all additional expenses. Virtually the village seized Mrs. Baker's property without paying her for it, and compelled her to pay for being despoiled.

The case was distinguished in *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616, involving the constitutionality of an act of Congress regulating

assessments on landed property in the District of Columbia, and in which it was held that congressional jurisdiction of the subject was not controlled by the provisions of the 14th Amendment to the Federal Constitution.

The decision in *Norwood v. Baker*, *supra*, was generally understood as ruling that the arbitrary imposition according to the front-foot rule of any assessment upon property, to defray the cost of a local improvement, in which special resulting benefits were not taken into account and found to be equivalent to the charge, was a deprivation of property without due process of law and a denial of equal protection of the laws, in contravention of the 14th Amendment.

Accordingly, in *Fay v. Springfield*, 94 Fed. 409, under the supposed authority of that decision, a statute of Missouri authorizing assessments of the cost of repaving streets in cities of the third class upon abutting property, apportioned by the front-foot rule, without regard to whether or not the land assessed was benefited by such repaving to the extent of the assessments, and without affording landowners an opportunity to contest the actuality of such benefits, was held to be unconstitutional and void.

In deference to the same supposed authority, like decisions were made in *Cowley v. Spokane*, 99 Fed. 840; *Charles v. Marion*, 100 Fed. 538; *Zehnder v. Barber Asphalt Paving Co.* 106 Fed. 103, respecting similar legislation in Washington, Indiana, and Kentucky; and in *Bidwell v. Huff*, 103 Fed. 362, the constitutionality of a similar assessment made under the laws of Georgia was impugned.

None of these cases is now regarded as sound, and the Kentucky decision has been expressly overruled. *Zehnder v. Barber Asphalt Paving Co.* 108 Fed. 570.

This result is attributable to a series of decisions by the Supreme Court of the United States, by which that of *Norwood v. Baker*, *supra*, was strictly limited to extraordinary cases of the same kind.

The series just mentioned began with *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, in which it was adjudged that an assessment by the front-foot rule of city lots of uniform size and approximately equal value, all occupied as private dwelling places of the same general class, for the cost of paving the abutting street, alike throughout at substantially the same grade, under an orderly scheme of local improvement prescribed by the state legislature and approved by the state courts, violates no provision of the Federal Constitution.

The other cases in the series referred to are all in harmony with the *French Case*, and are as follows: *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; *Detroit v. Parker*, 181 U. S. 399, 45

L. ed. 917, 21 Sup. Ct. Rep. 644; *Shumate v. Heman*, 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645; *King v. Portland*, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; *Chadwick v. Kelly*, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175; *Schaefer v. Werling*, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449.

And, according to Mr. Justice Holmes, in the opinion of the majority of the court in *Louisville & N. R. Co. v. Barber Asphalt Paving Co.* 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466, it is now established beyond permissible controversy, that laws providing that original public improvements shall be made at the exclusive cost of adjoining owners, and equally apportioned among them according to the number of feet owned by each, are not contrary to the Constitution of the United States.

In the case just cited it was held that an assessment for grading and paving a street carriage way, of the entire cost upon adjoining property, laid under statutory authority in proportion to the number of feet in the several parcels of land assessed, was not invalid by the 14th Amendment to the Constitution of the United States, when imposed upon a part of a railroad right of way, notwithstanding the work was not only not beneficial, but positively injurious, to the property of the railroad.

The same objection that was made in *Louisville & N. R. Co. v. Barber Asphalt Paving Co.* supra, in form, but not in substance, according to Mr. Justice Holmes, was made in *Martin v. District of Columbia*, 205 U. S. 135, 51 L. ed. 743, 27 Sup. Ct. Rep. 440, to the validity of an assessment for widening an alley in the city of Washington; but in the later case it was more effective. In delivering the opinion of the court, Mr. Justice Holmes explained why the former case should not be deemed a controlling precedent. The assessment in question in that case, said he, was one for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good-sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the 14th Amendment a system of delusive exactness and merely logical form. But, he continued, when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent; . . . It well might be that a form of assessment that would be valid for paving would not be valid for the more serious expenses involved in the taking of land. Such a distinction was relied on in *French v. Barber Asphalt* 28 L.R.A.(N.S.)

Paving Co. supra, to reconcile the decision in that case with *Norwood v. Baker*, supra.

In a series of decisions recently rendered, said the court in *White v. Tacoma*, 109 Fed. 32, the Supreme Court of the United States has corrected a common misunderstanding of the decision of that court in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187. In these several decisions the Supreme Court recognizes the fact that the per-front-foot plan may be a perfectly fair method of apportioning the burden of paying for street improvements, and that in cases in which it appears that assessments levied according to that plan are not in excess of the benefits to the property assessed, and are equal and fair, so that there is no ground for complaining of actual injustice, the assessments are not necessarily in violation of the Constitution of the United States merely because made according to the per-front-foot plan; and it is shown that no such inflexible rule was announced or intended by the court in its decision in the case of *Norwood v. Baker*. That decision, however, does emphatically declare these important principles: That state laws providing for assessing the cost of street improvements upon abutting property, which in practical operation do confiscate property, are obnoxious to the 14th Amendment to the Constitution of the United States, and for that reason it is the duty of the courts to declare them to be void. That special assessments to pay for local improvements of public streets and highways do, in practical effect, deprive owners of their property without due process of law, unless the property subject to assessment is benefited by the improvement correspondingly to the amount of the assessment. That owners of property have the right to appeal to the courts for judicial protection against the unconstitutional invasion of their rights by municipal governments, in enforcing state laws or local regulations for the collection of assessments which are in excess of the benefits to the property assessed, accruing or to accrue by reason of the improvements to be paid for by such assessments.

Where private property is benefited by public improvement, the assessment against it by the proper authority for its proportionate share for the cost of such improvement, not exceeding the benefit which the property derives by reason of such improvement, in no way increases the burden of the taxpayer, and does not constitute the taking of private property without due process of law, but is simply an assessment for benefits. *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559, affirmed in 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645, on the authority of *French v. Barber Asphalt Paving Co.* supra.

An assessment of property for a street improvement according to its frontage, without reference to benefits, does not amount to a denial of the equal protection

of the laws or of due process of the law to the owner of the property assessed, so as to be repugnant to the 14th Amendment to the Federal Constitution. *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107.

A statute charging the entire cost of paving city streets against the abutting property, in proportion to its frontage, does not violate the provisions of the 14th Amendment to the Federal Constitution. *Rolph v. Fargo*, 7 N. D. 640, 42 L.R.A. 646, 76 N.W. 242; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049; *Webster v. Fargo*, 9 N. D. 208, 56 L.R.A. 156, 82 N. W. 732.

In *Cass Farm Co. v. Detroit*, 124 Mich. 433, 83 N. W. 108, affirmed in 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644, the counsel for the property owner contended, upon the authority of *Norwood v. Baker*, that an inflexible rule requiring assessments in all cases to be imposed according to the frontage or area of the assessed property, regardless of the circumstances of the particular case, was but an arbitrary exaction, and hence unconstitutional for want of due process of law. In dealing with this contention, the state court referred to the cited decision as a street-opening case, holding that a law providing for the assessment of abutting property in proportion to its frontage of the entire cost of opening a new street, and resting upon a basis which excluded any consideration of benefits, was violative of the Constitution of the United States in denying due process of law, in depriving the citizen of his property. We should feel inclined, said the court, to follow the opinion of the Supreme Court of the United States in *Norwood v. Baker*, supra, inasmuch as it was based upon the 14th Amendment of the Constitution of the United States, if that were a paving case, but that was a street-opening case, and until that court shall pass upon the question in the exact form in which it is here presented, we shall feel bound to follow our own decisions, which have settled the rule in this state, that in paving cases it is competent for the legislature to authorize the cost to be assessed upon the abutting property according to its frontage. This view received the approval of the United States Supreme Court when it affirmed the judgment, as has been stated above.

It was earnestly insisted in *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500, that the assessment there before the court was invalid because the statute under which it was laid was unconstitutional for arbitrarily apportioning the cost of the improvement according to the frontage of the assessed property, without requiring the assessments to be proportioned to benefits received. The constitutionality of the statute, said the court, has been upheld by this court so frequently that it is not an open question; but the appellants insist that the decision in *Norwood v. Baker*, is at variance with these decisions and requires them to be disregarded. If, it was added, 28 L.R.A.(N.S.)

the facts and statute under which the present assessment was made were of the same character as those involved in that case, we would without hesitation accept that decision as conclusive upon us, but we are of the opinion that there is a marked distinction between the two cases, and that that decision is not applicable to the facts herein.

In *San Francisco Paving Co. v. Bates*, 134 Cal. 39, 66 Pac. 2, the California street assessment statute was again objected to as repugnant to the 14th Amendment to the Federal Constitution, in authorizing assessments according to the front-foot rule, and the decision in *Norwood v. Baker*, supra, was relied upon to make good the objection. But, said the court, that point was elaborately considered by this court in *Hadley v. Dague*, supra, and decided adversely to appellant's contention; the conclusion there reached has been approved in subsequent cases, and, although invited by appellant to overrule that case, we decline to do so, as we are satisfied with it as a final declaration of the law on the subject.

And again in *Chapman v. Ames*, 135 Cal. 246, 67 Pac. 1125, the court reaffirmed the decisions mentioned. "A careful examination of appellant's very able brief," said the court in the last case, "discloses no ground upon which these cases should be overruled or distinguished."

It is contended, said the court once more in *German Sav. & L. Soc. v. Ramish*, 138 Cal. 120, 69 Pac. 89, that the act is in violation of the 14th Amendment to the Federal Constitution. Plaintiff insists upon this point, notwithstanding this court in *Hadley v. Dague*, supra, has held adversely to this contention. We are not disposed to reopen this question. *Hadley v. Dague*, supra, was adhered to in *San Francisco Paving Co. v. Bates*, supra.

The supreme court of Alabama, in *Montgomery v. Birdsong*, 126 Ala. 632, 28 So. 522, held that a municipal charter providing for the assessment upon benefited property of not over half the cost of paving streets and of constructing sidewalks, and of not more than a quarter of such cost on either side of the street, and requiring the amounts assessed to be fair and reasonable, and further providing for correcting any errors or omissions in the assessments on complaint of any property owner, in no wise infringed the 14th Amendment to the Federal Constitution, respecting due-process of law and equal protection of the laws, by also providing for the computation of the assessments upon opposite sides of the street in relation to each other according to the respective frontages, and limiting the charges to a stated maximum sum the front foot.

In *Montgomery v. Moore*, 140 Ala. 638, 37 So. 291, the court went beyond the decision just cited, and sustained, as a valid and constitutional exercise of the legislative power, an act of the legislature authorizing an issue of municipal bonds to defray the cost of improving a city street, and an

assessment to meet them laid upon the abutting property prorated according to the frontage along the line of the work. In the opinion of the court, McClellan, Ch. J., cited the case of *Montgomery v. Birdsong*, supra, and said that all it had actually decided was that, in giving power to assess the cost of a street improvement upon abutting property, the city charter required an assessment against each parcel of land to be in proportion to, and not in excess of, the actual benefit accruing to such parcel, the court assuming, rather than deciding, that such a rule of assessment was essential to the validity of the statute. The subsequent case of *Montgomery v. Foster*, 133 Ala. 587, 32 So. 610, he went on to say, had merely followed in *Birdsong* Case in construing the *Montgomery* city charter. Having thus cleared the ground, the learned chief justice turned to the consideration of the constitutionality of assessments by the front-foot rule for local improvements, imposed under statutory authority, ignoring consideration of benefits. The question arises, said he, whether, in view of state and Federal constitutional provisions as to compensation for property taken for public uses, and depriving the citizen of property without due process of law, it is within legislative competency thus to impose the costs of street paving, and the like, upon abutting property, without judicial ascertainment of the benefits accruing to such property from such improvements, and apportionment of the costs of the betterments according to, and not in excess of, the actual benefits enuring from them to the several abutting lots of land. This question, he continued, has been thrashed over in numerous decisions of the courts, and, while the cases are not uniform upon it, the better view, and that supported by the great weight of authority, is that it is a matter of legislative expediency and for the legislative determination whether abutting urban property will be benefited to the extent of the costs of a given improvement of the street or sidewalks along its front, and therefore entirely within legislative competency to impose such costs by way of special tax upon the property abutting the improved street, apportioning the charge thereto according to the distance of the several parcels of land fronting upon the street. (In expressing these views the learned chief justice did not consider, and perhaps had no occasion to consider, the qualifying effect of § 223 of the Alabama Constitution, limiting assessments to the increase in value of the assessed property, which results from an improvement on account of which the assessment is made. *Vide*, *Harton v. Avondale*, 147 Ala. 458, 41 So. 934.)

In *Harton v. Avondale*, supra, the court repudiated, so far as the state of Alabama was concerned, and under its present Constitution, the doctrine of *Montgomery v. Moore*, 140 Ala. 650, 37 So. 291. As will be noticed, said Simpson, J., in delivering the opinion of the court in the latest of the 28 L.R.A.(N.S.)

two cases, and referring to the earlier one and others, these decisions are based entirely on the construction of the 14th Amendment to the Constitution of the United States, § 24, Bill of Rights of the Alabama Constitution of 1875, and upon the law as it stood before the adoption of our present Constitution. It was while the *Norwood-Baker* Case, in the United States Supreme Court, and the *Birdsong* Case, in our own court, were generally supposed to be the law, . . . that our constitutional convention of 1901 added to our Constitution § 223, forbidding assessments for local improvements in excess of the increased value of the assessed property by reason of the special benefits derived from such improvements. The conclusion is irresistible, continued Justice Simpson, that, with the lights before them, the intention of our Constitution makers was to fix this limit in our organic law beyond which any assessment should be void, and to authorize the courts to examine into the matter and determine whether or not the constitutional limit had been transcended. To hold otherwise would be to suppose that the makers of the Constitution had taken the trouble to formulate and adopt an absolutely meaningless new section to the Constitution. To say that assessments shall not be made beyond the benefits received, and yet that, when an assessment is made, either directly by the legislative action or by a rule prescribed by it which has no provision for inquiring into the benefits, and conclusively to presume that the benefits were ascertained and that the assessment was not in excess thereof, would render the constitutional provision absolutely inoperative. This constitutional provision has nothing to do with the manner, he proceeded, in which the assessment is apportioned, whether by front foot or otherwise, but only fixes a limit beyond which it cannot go. It necessarily follows that the property owner has the right, in some form and at some time, to contest the fact as to the benefits accruing, and to bring forward such testimony as he can produce on that matter. Any guaranty of the Constitution would be but a *brutum fulmen*, if there were no tribunal in which the citizen could demand the enforcement of his right. . . . It must be admitted . . . that it belongs to that class of rights which do not necessarily demand a regular jury trial. Nevertheless, it must be passed upon in some way, and if the original assessment is not laid by some proceeding in which the citizen has an opportunity to produce evidence and have a legal determination of the matter, the courts afterwards can inquire into it and enforce his right.

In *Adams v. Roanoke*, 102 Va. 53, 45 S. E. 881, the 14th Amendment to the Constitution of the United States was held to apply to local assessments for street improvements, and that, to be constitutional, a statute authorizing the imposition of such an assessment must provide for giving the assessed landowner reasonable no-

tice and opportunity to appear and contest the legality, justice, and correctness of the charge before it is made final, as otherwise it deprives the landowner of his property without due process of law.

But in Ohio it has been held that when land is appropriated for widening a village street, an assessment by the front foot of the property abutting on the street, to pay the cost of the improvement, without the passage, notice, and publication of a preliminary resolution by the village council declaring the necessity for appropriating the property taken for that purpose, does not amount to a taking of property without due process of law, in violation of the 14th Amendment of the Constitution of the United States. *Caldwell v. Carthage*, 49 Ohio St. 334, 31 N. E. 602.

Again, the supreme court of Texas, in *Hutcheson v. Storrie*, 92 Tex. 685, 45 L.R.A. 289, 71 Am. St. Rep. 884, 51 S. W. 848, held unconstitutional a statute of that state authorizing an assessment for the cost of a public improvement upon abutting property in proportion to its frontage, without regard to special benefits, and expressed the opinion that a charge greatly in excess of such benefits amounted to taking property without due process of law, for public use, without just compensation.

An assessment under the authority of a statute for laying a water main, imposed upon land along the line of the work and within municipal limits, according to the lineal foot frontage, and laid upon both rural and urban lots alike, was sustained in the case of *State v. Robert P. Lewis Co.* (*Ramsey County v. Robert P. Lewis Co.*) 72 Minn. 87, 42 L.R.A. 639, 75 N. W. 108, and sustained too in respect of land denied the use of the water flowing through the conduit. This decision was, on a second appeal, in 82 Minn. 390, 53 L.R.A. 421, 85 N. W. 207, 86 N. W. 611, reversed in deference to the authority of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, upon the theory that an arbitrary assessment where no benefits accrued was in contravention of the Federal Constitution, but after the decision in *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, the court, upon a rehearing, reaffirmed its original decision.

In weighing the decisions in Minnesota one should keep in mind the provision of the Constitution of that state (art. 9, § 1) empowering the legislature, by general or special law, to authorize municipal corporations to levy assessments for local improvements upon property fronting upon such improvements, or upon the property to be benefited by such improvements, without regard to a cash valuation, and in such manner as the legislature may prescribe. *Vide*, *Cook v. Slocum*, 27 Minn. 509, 8 N. W. 755.

V. Municipal power.

a. Constitutional.

It does not seem, said the court in *Cham-*
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berlain v. Cleveland, 34 Ohio St. 551 (a case decided in 1878), to have been considered necessary in any of the decided cases to look very carefully into the constitutional limits imposed on the exercise of the power of municipal corporations to impose assessments for street improvements, and hence the limitations have not been fully ascertained and announced in any of the decisions.

In certain states the Constitutions contain provisions making it the duty of the legislature to provide for the organization of municipal corporations, and to restrict their powers of taxation and assessment, and to borrow money, contract debts, or to loan their credit, so as to prevent abuses. A provision of this kind is held not to limit the power of the legislature by appropriate legislation, either directly or through municipal bodies, to impose assessments to defray the cost of local improvements upon property benefited thereby. according to its frontage. *Raleigh v. Peace*, 110 N. C. 32, 17 L.R.A. 330, 14 S. E. 521; *Hilliard v. Asheville*, 118 N. C. 845, 24 S. E. 738; *Kinston v. Loftin*, 149 N. C. 255, 62 S. E. 1069; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Ernst v. Kunkle*, 5 Ohio St. 520; *Reeves v. Wood County*, 8 Ohio St. 333.

A constitutional provision requiring the rule of taxation to be uniform is not limited or impaired by a further constitutional provision requiring the legislature, in establishing municipal corporations, to restrict their powers of taxation so as to prevent abuses; but the two are to be read together, and the latter as furnishing an additional protection to the taxpayer. *Weeks v. Milwaukee*, 10 Wis. 242.

Notwithstanding constitutional provisions requiring the rule of taxation to be uniform, and requiring the legislature in establishing municipal corporations to restrict their powers of taxation so as to prevent abuses, and notwithstanding, also, that such provisions apply to and restrain the levying of special assessments to defray the cost of local improvements, an additional provision of the Constitution, making it the duty of the legislature and empowering it to provide for the organization of cities and incorporated villages, and differentiating assessments from taxation, confers power upon the legislature to establish a system of local assessments to cover the cost of local improvements in municipalities. *Ibid*.

The Constitution of Missouri contains a provision (art. 10, § 11) that the annual rate of taxation in cities and towns of 30,000 inhabitants and upwards, for city or town purposes, shall not in the aggregate exceed 100 cents on the \$100 valuation, and that such restriction as to rate shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid existing indebtedness or bonds issued in renewal of such indebtedness. That provision is held to apply only to general taxes levied for gov-

ernmental purposes, and not to special assessments for paying the cost of local improvements. *Farrar v. St. Louis*, 80 Mo. 379; *Meier v. St. Louis*, 180 Mo. 391, 79 S. W. 955; *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. 172, 12 L.R.A.(N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 A. & E. Ann. Cas. 630.

In Minnesota, by a constitutional provision (art. 9, § 1, as amended in 1869), the legislature was empowered to authorize, by general or special laws, municipal corporations to levy assessments for local improvements upon property fronting upon such improvements, or upon the property to be benefited by them, without regard to a cash valuation and in such a manner as the legislature might prescribe. *Vide. Cook v. Slocum*, 27 Minn. 509, 8 N. W. 755.

By adopting this provision, the people, it is said, did not intend to reject or modify, in respect of taxes of the class of special assessments for local improvements, the just and reasonable principle that they shall be as nearly equal as may be, but, whatever the basis of apportionment that might be adopted, that it must include the idea of equality. *Noonan v. Stillwater*, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444; *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175. In the latter of these two cases, the court, speaking of the former one, said: "The gist of this decision is that while the amendment empowered the legislature to apportion and assess according to street frontage, it does not authorize an assessment on that plan, wholly disregarding the fundamental rule upon which special assessments are made, namely, that of benefits."

It was urged in *State v. Robert P. Lewis Co.* (Ramsey County v. Robert P. Lewis Co.) 72 Minn. 87, 42 L.R.A. 639, 75 N. W. 108, s. c. subsequent appeal, 82 Minn. 390, 53 L.R.A. 421, 85 N. W. 207, 86 N. W. 611, that an assessment for laying a water main in a city street, under the authority of a statute directing that method, of a stated sum the lineal foot, was unconstitutional and void under article 9, § 1 of the Minnesota Constitution, because the statute applied a uniform rate of taxation to densely populated city lots and the farm lands alike, and therefore necessarily resulted in inequality. It was not contended that the statute violated the Constitution simply because it provided for a frontage assessment, but because the same rate of assessment was applied indiscriminately to the two classes of real property, without regard to the benefits derived; but, while the Minnesota Constitution did provide that all taxes should be uniform upon the same class of subjects within the territory or limits of the authority levying the tax, it also provided that a frontage tax or assessment might be made on all lands fronting upon water mains or pipes laid by cities or other municipalities, without regard to the cash value of such lands, and the court held that the statute in question was authorized by this provision of the Constitution. 28 L.R.A.(N.S.)

This case was followed and approved in *State v. Macalester College*, 87 Minn. 165, 91 N. W. 484.

A statute creating a separate water department of a municipal board of public works, to manage the water works of the city, and empowering it to assess the cost of laying distributing conduits 6 or more inches in diameter upon the benefited lots on the line, in the ratio that the narrowest front of each lot assessed bears to the entire frontage of land on both sides of the same street, undertakes to authorize taxation for local purposes without the consent of the voters or their chosen representatives, and therefore is illegal and void. *Blades v. Water Comrs.* 122 Mich. 366, 81 N. W. 258.

The principle of this decision was again applied in *Cook Farm Co. v. Detroit*, 124 Mich. 426, 83 N. W. 130, holding unconstitutional a statute attempting to confer upon a previously appointed municipal water board power theretofore not possessed by it, to assess upon abutting property the cost of laying street water mains. "While it was doubtless competent," said the court, "for the legislature to prescribe the board through which action might be taken to lay water mains, if it could confide the matter to such a board to be thereafter appointed, to the exclusion of the common council,—a question which we are not called upon to decide,—it could not confer such power upon a board consisting of members previously appointed at a time when its powers were less, and who were not selected with a view to the exercise of such powers."

b. Statutory.

There is a wide difference, according to the court in *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, between an assessment laid by a legislative body having full authority over the subject and one imposed by a municipal corporation acting under a limited and delegated authority.

The question of apportionment of a special assessment for the cost of a local improvement among the owners of the property assessed, when the authority to apportion has been delegated by the legislature to a subordinate officer or body, is quite a different one from what it is when the legislature has itself prescribed how the apportionment shall be made. *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2.

Every municipal corporation derives all its power from the state, and none can legislate beyond what the state has either expressly or impliedly authorized. *Montgomery v. Foster*, 133 Ala. 587, 32 So. 610.

The power of a municipal corporation to make an assessment for street pavement has no existence unless distinctly conferred by legislative authority. *Blanchard v. Barre*, 77 Vt. 420, 60 Atl. 970.

The principle that municipal corporations

derive all their powers from the state, and cannot transcend them by legislation, is applied strictly to ordinances providing for the assessment of taxes on property for local improvements. *Montgomery v. Foster*, supra.

No citation of authorities, said the court in *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074, is needed in support of the fundamental principle that the right of a municipal corporation to levy special assessments depends upon statutory enactment, and has no existence unless there is a valid statute conferring it.

Unless constitutionally restricted, municipalities have the right, when duly authorized, to assess the expense of a public improvement against the property specially benefited by it. *Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467.

A municipality may be authorized by statute to create a local taxing district for local improvement purposes, embracing a part only of the property within its bounds. *Adams v. Shelbyville*, 154 Ind. 467, 49 L.R.A. 797, 77 Am. St. Rep. 484, 57 N. E. 114; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021.

It is entirely proper and competent for the legislature to empower the common council of a city to define the taxing district to be assessed to pay for a local street improvement. *Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76.

It is proper and competent for the legislature to empower the common council of a city to determine what property is specially benefited by a local street improvement. *Ibid*.

The right of municipal corporations under the Ohio Constitution of 1851, when empowered by their respective charters to impose special or local assessments upon property in the immediate vicinity of a public improvement, as distinguished from the power of general taxation, declared the court in *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159, is no longer to be regarded as an open question in Ohio.

The legislature may commit to local authorities the power to determine what property will be benefited by a local improvement so as to be charged with its cost. *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826.

There is no longer any question, said the court in *Independence v. Gates*, 110 Mo. 374, 19 S. W. 728, that cities may, by virtue of legislative grants, improve streets and make assessments on the abutting lands to pay for the same.

While the legislature may grant to a municipal corporation power to levy assessments for street improvements, the statute making the grant must be strictly construed, and the municipality must keep closely within its limit. *Violett v. Alexandria*, 92 Va. 561, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909.

A municipal corporation empowered by statute to make local improvements and de-

fray the cost thereof, in whole or in part, either from the general corporate funds or by assessments upon property benefited, must, if it elects to assess the property benefited for all or any part of the cost of any particular improvement, proceed strictly in accordance with the statute. *Helm v. Witz*, 35 Ind. App. 131, 73 N. E. 846.

A city, in making local improvements, proceeds under special powers, and outside of such powers can lawfully do nothing, and although it is not necessary that such a rigid observance of the requirements of the statute as would tend to defeat the object to be accomplished be followed, nevertheless a substantial compliance with statutory requirements is exacted. *State, Cronin, Prosecutor, v. Jersey City*, 38 N. J. L. 410.

The rule applying to general taxation, that no power can be exercised by a municipality which has not been clearly granted, and that grants of power must be strictly pursued, applies with equal force to all species of special taxation for local improvements. *Davis v. Litchfield*, 145 Ill. 313, 21 L.R.A. 563, 33 N. E. 888.

The power of a municipality to assess property to defray the cost of a local improvement rests wholly in the authorizing statute, and any action beyond the terms of such statute is *ultra vires* and renders the assessment invalid. *Adams v. Shelbyville*, 154 Ind. 467, 49 L.R.A. 797, 77 Am. St. Rep. 484, 57 N. E. 114; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021; *Klein v. Nugent Gravel Co.* 162 Ind. 509, 70 N. E. 801.

An ordinance for a street improvement which is beyond the power of the municipality under the statute by virtue of which it assumes to act is void. *People ex rel. Raymond v. Field*, 197 Ill. 568, 64 N. E. 544.

A municipal ordinance levying a special tax for a local improvement is equally invalid whether the power to pass it is lacking, or exists and is abused. *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067.

The power of a municipal corporation to improve a street and assess the cost thereof upon the abutting property does not depend upon the benefits to be derived by the property owners from the improvement. *Morrison v. Hershire*, 32 Iowa, 271.

VI. The principles governing the interposition of the courts.

The cases in which courts will entertain the complaint of a landowner and afford him substantial relief against a local assessment are few in number and lie within narrow bounds.

It is the general rule everywhere conceded, said the court in *Raleigh v. Peace*, 110 N. C. 32, 17 L.R.A. 330, 14 S. E. 521, that the discretion of the legislature in levying taxes, when exercised within constitutional limits, is conclusive.

It is for the legislature, and not the judiciary, to determine whether the expense of a public improvement shall be borne by

the whole community, or by the district or neighborhood immediately benefited. *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966.

The question of the necessity and reasonableness of a local improvement is for the determination of the legislature, not the courts. *Speer v. Athens*, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802.

If the legislature declares the cost of a local improvement shall be collected by general levy, or be levied upon abutting lots according to values or to benefits received, or to frontage, the determination binds the courts absolutely and conclusively, provided there is no want of legislative authority. *Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52.

The power to determine whether or not property assessed to defray the cost of a local improvement is benefited by such improvement is legislative, not judicial. *Speer v. Athens*, supra; *Chicago & A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077; *Moody v. Spotorno*, 112 La. 1008, 36 So. 836; *Prior v. Buehler & C. Constr. Co.* 170 Mo. 439, 71 S. W. 205; *McMaken v. Hayes*, 10 Ohio C. C. N. S. 38.

Whether assessed property is benefited or not is a question which addresses itself to the discretion of the municipal authorities. *Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408.

It is the peculiar province of a city council, in passing ordinances for local improvements, to determine the necessity and character of the improvement and the manner of its construction. *Chicago v. Wilson*, 195 Ill. 19, 57 L.R.A. 127, 62 N. E. 843.

In general, the local authorities are the judges of whether property assessed for a local improvement is benefited as much as or more than the sum assessed upon it. *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559, affirmed in 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645.

It is asserted with substantial unanimity by the courts of this country, as well as by text writers of learning, according to the court in *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2, that unless the nature of the case precludes it, power to determine the confines of a taxing district for any particular burden is purely one of legislative discretion, and that the question of benefits accruing by reason of improvements contemplated is regarded as one of fact, which the legislature is always presumed to have considered and settled by the enactment.

Under a special tax proceeding the city council has sole power to determine what proportion of the special tax levied to pay for the improvement shall be borne by the municipality; and its determination upon this question cannot be judicially reviewed. *East St. Louis v. Illinois C. R. Co.* 238 Ill. 296, 87 N. E. 407.

The determination of a city council or village board of trustees, that abutting property on the line of a street improvement, assessed by authority of statute in 28 L.R.A. (N.S.)

proportion to its frontage, has received special benefits equal to the assessments, is conclusive against all collateral attacks. *Pittsburgh, C. C. & St. L. R. Co. v. Taber*, 168 Ind. 419, 77 N. E. 740, 11 A. & E. Ann. Cas. 808.

The confirmation of an assessment by a municipal board of the expense of a local improvement laid upon property alleged to be benefited according to its frontage, and the direction to enforce the collection thereof, by a subsequent act of the legislature, preclude any judicial inquiry into its original validity. *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098.

The determination of city authorities, that a street improvement is necessary and required for the convenience, comfort, and welfare of the city and its inhabitants, is conclusive, and not the subject of judicial review. *Burlington v. Quick*, 47 Iowa, 222.

Where the power to assess for street improvements has been regularly exercised, the propriety of the special tax is not subject to review by the courts. *Heman v. Allen*, supra.

The adoption of an ordinance by a city council, under power granted by the city charter, for the improvement of a street, is conclusive of the propriety of the improvement. *Ludlow v. Cincinnati Southern R. Co.* 78 Ky. 357.

The judgment of a city council as to the propriety of a street improvement is conclusive. *Louisville v. Bitzer*, 115 Ky. 359, 61 L.R.A. 434, 73 S. W. 1115.

The authority invested with the power to levy special taxes upon particular property to pay for beneficial local improvements determines the occasion for the tax, and levies it upon property subject to the tax; and when that is regularly done according to the terms of the law conferring the power, the propriety of the tax in any particular instance is not a judicial question, and is not reviewable by the courts. *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014.

When a special assessment is laid upon property benefited, for the purpose of meeting the cost of a local improvement, and is imposed in conformity to a statute, the courts cannot review it. *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615.

When the legislature has determined that the cost, or a proportion of it, of a local improvement, shall be thrown upon a designated region, it must be assumed that its determination was reached on constitutional principles, unless the court can see that it was unreasonable. *Smith v. Worcester*, 182 Mass. 232, 59 L.R.A. 728, 65 N. E. 40.

As the legislature has the power to impose taxation by assessment made against landowners for local improvement, it cannot be judicially restricted in determining the mode of collecting the tax. *Broadway Baptist Church v. McAtee*, 8 Bush, 508, 8 Am. Rep. 480.

A court cannot in any given case say that a mode of apportioning an assessment adopted by the legislature was otherwise

than proper and valid. *Allen v. Galveston*, 51 Tex. 302.

If the legislature adopts the front-foot rule as the method of apportioning the expense of a local improvement among the owners of adjacent property thereby benefited, it is not for the judiciary to say that another method would be more equitable and uniform in its results. *Daily v. Swope*, 47 Miss. 367.

When the legislature itself has fixed the proportion and prescribed the standard by which the cost of a street improvement is to be apportioned and assessed upon the abutting property, according to its frontage upon the line of the improvement, the courts have no power to substitute another standard, based upon actual benefits received, or measured by the values or enhanced values of the assessed properties. *Kelly v. Chadwick*, 104 La. 719, 29 So. 295, affirmed in 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175.

If, in the judgment of the legislature, an apportionment of a local assessment according to frontage is just and equitable in a given case, and the legislature directs by statute that it be made, it is not open to the courts to annul an assessment made pursuant to such statute, in the absence of a constitutional limitation upon the legislative power. *Hager v. Melton*, 66 W. Va. 62, 66 S. E. 13.

If the commissioners to assess the cost of a sewer upon contiguous property determine, upon a fair consideration of all influencing circumstances, that the benefit of such sewer to each lot equals its cost in front of each parcel assessed, it is impossible for a court to say that the assessment was not fairly and impartially laid in proportion to benefits. *Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86.

A mode of assessment adopted by the legislature in apportioning the cost of a street improvement must be assumed to have been adopted for the purpose of substantially apportioning the cost according to benefits received. *Allen v. Galveston*, *supra*.

The action of the legislature in apportioning the expense of a local improvement, by whatsoever rule it may adopt, is of itself a determination that the property subjected to the assessment in the assessed district is benefited by the improvement to the extent of the burden imposed. *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500; *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309; *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158; *Pittsburgh, C. C. & St. L. R. Co. v. Taber*, 168 Ind. 419, 77 N. E. 740, 11 A. & E. Ann. Cas. 808; *Kansas City v. Gibson*, 66 Kan. 501, 72 Pac. 222; *Smith v. Worcester*, 182 Mass. 232, 59 L.R.A. 728, 65 N. E. 40.

In special taxation the imposition of the tax is of itself a determination that the benefits to the contiguous property will be as great as the burden imposed. *Davis v. Litchfield*, 145 Ill. 313, 21 L.R.A. 563, 33 N. E. 888; *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69.

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The imposition by municipal authorities of a special tax for a local improvement is of itself a determination that the property subjected to the tax is benefited by the improvement to the extent of the tax. *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *East St. Louis v. Illinois C. R. Co.* 238 Ill. 296, 87 N. E. 407.

The action of a city council or village board of trustees in approving an assessment upon abutting property for a street improvement, apportioned according to frontage, is a determination that the assessed property received special benefit from the improvement equal to the amount of the assessment. *Pittsburgh, C. C. & St. L. R. Co. v. Taber*, *supra*.

If municipal assessors in levying upon abutting property, in proportion to its frontage, an assessment for the cost of a sidewalk, act under the authority of a statute, and are not limited by constitutional provisions in that behalf, they are presumed to have determined that the frontage fairly measures the probable benefit from the improvement, and their decision cannot be overthrown nor disputed. *White v. People*, 94 Ill. 604; *Craw v. Tolono*, *supra*.

The case of *Montgomery v. Moore*, 140 Ala. 638, 37 So. 291, was decided upon the theory that the legislature by express statute is competent to direct an assessment to be laid upon property along the line of a local improvement, according to the frontage, to defray the total cost of such improvement, without making any provision for ascertaining whether or not such cost exceeds the benefits conferred by its expenditure, because, it was said, such a statute is in effect a legislative determination that the cost of the improvement does not exceed the amount of special benefit conferred by the improvement upon the assessed property, and such determination is conclusive, and not open to judicial review.

In every case in which there is room for any substantial difference of opinion, the decision of the legislature that the property in a particular district will be benefited by a local improvement in proportion to its frontage, area, or value is conclusive upon the courts. *English v. Wilmington and Pittsburgh, C. C. & St. L. R. Co. v. Taber*, *supra*; *Coates v. Nugent*, 76 Kan. 556, 92 Pac. 597; *Ludlow v. Cincinnati Southern R. Co.* 78 Ky. 357; *Louisville v. Bitzer*, 115 Ky. 359, 61 L.R.A. 434, 73 S. W. 1115; *Smith v. Worcester*, 182 Mass. 232, 59 L.R.A. 728, 65 N. E. 40.

An act of the Congress of the United States, enacting that assessments thereafter levied in the District of Columbia for laying water mains should be levied at the rate of \$1.25 the linear front foot, against all lots or land abutting upon the street, road, or alley in which a water main shall be laid, is conclusive as to the benefits to the abutting property. *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

Unless it is made to appear upon the face of the proceedings, or in some competent

way, that in the assessment upon abutting property in proportion to its frontage of the cost of a street improvement pursuant to a statute directing that method of apportionment,—which is in legal effect a legislative decision that the benefits resulting from the improvement are proportioned to the frontage of the assessed property upon the line of the work,—there has been a gross and substantial variation from the principle of compensatory benefits, it is the duty of the courts to respect the legislative judgment and uphold the assessment. *Hadley v. Dague*, 130 Cal. 207; 62 Pac. 500; *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309.

A statute authorizing the laying of an assessment for a local improvement is conclusive on the courts in respect of its benefits, unless in extraordinary cases in which manifestly the legislative authority has been abused. *Speer v. Athens*, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802.

The judgment of municipal authorities upon the question whether assessed property is benefited or not by a street improvement is ordinarily, and save in the most extreme cases, conclusive. *Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408.

The question of benefits is ordinarily one that must be addressed to the city council, in the levy of special taxes for local improvements; and the decision of that body, if not unreasonable, an arbitrary abuse of power, or a violation of the fundamental principles upon which the power of taxation rests, is final, and not open to judicial review. *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067; *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105; *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437.

A legislative affirmance or authorization of a front-foot rule of apportionment of assessments for street improvements adopted by municipal ordinance is conclusive upon the courts, unless the circumstances in a particular case show its application to be inequitable, unlawful, arbitrary, and unjust. *Baltimore v. Stewart*, 92 Md. 535, 48 Atl. 165.

Under a municipal charter providing that benefits should be assessed upon the owners or occupants of taxable property in proportion, as nearly as may be, to the advantage which the lot or parcel is deemed to derive from the improvement for which the assessment is made, the decision of what property is benefited and how much it is benefited is within the discretion of the municipal authorities, and if exercised in good faith, without fraud, mistake, or abuse, is not open to review in the courts. *Powers v. Grand Rapids*, 98 Mich. 398, 57 N. W. 250.

When, by statute, the cost of a local improvement is to be assessed by the municipal board of public works upon the real property especially benefited by the improvement, in proportion, as nearly as may be, to the benefits, and only to the extent of such benefits, the determination of that board of the facts as to what property is

benefited, and the extent of the benefit it receives, is conclusive upon the courts, in the absence of fraud or of demonstrable mistake of fact. *State ex rel. Cunningham v. District Ct.* 29 Minn. 62, 11 N. W. 133; *State ex rel. Powell v. District Ct.* 47 Minn. 406, 50 N. W. 476.

We have repeatedly held, declared the court in *State ex rel. Minnesota Transfer R. Co. v. District Ct.* 68 Minn. 242, 71 N. W. 27, that under the charter of the city of St. Paul the judgment of the board of public works as to what property is benefited, and how much it is benefited by a street improvement, is final and conclusive, and cannot be reviewed by the courts, unless it is shown to be fraudulent in fact, or to have been made upon a demonstrable mistake of fact, or that in making it the board applied an illegal principle or an erroneous rule of law.

The legislative charter granted the city of St. Paul pursuant to a provision in the Minnesota state Constitution (art. 9, § 1) authorizing the enactment of general or special laws with reference to assessments for local improvements empowered the city to levy such assessments upon property fronting upon the improvements or benefited thereby, and required such property to be assessed, as nearly as might be, in proportion to the resulting benefits. Under such authority the judgment of the board of public works of said city as to what property is benefited, and how much it is benefited, and that it is benefited in proportion to its frontage upon the line of the work, is, when exercised in good faith, and not founded upon a mistake of fact or law, conclusive upon the courts. *State ex rel. Wheeler v. District Ct.* 80 Minn. 293, 83 N. W. 183.

When a municipal legislature adjudges that a particular parcel of property will be benefited by the construction of a sewer, and fixes the ratio of its benefits when it establishes the sewer assessment district, in the absence of any charge of fraud or oppression such judgment is conclusive on the courts. *Prior v. Buehler & C. Constr. Co.* 170 Mo. 439, 71 S. W. 205.

A legislative determination by the city council, that property abutting upon the line of a street improvement will be benefited by such improvement in proportion to its frontage, and directing an assessment accordingly, where the city's power to adopt such a method of apportionment is unrestrained by statute, is final, and not the subject of review by the courts, save in occasional and exceptional cases involving fraudulent or arbitrary action. *Northern P. R. Co. v. Seattle*, 46 Wash. 674, 12 L.R.A. (N.S.) 121, 123 Am. St. Rep. 955, 91 Pac. 244.

The determination of the local authorities as to what property will be benefited by the opening of a street, for the purpose of assessing the cost thereof, is final and conclusive; and the only question upon which a property owner has a right to be heard is whether the assessment laid upon his

property is in its proper proportion to the whole assessment upon all the property benefited by the improvement. *Dickson v. Racine*, 61 Wis. 545, 21 N. W. 620; *Meggett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566.

A statement in the syllabus of *Chamberlain v. Cleveland*, 34 Ohio St. 551, that "where the city council determines that the amount of the assessment does not exceed the value of the benefits specially conferred, its judgment in the premises, in the absence of fraud, is final and conclusive, unless modified," was characterized as not called for by anything in the record, in a memorandum of Okey, J., concurring in the conclusion reached in the case, and therefore he withheld his assent to it.

If palpable injustice results from the application of a rule of apportionment prescribed by the legislature for an assessment upon property benefited by a local improvement, a court of equity may interfere. *Union P. R. Co. v. Abilene*, 78 Kan. 820, 98 Pac. 224.

While the power of the legislature to regulate assessments for local purposes must be respected, yet when in its exercise the attempt is made to take one man's property to improve the property of another, the interference of the courts becomes necessary. *Covington v. Matson*, 17 Ky. L. Rep. 1323, 34 S. W. 897.

The court will not permit an assessment which amounts to spoliation to be enforced. *Fidelity Trust & S. V. Co. v. Voris*, 110 Ky. 315, 61 S. W. 474.

A local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax or a contribution, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name. *Allen v. Drew*, 44 Vt. 174; *Sands v. Richmond*, 31 Gratt. 571, 31 Am. Rep. 742.

When taxation is so excessive that it is doubtful whether the property to be benefited will suffice to pay the assessments against it, such assessments can no longer be deemed taxation, and the courts will afford protection against such an arbitrary exercise of power. *Broadway Baptist Church v. McAtee*, 8 Bush, 508, 8 Am. Rep. 480.

When it is plainly and palpably manifest from the physical condition of the property involved, its locality, environment, character of the work or improvement, assessment, and from the very nature of things, that an assessment is not adapted to the purpose, and is an exaction from the property owner of a contribution which he should not be obliged to make in that capacity, the courts will interfere to prevent a consummation of the injustice. *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2.

Although the proper legislative authority, and not the courts, must be the judge of the propriety of a street improvement and the benefit to the abutting property assessed to pay its cost, nevertheless no department of the government can take the property of

the citizen for public purposes without just compensation; and when the entire property is taken to pay for a public improvement, there is no room for a presumption as to benefits received, but a case of spoliation is established. *Louisville v. Bitzer*, 115 Ky. 359, 61 L.R.A. 434, 73 S. W. 1115.

If a statute upon its face entirely disregards the relation of the benefits received to the special taxes assessed upon the respective estates, it is plainly unconstitutional; but as in many cases it is impossible to estimate the amount of benefits with absolute accuracy, and methods of determination must be adopted which are practicable and give a reasonable approximation to accuracy, the choice of methods is primarily for the legislature, which must be allowed much latitude in exercising its judgment and discretion; and it is only when the decision of the legislature is plainly one that will be likely to result in taxation either disproportional or unreasonable, that the courts can interfere. *White v. Gove*, 183 Mass. 333, 67 N. E. 359.

Municipal authorities, in the guise of a public improvement, will not be allowed arbitrarily to deprive any citizen of his estate. *Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408, s. c. subsequent appeal, 101 Ga. 697, 29 S. E. 14.

The validity of a municipal ordinance levying special taxes to make local improvements, if unreasonable, an arbitrary abuse of power, or violative of the fundamental principles upon which the taxing power rests, is open to attack and determination in the courts. *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067.

A municipal ordinance imposing a special tax for the construction of a sidewalk, proportioned according to frontage, cannot stand if it is unfair, oppressive, and unreasonable,—if, for example, an owner of a lot of small value is by such an ordinance burdened with the expense of filling or bridging a chasm, digging down a hill, or blasting a ledge of rock, in order that the walk may be made. *Job v. Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622.

While special assessments to meet the cost of local improvements, laid upon property benefited by them in accordance with the front-foot rule, are, as a general proposition, valid and constitutional, provided they do not result in gross inequality, nevertheless if in any particular case it is established by the proof that there is such a marked disproportion between the assessment as laid, and any possible benefit conferred by the improvement upon the property assessed, as clearly to show the principle of equality and uniformity to have been ignored and gross injustice to have been done, courts will interfere and afford appropriate relief to the landowner. *Kinston v. Wooten*, 150 N. C. 295, 63 S. E. 1061.

If a mode of assessment is regular and constitutional, and the power to levy it exists in the class of cases in which it is made, the courts are not authorized to in-

terfere merely because they may consider the taxation impolitic, or even unjust and oppressive. *Norfolk City v. Ellis*, 26 Gratt. 224; *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230.

A court is never called upon to decide which is the most just and equitable form of taxation, but whether the one it has under consideration is in conflict with the Constitution or laws of the state. *Norfolk City v. Ellis*, supra.

An assessment for the cost of improving a street, laid upon abutting property according to the front-foot rule, and not measured by the value of benefits received by the assessed property, where such rule is sanctioned by the legislature, is not open to correction in the courts, except in such cases as amount to a virtual confiscation of the property. *Wilzinski v. Greenville*, 85 Miss. 393, 37 So. 807.

The power to impose special taxes against landowners to pay for local improvement must to some extent depend upon the fact that the persons taxed are correspondingly benefited by the expenditure of the tax; but courts hesitate to interfere in cases in which it may be doubtful as to whether the persons taxed receive commensurate benefits. *Broadway Baptist Church v. McAtee*, 8 Bush, 508, 8 Am. Rep. 480.

While the right of the court to interfere for the protection of an individual property owner in cases of special assessments for local improvements is recognized and acknowledged, its exercise can only be justifiable in rare and extreme cases, when it is manifest that palpable injustice has been done and the landowner's rights have clearly been violated. *Kinston v. Wooten*, 150 N. C. 295, 63 S. E. 1061.

The power of taxation implies the power of apportionment; and when the legislature has exercised the power and made an apportionment, a court cannot assume to adjudge it void, unless the invasion of private right is flagrant and its demonstration clear. *Allen v. Drew*, 44 Vt. 174.

Unless it is patent and obvious that the burden imposed upon property by the front-foot rule of apportionment of an assessment for a local improvement is wholly disproportionate to the benefits conferred upon such property by the improvement, the courts will not interfere. *Union P. R. Co. v. Abilene*, 78 Kan. 820, 98 Pac. 224.

The rule is that it requires a clear and strong case to justify a court in nullifying a municipal ordinance for a local improvement and special taxation to pay for it, upon the ground that it is unfair, unjust, and unreasonable. *Chicago v. Wilson*, 195 Ill. 19, 57 L.R.A. 127, 62 N. E. 843.

Unless otherwise provided by statute, it must appear that the power and authority conferred upon a municipal council to determine the question of benefits has clearly been abused, to warrant judicial interference. *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437.

And ordinarily it must so appear upon the face of the proceeding. *Ibid.* 28 L.R.A.(N.S.)

The legislature, or its duly authorized instrumentalities, are primarily the judges in respect of the imposition of local assessments upon property benefited to defray the cost of local improvements, and their decisions will not be disturbed by the courts, unless it is clearly established either that there is an absence of power, or that the particular method prescribed for the assessments of the peculiar benefits to the burdened property is so plainly inequitable as to offend the constitutional principle. *Raleigh v. Peace*, 110 N. C. 32, 17 L.R.A. 330, 14 S. E. 521; *Hilliard v. Asheville*, 118 N. C. 845, 24 S. E. 738; *Kinston v. Loftin*, 149 N. C. 255, 62 S. E. 1069.

A case of spoliation is not made out by an assessment for a street improvement at a rate per front foot not over half the salable value of the property assessed, after the improvement has been made. *Duker v. Barber Asphalt Paving Co.* 25 Ky. L. Rep. 135, 74 S. W. 744.

Where local and unequal assessments in the ratio of benefits received is warranted in the taxing power of the state by the absence of any constitutional restriction, an assessment upon abutting property for the cost of a public work in a city street, made upon the rule of like assessments for like buildings in the ratio of frontage on the street, without reference to the use or benefits from the work, is not so unreasonable and unjust that the courts are at liberty to declare it void. *Allen v. Drew*, 44 Vt. 174.

The Federal courts cannot interfere to restrain the enforcement of an assessment upon abutting property for the cost of a local improvement, notwithstanding it is laid under the front-foot rule, and even without actual consideration of special benefits, where the state statutes have authorized the assessment, unless there has been such an abuse of power as to amount to a confiscation of property or a deprivation of personal rights. *Hibben v. Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88.

Under a statute giving authority to county courts in certain counties to entertain a landowner's appeal from an assessment by the commissioners under certain drainage acts, the court has the power to set aside an assessment made under a rule of apportionment by the acre, instead of an apportionment according to benefits. *People ex rel. Parker v. Jefferson County Ct.* 55 N. Y. 604.

The court will not vacate an assessment for the cost of repairs to a street, laid upon the abutting property according to its lineal foot frontage, instead of against the lot owners, because of the possible error, in case of change of ownership, in shifting the burden from vendor to vendee. *Covington v. Boyle*, 6 Bush, 204.

Whether or not an assessment upon land abutting on a street to defray the cost of repaving such street, apportioned according to the number of feet frontage upon the line of the work, is unconstitutional, an

action in equity to vacate it as a cloud upon the title will not lie, because, if unconstitutional, the invalidity of the assessment is apparent upon the face of the record, and constitutes no cloud; and if constitutional it is, of course, valid, and therefore not a cloud. *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130.

Although a municipal charter requires an assessment for a local improvement to be made according to special benefits to the assessed property upon the line of the work, and according to frontage, and it is essential to the validity of such assessment that the requirements of the statute be complied with, nevertheless if, upon the face of the proceedings, it appears that the statute has been disregarded, so that the assessment is void, an action in equity to enjoin the collection of and to remove the assessment as void upon its face cannot be maintained in the absence of an allegation of fraud, because, the assessment being void upon its face, the property owner has an adequate remedy at law. *Blanchard v. Barre*, 77 Vt. 420, 60 Atl. 970.

VII. The necessity for an apportionment.

The power of taxing and the power of apportioning taxation are identical and inseparable, and taxes cannot be laid without apportionment. *M'Culloch v. Maryland*, 4 Wheat. 428, 4 L. ed. 606.

The statement applies to special assessments for local improvements, and, according to the court in *Emery v. San Francisco Gas Co.* 28 Cal. 345, the "doctrine is sustained by a uniform line of decisions in our own and our sister states."

An apportionment of the burden of an assessment for a local improvement is essential. *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2, affirmed in 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290.

Every valid assessment to pay for a public improvement must rest upon a legally ordained basis of apportionment. *Detroit v. Daly*, 68 Mich. 503, 37 N. W. 11.

All that is required in assessing property for the cost of a local improvement is that the charges shall be apportioned in some just and reasonable mode, according to the benefits received. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

I admit, said Agnew, J., in *Re Washington Ave.* 69 Pa. 352, 8 Am. Rep. 255, in the course of the opinion of the court nullifying an assessment upon rural lands, laid according to frontage, for the cost of opening and improving a rural highway, that the power to tax is unbounded by any express limit in the Constitution, that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further than that all derive benefit from the purpose to which it is 28 L.R.A.(N.S.)

applied. But, nevertheless, taxation is bounded in its exercise by its own nature, essential characteristics, and purpose. It must therefore visit all alike, in a reasonably practicable way, of which the legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation; extortion, not assessment; and falls within the clearly implied restriction in the Bill of Rights.

The benefits a property owner receives from the improvement can be ascertained only by a reasonable mode of assessment. *Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760.

If municipal authorities, in assessing property for the cost of a local improvement, act upon an illegal principle of assessment,—for example, on the assumption that they might assess all lots benefited at a uniform rate, without regard to the difference in benefits conferred,—although there might be no mistake of facts, and the action be in good faith, yet the assessment would be invalid. *State ex rel. Powell v. District Ct.* 47 Minn. 406, 50 N. W. 476.

When property is assessed by the front-foot rule for the cost of a local improvement, equity requires that the amount of the whole work be ascertained, and each lot be charged in the proportion that its frontage bears to all the property assessed. *Wilkes-Barre v. McDermott*, 6 Kulp, 345.

An assessment upon abutting property for the cost of grading the part of the street in front of such property is not in accordance with any recognized principle of taxation for local improvements, but is a tax upon specific lands, without any reference to benefits conferred upon such land; and as a mode of assessment it is purely arbitrary and void. *State, Cronin, Prosecutor, v. Jersey City*, 38 N. J. L. 410.

An assessment for a street improvement, upon abutting property, charging each lot with the expense of the work directly in front of it, is void. *New Whatcom v. Bellingham Bay Improv. Co.* 9 Wash. 639, 38 Pac. 163.

A levy of special taxes by a municipality for the cost of constructing or reconstructing a sewer, according to the front-foot rule, is invalid without a finding that the benefits conferred by the work are equal and uniform upon all the lots assessed, under the provisions of the Compiled Statutes of 1893 of Nebraska, chap. 12a, § 78. *John v. Connell*, 64 Neb. 233, 89 N. W. 806.

The streets in a town or city are common highways which all the citizens have a right to use, and which it is their common duty, as a local public, to render useful and to preserve; and the legislature cannot impose upon any one citizen the whole burden of constructing a public road; neither can any municipality exact the cost of opening or

repairing a street from a particular citizen. In either case, each and every one must contribute his proper share. *Sutton v. Louisville*, 5 Dana, 28; *Lexington v. McQuillan*, 9 Dana, 513, 35 Am. Dec. 159.

It is not sufficient, to render an assessment valid, that the legislative act under which it is made shall merely declare that the cost, or a part of the cost, of the improvement shall be assessed upon the property burdened. It must go further, and establish some rule, some definite scheme within constitutional limits, for the apportionment of the tax upon the lands on which it is assessed. *State, Speer, Prosecutor, v. Passaic*, 38 N. J. L. 168.

An assessment made upon a mere arithmetical calculation of the proportion of the sum paid to a contractor for filling in a street, without regard to whether he has done his work in whole, or in part, or not at all, and laid down each parcel of property assessed according to its size, without any consideration of benefits received by it from the work, or its situation and state with reference to the work, is invalid. *State, Mann, Prosecutor, v. Jersey City*, 24 N. J. L. 662.

The court, in *State, Zabriskie, Prosecutor, v. Hudson City*, 29 N. J. L. 115, referring to and vacating an assessment for a street improvement according to the frontage of the property on the line of the work, under a municipal charter requiring such assessments to be assessed upon the lands benefited in proportion to the benefits received, said: The principle on which the commissioners made their estimate is not contemplated by the charter. To make a mere calculation on such a basis would not require the services of three judicious disinterested persons, sworn faithfully, honestly, and impartially to perform their duties. Any clerk or schoolboy, with a little knowledge of arithmetic, could do that.

It was the duty of the commissioners, said the court in vacating an assessment for a street improvement, in the case of *State, Water Comrs. Prosecutors, v. Hudson*, 27 N. J. L. 214, in the first place, to ascertain all the lands benefited. They were, in the next place, to ascertain how much each lot was benefited by this expenditure, and to adjudicate the amount each was to pay, in proportion to the benefit. These were of the essence of their duties. They required great care and discrimination to do them justly. It not only does not appear, from their report, that they did this, but it appears affirmatively that, instead thereof, they merely applied the Procrustean rule, of dividing the aggregate expense by the number of lots fronting on the avenue, and placing it equally on all. For this purpose there was no necessity of the gravity of a commission. The clerk of the council could have done it without leaving his office. It was only one sum in simple addition, and another in long division. These remarks of the court were referred to with approval in 28 L.R.A.(N.S.)

State, Malone, Prosecutor, v. Jersey City, 28 N. J. L. 500.

VIII. The legislative discretion to prescribe rules of apportionment.

The power to tax is a power to apportion the tax as the legislature may see fit, without limit, unless one is imposed by the Constitution. *M'Culloch v. Maryland*, 4 Wheat. 428, 4 L. ed. 606; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Emery v. San Francisco Gas Co.* 28 Cal. 345.

When the legislature has contemplated a certain region, and may be supposed to have acted in view of a specific scheme of local improvement, it may, within reasonable limits, determine that the cost of the improvement shall fall upon a designated district, and may fix the principles upon which the cost shall be apportioned. *Smith v. Worcester*, 182 Mass. 232, 59 L.R.A. 728, 65 N. E. 40.

The rule of apportionment of the cost of a local improvement among the parcels of land benefited thereby rests in the discretion of the legislature. The discretion of that body in this behalf is commensurate with the broad domain of legislative power. It may lawfully prescribe any method of apportionment, when not constitutionally restricted, which it chooses and deems just and equitable. *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2; *Kansas City v. Gibson*, 66 Kan. 501, 72 Pac. 222; *Union P. R. Co. v. Abilene*, 78 Kan. 820, 98 Pac. 224; *Woodbridge v. Detroit*, 8 Mich. 274; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615.

In the exercise of the power of assessment by municipal corporations, the legislative discretion in apportioning the burden according to benefits is unfettered and broad. *Reeves v. Wood County*, 8 Ohio St. 333.

The authorities establish the proposition, said the court in *Daily v. Swope*, 47 Miss. 367, that a special assessment to defray the cost of a local improvement may be made by the legislature on the basis of benefits, and that the legislature is not restricted to any one mode of apportionment.

The power of the legislature to impose the entire cost of the construction of a sewer upon such principle or rule of apportionment as it shall prescribe cannot be doubted. Unless restricted in the choice of methods, it may adopt any rule or principle of apportionment, in imposing the cost or a part of the cost of an improvement in a municipality, whether regulating, grading, or paving a street, or constructing a sewer, that it determines to be just and equitable. *People ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L.R.A. 372, 62 N. E. 662, affirming 64 App. Div. 316, 72 N. Y. Supp. 191.

Any mode of assessment upon abutting property for the cost of a street improvement, which the legislature may provide,

whether the front-foot rule or another, may lawfully be resorted to in apportioning the charge, provided the assessment does not exceed the amount of special benefits conferred by the improvement upon the property assessed. *Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100.

The mode in which provision is made for necessary repairs to streets, provided only it operates equally and uniformly, is in the discretion of the legislature. *Hart v. Gaven*, 12 Cal. 476.

It is entirely competent for the legislature to authorize municipal corporations to assess the whole or any portion of the expense of local street improvements upon the property deemed to be particularly and especially benefited thereby, in proportion to the benefits received, if in the judgment of the legislature that rule of apportionment is most just and equitable. *Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76.

A statute authorizing a municipal corporation to grade and improve the city streets, and to assess the expense of doing so among the owners and occupants of the land benefited by the improvement, in proportion to the amount of benefits conferred, is constitutional. *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289.

No constitutional limitation in the state of Missouri prohibits the use of the area rule of apportionment of the cost of district sewers, as provided by a charter granted by the legislature to the city of St. Joseph. *St. Joseph use of Gibson v. Farrell*, 106 Mo. 437, 17 S. W. 497.

And acts of the legislature authorizing the apportionment of assessments for local improvements according to the frontage of abutting property are equally constitutional and valid, if not expressly prohibited in the organic law. *Montgomery v. Moore*, 140 Ala. 638, 37 So. 291; *St. Joseph v. Anthony*, 30 Mo. 537; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *Powell v. St. Joseph*, 31 Mo. 347; *Magee v. Com.* 46 Pa. 358; *Wray v. Pittsburgh*, 46 Pa. 365.

An act of the legislature authorizing the imposition of assessments upon property along the line of a local improvement, to pay the cost of such improvement, violates no provision of the Constitution by prescribing a different method for laying such assessments than one based upon special benefits conferred. *Kansas City v. Gibson*, 66 Kan. 501, 72 Pac. 222.

A provision in a municipal charter enacted by the legislature, directing and authorizing the assessment and levy by a board of sewer commissioners, by direct tax or assessment on the property located or fronting on the street through which any sewer may be laid or built, of a definite and precise sum per linear foot, is constitutional and valid, inasmuch as the legislature has an unrestricted choice of methods in apportioning the cost of a local improvement, and unlimited power to impose the entire or any part of the cost thereof upon abut-

ting property. *People ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L.R.A. 372, 62 N. E. 662, affirming 64 App. Div. 316, 72 N. Y. Supp. 191.

In the absence of any constitutional provision forbidding it to do so, the power and discretion of the legislature to impose, or authorize the imposition of, special assessments upon adjacent property to defray the cost of local improvements, according to the front-foot rule, is unrestrained. *Emery v. San Francisco Gas Co.* 28 Cal. 345; *Emery v. Bradford*, 29 Cal. 75; *Walsh v. Mathews*, 29 Cal. 123; *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500; *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309; *Union P. R. Co. v. Abilene*, 78 Kan. 820, 98 Pac. 224; *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249; *Langstroth v. Philadelphia*, 1 W. N. C. 166; *Rolph v. Fargo*, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049; *Tripp v. Tankton*, 10 S. D. 516, 74 N. W. 447.

The legislature by statute may authorize municipal corporations to assess the cost of street improvements against abutting lands and lots by the running foot, without regard to benefits or the area of the assessed property; and assessments laid pursuant thereto will be valid. *Kirkland v. Board of Public Works*, 142 Ind. 123, 41 N. E. 374.

A rule of apportionment according to frontage, even if it does work inequality, does not invalidate an assessment, if the legislature has authorized or commanded it to be employed. *State, Sigler, Prosecutor, v. Fuller*, 34 N. J. L. 227.

When the power of the legislature to levy special assessments for local improvements in municipalities is not limited by the Constitution, it is competent not only for the legislature to impose such assessments upon adjoining property, but also to apportion the assessment by the foot frontage of the assessed property, or in any other manner that the legislature may see fit to adopt. *Winona & St. P. R. Co. v. Watertown*, 1 S. D. 46, 44 N. W. 1072.

The legislature has discretionary power to prescribe the mode of apportioning an assessment for a local improvement, either according to valuation or to frontage. *State, Sigler, Prosecutor, v. Fuller*, supra; *Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124; *Motz v. Detroit*, 18 Mich. 495.

The legislature has the power to direct an assessment to be made for the cost of a local improvement upon the property charged, either *pro rata* according to the foot frontage, or in proportion to the benefit received. *Re Klock*, 30 App. Div. 24, 51 N. Y. Supp. 897.

There is no constitutional restraint upon the legislature, which prevents its authorizing a municipality to levy local assessments for the cost of sewers and street improvements according to either the front-foot rule or the area rule of apportionment. *St. Joseph use of Gibson v. Farrell*, 106 Mo. 437, 17 S. W. 497.

If there are no constitutional restrictions in the way,—and in Montana there are

none,—and nothing in the nature and circumstances of the particular case to make an assessment of the cost of a local improvement upon the property benefited in proportion to its superficial area work manifest injustice, it may be regarded as settled as within the competency of the legislature to provide that the assessment be made by such method. *McMillan v. Butte*, 30 Mont. 220, 76 Pac. 203.

A state legislature, if untrammelled by any constitutional limitation, may, at will and in its discretion, direct assessments for the cost of local improvements to be laid in proportion to the frontage, the area, or the market value of the assessed property. *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; *Seattle v. Kelleher*, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44; *Voris v. Pittsburg Plate Glass Co.* 163 Ind. 599, 70 N. E. 249; *Meier v. St. Louis*, 180 Mo. 391, 79 S. W. 955; *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. 172, 12 L.R.A. (N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 A. & E. Ann. Cas. 630.

The legislature, in authorizing a public improvement and an assessment upon neighboring property to pay for it, is not limited to any particular method in making the assessment, but, at its election, may adopt as the measure the front-foot, the square foot, the acreage, or the *ad valorem* rule of assessment. *Sinton v. Ashbury*, 41 Cal. 525; *Daily v. Swope*, 47 Miss. 367.

The legislature may constitutionally fix upon a basis of apportionment of local assessments for local improvements according to some definite standard applied through a measurement of length, quantity, or value to the assessed property. *English v. Wilmington*, *Qellarv.* (Del.) 63, 37 Atl. 158.

In the opinion of the court in *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098, it is no longer an open question but that the legislative power may direct special assessments for local road and street improvements to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion.

It is conceded on all sides, said the court in *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1, to be the province of the legislature to prescribe how an apportionment of a special assessment for street paving shall be made, and it may adopt either the front-foot rule, or the area of the fronting lots, or their value, inclusive or exclusive of the buildings upon them, as the rule or standard, at its election. Occasional hardships may result from the adoption of any one of these modes, but the authorities are united in the conclusion that any of them may lawfully be made the basis of the apportionment.

There is no constitutional limitation upon the power of the legislature to provide for the working, opening, repairing, and improving of public highways, streets, and roads, and for the meeting of the expense of doing so: all this rests in the sound dis-

cretion of that body, and the maxim, *Salus populi suprema lex*, applies. *Hayden v. Atlanta*, 70 Ga. 817.

While the taxing power is limited or circumscribed by a constitutional rule requiring uniform and *ad valorem* taxation; and the power of eminent domain by the prohibition of taking private property for public use without making just compensation,—the power to have worked, opened, repaired, and improved the public highways, streets, and roads, according to the court in *Hayden v. Atlanta*, *supra*, may be exercised by the legislature in such manner and way and in such circumstances as it may deem best.

Although a charge upon property, of the cost of a local improvement, may exceed the benefit conferred by such improvement upon the assessed property, nevertheless, if it is made under the authority and direction of the legislature, in the exercise of an undoubted legislative power, it cannot be invalidated by proof that the charge was unequal, unjust, or even arbitrary. *Genet v. Brooklyn*, 99 N. Y. 296, 1 N. E. 777.

IX. The binding quality of statutory rules of apportionment.

a. In general.

Authority to levy an assessment for the cost of a local improvement is purely statutory, and no assessment other than that which the statute authorizes can be made. *Niklaus v. Conkling*, 118 Ind. 289, 20 N. E. 797; *Frankfort v. State*, 128 Ind. 438, 27 N. E. 1115.

The power to levy assessments to pay for local improvements exists only where it is distinctly conferred by legislative authority. *Stebbins v. Kay*, 123 N. Y. 31, 25 N. E. 207, reversing 51 Hun, 589, 4 N. Y. Supp. 566.

In order to make an assessment a lien upon the property assessed, the statute authorizing the imposition of such assessment must be strictly pursued. *Fitzgerald v. Sioux City*, 125 Iowa, 396, 101 N. W. 268.

The legislature, in authorizing municipalities to levy assessments for the cost of public or local improvements upon the property in a particular district, may prescribe a rule of apportionment, either according to special benefits conferred upon the assessed property by the improvement, or proportionally to its lineal frontage upon the line of the improvement, at its election; and in either case an assessment by any other method than the one prescribed in the governing statute will be invalid. *Crawfordsville Music Hall Asso. v. Clements*, 12 Ind. App. 464, 39 N. E. 540, 40 N. E. 752; *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281.

Whenever the legislature by statute prescribes the rule or method of apportioning a special assessment for a local improvement, that rule or method, and none other, must be adopted and followed, or else the assessment will not be valid. *Joyes v. Shadburn*, 11 Ky. L. Rep. 892, 13 S. W. 361; *Marshall v. Barber Asphalt Paving Co.*

(Ky.) 66 S. W. 182; Barber Asphalt Paving Co. v. Watt, 51 La. Ann. 1345, 26 So. 70; Moody v. Chadwick, 52 La. Ann. 1888, 28 So. 361; State ex rel. Cunningham v. District Ct. 29 Minn. 62, 11 N. W. 133; Fowler v. St. Joseph, 37 Mo. 228; Stebbins v. Kay, supra; Re Klock, 30 App. Div. 24, 51 N. Y. Supp. 897; Re Wheeler, 39 Misc. 484, 80 N. Y. Supp. 204; Jones v. Holzapfel, 11 Okla. 405, 68 Pac. 511; Blanchard v. Barre, 77 Vt. 420, 60 Atl. 970.

An assessment made by a municipal corporation under an arbitrary rule is void, when the statute which authorizes the assessment to be made at all lays down another and different rule of making it. State ex rel. Shannon v. District Ct. Judges, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122.

When commissioners of assessment adopt a principle of apportionment not sanctioned by the law defining their duties,—as, for example, the front-foot rule, when they are required to assess the real estate on principles of equity and according to the damage or the benefit to the owners of the assessed property,—the assessment is void. State, Culver, Prosecutor, v. Bergen, 29 N. J. L. 266; State, Vanhorn, Prosecutrix, v. Bergen, 30 N. J. L. 307.

When assessors adopt erroneous rules as the basis of making an assessment upon property benefited by such a local improvement as the construction of a sewer, and in so doing violate the spirit and intent of statutory provisions requiring, as near as may be, a just and equitable assessment in proportion to the advantages which the owner assessed may be deemed to derive from the work, the courts will set the assessment aside. Clark v. Dunkirk, 12 Hun, 181.

When the legislature limits a municipal corporation, in assessing by the front-foot rule the cost and expense of widening and extending a street, to imposing the burden upon property immediately abutting on the part improved, it has no power, by declaring other property specially benefited, even if it really is, to assess such other property, although it might lawfully have done so had it adopted the rule of benefits, instead of the frontage rule. Klein v. Cincinnati, 7 Ohio C. C. 266.

When the statute requires the expense of grading a city street preparatory to laying a sidewalk thereon, to be met by a levy upon all the taxable real estate within the corporate limits, a special assessment upon abutting lots, according to their frontage, to pay for such an improvement, is illegal and void. Keys v. Neodesha, 64 Kan. 681, 68 Pac. 625.

If the legislature limits the amount of an assessment which a municipality is authorized to impose on abutting property for the construction of a sewer, to a stated maximum for each front foot, that limit cannot be exceeded, whether the assessment is laid by the front-foot rule, or in proportion to benefits, or *ad valorem*. Toledo use 28 L.R.A.(N.S.)

of Gates v. Lake Shore & M. S. R. Co. 4 Ohio C. C. 113.

If a statute requires assessments for the cost of local improvements not to exceed a stated percentage of the enhanced value of the assessed property due to such improvements, an assessment by the front-foot rule must be kept within the statutory limit thus set. Connor v. Cincinnati, 5 Ohio C. D. 199.

Notwithstanding a statute providing for the opening and improving of a public highway authorizes the cost to be assessed *pro rata* according to the frontage, upon the property abutting upon the highway and upon other property specially benefited, according to the judgment of the assessors as to what is equitable, when such statute requires, in addition, the assessors to certify certain facts in reporting the assessment, the certificate is such a necessary and integral part of a valid assessment under the statute that the omission from it of any statement which the statute requires it to contain is fatal to the assessment. Stebbins v. Kay, supra. Here, said the court, a certificate as to certain facts is required, and this requirement is entirely ignored. The requirement, too, is a material one; it is mandatory, not directory. It served as a protection to the taxpayer. The legislature desired the commissioners to make a solemn declaration that they had done their duty. To them was confided not merely a bare computation. It was their duty to lay such assessments upon adjacent property as seemed to them equitable. It was, therefore, provided that they should certify that the figures they had set down opposite the several lots were the apportionment and assessments made by them as directed in the act.

b. The front-foot rule.

The legislature, as has been seen, has, when not hampered by a constitutional restriction, a perfect right to prescribe the front-foot rule of assessment.

The cost of a street improvement may by law, in proper cases, be apportioned to the property benefited by it, by a mere mathematical calculation, according to a certain rate the front foot. Garvin v. Daussman, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826.

An assessment to defray the cost of a local improvement, laid upon abutting property in proportion to its frontage, under statutory authority prescribing that method of apportionment, is valid. Hayden v. Atlanta, 70 Ga. 817; Coburn v. Bossert, 13 Ind. App. 359, 40 N. E. 281; Ludlow v. Cincinnati Southern R. Co. 78 Ky. 357; Auditor General v. Wellman, 160 Mich. 512, 125 N. W. 392.

The amount and value of the benefits conferred by a street improvement upon abutting property assessed to pay for it may, if the legislature so directs by statute, be

properly and fairly measured by the frontage of such property upon the line of the work, and the assessment may equitably be made in proportion to such frontage. *New Albany v. Cook*, 29 Ind. 220.

A statute authorizing the assessment of abutting property for the cost of street improvements according to the front-foot rule is constitutional, provided the assessment made under its operation does not exceed the benefits conferred upon the assessed property by the improvement. *Deane v. Indiana Macadam & Constr. Co.* 161 Ind. 371, 68 N. E. 686.

The principle of distributing the cost of a local improvement, or a part of it, upon property located on the street where the improvement is made, according to the frontage of the lots, or upon the basis of a specified sum per linear foot, is within the power and discretion of the legislature to adopt; and as long as the burden is less than the actual cost of the improvement in front of the lot, the landowner has no just ground of complaint. *People ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L.R.A. 372, 62 N. E. 662, affirming 64 App. Div. 316, 72 N. Y. Supp. 191.

When a statute requires a special assessment to be levied according to the front-foot rule, no lien is acquired if a different method of levying the assessment is adopted. *Fitzgerald v. Sioux City*, 125 Iowa, 396, 101 N. W. 268.

An assessment for the cost of macadamizing a city street is illegal and void, if laid in proportion to the amount of benefits received by the assessed property from the improvement, when the municipal charter expressly commands all assessments for street improvements to be laid upon the lots of land abutting on the line of the improvement, and in proportion to the number of front feet of each lot. *Lill v. Chicago*, 29 Ill. 31.

When a municipal charter provides that the expense of making street improvements shall be levied upon abutting property, not according to its value, but according to its frontage on the line of the improvement, an assessment for such an improvement *ad valorem* is unauthorized and void. *Wilson v. Seattle*, 2 Wash. 543, 27 Pac. 474.

When a statute requires the cost of a street pavement to be borne, three fourths by the owners of the property fronting on the work, in equal proportions, according to the running foot front, an assessment based upon the measurement of each square of ground fronting on the street as completed is invalid because contrary to the express terms of the authorizing statute. *Barber Asphalt Paving Co. v. Watt*, 51 La. Ann. 1345, 26 So. 70; *Moody v. Chadwick*, 52 La. Ann. 1888, 28 So. 361.

An assessment by the front-foot rule when authorized by a statute in force at the time a local improvement is ordained is valid; and it is not invalidated by the circumstance that such statute was changed before the laying of the assessment, so as to 28 L.R.A.(N.S.)

require assessments of that character to be apportioned according to benefits. *Ehni v. Cincinnati*, 2 Ohio C. D. 283.

A statute prescribing the front-foot rule of apportionment for the cost of a street improvement upon the property abutting upon the line of the work does not authorize any assessment upon property fronting upon a break in the line of improvement, upon which no work is done. *Salem v. Henderson*, 13 Ind. App. 563, 41 N. E. 1062.

When a municipality ordains the improvement of a street under a statute requiring the cost of such an improvement to be apportioned to the front foot of the property fronting upon such improvement, the mere fact that the city council may have entertained an erroneous opinion as to how the cost of the improvement should be apportioned does not in the slightest degree affect the validity of the ordinance in so far as it orders the improvement and fixes the bounds of the territory to be charged with the cost of making it. *Gleason v. Barnett*, 106 Ky. 125, 50 S. W. 67.

c. The rule of benefits.

A statute relating to special assessments for street improvements, which requires a city council to ascertain the cost of an improvement, and what portion of such cost shall be assessed on adjoining property, and to assess such portion upon such property as provided by law or ordinance of such city, does not require an assessment of the total cost to be made upon abutting property by the front-foot rule, but empowers the city council to lay the assessment solely with reference to the benefit to the property taxed from the improvement, and is therefore open to no constitutional objection. *Burlington Sav. Bank v. Clinton*, 106 Fed. 269.

A statute requiring a special assessment for a local improvement to be measured by, and not to exceed, the special benefits accruing to the assessed property from such improvement, and in no case to go beyond a stated sum the front foot along the line thereof, is in no wise obnoxious to a constitutional prohibition against all assessments for the cost of local improvements in excess of the increased value of the assessed property by reason of the special benefits derived from the same. *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678.

A provision in a municipal charter requiring assessments for street improvements against abutting property to be made in proportion to the amount of the benefits accruing to the abutting owner is not in conflict with a constitutional requirement that such assessments shall not be in excess of the increased value of the assessed property by reason of the special benefits derived from such improvements. *Harton v. Avondale*, 147 Ala. 458, 41 So. 934.

When the legislature, by statute, requires a municipality, in assessing property for

the cost of local improvements, to assess it in proportion to the benefits conferred upon it by the improvement, no other method of levying the assessment will produce a valid one. *Delaware & H. Canal Co. v. Buffalo*, 39 App. Div. 333, 56 N. Y. Supp. 976.

When a statute directs a board of assessors, in assessing the cost of the construction of a sewer, to assess it upon the land benefited by such construction, in proportion to such benefit, the assessors are bound to take as their rule and guide in making their assessment the benefits conferred by the sewer upon the property assessed, and assess it according to such benefits; and if they adopt any other method, the assessment shall be void because made upon an erroneous principle. *People ex rel. Keim v. Desmond*, 186 N. Y. 232, 78 N. E. 857.

When the legislature, by general or special statute, or in a municipal charter, commands assessments upon property to pay for local improvements to be laid in proportion to the benefits they confer upon the property charged, all such assessments imposed without regard to benefits, arbitrarily, according to the front-foot rule are invalid and void. *Clapp v. Hartford*, 35 Conn. 66; *St. John v. East St. Louis*, 50 Ill. 92; *Crawfordsville Music Hall Asso. v. Clements*, 12 Ind. App. 464, 39 N. E. 540, 40 N. E. 752; *Des Moines Union R. Co. v. Des Moines*, 140 Iowa, 218, 118 N. W. 293; *State, Malone, Prosecutor, v. Jersey City*, 28 N. J. L. 500; *State, Ogden, Prosecutor, v. Hudson*, 29 N. J. L. 104; *State, Zabriskie, Prosecutor, v. Hudson*, 29 N. J. L. 115; *State v. Hudson*, 29 N. J. L. 117; *State, Speer, Prosecutor, v. Passaic*, 38 N. J. L. 168; *State, New Brunswick Rubber Co., Prosecutor, v. Street & Sewer Comrs.* 38 N. J. L. 190, 20 Am. Rep. 380; *Re Klock*, 30 App. Div. 24, 51 N. Y. Supp. 897; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Harrisburg v. Adams*, 5 Pa. Dist. R. 379; *Fraser v. Pittsburg*, 41 Pa. Super. Ct. 103; *State ex rel. Moore v. Ashland*, 88 Wis. 599, 60 N. W. 1001.

The case of *State, Ogden, Prosecutor, v. Hudson*, supra, was taken upon writ of error to the court of errors and appeals, and the judgment in it was reversed, but only in so far as it had held the ordinance or ordinances of the city of Hudson, under which the improvements were made, were valid and lawful, and had refused to set them aside. The decision that the assessments were unlawful because made in accordance with the front-foot rule, instead of according to benefits, was in effect affirmed by the court of errors and appeals.

A municipal ordinance laying assessments for the whole or a part of the cost of constructing sewers, sidewalks, street pavements, and curbs, upon abutting property according to the front-foot rule, without providing any method by which to ascertain the special benefits accruing to the assessed property from such improvements, or whether or not the assessments laid according to frontage are fair and reasonable, is 28 L.R.A.(N.S.)

null and void, when the legislative grant of power to lay assessments for the cost of local improvements requires that they be fair and reasonable and proportioned to resulting benefits. *Montgomery v. Foster*, 133 Ala. 587, 32 So. 610.

An assessment for the construction of a sewer, laid upon all the parcels of property within a limited assessment district, is invalid for want of conformity to a statute requiring such assessments to be levied in proportion to the special benefits conferred by the sewer upon the property assessed, when, by reason of their proximity or remoteness, there is a substantial difference in the utility of the sewer to the different parcels, which is not taken into account in making the assessment. *Bennett v. Emmetsburg*, 138 Iowa, 67, 115 N. W. 582.

If a municipal board empowered to assess the cost of a local improvement upon the real property especially benefited, in proportion, as nearly as may be, to the extent of the benefit, and not beyond it, adopts arbitrarily a method of apportioning the cost of an improvement upon a basis of street frontage only, without regard to benefits, the determination is unauthorized and unsupported under the statute by which it acts, and the assessment is invalid. *State ex rel. Cunningham v. District Ct.* 29 Minn. 62, 11 N. W. 133.

When the statute makes it the duty of commissioners of assessment, in assessing the cost of a local improvement, first to ascertain the lands benefited by such improvement, and, second, to adjudicate the amount each parcel is to pay in proportion to the benefits it receives, their failure to do so, and the adoption of the simple frontage rule of assessment, renders the assessment void. *State, Water Comrs., Prosecutors, v. Hudson*, 27 N. J. L. 214; *State, Malone, Prosecutor, v. Jersey City*, supra.

A provision in a municipal charter requiring commissioners of assessment for a street improvement to examine the whole matter, and report in writing to the common council what real estate ought to be assessed for such improvement, and what proportion of its expense should be assessed to each separate parcel, and directing such assessments to be laid upon the land and real estate benefited by the improvement, in proportion to the benefits received, is not complied with by a report of the commissioners showing nothing more than the total cost of a street improvement, and the items that make up such total, and then the assessments thereof on the several lots in proportion to their frontage on the street; and an assessment founded thereon is void. *Ibid.*

When the legislature prescribes by statute, as the legislature of New York did (*Laws 1897, chap. 414, § 268*), the method of assessing the cost of a village sewer, and directs that it be assessed upon lands within the district marked for assessment, in proportion, as nearly as may be, to the benefit each parcel or lot will derive from the

improvement, and that the ratio of such benefit shall be established, the statutory method must be followed in order that the assessment may be legal. If, instead, the front-foot rule of assessment be adopted, the assessment will be void. *Re Wheeler*, 39 Misc. 484, 80 N. Y. Supp. 204.

If a statute conferring power upon a municipality to make special assessments for street improvements limits its exercise to the benefits conferred by the improvements upon the property assessed, or is not broad enough to enable the municipality to select the mode of assessment,—in either case an assessment by frontage does not meet the requirements of the statute, and is therefore invalid. *Violett v. Alexandria*, 92 Va. 561, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909.

When the only authority that a municipal corporation has to levy special assessments for street improvements upon abutting property is a statute which requires such assessments to be laid in proportion to the benefits, upon the property benefited, sufficient to cover the total expense of the work to the center of the street on which it fronts, an assessment made upon the basis of the number of lineal feet of property fronting on a proposed street improvement is invalid and void. *Elma v. Carney*, 9 Wash. 460, 37 Pac. 707.

Under a statute requiring the cost and expenses of a local improvement to be met by an equitable assessment on the land fronting on the improvement, in proportion to the benefits received, an assessment levied indiscriminately on all the property, at a certain rate per lineal foot, without the exercise of any judgment on the part of the commissioners, or any attempt to ascertain the benefits with respect of particular parcels, is invalid. *State, Becker, Prosecutor, v. Gardner*, 34 N. J. L. 327.

When a municipal charter, in granting power to levy special assessments to meet the cost of local improvements, provides that such assessments shall not exceed the actual benefits derived from the improvements, an arbitrary assessment, in a given case, of the actual cost of an improvement, without a fair estimate, upon actual view, of the benefit accruing to each parcel of the assessed property, is a fraud upon the rule established by the charter, and invalidates the assessment. *Johnson v. Milwaukee*, 40 Wis. 315; *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35; *Liebermann v. Milwaukee*, 89 Wis. 336, 61 N. W. 1112.

In *Re Klock*, 30 App. Div. 24, 51 N. Y. Supp. 897, *Herrick, J.*, reviewed and analyzed the previous decisions in the state of New York in which assessments made according to the front-foot rule were sustained notwithstanding the rule of assessment prescribed was that it should be proportional to benefits conferred, and concluded that they all fell within one or the other of two classes, namely, either where, from the nature of the proceedings before the court under the terms of the statute giving it jurisdiction to review, the question could not be

considered, or else cases where the assessors really made their assessment proportional to the benefits, using the front-foot rule as a convenient method of determining such benefits, and where the benefits, by reason of the uniform conditions applying to the assessed property, were substantially alike to all parcels; and thereupon he concluded that none of such decisions require where the assessment is commanded to be made in proportion to benefits, and there is a manifest inequality in the condition, value, and situation of the different parcels of land assessed, that an assessment made purely by computation of frontage should be sustained.

An assessment levied upon a front-foot basis, for the cost of constructing a system of sewers, which the statute requires to be justly and equitably assessed against the owners or occupants of lands deemed to be benefited and assessed, upon each parcel in proportion to the benefits which have been derived from the improvement, is invalid and void, when laid upon land having a large frontage with but a single dwelling upon it, at the same rate the front foot as other lands in the business portion of the city wholly occupied with buildings, and having at once a greater need and a greater benefit from the sewers. *People ex rel. Connelly v. Reis*, 109 App. Div. 748, 96 N. Y. Supp. 597.

A local assessment for the cost of altering a grade in improving a street, which is required by the statute to show upon its face that the assessment does not exceed the benefits from the improvement, is void when the record fails to show affirmatively that the benefits were taken into account and fairly estimated in making the assessment. *Liebermann v. Milwaukee*, *supra*.

It is fundamental that the assessment of benefits shall be made by a rule of apportionment prescribed in the charter of a municipal corporation; and where the rule of actual benefits is prescribed in such charter, a valid assessment can be made only upon an actual view of all the property in the assessment district, and an impartial comparison of the benefits actually accruing to each parcel assessed from the improvement. *Hayes v. Douglas County*, 92 Wis. 429, 3 L.R.A. 213, 53 Am. St. Rep. 926, 65 N. W. 482.

When a municipal charter requires the cost of street improvements assessed upon lots or parcels of land to be charged in proportion to the benefits secured, an assessment according to the frontage of each lot upon a street improved is void, if it does not affirmatively appear to have been made upon an actual view of the property and a consideration of the benefits actually accruing to each parcel assessed. *Ibid*.

When a statute requires that a special assessment for the cost of a local improvement shall be imposed according to benefits accruing to the property, an assessment by the frontage rule does not show affirmatively a compliance with the statute. *Ibid*.

An assessment by the frontage rule, which

a mandatory statute requires to be made according to benefits, is presumed to be erroneous, unless the return shows that the assessors considered the matter of benefits, and found them to be in proportion to the frontage of the property assessed. *Ibid.*

When a provision in a municipal charter requires the city officials, in levying an assessment for the cost of grading a street, to consider and pass upon not only the question of benefits and injuries resulting from the improvement, but also the question of damages caused by and charges by way of compensation for the alteration of the grade, an arbitrary assessment at a uniform rate the front foot for the grading of a street, where the cut as to some of the lots is very much deeper than in respect of others, and varies from 1 foot to 30 feet, is illegal and void. *Friedrich v. Milwaukee*, 114 Wis. 304, 90 N. W. 174.

Under a statute authorizing a city, by its proper officers, to levy a special tax for the construction or reconstruction of sewers or drains within the city limits, to be assessed against real estate lying within the sewerage district, to the extent of the benefits accruing to such real estate by reason of the improvement, to be determined by the city council, after notice to the property owners, it is a jurisdictional prerequisite to the levy of such special tax that the city council shall find affirmatively, in order to adopt the frontage rule, that the benefits will be equal and uniform upon all the lots and parcels of land in the assessment district; and if it does not so determine, the assessment will be void. *John v. Connell*, 64 Neb. 233, 89 N. W. 806.

Under a statute (Anno. Stat. § 7629, chap. 12a, § 161, Neb. Comp. Stat. 1897) providing that all special assessments to cover the cost of any public improvements shall be assessed on the property abutting the improvements to the extent of the benefits by reason of the improvement, and that such benefits shall be determined by the city council sitting as a board of equalization after due notice; and in cases where such council so sitting shall find such benefits to be equal and uniform, the assessment may be according to the foot frontage,—it is a prerequisite to the validity of an assessment according to the rule of foot frontage that the city council shall affirmatively find that the benefits accruing to the assessed property are equal and uniform as to all of it. *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734.

In *Portsmouth Sav. Bank v. Omaha*, 67 Neb. 50, 93 N. W. 231, the soundness of the views expressed in the case of *John v. Connell*, supra, was questioned, and it was argued, that if an error had been committed in the failure of the city council affirmatively to find that the benefits in that case were equal and uniform, it was an error that should have been corrected by a direct proceeding, and not collaterally attacked in suchwise as to invalidate an assessment by the front-foot rule; and it was held that a finding that the property assessed was bene-

fited to the full amount in each case of the proposed levies was not so fatally defective as to warrant an injunction against collecting an assessment levied according to frontage. The decision of that case was followed, upon a later appeal, in 71 Neb. 10, 98 N. W. 457.

When a statute invests a city council with plenary power to change or modify an assessment upon abutting property for the cost of a street improvement, so as to make it conform as nearly as possible to the resulting benefits, a tentative assessment in accordance with the front-foot rule of apportionment is valid, and is conclusive, if not changed pursuant to the provision of the statute. *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930.

When an assessment for a local improvement is required by statute to be made not in excess of the benefits conferred upon the assessed property by the improvement, and an assessment is laid for the entire cost, if there have been mere errors of judgment in determining the amount of benefits, made by the assessing officers, the assessment will not be open to judicial review; but if the officers have failed to exercise any judgment at all, and have arbitrarily laid the assessment without regard to benefits, the assessment will be set aside. *Johnson v. Milwaukee*, 40 Wis. 315.

An assessment in proportion to the benefit, and not according to the market value, or any other rule, is required when a statute provides respecting a local improvement that each parcel of land benefited shall be assessed its proportional part of the whole cost. *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966.

The repeal of a statute authorizing municipalities to levy assessments for local improvements upon abutting property according to the front-foot rule, and the substitution therefor of legislation requiring such assessments to be apportioned according to the benefits conferred by the improvement, renders invalid an assessment made in virtue of the repealed and older statute, about the time the change was made. *Martin v. Oskaloosa (Iowa)* 99 N. W. 557.

d. The *ad valorem* rule.

When the legislature directs assessments upon abutting property for the cost of street improvements to be made *ad valorem*, the local authorities have no power to distribute the expense of the improvements in accordance with benefits. *Newman v. Emporia*, 41 Kan. 583, 21 Pac. 593.

When the legislature by statute fixes the standard for apportioning the cost of a street improvement to the lots or parcels of ground to be assessed to pay for the same, and directs the assessment to be made *ad valorem*, the assessing officers are not required to, and should not, base the assessment upon the special benefits conferred by the improvement upon the property assessed. *Ibid.*

Although a street improvement was start-

ed by a city under a law providing for the assessment of the cost thereof upon property in the assessment district *ad valorem*, and, before the improvement was finished and the assessment laid, the authorizing statute was amended and changed so as to provide for an assessment of abutting property according to its frontage, nevertheless an assessment laid according to frontage will be valid, provided the owners of the assessed property are neither called upon to pay a greater sum of money, nor to pay it at an earlier time, than they would have been required to pay under the former statute. *Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26.

e. Alternative rules.

The legislature may, and sometimes does, empower a municipal corporation to lay assessments upon abutting property to defray the cost of local improvements, and to apportion the charge according to the frontage of the assessed property, or its value, or in proportion to the benefits it derives from the improvement. When the legislature does this, the municipality is held to have the right to elect which of the authorized methods it will adopt in imposing an assessment. *Creighton v. Scott*, 14 Ohio St. 438; *Jaeger v. Burr*, 36 Ohio St. 164; *Klein v. Cincinnati*, 7 Ohio C. C. 266; *Crawford v. Cincinnati*, 11 Ohio Dec. Reprint, 378; *Shehan v. Cincinnati*, 25 Ohio L. J. 212.

When power is given to a city by statute to levy an assessment to defray the cost of a local improvement in proportion to the benefits to the land assessed, or the value of such land, or by an equal assessment by the front-foot rule upon the lands upon the line of work, the municipality may adopt either method it chooses; but when it adopts one of these methods, it has no power to blend with it either of the other methods. *Scranton v. Beckett*, 17 Pa. Super. Ct. 296.

Whichever method a municipality given by the legislature a choice of three may adopt in assessing the cost and expense of widening and extending a city street, it is bound to respect the limitations, if any, attached to that particular method by the statute. *Klein v. Cincinnati*, supra.

A city council authorized to assess the expense of grading a public street upon the abutting property, either by the front foot, or according to values, but not beyond 25 per centum of the property values as appraised for taxation, may adopt either rule, provided the limit of 25 per centum is not exceeded. *Upington v. Oviatt*, 24 Ohio St. 232; *Wilder v. Cincinnati*, 26 Ohio St. 284; *Corry v. Folz*, 29 Ohio St. 320.

When the municipal authorities decide by ordinance to assess the cost of a street improvement upon the abutting property by the front foot, being authorized thereunto by a statute giving them a choice of methods, one of which is in proportion to the benefits resulting, the question of benefits

cannot be considered, except where the assessment by frontage exceeds a limit imposed by the statute. *Crawford v. Cincinnati*, supra.

When a statute authorizes a municipal common council to levy an assessment for the cost of a street improvement upon the abutting property by any one of three methods of apportionment, one of such methods must be pursued; and an assessment made by any other method is void. *Walker v. Ann Arbor*, 118 Mich. 251, 76 N. W. 394.

Thus, an assessment for the cost of constructing a sewer, laid upon abutting property according to the value of each parcel "exclusive of any improvements" upon it, is void when laid under a statute which authorizes a city to levy the cost of an improvement upon adjacent property by foot frontage, according to benefits, or by land values, as the common council shall determine. *Ibid.*

X. Effect of omission of legislature to prescribe a rule of apportionment.

It is not a constitutional objection to a statute providing for certain local improvements in public streets, and an assessment of the expense thereof upon those immediately interested and whose estates are benefited by such improvement, that the rule of proportion to be followed in making the assessments has not been fixed by the legislature. *Howe v. Cambridge*, 114 Mass. 388.

Ordinarily the power to adopt the method of apportioning the burden of a local improvement in proportion to the frontage of the property on the line of such improvement charged with its cost has been denied, said the court in *Davis v. Litchfield*, 145 Ill. 313, 21 L.R.A. 563, 33 N. E. 888, unless sanctioned by express legislative authority; but we are committed to the rule that the municipality may adopt it as the measure and standard of apportioning special taxes.

The mode of determining, as nearly as may be, the benefits resulting to property assessed to pay for a street improvement, is discretionary with assessing officers, if not prescribed by the statute under which they act. *Scammon v. Chicago*, 42 Ill. 192.

Any mode adopted by municipal authorities in assessing contiguous property, whether by lot frontage or otherwise, for a local improvement, which does not violate the Constitution or the statute under which they act, will be sustained in the courts. *Enos v. Springfield*, 113 Ill. 65.

It is wholly discretionary with municipal authorities to determine for themselves the manner of assessment for local improvements, whether by lot frontage or otherwise, under a Constitution and a statute enacted in conformity therewith, empowering them to make such improvements by special assessments or by special taxation of contiguous property, or otherwise as they shall, by ordinance, prescribe. *Ibid.*

It is open to a city council in ordaining the construction of a sewer and levying upon

contiguous property a special tax to meet one half of the cost thereof, to adopt any method of apportioning the tax it may see fit to select,—whether according to frontage of the property, value, benefits received, or otherwise. *Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686.

A municipal ordinance providing for the construction of a sewer, to be paid for, one half by a general tax, and one half by a special tax to be levied on contiguous property, is valid regardless of the rule of apportionment adopted in laying the special tax. *Ibid.*

An assessment for a proportionate part of the cost of a local improvement, laid under a statute which does not require such assessment to be apportioned according to special benefits to the assessed property from the improvement, may lawfully be apportioned according to the frontage of the assessed property on the line of such improvement. *United States ex rel. Henderson v. Edmunds*, 3 Mackey, 142.

The cases deciding that no assessment can be lawfully made for a local improvement upon property not benefited by it in fact have no application to assessments made under a statute construed so as not to require such assessments to be confined to specially benefited property. *Ibid.*

When municipal authorities are given by statute discretion to determine the character and extent of the improvement of streets within the corporate bounds, they are free to determine all matters pertaining to the improvement, provided they do not act arbitrarily and in disregard of the interest of the public, and wantonly oppress individuals. *Morrison v. Hershire*, 32 Iowa, 271.

A statute providing that each municipal corporation may, by general ordinance, prescribe the mode in which the charge on the respective owners of lots shall be assessed and determined for the cost of a street improvement, authorize the assessment of abutting property in proportion to its frontage upon the line of the work. *Burlington v. Quick*, 47 Iowa, 222.

A statute authorizing a municipal corporation to adopt the mode in which a charge for a local street improvement shall be assessed upon adjacent property empowers the municipal authorities to provide by resolution regularly and duly adopted, that the expense of a particular street improvement shall be paid by the property holders along each side of the street, in proportion to the frontage each may own. *Kendig v. Knight*, 60 Iowa, 29, 14 N. W. 78.

When a Constitution imposes no restraint upon the legislature in respect of the apportioning of assessments for local improvements in cities, but leaves it at liberty to adopt the front-foot rule if it chooses to do so, municipal authorities empowered by act of the legislature in general terms to levy assessments upon abutting property for the cost of street improvements may lawfully impose them by the front-foot rule unless prohibited from doing so by some act of the 28 L.R.A.(N.S.)

legislature, either general or special. *Farrar v. St. Louis*, 80 Mo. 379.

When a municipal charter confers upon a city power to pave and reconstruct its streets, and to assess the cost of the work upon adjoining property, without prescribing any method of apportioning that cost, but leaving the municipal authorities free to adopt any method not prohibited by the Constitution or general laws of the state, the municipality may adopt any method of apportioning the cost which the legislature can constitutionally adopt. *Ibid.*

When the legislature, in a statute empowering a municipality to assess the cost of a street improvement upon abutting property, does not prescribe any rule for estimating the cost of making the improvement or of apportioning it, but leaves both to the judgment and discretion of the municipal authorities, an assessment by the front foot is valid and constitutional. *Wilson v. Salem*, 24 Or. 504, 34 Pac. 9, 691.

When a municipal charter provides that the expense of improving a public street shall be apportioned to the abutting property on each side of the street proportionately back to the center line of the block, the municipality has a discretion to apportion the total expense of such an improvement *pro rata* on the abutting property according to its frontage. *Oliver v. Newberg*, 50 Or. 92, 91 Pac. 470.

A municipality, when authorized to assess the cost of constructing a sewer or of paving a street, upon the local property benefited, by a provision in its charter not restraining it with respect of the method of apportioning the assessment, or empowering it to adopt the front-foot rule, an assessment is valid when laid in proportion to frontage upon the several pieces of property along the line of the work. *Meggett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566.

When, by the terms of the statute authorizing a municipality to levy an assessment for the construction of a sewerage system upon the abutting property benefited thereby, the common council is vested with the discretion to adopt any reasonable and equitable rule of apportionment upon the property in the district, it acts judicially in adopting the foot frontage rule of apportionment, and if it errs in this particular its error does not vitiate the assessment. *Ithaca v. Babcock*, 72 App. Div. 260, 76 N. Y. Supp. 49, affirming 36 Misc. 49, 72 N. Y. Supp. 519.

The courts of New Jersey are out of harmony with the foregoing line of decisions, and have several times expressed the opinion that under the Constitution of that state, it is essential to the validity of an assessment that the statute authorizing its imposition prescribe the method of apportioning it.

An act of the legislature directing a tax for a local improvement, to be imposed upon particular lands, to be legal, must consist of something more than a mere authorization to assess a sum of money, the cost of a local improvement, upon a designated property. The act must determine the mode

of distributing the burdened property on which the tax is to be made, and a certain standard of assessment be established. It cannot properly be left by the legislature to the discretion of others to fix the method. *State, Speer, Prosecutor, v. Passaic*, 38 N. J. L. 168.

A municipal charter providing that the whole amount of the cost and expenses of regulating, grading, and paving any street or section of a street, or graveling, flagging, macadamizing, or otherwise improving any street or section of a street, shall be assessed upon the owners of lands upon the line of said street or section thereof so improved, in such proportion as the common council shall deem just and equitable, is void because it does not limit the burden to be imposed upon the property by the amount of special benefits conferred upon such property, by the street improvement. *Bogert v. Elizabeth*, 27 N. J. Eq. 568.

The direction is perfectly clear, said the court in *Bogert v. Elizabeth*, supra, referring to a provision in a municipal charter for the assessment upon abutting property of the total cost of a street improvement, that the entire burden is to be borne by the land along the line of the improvement, and the ratio of distribution among the respective lots is left to the judgment of the common council. Such a power, according to local rules now at rest in this state, cannot be exacted. The whole clause is nugatory and void, and all proceedings under it are not mere irregularities, but nullities.

A statute authorizing the imposition of an assessment for the cost of a road improvement upon the report of a township committee, designating the real estate fronting upon and adjacent to such improvement that ought to be assessed, and what proportion of the expense thereof shall be assessed upon each parcel of land, is unconstitutional because it in nowise limits the amount of the assessment to special and peculiar benefits conferred upon the assessed property. *State, New York & G. L. R. Co., Prosecutor, v. Kearney Twp.* 55 N. J. L. 463, 26 Atl. 800.

XI. Special benefits the justification and foundation of local assessments.

Local assessments cannot be imposed to pay for an improvement of general public benefit. *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Craig v. Philadelphia*, 89 Pa. 265.

Local assessments are justifiable on the ground that the locality is specially benefited by the outlay of the money raised by their means, and if this is not the case no reason can be assigned why the tax is not a general one. *State, Agent, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729.

A law which would attempt to make one person or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but 28 L.R.A. (N.S.)

an act of confiscation. *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440.

Laws which cast the burdens of the public on a few individuals, no matter what the pretense, nor how seeming their analogy to constitutional enactments, are in their essence despotic and tyrannical, and it becomes the judiciary to stand firmly by the fundamental law in defense of those general, great, and essential principles of liberty and free government for the establishment and perpetuation of which the Constitution itself was ordained. *Re Washington Ave.* 69 Pa. 352, 8 Am. Rep. 255; *Allman v. District of Columbia*, 3 App. D. C. 8.

In *Mauldin v. Greenville*, 42 S. C. 293, 27 L.R.A. 284, 46 Am. St. Rep. 723, 20 S. E. 842, the supreme court of South Carolina decided that no constitutional right existed in a municipality, or in the legislature to grant power to a municipality, to assess the cost of street improvements exclusively upon abutting lands to the extent of the supposed benefits conferred; but that the power was limited to assessing the cost of sidewalks, drains, and sewers upon abutting property and that for other and general street improvements a general tax must be levied and it therefore decided that an assessment for a portion of the cost of paving the roadway in a city street, computed *pro rata* according to the frontage of the assessed property, was unconstitutional and void.

The reasoning of the court in *Mauldin v. Greenville*, supra, to sustain its conclusion that an assessment for the cost of paving a public street, laid according to frontage upon abutting property, was unconstitutional and void, rested upon the proposition that all highways belong to the general public, and in the earlier days might have been laid out across private lands without even compensating the owners; and while the Constitution of 1868 had provided for compensation to be made when private lands were taken for public highways, yet in all other respects the status of the public highway was unchanged; that being a public work and for the benefit of the public at large, its cost could be met only by a general public tax. This reasoning did not apply to sidewalks and surface drains for the adjoining property, and consequently assessments could be laid for the construction of sidewalks and lateral drains.

A local improvement is a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it through the municipality. *Chicago v. Blair*, 149 Ill. 310, 24 L.R.A. 412, 36 N. E. 829; *Illinois C. R. Co. v. Decatur*, 154 Ill. 173, 38 N. E. 626.

Assessments, as distinguished from other kinds of taxation, are those special and local impositions upon property in the immediate vicinity of municipal improvements, such as grading and paving streets, improving harbors of navigable rivers within the limits of the municipality, and the like, which are necessary to pay for the improve-

ment, and are laid with reference to the special benefit which the property is supposed to have derived from the expenditures. *Hale v. Kenosha*, 29 Wis. 599.

Special assessments for street or local improvements are assessed upon property with reference to the benefits derived from the improvement, and constitute a tax on the benefits rather than on the property. *Buchan v. Broadwell*, 88 Mo. 31.

It is but the demand of simple justice that special contributions in consideration of special benefits should be made by those who receive the benefits. *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2.

Taxation according to benefits received is neither unequal nor unjust. *Re Washington Ave. supra*.

The rule that he who reaps the benefit should bear the burden of a local improvement is just and equitable. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 589, 4 Sup. Ct. Rep. 663.

It is only just that those who are chiefly partakers of the benefits of a local improvement should bear proportionally a larger share of the burden of its cost. *Daily v. Swope*, 47 Miss. 367.

An assessment made upon the basis of a benefit regards nothing but the benefits to be conferred upon the particular estate. The levy is made on the supposition that the estate, having received the benefits of a public improvement, ought to relieve the public from the expense of making it. *Asberry v. Roanoke*, 91 Va. 562, 42 L.R.A. 636, 22 S. E. 360.

If the assessment method of taxation is employed to pay, in whole or in part, for a local public improvement, and in making such improvement the property of individuals, owing to its proximity, is specially benefited, it is but just that such property should pay toward the cost of the improvement a sum equal to the value of the special benefits conferred; for to this extent it is peculiarly benefited over and above that of other individual members of the public. *Chamberlain v. Cleveland*, 34 Ohio St. 551.

The right to make special assessments to meet the cost of local public improvements rests upon the underlying principle that the property upon which they are imposed is peculiarly benefited by the improvement, and therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement. *Adams v. Roanoke*, 102 Va. 53, 45 S. E. 881.

It is well to remark, said the court in *Arnold v. Knoxville*, 115 Tenn. 195, 3 L.R.A. (N.S.) 837, 90 S. W. 469, 5 A. & E. Ann. Cas. 881, that the power to assess is not unrestricted as to amount, but must be measured by the benefits received or reasonably anticipated.

Special assessments, in distinction from general taxation, rest upon the idea of equivalents. *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159.

All assessments for local improvements are laid upon the idea that property assessed is benefited by the improvement, in 28 L.R.A. (N.S.)

proportion to the charge. *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546.

The theory or principle upon which local assessments rest and are sustained is that the property upon which they are laid has been or will be specially and peculiarly benefited by the improvements on account of which the assessments are imposed. *Denver v. Knowles*, 17 Colo. 204, 17 L.R.A. 135, 30 Pac. 1041; *Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467; *New Albany v. Cook*, 29 Ind. 220; *Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124; *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175; *Seibert v. Tiffany*, 8 Mo. App. 33; *Allen v. Krenning*, 23 Mo. App. 561; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559, affirmed in 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645; *Litchfield v. Vernon*, 41 N. Y. 123; *Raleigh v. Peace*, 110 N. C. 32, 17 L.R.A. 330, 14 S. E. 521; *Hilliard v. Asheville*, 118 N. C. 845, 24 S. E. 738; *Kinston v. Loftin*, 140 N. C. 255, 62 S. E. 1069; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Craig v. Philadelphia*, 80 Pa. 265; *Re Morewood Ave.* 159 Pa. 20, 28 Atl. 123, 132.

Assessments for local improvements in municipalities are not founded upon any idea of revenue, but upon the theory of benefits conferred by improvements upon the assessed property. *Norfolk v. Ellis*, 26 Gratt. 224.

The rule which municipalities must observe in assessing the cost of a public improvement is that the property assessed must be specially benefited by such improvement. *Denver v. Kennedy, supra*.

The keynote of every local assessment is that it must be made according to the benefits conferred. *Donovan v. Oswego*, 90 App. Div. 397, 86 N. Y. Supp. 155.

Assessments on individual property for public improvements can only be made to the extent of local and special benefits received therefrom. *McKeesport v. Soles*, 165 Pa. 628, 30 Atl. 1019.

Special assessments for local improvements find their only justification in the peculiar and special benefits which such improvements bestow upon the particular property assessed. *Kirst v. Street Improv. Dist. No. 120*, 86 Ark. 1, 109 S. W. 526.

Special taxation, as spoken of in the Illinois Constitution, is based upon the supposed benefits to the contiguous property as well as are special assessments, and the two differ only in the mode of ascertaining the benefits. *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *East St. Louis v. Illinois C. R. Co.* 238 Ill. 296, 87 N. E. 407.

Special assessments and special taxes for local improvements go upon the basis of benefit to the particular property, and are authorized only when the local improvement either actually or presumptively benefits the particular property in an amount equal to the burden imposed. *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69.

We have held in many cases, said the court in *Chicago & A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077, that special taxation

for a local improvement, as well as special assessment of benefits for the same, proceed upon the theory of benefits to the property levied upon.

A district created for taxation for a local improvement may, as a whole, be assessed only to the extent of the sum of special benefits actually received by the several parcels of property charged with the cost of such improvement; and each parcel of property taxed may be assessed only to the extent that it actually receives special benefits from such improvement. *Adams v. Shelbyville*, 154 Ind. 467, 49 L.R.A. 797, 77 Am. St. Rep. 484, 57 N. E. 114; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021.

The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440; *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074.

It is elementary, according to the court in *Northern P. R. Co. v. Seattle*, 46 Wash. 674, 12 L.R.A.(N.S.) 121, 123 Am. St. Rep. 955, 91 Pac. 244, that the whole theory of special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the local improvement.

The whole and only foundation for special assessments, according to the court in *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734, lies in the special benefits conferred upon the property assessed.

This court has consistently held for thirty years, it was declared in the opinion in *Adams v. Shelbyville*, supra, that special benefits are the only foundation for special assessments.

Upon the theory of benefits, declared the court in *Violett v. Alexandria*, 92 Va. 561, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 900, rests all the decisions of this court and of other courts upholding assessments for street improvements apportioned upon abutting property by any rule, and upon this theory alone are they looked upon with favor by taxing powers; nor can they by sound reasons and principles be justified upon any other theory.

It was said in *Robinson v. Burlington*, 50 Iowa, 241, that a special assessment is allowable on the theory that the improvement for which it is made is of special value to the property owner, and in *Muscatine v. Chicago, R. I. & P. R. Co.* 88 Iowa, 291, 55 N. W. 100, this remark was referred to by Robinson, Ch. J., with the statement, it is undoubtedly true that the law contemplates a special benefit, from the pavement of the street, to the owner of property which is adjacent to it.

The right to impose the special burden of an assessment is founded in the idea that whilst the public health, comfort, and convenience demand the improvement, its construction is at the same time of special and peculiar benefit to certain private property in the immediate vicinity. *Allman v. District of Columbia*, 3 App. D. C. 8, 28 L.R.A.(N.S.)

The essential element in a local improvement is, as the term implies, a benefit to the property upon which the cost of it is assessed, in a manner local in its nature, and which does not attach to other property of a like character. *Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467.

The theory upon which local assessments for street improvements are allowed to be laid upon the abutting property is that such improvements, aside from the mere general advantage resulting to the community at large, will result in some special advantage to the particular owners, in which the general public does not participate. *Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408; *State, Agents, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *Kinston v. Wooten*, 150 N. C. 295, 63 S. E. 1061.

Special assessments are based on the theory that the property assessed will be specially benefited thereby above the benefits received by the public at large; and, while the results may not be such as are anticipated, still the principle holds good. *Arnold v. Knoxville*, 115 Tenn. 195, 3 L.R.A.(N.S.) 837, 90 S. W. 469, 5 A. & E. Ann. Cas. 881.

Upon the theory that a local improvement is of special and peculiar benefit to the private property in its immediate vicinity depends absolutely the power to assess such property to defray the cost of such improvement. *Allman v. District of Columbia*, supra.

Assessments for street improvements rest upon the basis of benefits, actual or presumptive, to the property assessed. *Ludlow v. Cincinnati Southern R. Co.* 78 Ky. 357.

The basis of all assessments for city street improvements is presumptive benefits received. *Fidelity Trust & S. V. Co. v. Voris*, 110 Ky. 315, 61 S. W. 474.

Assessments for local improvements are justified upon the theory that the assessed property is correspondingly enhanced in value, and should, therefore, pay the cost of such improvements. *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; *Hayden v. Atlanta*, 70 Ga. 817; *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69; *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826; *Re East 136th Street*, 127 App. Div. 672, 111 N. Y. Supp. 916; *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2; *McGonigle v. Allegheny*, 44 Pa. 118; *Sands v. Richmond*, 31 Gratt. 571, 31 Am. Rep. 742.

Assessments for street improvements are upheld upon the ground that the assessed property charged with the cost of the improvement is enhanced in value to an amount equal to the sum charged against it, and that its owner has received a peculiar benefit from the improvement which the citizens do not share in common. *Marion Bond Co. v. Johnson*, 29 Ind. App. 294, 64 N. E. 626.

The fundamental fact upon which the validity of special assessments for the cost of a local improvement rests, is an increment of benefit to the property taxed resulting

from the improvement. *Union P. R. Co. v. Abilene*, 78 Kan. 820, 98 Pac. 224.

Local taxes for local improvements are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer. Lots, being increased in value, are better adapted for the use of town lots, and upon no other ground will such taxation for a moment stand. *Neenan v. Smith*, 50 Mo. 525.

The doctrine that the standard to be fixed by statutory enactment must be that the assessment can only be laid upon the principle of exceptional benefits, and not in excess thereof, said the court in *State, New York & G. L. R. Co., Prosecutor, v. Kearney Twp.* 55 N. J. L. 403, 26 Atl. 800, has been so frequently established in our own reports of decided cases that a further discussion of the subject here by the court appears to be useless.

The mode of apportionment by which local assessments are to be made must have reference to special benefits accruing to the property because of the improvement,—that is, benefits in addition to those received by the community in general; and the rule of apportionment must be such as to make the assessments in proportion to such benefits as nearly as is reasonably practicable. *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899.

Local assessments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits on the property assessed, and to the extent of those benefits. *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Craig v. Philadelphia*, 89 Pa. 265.

The legislature cannot constitutionally fix, or authorize a municipality to fix, an arbitrary basis for an assessment to pay for local improvements to be imposed upon property without regard to benefits. *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175.

Under a Constitution requiring taxes to be proportional and reasonable, a special tax levied upon abutting property to pay for a street improvement can be justified only when there is a special benefit to the property from the expenditure on account of which the assessment is made. *Sears v. Boston*, 173 Mass. 71, 43 L.R.A. 834, 53 N. E. 138.

Where a landowner assessed for a public improvement receives and can receive from such improvement no other or greater benefits than the community at large the assessment is invalid. *Re Washington Ave.* 69 Pa. 352, 8 Am. Rep. 255.

A local assessment cannot be imposed where it is clearly established that the improvement for which the charge is made is for the public benefit, without any advantage to the property assessed. *Craig v. Philadelphia*, supra.

No valid assessment for a street improvement can lawfully be made on property which is not actually benefited to some extent by such improvement. *Re East 136th Street*, supra.

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An assessment to meet the cost of a local improvement cannot stand if no benefit whatever peculiar to the property assessed results to it from the improvement. *Kinston v. Wooten*, 150 N. C. 295, 63 S. E. 1061.

Where there is no special and peculiar benefit due to a local improvement conferred upon adjacent property, there can be no valid assessment of its cost laid upon such property. *Allman v. District of Columbia*, 3 App. D. C. 8.

It is the special benefit to the private lot owner which gives legal validity to a legislative act authorizing an assessment for a street improvement; for unless some special advantage results to the lot owner in consequence of the street improvement for and on account of which his property has been assessed, the effect of that assessment is arbitrarily to deprive the citizen of his property. *Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408.

Special taxes cannot be levied unless the property charged receives a corresponding physical, material, and substantial benefit from the exaction. Otherwise, it is an attempt under the guise of taxation to take private property without just compensation, in violation of the Constitution. *Owensboro v. Sweeney*, 129 Ky. 607, 18 L.R.A.(N.S.) 181, 130 Am. St. Rep. 477, 111 S. W. 364; *McCormack v. Henderson*, 33 Ky. L. Rep. 854, 111 S. W. 368.

To warrant the assessment of a special tax to pay for a local improvement, it must appear that the property assessed is benefited by that improvement. *Re Casacalvo & M. Streets*, 20 La. Ann. 497; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 251, 5 So. 848; *Rosetta Gravel, Paving & Improv. Co. v. Jollisaint*, 51 La. Ann. 804, 25 So. 477.

When it is clear that lots having no present connection with a sewer derive no special and peculiar advantage from its construction, and when nothing indicates that they ever will certainly have any special benefit, to impose a present lien and obligation to pay where the special benefit is contingent on the will of the municipality would be a clear violation of the fundamental basis on which all such assessments rest. *Parker's Appeal*, 169 Pa. 433, 32 Atl. 574.

A statute authorizing the expense of paving the roadbed of a street, to be assessed in the proportion of two thirds on the abutting property and the other third on the public at large, is unconstitutional and void, because it does not limit the assessments upon the private property by the amount of special and peculiar benefits conferred thereon by the improvement. *State, Agents, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729.

An act chartering a private corporation for the purpose of reclaiming large tracts of swamp land, and providing for the appointment of commissioners to enter into a contract with such corporation for the drainage of many acres of meadows, the property of various individuals, and empowering such

commissioners to assess upon the lands, when reclaimed, a just proportion of the contract price, is unconstitutional because it does not limit the assessments in amount by the extent of the benefits conferred upon the property assessed. *Coster v. Tide Water Co.* 18 N. J. Eq. 54, affirmed in 18 N. J. Eq. 518, 90 Am. Dec. 634.

Under our decisions, said the court in *Benjamin v. Bog & Fly Meadow Co.* 68 N. J. L. 197, 52 Atl. 215, a compulsory assessment for the special benefit resulting to land from the improvement thereof must generally be levied in proportion to the benefits received, and assessments cannot be sustained when levied in proportion to the quantity of land.

A statute which authorizes a municipality to construct street improvements, and lay local assessments on the property fronting thereon for so much of the expense as it shall deem just and equitable, is unconstitutional because it does not prescribe any fixed certain legal standard for the assessment which, to be valid and constitutional, must be limited to particular benefits conferred by the improvement upon the property assessed. *Barnes v. Dyer*, 56 Vt. 469.

Since the decisions of *Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634, and of *State, Agents, Prosecutor, v. Newark*, supra, it has been settled law in this state, said the court in *Doughten v. Camden*, 72 N. J. L. 451, 3 L.R.A.(N.S.) 817, 111 Am. St. Rep. 680, 63 Atl. 170, 5 A. & E. Ann. Cas. 902, that the cost of local improvements may be imposed, under the power to tax, upon lands peculiarly benefited thereby, but only to the extent of the benefits so conferred. Legislation intended to confer power to impose such tax on lands, to be valid, must not only limit the power to lands peculiarly benefited, but must expressly or by necessary implication limit the imposition to the amount of the peculiar benefits conferred. The cases in which this doctrine have been applied are too numerous and well known to require citation.

It must not be inferred that all American jurists accept the views just set forth. There have been several strong dissents.

The theory that a local assessment can only be commensurate with the enhancement of value of the assessed property, due to the improvement for which it was imposed, was repudiated and utterly reprobated by *Corliss, Ch. J.*, in *Rolph v. Fargo*, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242.

And Mr. Justice Holmes, in delivering the opinion of the majority of the court in *Louisville & N. R. Co. v. Barber Asphalt Paving Co.* 107 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 406, treated the theory almost contemptuously. He virtually regards the expression of such theory as mere sound and fury, signifying nothing.

The argument against the theory has been temperately stated in several cases, of which it will be sufficient to cite two.

If the right to make improvements, said *Campbell, J.*, in *Woodbridge v. Detroit*, 8 Mich. 274, and charge them to property 28 L.R.A.(N.S.)

owners, is to be based upon the idea of private benefits created, I am entirely clear that no such power is maintainable. No principle is better settled than that private property cannot be taken by the government for private use, and it is equally clear, on principle, that taxation in general can only be justifiable for public purposes, affecting large or small localities. The improvement of private property is no part of the object of government. Unless a work is needed by the public, the public have no right to make it, and, if needed, no individual should be compelled to pay except as a proportionate share of the public burden.

An assessment to pay for a street improvement is levied upon abutting property, not because of any special benefits its owners derive from the improvement, but because the public interest requires that the improvement be made, and the law authorizes special taxation for such an object. *Morrison v. Hershire*, 32 Iowa, 271.

In my opinion, said *Beck, J.*, in delivering the opinion of the court in *Warren v. Henry*, 31 Iowa, 31, in the exercise of the power of taxation the special participation in the benefits of a particular tax on the part of the taxpayer has nothing to do with the right to impose the tax. I find no support for my conclusion, upon the ground that the tax may be sustained because the property is benefited by the improvement. The property holder has a right to determine whether he will or will not enjoy certain benefits. The city cannot determine that question for him, and tax him in order to bestow them upon him. I base my conclusion upon the simple ground that the object of the taxation—the improvement of the streets—is a public object which will support it, that the system of taxing the abutting lots, in its particular application, secures such a just and fair distribution of the burden as to be within the rule requiring uniformity of taxation.

In Iowa, subsequently enacted statutes (acts 28 Gen. Assem. chap. 29, § 1, Code Supp. 1900, § 92a, and Code Supp. 1902, § 792a) require assessments for public improvements to be proportioned to the special benefits conferred by such improvements upon the property assessed. *Reed v. Cedar Rapids*, 137 Iowa, 107, 111 N. W. 1013; *Des Moines Union R. Co. v. Des Moines*, 140 Iowa, 218, 118 N. W. 293.

And legislation of similar character has not been uncommon in other states.

XII. Assessments that exceed benefits.

The courts generally acknowledge that every assessment imposed to pay for a local improvement which exceeds in amount the value of the benefits, actual or potential, that accrue to the assessed property from such improvement, is, at least to the extent of the excess, void.

While it is but just that special contributions in consideration of special benefits should be made by the recipients of such benefits, such contributions, by the same

justice, ought not to be compelled in any case beyond the benefits conferred. *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2.

In so far as a local improvement exceeds in cost the special benefits it confers upon the several parcels of property within the assessment district, the excess is a benefit to the municipality at large, and must be borne by the general treasury. *Adams v. Shelbyville*, 154 Ind. 407, 40 L.R.A. 707, 77 Am. St. Rep. 484, 57 N. E. 114; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021.

When private property has, in an assessment, once paid the value of the special benefits it has received from a local improvement, its owners stand in the same relation to any residue of the cost of such improvement that may remain unpaid, that other members of the public do, hence all the public must bear the burden of paying such residue by general taxation. *Chamberlain v. Cleveland*, 34 Ohio St. 551.

If one is required to pay a special assessment upon his property, in addition to the general assessment which he pays equally with everyone else, this special assessment cannot properly be founded upon anything but benefits to the property. If he pays his proper proportion of the general tax, and then pays a special assessment greater in amount than the benefit he receives, his entire tax is excessive, unreasonable, and disproportionate. Hence, under a Constitution which requires that taxes shall be proportional and reasonable, a system which imposes upon property, in addition to its share of the general tax, a special assessment without an equivalent in benefit, is unconstitutional. *White v. Gove*, 183 Mass. 333, 67 N. E. 359.

A municipal charter which provides that each lot shall be assessed for the labor and materials necessary to grade the street in front of it, and for its share of the intersections, totally disregards the well-established doctrine that assessments of this character shall not exceed the benefits conferred upon the assessed property. Hence, an assessment pursuant thereto is void. *State v. Van Tassel, Prosecutor, v. Jersey City*, 37 N. J. L. 128.

An assessment for a local street improvement laid upon abutting property cannot exceed the special benefits conferred by the improvement upon such property. *Lincoln v. Street Comrs.* 176 Mass. 210, 57 N. E. 356.

In no case can an assessment for the construction of a sewer be made that exceeds the special benefits received by the estate assessed from the work. *Cheney v. Beverly*, 188 Mass. 81, 74 N. E. 306.

All special assessments upon abutting property along the line of a street, for improvements or service, must be proportioned to the special benefits derived by the assessed property, and if these are exceeded the assessment is illegal. *Corcoran v. Cambridge*, 199 Mass. 5, 18 L.R.A. (N.S.) 187, 85 N. E. 155.

Thus, an assessment of about \$20 upon 28 L.R.A. (N.S.)

a vacant city lot for street sprinkling for a single season is so far in excess of any benefit received as to be invalid unless reduced. *Ibid.*

To be valid, an assessment for the cost of a municipal street improvement upon lands benefited thereby must be confined to the benefits received, and may not exceed them in amount. *State, Delaware, L. & W. R. Co., Prosecutors, v. Passaic*, 37 N. J. L. 137; *State, Graham, Prosecutor, v. Pateron*, 37 N. J. L. 380; *Passaic v. State*, 37 N. J. L. 538.

While the cost of a public improvement may be imposed upon property peculiarly benefited, it never can be imposed beyond the amount of the benefits the improvement confers. *Coster v. Tide Water Co.* 18 N. J. Eq. 54, affirmed in 18 N. J. Eq. 518, 90 Am. Dec. 634.

The cost of a public improvement may be imposed on designated property to the extent to which that property is exceptionally benefited, but any burden beyond that measure is illegal. *State, Agents, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729.

An assessment for a public improvement clearly shown to exceed the benefits conferred by such improvement on the property assessed is void. *State, Prevett, Prosecutor, v. Bayonne*, 63 N. J. L. 202, 42 Atl. 773.

It is now settled law in this court, as it is in the Supreme Court of the United States and in many other courts, it was said in *Dexter v. Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379, that, after the construction of a public improvement, a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits and be proportional to the benefits. The principle involved has been so recently and so fully considered in the cases that it is unnecessary to discuss it at length in this opinion. It was shown in *Weed v. Boston*, 172 Mass. 28, 42 L.R.A. 642, 51 N. E. 204, that, as applied to the facts of that case and of many supposable cases, the requirements of the statutes might produce assessments upon some estates greatly in excess of the benefits received, and, as compared with other estates, greatly disproportionate to the benefits, and for this reason the statute was declared unconstitutional.

We have no doubt of the correctness of our decisions, said the court in *White v. Gove*, supra, which hold that special assessments upon property for the cost of public improvements are in violation of our Constitution if they are in excess of the benefits received.

Any rule or method of assessment prescribed by the legislature for apportioning the cost of a local improvement is to be regarded as subject to the limitation that the assessment made pursuant thereto shall not exceed the special benefits conferred by the improvement upon the property as-

essed. *Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100.

A determination of a rule or principle of general application which will make special assessments upon abutting property for the cost of local improvements reasonable and proportional according to the benefits they confer, by the legislature itself or by a body appointed by the legislature to make the assessments, has actually been upheld by the courts, but if its effect plainly is to make an assessment upon any estate substantially in excess of the benefit received, it is judicially annulled. *Sears v. Boston*, 173 Mass. 71, 43 L.R.A. 834, 53 N. E. 138.

Any exaction by special assessment for a local improvement in excess of the special benefit derived from it by the assessed property is, to the extent of such excess, a taking of property without compensation. *Kirst v. Street Improv. Dist. No. 120*, 86 Ark. 1, 109 S. W. 526.

The special benefit from an improvement to assessed property being the limit to the power and discretion to assess it, when that is clearly exceeded the assessment ceases to be a tax, and becomes a taking of private property for public use without compensation. *Allman v. District of Columbia*, 3 App. D. C. 8.

To compel the owner of property to bear the expense of a public improvement beyond the amount of the peculiar and particular advantage which he derives from such improvement is, to the extent of the excess, to take private property for public use without compensation. *Coster v. Tide Water Co. supra*.

It must be constantly borne in mind, said the court in *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734, that the whole and only foundation for special assessments lies in the special benefits conferred upon the property assessed, and an assessment in excess of the benefits so conferred is a taking of property for the public use without compensation, and is illegal.

If, by an assessment to pay for a local improvement, a sum is exacted in any instance in excess of the special benefits conferred upon the assessed property by such improvement, it is, as to such excess in that instance, private property unjustly taken for public use without compensation to the owner. *Chamberlain v. Cleveland*, 34 Ohio St. 551.

According to the best considered of the modern cases and most reliable authorities, said the court in *Walsh v. Barron*, 61 Ohio St. 15, 76 Am. St. Rep. 354, 55 N. E. 164, an assessment, being sustainable only on the theory of special benefits conferred on the land by the improvement over those received by the general public, is necessarily limited to the value of the benefits so conferred. The value of the entire benefits so conferred may be assessed upon the land for the cost of the improvement. More, however, cannot be exacted without impairing the inviolability of private property guaranteed by the Constitution, or in other, 28 L.R.A.(N.S.)

if not more appropriate, words, confiscating it.

In *Moale v. Baltimore*, 61 Md. 224, it was objected that the ordinance assailed should not be sustained because the front-foot rule of apportionment had been adopted, and that, by the application of that rule in the particular case, a part of the property of the complainants fronting upon the street had been taxed beyond its value, and thus virtually confiscated.

We do not understand, said the court, the bill to present such a case as the argument suggests. If it did, it would raise a very grave question whether the owner could be forced to pay the assessment in excess of the value of his property, or be compelled to submit to a rule which in effect took from him his whole property. The subjection of the possibility of such case illustrates the possible hardship of the rule, but we do not think that this is such a case.

An assessment for the cost of a local improvement apportioned upon property declared by the legislative body to be benefited by such improvement, according to the front-foot rule, is valid in the absence of any showing that the amounts assessed were substantially in excess of any benefits conferred. *McMillan v. Butte*, 30 Mont. 220, 76 Pac. 203.

In the state of New Jersey the record of the assessment proceedings must apparently show affirmatively that the burden laid does not exceed the benefits conferred, or the assessment will not be held valid.

To be valid, an assessment upon lands for the cost and expense of opening a street must affirmatively appear to have been made in proportion to, and not in excess of, the benefits specially conferred by the street opening upon the assessed property. *State, Buess, Prosecutor, v. West Hoboken*, 51 N. J. L. 267, 17 Atl. 110.

An assessment which does not appear affirmatively to be not in excess of the benefits conferred by the work on account of which the assessment is made is invalid. *Poillon v. Rutherford*, 65 N. J. L. 538, 47 Atl. 439.

Under a village charter providing for the assessment of the cost of grading streets upon the abutting lands in proportion to the benefits to be received by each parcel assessed, it is essential to the validity of an assessment that it affirmatively and unequivocally appear that it does not exceed the benefits. *Passaic v. State*, 37 N. J. L. 538; *State, Bogart, Prosecutor, v. Passaic*, 38 N. J. L. 57.

An assessment for the cost of a street improvement which does not affirmatively appear upon the return of the commissioners of assessment to be not greater than the benefits conferred by the improvement upon the assessed property is fatally defective. *State, Hutton, Prosecutor, v. West Orange Twp.* 39 N. J. L. 453.

The Oregon supreme court in *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2, declared itself inclined to believe

that the better doctrine deducible from adjudged cases, including those of the Supreme Court of the United States, is that an assessment for the cost of a local improvement will be upheld wherever it is not patent and obvious, from the nature and location of the property involved, district prescribed, the condition and character of the improvement, cost and relative value of the property to the assessment, that the plant or method adopted has resulted in imposing a burden in substantial excess of the benefits or disproportionate within the district as among the several property owners.

The supreme court of Pennsylvania has decided that it does not affect the validity of an assessment made under authority of law by the front-foot rule upon a city lot, if the lot burdened is a long, narrow strip, and not worth the amount of the assessment against it. *Harrisburg v. McCormick*, 129 Pa. 213, 18 Atl. 126. The courts in other states, however, consider such assessments illegal.

An assessment upon property for the cost of a public improvement that is not only in excess of the benefits conferred on it, but of its value with the benefits added by the improvement, cannot legally be made where the property owner complaining of the charge in no way promoted the improvement. *Walsh v. Barron*, supra.

An assessment for the cost of a street improvement exceeding in amount the total value of the property upon which the charge is laid, where it is established that only a portion of the value of said property can be credited to the improvement, is void. *Marion Bond Co. v. Johnson*, 29 Ind. App. 294, 64 N. E. 626.

When the proof conclusively establishes that the cost of a street improvement is far in excess of the entire value of the property assessed to pay for it after the improvement has been made, the courts properly refuse to enforce a lien upon the property. *Louisville v. Bitzer*, 115 Ky. 359, 61 L.R.A. 434, 73 S. W. 1115.

While the judgment of the legislative municipal authorities is conclusive in all cases of doubt as to the benefits conferred upon property assessed to pay for a street improvement, nevertheless, when the total value of the property taxed after the improvement is made is less, or not more, than the cost of such improvement, there is no room for difference of opinion, and to enforce the assessment is to take from the owner his property without compensation. *Ibid*.

If, in the laying of an assessment for a street improvement, the cost of such improvement is so disproportioned to the value of the estate sought to be improved as that the levy of the assessment amounts virtually to confiscation of the assessed property, the assessment cannot stand as a legal or valid exercise of the power to tax for such improvements. *Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408, s. c. 28 L.R.A. (N.S.)

subsequent appeal, 101 Ga. 697, 29 S. E. 14.

In *Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408, the defendant was the owner of a strip of land 407 feet long and 7 feet wide at one end and 3 feet wide at the other, lying the long way to the street, for the improvement of which it was assessed by the front-foot rule. The highest estimated value of this strip of land after the completion of the improvement was \$260, and the assessment upon it for its *pro rata* share by frontage of the cost of the work was \$721.28. According to these figures, said the court, this assessment, if upheld as legal, would appropriate to the public use entirely the private property of the landowner and in addition leave him in debt to the city in the sum of \$461.28. In these circumstances the defendant applied to the superior court for an injunction to restrain the collection of the assessment. "The exact extent of benefit," continued the court, "necessary to uphold such an assessment is incapable of definition; but it may be asserted with perfect confidence, that the present is one of those extreme cases of such doubtful benefit and probable spoliation as will justify the interference of a court of equity, in order to prevent the citizen from being arbitrarily deprived of his property." The assessment in this case, finally, was altogether annulled. *Vide*, 101 Ga. 697, 29 S. E. 14.

The assessment which the court in *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 67 L.R.A. 408, 106 Am. St. Rep. 311, 101 N. W. 141, 3 A. & E. Ann. Cas. 7, held void because it was so manifestly in gross excess of any possible benefits, and so unequal and unjust as to amount to a virtual confiscation of the property, was one which was made in this peculiar circumstance. The property assessed consisted of three lots originally 33 feet wide and 100 feet long, end to end, of which a strip 25 feet in width had been condemned under the power of eminent domain for a new street, leaving a strip 8 feet in width, 300 feet long, which was assessed according to its frontage on the new street by the front-foot rule, for the construction of a sewer,—a rule which was applied to other property on the street varying in depth from 120 to 175 feet. Each lot property owner, before the assessment was made, had, besides, conveyed away a strip 5 feet wide off one of the lots, so that for 100 feet his property was only 3 feet wide on the line of the street. These facts brought the case within the well-recognized exception that permits and requires assessments made oppressively and in abuse of power to be annulled by the court of equity.

XIII. Equation of benefit and burden to particular pieces of property.

When the power of a municipality to lay assessments for public improvements is

limited to cases where the land of somebody is "especially benefited" by the improvement, and assessments must not materially exceed the benefits conferred, there can be no valid assessment where there are no benefits. *Naugatuck R. Co. v. Waterbury*, 78 Conn. 193, 61 Atl. 474.

The legislature, though vested with the widest discretion to declare the character and extent of a public improvement, to fix the district taxable for it, and to direct the manner in which assessments to meet its cost shall be laid and collected, nevertheless cannot, by its mere declaration, create, where they do not in fact exist, the special and peculiar benefits to the property subjected to assessment which are the fundamental prerequisites of any assessment at all. *Allman v. District of Columbia*, 3 App. D. C. 8.

The term "benefits derived thereby," in a statute authorizing an assessment upon property for the cost of constructing sewers, said the court in *Ithaca v. Babcock*, 72 App. Div. 260, 76 N. Y. Supp. 49, serves to confer the idea of highest equity. The difficulty is not in understanding its meaning, but in formulating any rule for its particular application.

The real difficulty in cases contesting assessments for local improvements, said the court in *Sands v. Richmond*, 31 Gratt. 571, 31 Am. Rep. 742, is not with respect of the power to assess the expense of local improvements upon the property specially benefited thereby, but with respect of the method or basis of apportioning the expense among the property owners adjacent to the improvement.

If, owing to extraordinary facts, the presumption of benefit from a street improvement to property assessed to defray the cost thereof is overthrown, and it appears that the assessment amounts to a confiscation of the assessed property without compensation, the courts will not permit the spoliation to be carried through. *Louisville v. Bitzer*, 115 Ky. 359, 61 L.R.A. 434, 73 S. W. 1115.

If municipal authorities, in assessing property for a local improvement, assess lots shown beyond all question not to be benefited by the improvement, so that the assessment could not be a matter of judgment or difference of opinion, the inevitable inference is that they acted either under a mistake of fact or fraudulently or upon an illegal principle of assessment, and the assessment will be vitiated. *State ex rel. Powell v. District Ct.* 47 Minn. 406, 50 N. W. 476.

When property is not and cannot be benefited by the opening of a street to the extent of the amount assessed upon it, it is the duty of the court to send back their report to the commissioners for opening the street until property can be found sufficiently benefited to defray the expense of the improvement, or until the proceedings shall be discontinued. *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618.

While the statutes of New York (Laws, 28 L.R.A.(N.S.)

1901, chap. 466, §§ 980 et seq.; Laws 1905, chap. 299; Laws 1906, chap. 638) make it the duty of commissioners for a street opening to determine in the first instance whether property upon which an assessment for benefits is to be made will be enhanced in value, and if so, to what extent, their determination is not conclusive, and, when brought under review by the court, such facts must be presented as will enable the court to see that there is a basis for the assessment made. *Re East 136th Street*, 127 App. Div. 672, 111 N. Y. Supp. 916.

At best, and by any mode of assessment adopted, it is possible only to approximate the relative benefit from an improvement to each parcel assessed. *Allen v. Galveston*, 51 Tex. 302.

The market value of assessed property after a street improvement, as compared with its previous value, does not of itself determine whether it has or has not been benefited by the improvement. *McMaken v. Hayes*, 10 Ohio C. C. N. S. 38.

The rule in Kentucky is that, while assessments for street improvements rest upon the basis of benefits or presumed benefits to the property assessed, it is not essential to their validity that actual enhancement in value or other benefits to each owner should be shown. *Ludlow v. Cincinnati Southern R. Co.* 78 Ky. 357; *Louisville v. Bitzer*, 115 Ky. 359, 61 L.R.A. 434, 73 S. W. 1115.

One of the points made in *Whiting v. Townsend*, 57 Cal. 515, against a judgment enforcing an assessment for plankton a street was that the exclusion of offered evidence that the assessed lot had not been increased in value by the work done upon the street was prejudicial error. We are not aware, replied the court, of any principle of law upon which such evidence could have been considered by the court, and in our opinion the authorities referred to by the learned counsel for the appellant fail to establish the proposition contended for by him. The act provided that the expenses incurred by the work should be assessed upon the lots fronting thereon in proportion to frontage at a rate the foot sufficient in the whole to cover the total expense of the work. This is perhaps the most uniform and the least objectionable mode of assessing the property that could be adopted, and the provisions of the statute have been carried out and enforced in cases too numerous to mention.

The validity of a special tax or assessment for a local improvement in a city is not to be tested by individual benefits to specific taxpayers or their property, but by the general purpose of the law under which it is imposed, and the relative ratio of the tax exacted to the value of the property upon which it is levied. *Rich v. Woods*, 118 Ky. 865, 82 S. W. 578.

An assessment for the cost of plankton a street laid upon the abutting lots, each being separately assessed in proportion to its frontage, at such a rate the foot as in the aggregate will defray the total expense

of the work, is valid, fair, uniform, and unobjectionable, regardless of whether any particular piece of the assessed property is or is not benefited. *Whiting v. Townsend*, supra; *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127.

While special assessments, as distinguished from general taxation, rest upon the idea of equivalents,—a compensation proportional to the special benefits derived from the improvement to pay for which they are laid,—it does not follow that there must be in fact such full equivalent in every instance, or that its absence will invalidate the assessment. *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159.

The test of the fairness, justice, or reasonableness of a municipal ordinance imposing a special tax for the construction of a sidewalk, proportioned according to frontage, is in no case the exact equality between burden and benefit. *Job v. Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622.

It is not necessary to the legality and constitutionality of a municipal ordinance assessing the cost of a local street improvement upon abutting property, that such property should be benefited in every possible respect or directly or immediately benefited. *Kelly v. Chadwick*, 104 La. 719, 29 So. 295, affirmed in 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175.

Abutting property assessed for the cost of a sewer cannot escape the burden, upon the ground that the sewer conferred no real benefit upon it. *Connor v. Cincinnati*, 5 Ohio C. D. 199.

A landowner assessed for the cost of a sewer in front of his property cannot evade the payment of the assessment, upon the ground that the sewer was neither a private benefit to him or his property nor necessary to the public. *Michener v. Philadelphia*, 118 Pa. 535, 12 Atl. 174; *Harrisburg v. McCormick*, 129 Pa. 213, 18 Atl. 126.

The real question in assessing abutting property for a street improvement is not whether it is actually benefited by such improvement, but whether there are no potential benefits to accrue. *McMaken v. Hayes*, supra.

A parcel of land derives special benefit from a sewer, whether main or lateral, when it is so situated that connection may be made with such sewer and it can be used as a drain for such parcel, or, in other words, it is the opportunity presented for use which determines the question of special benefit from the construction of a sewer. *Bennett v. Emmetsburg*, 138 Iowa, 67, 115 N. W. 582.

Assuming that an assessment can ever be impeached by parol evidence merely showing that the property received no benefit in fact, still that fact is not to be determined with reference merely to the particular use to which the owner is devoting the property. *State ex rel. Minnesota Transfer R. Co. v. District Ct.* 68 Minn. 242, 71 N. W. 27.

Abutting property cannot be relieved
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from the burden of a street assessment simply because its owner has seen fit to devote it to a use which may not be specially benefited by the local improvement. The benefit is presumed to inure, not to such present use, but to the property itself. *Northern P. R. Co. v. Seattle*, 46 Wash. 674, 12 L.R.A. (N.S.) 121, 123 Am. St. Rep. 955, 91 Pac. 244.

When a landowner seeks to enjoin the enforcement of an assessment upon his land for the construction of a sewer, he assumes the burden of establishing conclusively that no possible benefit from such sewer does or can result to his land. His failure to adduce evidence to establish an utter want of benefit to such land from the improvement is fatal to his success. *Coates v. Nugent*, 76 Kan. 556, 92 Pac. 597.

The circumstance that property assessed for the cost of a street improvement is a railroad right of way which is vacant and unimproved, and is not and cannot be in anywise benefited, does not vitiate the assessment, notwithstanding it is laid in proportion to frontage. *Northern P. R. Co. v. Seattle*, supra.

A railroad right of way used for railroad purposes is subject to a special assessment for a local improvement, and it cannot be said, as a matter of law, that it derives no special or particular benefit from such improvement. *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. 172, 12 L.R.A. (N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 A. & E. Ann. Cas. 630.

If it were true that the property of a railroad company was not, and in the nature of things could not be, benefited at all by a local street improvement, that fact, in and of itself, would not necessarily render the assessment of the property of such company invalid and void. *Northern Indiana R. Co. v. Connelly*, supra.

Land owned by a railroad corporation not required nor used for railroad purposes is subject to assessment for street improvements, and land used for railroad purposes and specially exempted from taxation is not thereby exempt from local assessment, but land used for railroad purposes and exempt from taxation cannot be assessed for a local improvement, which is required to be assessed only upon, and not in excess of, the special benefits conferred by the improvement for which the assessment is laid. *Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417.

It is the benefit offered by a water main in a city street to abutting property, and not the actual use of the water upon such property, that affords ground for assessing it to pay the cost of laying a water main in the street. *Batterman v. New York*, 65 App. Div. 576, 73 N. Y. Supp. 44.

The mere fact that property along the line of a city street in which a water main is laid does not use the water does not entitle the landowner to have an annual assessment on his land, laid on account of it, adjudged unreasonable and void. *Richmond & A. R. Co. v. Lynchburg*, 81 Va. 473.

An ordinance directing the laying of a water main in a public street, and assessing the expense thereof on the abutting property, is not so unreasonable that the courts can declare it void merely because the assessed property is vacant land. *Myers v. Chicago*, 196 Ill. 591, 63 N. E. 1037.

A city is not entitled to a lien upon rural property for the cost of laying a water conduit that is not a service pipe for such property, but a trunk main to carry a supply of water to another section of the city. *Crawford's Estate*, 14 Phila. 323.

Inasmuch as it is essential to the validity of an assessment that it be limited to the actual peculiar benefits which the property burdened by it receives from the work on account of which the assessment is made, a tax for water service or rent upon a vacant lot is invalid. *State, Vreeland, Prosecutor, v. Jersey City*, 43 N. J. L. 135, affirmed in 43 N. J. L. 638.

A statute directing assessors to assess a proportionate part of the cost of a local improvement upon "property adjoining and to be specially benefited" means no more than a designation of the assessable property. It does not mean that adjoining property is to be assessed provided and only when it is specially benefited. *United States ex rel. Henderson v. Edmunds*, 3 Mackey, 142.

In *Stevens v. Port Huron*, 149 Mich. 536, 113 N. W. 291, 12 A. & E. Ann. Cas. 603, the power of the municipality to levy a special assessment upon city lots for the cost of sprinkling the street in front of them was denied, but the court was divided upon the ground of its invalidity. A majority of the court were of the opinion that street sprinkling confers no substantial or permanent benefit upon the abutting property, another member of the court was of the opinion that the city charter did not authorize special assessments to be laid by the front-foot rule without any hearing as to benefits, and two of the judges dissented.

XIV. The front-foot rule in the abstract.

The front-foot rule is really a labor-saving device of assessors. It does not express a principle of taxation, but merely a convenient method of imposing a tax. *Witman v. Reading*, 169 Pa. 375, 32 Atl. 576; *Scranton v. Koehler*, 200 Pa. 126, 49 Atl. 792.

Its use has been repeatedly declared by the courts to be valid and to be open *per se* to no constitutional objections. *Montgomery v. Moore*, 140 Ala. 638, 37 So. 291; *Motz v. Detroit*, 18 Mich. 495; *Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *State ex rel. Stateler v. Reis*, 38 Minn. 371, 38 N. W. 97; *Edwards House Co. v. Jackson*, 91 Miss. 429, 45 So. 14; *Neenan v. Smith*, 60 Mo. 292; *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249; *Thale v. Cincinnati*, 3 Ohio Dec. 131; *Norfolk City v. Ellis*, 26 Gratt. 224.
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And its employment is neither unequal nor unreasonable. *Covington v. Worthington*, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038; *Magee v. Com.* 46 Pa. 358; *Wray v. Pittsburgh*, 46 Pa. 365.

The front-foot rule of assessment furnishes not infrequently as fair an expression of the proportionate benefits received by the construction of a sewer as any other process. *Bassett v. New Haven*, 76 Conn. 70, 55 Atl. 579.

And yet the foot-frontage rule is the imposition of a tax upon special lands without any reference to benefits conferred upon such land, and as a mode of assessment it is purely arbitrary. *Re Klock*, 30 App. Div. 24, 51 N. Y. Supp. 897.

The front-foot rule has been much criticized. The best statement of the objections to its use is probably that of Carpenter, J., in the opinion of the court in *Clapp v. Hartford*, 35 Conn. 66. The rule, said he, ought not to receive the sanction of this court unless it appears to be fair and reasonable. Let us examine the rule and see whether it is reasonable in its operation. It disregards entirely the quantity of land affected. Two lots with equal fronts, the one containing double the number of square feet contained in the other, are benefited in different degrees. The rule taxes them alike. This is not in proportion to the benefit received. We think it reasonable that the quantity should be considered. The rule ignores the value of the lands benefited. Two different lots with the same length of front may differ greatly in value, owing to a difference in location or other causes, and hence be benefited in different degrees. Yet an arbitrary rule like this taxes both alike. We cannot sanction a rule which excludes the value of the property in estimating the tax to be assessed. The rule also excludes from consideration any and all peculiar circumstances which modify the amount of benefit received. One man owns a piece of land extending from one street to another. A sewer in one street sufficiently drains his whole premises. Another sewer is constructed in the other street, from which he derives little or no benefit. This rule imposes the same burden upon him that it does upon an adjoining proprietor, to whom the new sewer is indispensable. It seems to us quite clear that all the circumstances tending either to enhance or diminish the benefit received must be taken into consideration.

While it is undeniable that a method of assessing the cost of a local improvement upon abutting property in proportion to each linear front foot is one not proportioned either to the benefits received or to the value of the estates assessed, but rests upon a purely mathematical computation of frontage, is unequal and may in many instances be unfair, this, in and of itself, does not warrant the conclusion that a statute authorizing the adoption of such a mode is unconstitutional. *Cleveland v. Tripp*, 13 R. I. 50.

But, notwithstanding the front-foot rule

is an arbitrary formula, and the principles stated *ubi supra* appear to be disregarded when it is employed, nevertheless, the courts have acquiesced so long in its use that they refuse longer to listen to attacks upon it standing alone.

An objection urged in *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127, was that the assessment under review had not been levied in proportion to benefits, and hence was beyond the constitutional power of the state and municipal governments. The learned counsel for the appellants, said the court, has submitted an able argument upon this point, evincing thorough research and critical examination of all the leading cases and text writers upon this much debated question; but it comes to this court too late. . . . The objection is that the mode of apportionment, *viz.*, in proportion to frontage on the improvement, . . . is unequal, and not in proportion to benefits, and therefore, unconstitutional. Twenty-four years ago these questions were deliberately considered by this court and decided against the views of the learned counsel for the appellants, in *Emery v. San Francisco Gas Co.* 28 Cal. 345, in which it was decided that the legislature may delegate to municipal corporations authority to assess real property to pay the expenses of local improvements, and to apportion the assessment in proportion to the frontage of the land assessed on the improvements; and that this is a constitutional mode of the exercise by the legislature of the sovereign right of taxation, which does not in any degree depend upon the right of eminent domain, nor involve the taking of private property for public use in the sense of the constitutional prohibition. We are not aware that any of these propositions have been overruled or qualified, but understand that they have been repeatedly affirmed. . . . We are therefore not at liberty to accede to the earnest and respectful request of the learned counsel for appellants to open and reconsider these questions.

In reaffirming the constitutional validity, under the present Constitution of Illinois, of an assessment for a local improvement apportioned according to frontage, Chief Justice Mulkey, who wrote for the court, said in *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261: If this were a new question, the writer, and perhaps other members of the court, would take the view of appellees. But it is not. If it be possible to settle any question by repeated decisions all the same way, the present one surely ought to be regarded as finally and irrevocably settled.

The constitutionality of the front-foot rule of apportionment of local assessments being once more denied in *Wilbur v. Springfield*, 123 Ill. 395, 14 N. E. 871, the court disposed of the question on the ground of *stare decisis*. Had the able and exhaustive argument of counsel, it was said in the opinion, not been pressed before upon the attention of this court, and met, as it must 28 L.R.A.(N.S.)

be again, by the fact that this court in numerous cases has settled the doctrine adversely to the contention of counsel, we should feel called upon to give it greater consideration than we can now do. No further discussion of this contention, however inviting it may be, would be profitable in view of these repeated decisions.

It is contended, said the court in *Chicago & A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077, that an ordinance requiring the cost of improving a street to be assessed upon the abutting real estate in proportion to the frontage of the several parcels of land is obnoxious, if not to the letter, at least to the spirit, of the Constitution, and consequently void. This question has been repeatedly passed upon adversely to this contention.

The front-foot rule of assessment was challenged as unconstitutional because assessments under it were not limited to the benefits conferred, in *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532, but the court replied: "We have heretofore approved of what is known as the 'front-foot rule of assessment,' and have also said that the expense of improving streets has been too long imposed upon abutting property without regard to benefits, to be now called in question." *Deemer*, Ch. J., however, who delivered the opinion of the court, added, on his own account, it may not be out of place to say that if the proposition were an original one, the writer, and perhaps other members of the court as now constituted, would be strongly inclined to the view that such assessments can only be justified on the theory of benefits conferred, and that when there is no benefit, as when the property is taken and a balance yet remains, such balance cannot be collected from the property owner. The proposition seems to be closed, however, and it is better perhaps that it be not disturbed.

Again in *Hackworth v. Ottumwa*, 114 Iowa, 467, 87 N. W. 424, the constitutionality of the statutes prescribing assessments under the front-foot rule was assailed. The validity of these statutes, said the court, has been questioned many times in this court, but we have uniformly held that there is nothing in them which runs counter to the provisions of our fundamental law. In view of these decisions, nothing is to be gained from further discussion, as none of us is prepared to overrule them.

In *Ft. Dodge Electric Light & P. Co. v. Ft. Dodge*, 115 Iowa, 568, 89 N. W. 7, the validity of the entire contract in that case was assailed on the ground that the legislation on which it was based was unconstitutional because it authorized an assessment in accordance with the front-foot rule without regard to benefits. This question, said the court, has recently been discussed, and this court is committed to the doctrine that our statutory method of making such assessments is constitutional. It is not necessary to review the question here.

Methods of assessment by the foot, said

the court in *Louisville v. Bitzer*, 115 Ky. 359, 61 L.R.A. 434, 73 S. W. 1115, have been followed so long, and have been so often approved by this court, that it no longer remains an open question.

In the case of *Smith v. Worcester*, 182 Mass. 232, 59 L.R.A. 728, 65 N. E. 40, the court, according to Holmes, Ch. J., was asked to declare the statute unconstitutional on the ground that the assessment which it purports to authorize may exceed the benefit to the estate assessed, and therefore is bad under the recent decisions. It is admitted, said the chief justice, that the statute has been before the court repeatedly, and has been upheld after argument as to its validity, but it is said that the rule of the recent cases was not understood at the time of these decisions, and that they are no longer authority so far as the present question is concerned. It would be a misfortune, he continued, if we were driven to the conclusion contended for, after the act has stood so long under the shelter of an express decision, and after, as we may presume, very great and costly improvements have been made and probably titles passed in reliance upon the authority which the statutes purport to confer. It is only justice to require an argument from which there is no possible escape before we accept such a result, but we do not suppose the recent decisions of this court to have made such slaughter among the older cases as the petitioner's counsel is inclined to believe. We are of the opinion that the act may be sustained.

It has several times been decided in Michigan, according to the court in *Shelley v. Detroit*, 45 Mich. 431, 8 N. W. 52, that it was competent, under legislation permitting it, to apportion local assessments according to frontage. We might fill pages, said Cooley, J., in delivering the opinion, with the names of cases decided in other states which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such assessments, and to direct an apportionment of the cost by frontage, should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law, on the law of taxation, have collected the cases, and have recognized the principle as settled, and if the question were new in this city, we might think it important to refer to what they say. But the question is not new. It was settled for us thirty years ago.

The question of the right to pave certain streets and to assess abutting property for the cost thereof according to the street frontage was again declared to be settled in Michigan, in the case of *Kalamazoo v. Francoise*, 115 Mich. 554, 73 N. W. 801.

In street paving cases, according to the court in *Cass Farm Co. v. Detroit*, 124 Mich. 433, 83 N. W. 108, the rule has been settled in Michigan by many decisions, that 28 L.R.A. (N.S.)

it is competent for the legislature to authorize the cost of paving streets to be assessed upon the abutting property according to frontage.

According to Norton, J., in the opinion of the court in *Farrar v. St. Louis*, 80 Mo. 379, the liability of lots fronting on a street, the paving of which is authorized, to be charged with the cost of the work according to their frontage, having been so repeatedly asserted, the question is no longer an open one in the state of Missouri, and there is no necessity to examine authorities condemning what is familiarly known as the "front-foot rule."

It is no longer an open question in this state, declared the court again in *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249, whether the assessment of the cost of a sewer upon the property fronting thereon, apportioned in proportion to the frontage on each lot, without considering the amount of actual benefits conferred by the sewer on the lot owners, is a method constitutionally applicable to such subjects. In many well-considered cases it has been held that such charge may, by valid laws or authorized ordinances, be levied upon the abutting property having the benefit of the improvement, in proportion to its frontage thereon, as well as by any other approved method.

In *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014, it was argued by the complaining property owner that the front-foot rule of assessment did not properly apply to the side of his lot as it had been assessed. This, said the court in reply, is an old subject on which the law is settled to the effect that where the side of a lot abuts upon the improvement, the lot is properly assessable therefor according to that frontage. Where the language of the law is in substance as it is here, it is unnecessary to go over the argument of the subject now.

The constitutionality of provisions in municipal charters providing for the construction of streets, alleys, or sewers, and the assessing of the cost of such construction proportionately upon all property abutting the improvement or within the established benefit district, either according to the front-foot rule or according to the area rule, declared the court in *Prior v. Buehler & C. Constr. Co.* 170 Mo. 439, 71 S. W. 205, is no longer open to debate.

In *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163, it was again contended that an assessment for the cost of paving an alley, laid upon the abutting property according to the front-foot rule, violated the Federal and state Constitutions; but as to this the court deemed it only necessary to say that the constitutionality of this method of assessing benefits for an improvement against abutting property is no longer an open question.

One of the defenses set up in *St. Charles ex rel. Budd v. Deemar*, 174 Mo. 122, 73 S. W. 469, was that a tax was null and void because the statute by the authority of which it was imposed, and which provided for the apportionment of the cost of

the improvement for which it was imposed by the front-foot rule, was unconstitutional. That this defense is untenable is now finally and conclusively settled, and no more cases ought to be brought here questioning the constitutionality of this method of assessing the cost of such improvements.

In *Barber Asphalt Paving Co. v. Munn*, 185 Mo. 552, 83 S. W. 1002, an assessment for the cost of street paving to be kept in condition by the contractor for five years was challenged as void, because made under a provision in the municipal charter apportioning the burden against abutting lands according to the front-foot rule. That provision in the charter, said the court, was carefully considered and held to be constitutional in *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 54 L.R.A. 492, 58 S. W. 934, and reaffirmed by the Supreme Court of the United States in the same case (181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625), and we must decline further to consider that question.

The cases of *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289, and *Ernst v. Kukle*, 5 Ohio St. 520, were both cited in *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159, and declared to establish the proposition that a special assessment for a local public improvement may be made upon abutting property in proportion to the feet front as well as ad valorem, and to establish the proposition that an assessment in proportion to the feet front is not unconstitutional. It was added that the two cases cited were reconsidered and affirmed in *Reeves v. Wood County*, 8 Ohio St. 333, and other cases.

It is well settled, said the court in *Chamberlain v. Cleveland*, 34 Ohio St. 551, that assessments for street improvements apportioned by frontage, when properly made by municipal corporations, are constitutional. This is the first case in this court in which the assessment was made on the principle of special benefits without reference to frontage.

Of an act of the legislature of the state of Pennsylvania empowering the city of Allegheny to pave and grade its streets, and, for the purpose of defraying the cost and expenses of so doing, levying a special tax to be equally assessed upon the property abutting on the improved streets in proportion to the feet front, the court, in *Schenley v. Allegheny*, 25 Pa. 123, said the legislation complained of here is of the character of much that has prevailed in Pennsylvania without complaint, which has been often sanctioned by judicial tribunals, and which is made indispensable by the growth and prosperity of towns and cities. It is a fair and legitimate mode of taxation, because it imposes the burdens exactly where the benefits are conferred, and its constitutionality is unquestionable.

Whatever doubt might have been originally entertained of an assessment according to the frontage of property on a public street 28 L.R.A.(N.S.)

to pay for its opening, grading, and paving, as a substitute for an actual assessment by jurors or assessors under oath, it has been, said the court in *Re Washington Ave.* 69 Pa. 352, 8 Am. Rep. 255, so often sanctioned by decision, it would ill become us now to unsettle its foundation by disputing its principle.

It is settled beyond all question, said the court in the *Parker's Appeal*, 163 Pa. 433, 32 Atl. 574, by a line of cases of which it is only necessary to mention *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615, and *Re Washington Ave. supra*, that local assessments are special and individual taxation, sustainable only on the basis of special and individual benefit, and the limit of the benefit is the limit of the taxing power.

The right to adopt the front-foot rule of assessing the cost of street paving in Pennsylvania, declared the court in *Harrisburg v. McPherran*, 200 Pa. 343, 40 Atl. 988, must be regarded as definitely settled.

After referring to an objection that a local assessment for the cost of a local improvement conferring special benefits on the property assessed was in conflict with a constitutional provision requiring equality and uniformity of taxation, and the collection of taxes under general laws, the court, in *Greensburg v. Laird*, 8 Pa. Co. Ct. 608, said we do not consider the liens authorized by the statute come under the band of a constitutional provision requiring uniformity. We will not tarry to argue this objection for it is settled by authority.

In *Whittaker v. Deadwood* (S. D.) 122 N. W. 590, the front-foot rule for computing the amount of the special assessment there involved was attacked as unequal and unjust. The court, however, disposed of this objection by simply saying the front-foot rule is established by the statute of this state (Rev. Pol. Code, § 204), and the following of any other rule of computation would be invalid. The constitutionality of the front-foot rule has been many times assailed in other jurisdictions, and the great weight of authority seems to be in favor of its validity. The identical statute exists in North Dakota, and was assailed in *Rolph v. Fargo*, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242, and again in *Webster v. Fargo*, 9 N. D. 208, 56 L.R.A. 156, 82 N. W. 732, and by able opinions held constitutional.

The validity and constitutionality of special assessments for local improvements, according to the court in *Sands v. Richmond*, 31 Gratt. 571, 31 Am. Rep. 742, are sustained by an array of authority and force of reasoning which ought to be decisive of the question.

It must be held to be a settled principle in this state, said the court in *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230, that assessments by the front-foot rule of lots adjacent to a street to be improved, for the cost of the improvement, when made under the authority of public law, are valid and bind-

ing, and whatever remedy is to be applied, if any, must come from the lawmaking power, and not from the courts.

XV. Squaring the front-foot rule with the rule of benefits.

The efforts, not to say struggles, of the courts, to escape nullifying assessments imposed by the arbitrary rule of frontage, and to reconcile the use of that rule with the doctrine of equivalent benefits, have been numerous and long continued. They have developed a general theory of consistency which has been made to fit a majority of the cases.

The courts, it was said in *Cleveland v. Tripp*, 13 R. I. 50, have sustained assessments by the front-foot rule generally upon two grounds: First, that they are a species of taxation, and the power to tax cannot be limited by judicial construction except where it clearly violates the Constitution; and, secondly, that such assessments, although theoretically more unequal than assessments in the ratio of benefits received or than ad valorem, assessments, are nevertheless, in practical operation, a fair substitute for either of them in compact parts of large towns or cities.

After, stating such grounds, the court in that case confessed that the reasons were not entirely convincing, but, reinforced as they were by many precedents, they were sufficient to prevent the courts from nullifying an unconstitutional assessment by the front-foot rule.

Assessment by the front-foot rule has been declared to be but a rule of thumb, resorted to for measuring special benefits upon which the whole right to assess rests. *Fridman v. Norwood*, 25 Ohio C. C. 258.

An assessment according to the front-foot rule is merely a substitute for an actual assessment according to benefits. *Seely v. Pittsburgh*, 82 Pa. 300, 22 Am. Rep. 760.

While assessments of special taxes according to an estimate of the particular benefits to each lot assessed, conformably to a measurement of the amount of frontage upon a street or sewer, or the measurement of the area of the lots, or according to a valuation of the property, have all been sustained, the only ground upon which they can properly rest is that they are methods reasonably determined upon for the purpose of ascertaining the benefits actually received by the different states upon which the assessments are to be laid. *Sears v. Boston*, 173 Mass. 71, 43 L.R.A. 834, 53 N. E. 138.

When the assessors for the cost of a local improvement in a municipality are required by statute to assess property upon the basis of the benefits peculiar to it resulting from the improvement, they may, when the situation of all the parcels of property with respect of the improvement which are assessed is substantially the same, be warranted in apportioning the assessment according to the frontage, but the basis of the assessment must still be the benefits peculiar to the

property. *Fraser v. Pittsburg*, 41 Pa. Super. Ct. 103.

The front-foot rule of assessment is not inherently and necessarily vicious, neither is an assessment made by applying it necessarily invalid even though commanded to be made in proportion to benefits conferred upon the property assessed. The front-foot rule is not invariably and inevitably inconsistent with an assessment according to benefits; it may or may not be so in varying circumstances. If benefits are fairly measured by frontage, if the assessment does not exceed such benefits, if it is not unjust, unequal, or unreasonable, the fact that in the given case the front-foot rule was employed in making it affords no ground for vacating the assessment. *English v. Arizona*, 214 U. S. 359, 53 L. ed. 1030, 20 Sup. Ct. Rep. 658; *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687; *Bassett v. New Haven*, 76 Conn. 70, 55 Atl. 579; *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741; *Peru v. Bartels*, 214 Ill. 515, 73 N. E. 755; *East St. Louis v. Illinois C. R. Co.* 238 Ill. 296, 87 N. E. 407; *Reed v. Cedar Rapids*, 137 Iowa, 107, 111 N. W. 1013; *O'Connell v. First Parish*, 204 Mass. 118, 90 N. E. 580; *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410; *State, Sigler, Prosecutor, v. Fuller*, 34 N. J. L. 227; *State, Padney, Prosecutor, v. Passaic*, 37 N. J. L. 65; *State, Simmons, Prosecutor, v. Passaic*, 42 N. J. L. 524; *State, Raymond, Prosecutor, v. Rutherford*, 55 N. J. L. 441, 27 Atl. 172; *DeWitt v. Elizabeth*, 56 N. J. L. 119, 27 Atl. 801; *Long Branch Police Sanitary & Improv. Commission v. Dobbins*, 61 N. J. L. 659, 40 Atl. 599, reversing 59 N. J. L. 146, 36 Atl. 482; *Dooling v. Ocean City*, 67 N. J. L. 215, 50 Atl. 621; *Donovan v. Oswego*, 90 App. Div. 307, 86 N. Y. Supp. 155, reversing, 39 Misc. 291, 79 N. Y. Supp. 562; *Schroder v. Overman*, 61 Ohio St. 1, 47 L.R.A. 156, 76 Am. St. Rep. 354, 55 N. E. 158; *Shoemaker v. Cincinnati*, 68 Ohio St. 603, 61 N. E. 1; *Queen City Foundry Co. v. Cincinnati*, 8 Ohio N. P. 167; *Taylor v. Wapakoneta*, 26 Ohio C. C. 285; *Taylor v. Boyd*, 63 Tex. 533; *Adams v. Fisher*, 63 Tex. 651, and on second appeal, 75 Tex. 657, 6 S. W. 772; *Texas Transp. Co. v. Boyd*, 67 Tex. 153, 2 S. W. 364; *Harrell v. Storrie* (Tex. Civ. App.) 47 S. W. 838; *Adams v. Roanoke*, 102 Va. 53, 45 S. E. 881; *Hayes v. Douglas County*, 92 Wis. 429, 31 L.R.A. 213, 53 Am. St. Rep. 926, 65 N. W. 482.

To esteem the frontage principle of assessment as necessarily wrong in all cases is as great an error as to assume it right in all cases. *Jersey City v. State*, 30 N. J. L. 521.

That the general distribution of an assessment among the parcels of property subjected thereto is in a ratio of their frontage does not raise a presumption that the assessment is necessarily wrong. *Kirtland v. Parker*, 76 N. J. L. 217, 68 Atl. 913.

An objection that property assessed for a local improvement was assessed according to its frontage is not good unless it is shown that the property does not bear the

same ratio to the total benefit conferred by the improvement, as the tax assessed against it bears to the total tax. *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410.

The mere fact that property in a municipality is assessed according to its frontage for the cost of a local improvement, under a statute which gives the corporation the power to levy such an assessment only in proportion to the benefits upon the property benefited, is not alone conclusive against the validity of the assessment, for it may be possible for property to be really benefited in proportion to its extent along the street. *Elma v. Carney*, 9 Wash. 466, 37 Pac. 707.

There is no presumption that the front-foot rule of assessment is wrong, for it may be right, and the burden of establishing that it is wrong in any particular case is upon the landowner. *Ithaca v. Babcock*, 72 App. Div. 260, 76 N. Y. Supp. 49, affirming 36 Misc. 49, 72 N. Y. Supp. 519.

It is to be presumed, when no evidence is adduced to the contrary, that a municipal council in adopting and approving an assessment for the cost of a street improvement, laid upon the abutting property according to its frontage upon the line of the work, considered and determined that the benefits conferred upon the assessed property by the improvement were in proportion to its frontage. *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930.

It will be presumed, in the absence of evidence to the contrary, that property abutting upon a street improvement, which is assessed in proportion to its frontage, was benefited by the improvement to the extent of the assessment. *Brown v. Central Bermudez Co.* 162 Ind. 452, 69 N. E. 150.

In order for a landowner who complains of an assessment upon his premises for the construction of a sewer in a public way, to establish its invalidity upon the ground that it was apportioned according to frontage, he must affirmatively prove that the assessment exceeded or was disproportionate to the special benefits conferred by the work. *O'Connell v. First Parish*, supra.

The cost of a street improvement may be apportioned tentatively according to the front-foot rule upon the abutting property on the line of the work, and assessed accordingly, provided due opportunity is given to the property owner to be heard upon the question of special benefits, and for correction of the assessment, if the facts concerning the special benefits are found to warrant such action. *Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100.

An error in computing the frontage of property assessed for the construction of a sewer upon the basis of the front-foot rule will not affect the validity of the assessment when it appears affirmatively that the sum assessed upon the particular parcel is a fair and equitable share of the cost of the work chargeable to the property. *Morse v. Buffalo*, 35 Hun, 613.

If a special tax is levied for a local improvement according to frontage, then, although the distribution of burden as be-

tween different lots is not on a basis of proportionate shares, the tax is still valid if within the limits of benefits conferred. *East St. Louis v. Illinois C. R. Co.* 238 Ill. 296, 87 N. E. 407.

An assessment for the cost of a storm sewer upon all the real estate in a special assessment district, in proportion as the area of each parcel in the district is to the area of all the land, save public highways, in such district, is valid when such method approximately results in assessing the several parcels in proportion to the special benefits accruing to them by such sewer. *Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114.

The foundation of the front-foot rule of assessment is not in uniformity of value, but in uniformity of benefit. *Witman v. Reading*, 169 Pa. 375, 32 Atl. 576; *Scranton v. Koehler*, 200 Pa. 126, 49 Atl. 792.

If the physical conditions of property assessed for grading or paving a street are such that the benefits to the different lots are not approximately equal, but vary greatly in amount, then an assessment according to the front-foot plan is necessarily unequal and unjust, and cannot stand. *White v. Tacoma*, 109 Fed. 32.

A uniform assessment arbitrarily imposed by the lot on all property affected in the same way by a public improvement is void if the advantages to the several lots from the improvement are varied and unequal. *State, Frevert, Prosecutor, v. Bayonne*, 63 N. J. L. 202, 42 Atl. 773.

An assessment imposed upon abutting property for the cost of constructing a sidewalk in a street, and the grading of the street for the purpose, laid in the proportion of the entire cost of the work which the frontage of the lot assessed bears to the entire frontage upon the line of such work, is invalid and void when the amount of the burden is more than ten times the cost of the improvement in front of the property assessed, and most of the work has been done by the property owner himself; since such a state of facts discloses that the result of the application of the front-foot rule was unnecessarily and inevitably unfair and unequal. *State, Simmons, Prosecutor, v. Passaic*, 42 N. J. L. 524.

When a sewer has been constructed in a strip of private land taken for the purpose, and the cost thereof assessed according to the frontage of the lots on the strip taken, and the assessments are grossly disproportionate to the benefits received by such lots from the construction of the sewer, and the lots assessed vary greatly in shape, size, depth, and value, method of allowing the assessments in such case is unreasonable, unjust, and disproportionate, and a statute which authorizes it to be employed is unconstitutional. *Weed v. Boston*, 172 Mass. 28, 42 L.R.A. 642, 51 N. E. 204.

This case was followed in *Dexter v. Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379; *White v. Gove*, 183 Mass. 333, 67 N. E. 359; *Harwood v. Street Comrs.* 183 Mass. 348, 67 N. E. 362.

When it appears upon the face of the

record of the proceedings to assess property for the cost of construction of a sewer, that the assessment had been made by the front-foot rule, and is manifestly unjust, unequal, and erroneous, and in no sense proportional to the benefits conferred by the sewer, the assessment should be annulled. *People ex rel. Connelly v. Reis*, 109 App. Div. 748, 96 N. Y. Supp. 597.

While it may be conceded that lots similarly situated on a street through which a sewer is constructed may, in many instances, be benefited in proportion to their respective frontage upon such street, whether vacant or improved, yet it cannot be supposed that very different classes of property, valuable for many and different purposes, scattered throughout a wide area in which a system of sewers is constructed, and all of which have been assessed at a fixed and equal rate per front foot, have in every instance been equally benefited in proportion to frontage from the construction of the sewer system. *Ibid.*

An assessment by the front-foot rule for the cost of a local improvement, although laid only upon property actually benefited to some extent by such improvement, will be set aside where the quantum of benefits received by some of the properties assessed is very greatly in excess of that derived by other parcels. *People ex rel. Lake Shore & M. S. R. Co. v. Buffalo*, 57 Misc. 17, 107 N. Y. Supp. 281.

While a front-foot rule of assessment required to be made according to the benefits conferred by a local improvement is not necessarily improper when the several parcels assessed are equally benefited, and substantially equal in condition and value, it cannot be sustained when there is great disproportion in value and in the benefits they receive by the improvement. *Ibid.*

An assessment for a street improvement, imposed upon abutting property without regard to its depth or comparative value before and after the improvement, when the statute requires it to be made according and in proportion to benefits, is invalid. *Nulsen v. Cincinnati*, 27 Ohio C. C. 383; *Kummer v. Cincinnati*, 27 Ohio C. C. 683.

An assessment for the cost of a street improvement upon various parcels of land abutting on the street, ad valorem, in disregard of the frontage and depth of the parcels, which necessarily affect the values, and resulting in the burdening of some parcels with a charge several times as much for each foot front as other parcels on the line of the work, is void for inequality. *Howell v. Tacoma*, 3 Wash. 711, 28 Am. St. Rep. 83, 29 Pac. 447; *Griggs v. Tacoma*, 3 Wash. 785, 29 Pac. 449.

The moderate variation in the percentage of the different classes of property assessed ad valorem per foot, making the proportion of assessment greater upon the estates of less value per foot, and somewhat less upon those of greater value, does not show the entire scheme to be so unreasonable, or to operate so unjustly, that it can be judicially declared to be fully invalid. *Butler v. Worcester*, 112 Mass. 541.
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Slight physical differences in the situation and state of parcels of property abutting upon a street, and assessed for the cost of macadamizing it, do not impeach the fairness and equality of an assessment according to the front-foot rule for the cost of the improvement, property being in most respects and substantially all of the same general character. *Re Phelps*, 110 App. Div. 69, 96 N. Y. Supp. 862.

The mere fact that city lots assessed for the cost of a local improvement in front of them according to the front-foot rule differ somewhat in situation, and in depth, and in the topography of their surfaces, is not in itself patent to invalidate the assessment. *McKeesport v. Busch*, 166 Pa. 46, 31 Atl. 49.

An assessment for a local improvement, laid upon adjoining property according to the front-foot rule, is not open to the objection of inequality and want of uniformity, when the lots upon which it is laid are substantially of the same width of front, although they may vary greatly in depth. *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447.

Notwithstanding lots assessed along the line of a street pavement according to the front-foot rule, to meet the cost of such pavement, vary considerably in depth, the assessment is not invalid, when each lot is specially benefited to the amount or in excess of its assessment, and when those least in depth are yet deep enough for building purposes and practically are as much benefited as the deeper ones the rear portions of which are benefited only slightly or not at all. *Bowditch v. New Haven*, 40 Conn. 503.

If it affirmatively appears that city lots of equal frontage upon the line of a sewer, assessed in equal amounts for the cost of such sewer, have received equal benefits from such sewer, the assessment is valid, notwithstanding such lots are unequal in depth. *State, Van Solingen, Prosecutor, v. Harrison*, 39 N. J. L. 51.

The assessments in controversy in *Bacon v. Savannah*, 86 Ga. 301, 12 S. E. 580, s. c. on subsequent appeal, 91 Ga. 500, 17 S. E. 749, had been laid according to the front-foot rule of apportionment, and were finally vacated, but upon grounds unrelated to that rule. In the first report, indeed, the court appeared, if not favorable to the rule, at least of the opinion that its adoption and application afforded no reason to invalidate the assessments. The court, in substance and effect, there held that a local assessment for a part of the cost of paving, grading, and otherwise improving a city street, laid upon the abutting property in proportion to its frontage upon the line of the improvement, is valid under a charter authorizing, and a municipal ordinance prescribing, apportionments of such assessments according to the lineal frontage of the assessed property, and without any reference to the depth, superficial area, or estimated value of the several parcels subjected to the burden.

When the assessed property along the line

of a local improvement consists of lots substantially equal in depth, and there is nothing in the nature and circumstances of the particular case to indicate that an assessment in proportion to the frontage of the lots will work manifest injustice, such a mode of assessment will be valid. *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899; approved in *Denver v. Knowles*, 17 Colo. 204, 17 L.R.A. 135, 30 Pac. 1041.

An assessment upon abutting property according to its frontage, for the cost of opening, grading, guttering, and curbing a street, may well be in proportion to the benefits conferred upon the property, as every landowner upon the line of the street may be equally benefited by the improvements. *State, Pudney, Prosecutor, v. Passaic*, 37 N. J. L. 65.

The foot-frontage rule of assessment for local improvements may be the most just and equitable of any that can be adopted in certain cases, but that is true only where the property has been platted into lots of equal depth, and where all are unimproved or improved alike, and where all can derive equal advantages from the improvement. *Re Klock*, 30 App. Div. 24, 51 N. Y. Supp. 897.

An assessment by the front-foot rule is permissible only as a convenient approximation where the assessed property is all substantially of the defined kind, and does not differ very much in the value of the parcels. *Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760.

To measure the front of all abutting properties along the line of a street or highway improvement, and divide the cost of making such improvement by an equal charge per front foot upon each parcel, is not an assessment of advantages, but simply an arbitrary impost. Therefore, to be just and equally fair to each landowner, all such owners must stand in like or in reasonably equal circumstances; otherwise the burden is an exaction, and not a fair assessment. *Ibid.*

While the frontage rule of assessment may be conceded to be a legal mode of apportioning the burden of a public improvement upon property thereby benefited, when such property is substantially alike in situation, size, and value, it cannot be used as an arbitrary mode of casting public burden upon the property of individuals. *Ibid.*

The system of assessment by the front-foot rule is only sustained on the ground that in cities and large towns, where population is dense and lots are small, it affords a fairly approximate and just measure of the benefits conferred upon the property assessed by the improvement for which the charge is made. *McKeesport v. Soles*, 165 Pa. 628, 30 Atl. 1019.

Benefit to property from an improvement to pay for which it is assessed is not always, perhaps not even generally, dependent upon value or in any fixed ratio to it. Properties in the same general situation are presumed to get the same general benefit from a common improvement, and, as this

benefit is assessed exclusively on property abutting on the line of the improvement, it is presumed to be measured fairly by the foot frontage of the property on that line, although values may be and usually are various, depending on other circumstances, such as the depth of the lots, buildings erected on them, use to which they are put, and their proximity to business centers. *Witman v. Reading*, 169 Pa. 375, 32 Atl. 576; *Scranton v. Koehler*, 200 Pa. 126, 49 Atl. 792.

Upon reason and principles of natural justice, said the court in *Norfolk City v. Ellis*, 26 Gratt. 224, an assessment for grading and paving a city street upon abutting lots in proportion to foot frontage may be sustained as an apportionment of the burden according to the benefit, as nearly, perhaps, as any other method that can be adopted. That it may in some instances operate harshly, and even oppressively, is conceded; but this is true of all forms of taxation.

As a rule property along the line of a street improvement will be equally benefited by the improvement, and will be foot by foot of equal value, and therefore may be equally assessed according to frontage, under a Constitution requiring equality and uniformity in the rate of assessment and taxation. *Palmer v. Stumph*, 29 Ind. 339.

When a street is graded or paved, the improvement is generally actually beneficial to the property abutting upon it, and the benefit is permanent, so that the owner cannot well say that the cost of the improvement, distributed according to the per front-foot plan, exceeds the benefits. *White v. Tacoma*, 109 Fed. 32.

When an improvement is a permanent one, equally useful to every portion of the abutting property, the assessment of the cost thereof by the foot-frontage rule is a fair and equitable method of apportionment. *Ithaca v. Babcock*, 72 App. Div. 260, 76 N. Y. Supp. 49, affirming 36 Misc. 49, 72 N. Y. Supp. 519.

If the general conditions and the benefits that apply to all the property fronting upon a street improvement are substantially the same, the result of an assessment made in proportion to the benefits is necessarily the same as if it were made under the front-foot rule. *Hedge v. Des Moines*, 141 Iowa, 4, 119 N. W. 276.

Parcels of property assessed for the cost of constructing a village sewer, which do not substantially differ in depth, value, and situation, may, if the assessing officers so determine, lawfully be assessed according to the front-foot rule for the cost of constructing such sewer, upon the theory that each parcel is equally benefited by the work. *Dennis v. Fairport*, 11 Misc. 199, 32 N. Y. Supp. 97.

Where lots are substantially alike, except as to the number of lineal feet fronting upon the street improved, with practically the same facilities for enjoying the improvement, and where each is unimproved or im-

proved substantially alike, the foot frontage upon the street may measure the benefits derived by each owner from its improvement; but, unless such is the case, an assessment by the front-foot rule will not be valid where the statute is mandatory in directing it to be made in proportion to benefits. *Re Klock*, *supra*.

Assessing officers commanded to assess the cost of a local improvement upon property benefited thereby, and in proportion to the amount of benefits derived from such improvement, are permitted to adopt the front-foot rule of assessment, where the several parcels of property assessed are substantially uniform in value and are each equally benefited by the improvement. *Re Wheeler*, 39 Misc. 484, 80 N. Y. Supp. 204.

The front-foot rule of assessment for sprinkling a city street will be sustained when it is not established that, in its application to the property assessed, it is not an approximately accurate method of determining benefits conferred upon the property charged. *Sears v. Boston*, 173 Mass. 71, 43 L.R.A. 834, 53 N. E. 138.

Every owner of property situated on a street where improvements are made derives peculiar benefits from such improvements in front of his property, distinct from that enjoyed in common by the community; and when a tax applies equally upon all property of the description assessed, there is no valid objection to it, especially under a Constitution which does not require taxes to be assessed *ad valorem*, nor restrict in any wise the legislative power to levy specific taxes. *Smith v. Aberdeen*, 25 Miss. 458.

The weight of authority, according to the Massachusetts supreme court, is that an assessment according to the frontage of lots abutting upon a street or public way in a city sometimes may be a reasonable mode of assessing the cost of constructing a sewer in such street or way, because of the similarity of the lots. *Weed v. Boston*, 172 Mass. 28, 42 L.R.A. 642, 51 N. E. 204; *O'Connell v. First Parish*, 204 Mass. 118, 90 N. E. 580.

The special and peculiar benefits to abutting property afforded by a water main in a city street, for which an assessment is laid, may properly be measured by frontage. *Batterman v. New York*, 65 App. Div. 576, 73 N. Y. Supp. 44.

While assessments for the cost of local improvements laid upon the property thereby benefited must be apportioned fairly and equitably, and in proportion to the benefits conferred, an apportionment according to the front-foot rule is not necessarily objectionable, if the conditions are such that the benefits conferred are substantially the same with respect of all the property assessed to pay for the work. *Raleigh v. Peace*, 110 N. C. 32, 17 L.R.A. 330, 14 S. E. 521; *Hilliard v. Asheville*, 118 N. C. 845, 24 S. E. 738; *Kinston v. Loftin*, 140 N. C. 255, 62 S. E. 1069.

The front-foot rule of assessing the cost of street paving is not to be considered as 28 L.R.A.(N.S.)

an assessment irrespective of benefits conferred, when it is applied to the paving of a street in the built-up part of a city. *Harrisburg v. McPherran*, 200 Pa. 343, 49 Atl. 988.

An assessment on abutting property which is urban and uniform in character, for improving or paving for the first time a city street, by the front-foot rule, is valid. *Franklin v. Hancock*, 204 Pa. 110, 53 Atl. 644.

Property in a city or other densely populated country may with propriety be assessed for the cost of a local improvement according to the front-foot rule, as an approximation to the measure of benefits conferred by the improvement. *Anderson v. Lower Merion Twp.* 217 Pa. 369, 66 Atl. 1115.

The frontage mode of equal assessment according to the front foot upon city property, for the cost of a street pavement, is a reasonable exercise of the taxing power according to the benefits received. *Shoemaker v. Harrisburg*, 4 Pa. Co. Ct. 86.

The front-foot rule of assessment for the cost of paving, grading, or otherwise improving a street or highway, may be applied in cities and large towns, where the density of population along the way and the small size of the lots make it a reasonable approximate method of estimating the benefits. *Wilson v. Allegheny*, 25 Pittsb. L. J. N. S. 15.

An assessment for paving and curbing a street in Philadelphia, except where the assessed property is rural land, is to be apportioned according to frontage. *Stewart v. Philadelphia*, 3 Sadler (Pa.) 137, 7 Atl. 192; *Allentown v. Adams*, 5 Sadler (Pa.) 253, 8 Atl. 430.

The front-foot rule of assessment for local improvement, said the court in *Greensburg v. Laird*, 8 Pa. Co. Ct. 608, in the built-up portion of cities and large towns, has been recognized in a beadroll of cases, and for us to decide against it would be to defy *stare decisis*.

Where the parcels of land in a town or city are small, of uniform depth, and similarly situated, an assessment upon them of the cost of a local improvement, on the basis of frontage, may be a convenient substitute for an estimate of the benefits conferred, and not result in injustice or inequality of burden, and therefore be valid. *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2.

An assessment of damages and of corresponding benefits consequent on a widening of a street in a residential section of a city, for the purpose of making a park way along its sides, made upon the front-foot rule of apportionment, where there are no substantial differences in the values and uses of the property abutting on the street, is valid and *prima facie* fair and equitable. *Re Clinton Ave.* 106 App. Div. 31, 94 N. Y. Supp. 146.

The fairness of the rule of charging benefits by frontage is apparent as a practical adjustment of proportional benefits,

when it is applied to cities and large towns, where the density of population along the streets and the small size of the lots make it a reasonable mode of arriving at a just result. *Re Washington Ave.* 69 Pa. 352, 8 Am. Rep. 255.

The Michigan courts, in deciding that assessments for paving may constitutionally be made in proportion to the frontage of the lots along the improvement, rest upon the idea that underlies statutes enacted for this purpose, that the benefits to the abutting lots are generally proportioned to the length of their respective fronts, and that commonly this principle of apportionment is more just than any other. *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52.

That an assessment for a street improvement was in point of fact laid upon the abutting property according to frontage does not establish that it was made arbitrarily, and not in accordance with resulting benefits. *Brown v. Central Bermudez Co.* 162 Ind. 452, 69 N. E. 150.

When the front-foot rule of apportionment does not work inequality, its adoption, of itself, affords no sufficient ground for vacating an assessment. *State, Sigler, Prosecutor, v. Fuller*, 34 N. J. L. 227.

An assessment which is in fact apportioned according to the benefits received by the improvement for which it is made, upon the lots assessed, is not vitiated by being also apportioned according to frontage. *State, Van Solingen, Prosecutor, v. Harrison*, 39 N. J. L. 51.

The mere fact that an assessment for an improvement in a city for paving a street, and constructing water, gas, and sewer connections, was apportioned among the abutting owners according to the lineal foot frontage of their several lots, does not establish that the method chosen to make the apportionment was erroneous. *Donovan v. Oswego*, 90 App. Div. 397, 86 N. Y. Supp. 155.

A municipal ordinance directing cost of a street improvement to be assessed per lineal foot against the abutting real estate does not prevent the assessment being made according to resulting benefits. *Pittsburgh, C. C. & St. L. R. Co. v. Tabor*, 168 Ind. 419, 77 N. E. 740, 11 A. & E. Ann. Cas. 808.

If property assessed for the cost of a local improvement is in fact benefited by such improvement, and the assessment laid upon it is not shown to be unfair, inequitable, or unjust, or grossly disproportioned to the benefits received by the assessed property from the improvement, then the mere fact that it was laid in accordance with the front-foot rule, without any direct or explicit consideration of the question of benefits, will not invalidate it. *Schroder v. Overman*, 61 Ohio St. 1, 47 L.R.A. 156, 55 N. E. 158.

An assessment for a street improvement made by the front-foot rule cannot be said to have been laid arbitrarily without re- 28 L.R.A.(N.S.)

gard to the benefits resulting from the improvement, in the absence of any proof to that effect. *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930.

An assessment by the front-foot rule for the cost of repaving a city street is unobjectionable in the absence of any proof that the results were unfair, unjust, and constituted an abuse of power. *Alberger v. Baltimore*, 64 Md. 1, 20 Atl. 988.

When it nowhere appears in the record that a front-foot basis of an assessment upon property, for the cost of constructing a sewer in a public way, is not proportionate or unreasonable or works any injustice the invalidity is not made out. *O'Connell v. First Parish*, 204 Mass. 118, 90 N. E. 580.

The front-foot rule of apportionment of an assessment for a street improvement laid upon abutting property, required by law to be in proportion to the benefits conferred by the improvement upon the assessed property, may be resorted to when there are no other facts to show that the result of the use of the front-foot rule is disproportionate and contrary to the amount of benefits. *Des Moines Union R. Co. v. Des Moines*, 140 Iowa, 218, 18 N. W. 293.

Under a statute merely requiring commissioners of assessment to make a just and equitable assessment for the cost of a street improvement, upon land upon the line of the street, an assessment made by the lineal foot is not invalid, in the absence of evidence that the mode adopted was not just and equitable. *State, Hand, Prosecutor, v. Elizabeth*, 31 N. J. L. 547.

In apportioning special assessments for local improvements, an arbitrary rule prescribed or adopted is not objectionable if, by its operation, the property is as nearly as practicable assessed in proportion to the special benefits it receives by reason of the improvement. *Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114.

The adoption and application, in the laying of assessments, of a rule of any sort and wheresoever derived, does not violate a requirement that they be laid with regard to special benefits, if that rule is, in the discretion and judgment of the assessing authority, chosen for the reason that it leads to the required result. *Bassett v. New Haven*, 76 Conn. 70, 55 Atl. 579.

If an assessment made upon abutting property to pay the cost of a street improvement does not exceed the amount of benefits conferred by such improvement, and the property owner is afforded an opportunity to be heard upon the question of the benefits to his property, it is immaterial what method is adopted to apportion the assessment. *Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100.

When a statute requires property assessed for a local improvement to be assessed in proportion to the benefits conferred upon it by such improvement, it is immaterial what method is employed by the assessing officers to determine the *quantum* of bene-

fits received by each parcel assessed, but the result of the assessment must be in proportion to the benefits, or the assessment will be void. *Delaware & H. Canal Co. v. Buffalo*, 39 App. Div. 333, 56 N. Y. Supp. 976.

An assessment for the cost of a local improvement, required by law to be made according to benefits, is not vitiated by an apportionment according to the front-foot rule, if in point of fact such rule was adopted as a reasonable measure of the benefits resulting to the assessed property, under conditions and in circumstances indicating a substantial correspondence between the benefits conferred and the frontage of the assessed property. *Hughes v. Portland*, 53 Or. 370, 100 Pac. 942.

If the burdens of an assessment for the construction of a trunk line sewer, beneficial to a district and area beyond the line it follows, are in fact laid upon the property benefited, and fairly and equably distributed as required by law, it is a matter of indifference what method was adopted by the assessing officer to make his calculations of the several amounts of the assessment, whether the rule of frontage or another. *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687.

If an assessment by the front-foot rule is made for the cost or part of the cost of constructing a sewer, by assessing officers in the exercise of their best judgment, and with an honest purpose to assess the property benefited in proportion to the benefits it received from the work, and such a result is approximately attained by that method, the assessment cannot be successfully assailed upon the ground that special benefits were not its basis. *Bassett v. New Haven*, supra.

An assessment for the cost of a street improvement upon abutting property according to its frontage, under a statute requiring assessments of that sort to be according to benefits, is not illegal or invalid, if the benefits have actually been ascertained and assessed and found to be approximately in proportion to the frontage of the assessed property. *New Whatcom v. Bellingham Bay Improv. Co.* 16 Wash. 131, 47 Pac. 236.

Although an assessment for the cost of a street improvement must be based upon the benefits conferred by the improvement upon the property assessed, yet, if the amount of the assessment laid upon the property is actually proportioned to such benefit, the landowner cannot complain that the correct result was reached by a wrong rule or method. *Re Elliott Ave. & M. Street*, 54 Wash. 297, 103 Pac. 20.

A valid assessment for a street improvement may be laid upon abutting property, if actually benefited by the improvement, according to its frontage, where the amount of benefits are proportioned to such frontage. *Strickland v. Stillwater*, 63 Minn. 43, 65 N. W. 131.

If an assessment made upon what is called the frontage principle does in fact properly distribute the benefits among the

owners of the property benefited, there can be no objection to its use, but that principle must not be arbitrarily applied without the exercise of judgment in each case. *Jersey City v. State*, 30 N. J. L. 521.

An assessment for grading, curbing, and guttering a street apportioned upon the abutting property according to its frontage, but resting in fact only upon property benefited, and which is, by reason of its uniform character, equally benefited, is valid. *State, Hunt, Prosecutor, v. Rahway*, 39 N. J. L. 646.

If, in any particular case, an assessment by the front-foot rule properly apportions the burden of a street improvement to property thereby benefited, and in proportion to the amount of benefits which the burdened property receives, the assessment is valid. *State, Raymond, Prosecutor, v. Rutherford*, 55 N. J. L. 441, 27 Atl. 172.

If an assessment apparently made according to the front-foot rule purports to have been made according to benefits, it will not be disturbed if, under any conceivable condition, the benefits and frontage are substantially equal. *Hughes v. Portland*, 53 Or. 370, 100 Pac. 942.

It is perfectly legitimate to adopt the front-foot rule of apportionment as prima facie evidence of the benefits received by assessed abutting property from a local street improvement, provided such rule is not made conclusive, and the right remains to the property owner to be heard upon the question of benefits, and to the local authorities so to apportion the cost of the improvement as to make it conform to the benefits it confers. *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447, affirmed in 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88.

It is entirely proper to take into account the lineal frontage and size, shape, and location of the property assessed for the cost of a street improvement, in determining the amount of special benefits which the said improvement confers upon the assessed property. *Reed v. Cedar Rapids*, 137 Iowa, 107, 111 N. W. 1013.

While the front-foot rule of assessment, independent of benefits, is no longer lawful in the state of Iowa, where the statute now requires assessments for public improvement to be proportioned to the special benefits they confer upon the property assessed, and not to exceed such benefits (*Cole Supp.* 1902, § 792 a), yet it may be used as an aid in determining the quantum of benefits, without invalidating the assessment. *Ibid.*

The adoption of the front-foot rule of assessment required to be apportioned according to benefits upon abutting property, for a street improvement, is not invalid when it is fairly and reasonably adopted as a method of ascertaining the amount of benefit conferred by the improvement upon the assessed property, and is approximately equal to such benefit. *Durkee v. Barre*, 81 Vt. 530, 71 Atl. 819.

If assessing officers in point of fact base a

local assessment, according to their best judgment, upon the special benefits resulting to the assessed property from the improvement assessed for, the circumstance that the front-foot rule was employed as an aid in computing the amounts and reaching the conclusions will not invalidate the assessment. *Jenks v. Chicago*, 48 Ill. 296.

An assessment for a street improvement in a city, required by statute to be laid upon the abutting property in proportion to the benefits resulting, is not invalid merely because it has been laid according to the frontage of the assessed property upon the line of the work, where, in good faith, the municipal board empowered to levy the assessment determined that such property is benefited by the improvement substantially in proportion to its frontage. *State ex rel. Wheeler v. District Ct. 80 Minn.* 293, 83 N. W. 183.

When municipal assessing officers determine in good faith, and without laboring under any mistake as to fact or law, that all the property fronting upon a street assessed for the improvement of that street is especially and to an equal degree benefited by such improvement, the front-foot rule of apportioning the assessment may properly be employed to determine the amounts to be charged to each lot. *Ibid.*

When assessing officers actually take into account benefits conferred upon the assessed property by a street improvement, and assess it accordingly, their action is not void merely because they made the apportionment by the aid of the front-foot rule. *State, Pudney, Prosecutor, v. Passaic*, 37 N. J. L. 65.

The mere fact that commissioners of assessment, in assessing upon abutting property the cost of a street improvement, have used the front-foot rule as an aid to making their assessments, will not invalidate the assessment, if the commissioners in fact were guided by the principle that the assessment must be apportioned according to the benefits conferred by the improvement upon the property assessed. *State, Kohler, Prosecutor, v. Guttenberg*, 38 N. J. L. 419.

Assessors do not necessarily act upon an erroneous principle in employing the front-foot rule of assessment, when the statute requires the property assessed for an improvement to be assessed proportionally to the benefits received, provided they act in good faith, with an honest purpose and intention to levy the assessment fairly and equitably, and do so levy it according to the benefits and their best judgment as to what such benefits are. *Delaware & H. Canal Co. v. Buffalo*, 39 App. Div. 333, 56 N. Y. Supp. 976.

An apportionment according to the front-foot rule, of an assessment which the statute requires to be laid according to benefits, does not, in and of itself, vitiate an assessment, provided it affirmatively appears that the assessment was in fact laid according to benefits fairly and reasonably estimated in the judgment of the assessors and approxi-

mately the same as an assessment arrived at by application of the front-foot rule. *Hennessey v. Douglas County*, 99 Wis. 129, 74 N. W. 983.

An assessor who adopts the frontage rule in assessing the cost of grading, curbing, and paving a city street, pursuant to a conclusion that all the lands similarly situated with reference to such improvement were alike benefited thereby, and has reasonable grounds for his conclusion, does not act upon an erroneous principle, and the assessment he makes is valid. *Mansfield v. Lockport*, 24 Misc. 25, 52 N. Y. Supp. 571.

An assessment for the paving of a street cannot be said to have been made upon an erroneous principle of assessing for benefits, when it appears to have been made by the assessors in good faith, in the exercise of an honest judgment, and facts exist for the consideration of the assessors and upon which the exercise of their judgment as to the amount of benefits was based. *Voght v. Buffalo*, 133 N. Y. 403, 31 N. E. 340.

Under a municipal charter empowering the common council to grade, pave, or repair the city streets and highways, and to defray the expense thereof by special assessment upon real estate within the city and the owners of it, as the assessors shall determine to be more immediately benefited by the improvement, the assessors act judicially, and do not necessarily adopt an erroneous principle, in concluding that the assessment for such an improvement shall be apportioned among the owners of the real estate bordering upon the improved street according to the number of front feet owned by each individual, when, in the judgment of the assessors, each owner is benefited in that proportion. *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004, affirming 39 Hun, 285.

An assessment upon abutting property for the grading of a street and the construction of a sewer therein, according to the front-foot rule, is valid, notwithstanding the assessor was charged with the judicial duty, in apportioning the cost of the improvements, to assess it upon the property which, in his judgment, derived benefit therefrom in proportion to the benefits conferred, provided such assessor exercised his best judgment in discharging that duty, even if he did employ the front-foot plan of apportionment. *People ex rel. O'Reilly v. Kingston*, 114 App. Div. 326, 99 N. Y. Supp. 657.

When an assessor, in following the front-foot plan of apportioning an assessment for the cost of grading a street and constructing a sewer therein, actually takes into consideration the values of the different parcels of property assessed, and whether they are improved or not, and their uses, and honestly determines that the benefits they receive are actually in proportion to their frontage, and that such an apportionment is fair and equitable, the assessment is valid, and not based upon any erroneous principle. *Ibid.*

An assessment cannot be set aside because

the front-foot rule was employed in making it, when the assessors, after examining the premises and upon reasonable grounds, decided that the benefits to be derived from the improvement were alike and equal to each lot, and that each lot should equitably bear an equal amount of the assessment. *Re Gardner*, 41 How. Pr. 255.

If assessing officers, in apportioning the cost of a local improvement, visit the locality of it, examine the assessed property, and ascertain the value and extent of the benefit conferred upon such property, and really make such benefit the basis of the assessment, the validity of such assessment is unaffected by the circumstance that it was worked out by the front-foot rule. *English v. Arizona*, 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658.

An objection was made to a sewer assessment in *Newell v. Bristol*, 78 Conn. 571, 63 Atl. 355, upon the ground that it had been apportioned by an arbitrary rule according to the number of front feet, without apparent reference to any other consideration, but the facts failed to sustain the objection. It was found by the court that an arbitrary front-foot rule had not been the basis of computation. The front-foot rule had been used, but the values of the assessed lots had been considered and fairly estimated, and the assessment complained of was fair and reasonable.

An objection that an assessment for the cost of constructing a sewer was made by the front-foot rule, and not by ascertaining the special benefits, is not sustained where a city board of equalization has judged and determined that the several parcels of property assessed had each been specially benefited to the amount of the tax levied against each, and the evidence discloses that the benefits from the sewer were virtually confined to the assessment district, and that each lot therein was benefited specially, substantially, equally, with the others, so that the front-foot method of assessment was not inequitable. *Shannon v. Omaha*, 73 Neb. 507, 103 N. W. 53, 106 N. W. 502.

When local assessors, in levying an assessment for the paving of a street and the making of water, gas, and sewer connections, do not act arbitrarily, but take into consideration the state of the property and the improvements upon it, and all the existing conditions, and then determine that an assessment by uniform foot frontage is the most equitable of any that can be made, they act judicially, and their determination will not be disturbed by the courts in all ordinary cases. *Donovan v. Oswego*, 90 App. Div. 397, 86 N. Y. Supp. 155, reversing 39 Misc. 291, 79 N. Y. Supp. 562.

An assessment for paving a street, laid upon the abutting property according to its frontage, is not invalid if it is actually and in fact apportioned according to the benefits conferred upon such property by the improvement. *State, Johnston, Prosecutor, v. Trenton*, 43 N. J. L. 166.

To render valid an assessment required by law to be laid upon property benefited, to 28 L.R.A.(N.S.)

defray the cost of a local improvement, it must appear affirmatively by the report of the commissioners that they examined the whole matter and imposed the burden in proportion to the benefits received. *State, Hoboken Land & Improv. Co., Prosecutor, v. Hoboken*, 36 N. J. L. 291.

When parcels of land along the line of a sewer are assessed for the cost of it in proportion to the special benefits accruing therefrom, the fact that the commissioners of assessment reported the frontage of the lots on the line of improvement, or assessed against each the exact cost of the portion of the sewer in front of it, will not of itself vitiate the assessment. *Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86.

A special assessment for an improvement made on the basis of frontage merely, and without any regard to special benefits, said the court in *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741, would be invalid; but we know of no rule which would preclude the commissioners appointed to make a special assessment from taking into consideration the number of feet of frontage of the several lots to be assessed upon the street or improvement as an element in the ascertainment of benefits. . . . It may be that a given improvement will frequently be of benefit to the several parcels of real estate thereby benefited in exact proportion to the frontage of said several parcels upon such improvement.

That an assessment for a sewer corresponds with the frontage of the assessed property on the line of the work will not invalidate it, when it is shown that the assessing officer made the assessment according to the benefits, and determined that such benefits were equal to the sums assessed. *Sanitary Dist. v. Joliet*, 189 Ill. 270, 59 N. E. 506.

The mere circumstance that an assessment for the construction of a sewer is the same in amount as if the front-foot rule had been employed to determine it does not of itself establish that the assessment was arbitrarily made, without regard to the special benefits conferred by the improvement upon the property assessed. *Wray v. Fry*, 158 Ind. 93, 62 N. E. 1004.

An assessment which purports and is recited to have been made in proportion to benefits is not impeached by the circumstance that the result is the same as if it had been laid under the front-foot rule. *Hedge v. Des Moines*, 141 Iowa, 4, 119 N. W. 276.

The coincidence that the benefits from a public improvement appeared to be in proportion to the frontage of each parcel of property along the line of the improvement cannot be urged against the positive declaration of the assessors in their reports that they made the assessments according to the peculiar benefits each parcel of property had received. *Kirtland v. Parker*, 76 N. J. L. 217, 68 Atl. 913.

The court, in *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686, in dealing with the

objection that the assessment in hand had been made without regard to benefits, said: It is not disputed that the assessment is purported to have been made according to benefits, and that the city council found that it was so made, but it is said that this finding is merely colorable and perfunctory, because it appears that all of the lots were assessed alike, and for the precise amount they were assessed for when the apportionment was made according to the front-foot plan, and concededly without reference to benefits. It seems to us, however, that these facts argue nothing. Surely, it cannot be denied that a possible condition could exist where an improvement of a street would benefit all of the lots thereon precisely alike, yet it must be so denied in order to overturn this assessment in this proceeding. The assessment to be overturned in this proceeding must be void on its face, and it could only be void for the reason here given, on the theory that under no conceivable conditions could lots abutting upon an improvement be equally benefited thereby. But so far from this being impossible, it would seem that it would be found to actually exist in many instances. To pave and curb a street which has already been brought to grade, and the abutting property built upon with reference thereto, would seem rather to benefit each part of it alike than otherwise, especially where, as in this case, no unusual or special conditions are shown to exist.

The mere fact that assessors adopt a uniform rule of frontage in assessing the cost of a sewer upon the several parcels of property fronting upon the street through which the sewer is constructed, and a different yet uniform rule in assessing property not situated on such street, but benefited by such sewer, does not raise a presumption that they failed to make the assessment, according to their judgment, in the ratio of benefits resulting to the premises assessed from such sewer. *Denise v. Fairport*, 11 Misc. 199, 32 N. Y. Supp. 97.

The manner of estimating the benefits to abutting property from street improvements in municipalities is not confined to an actual appraisal by appraisers appointed for the purpose. *Raleigh v. Peace*, 110 N. C. 32, 17 L.R.A. 330, 14 S. E. 521; *Hilliard v. Asheville*, 118 N. C. 845, 24 S. E. 738; *Kinston v. Loftin*, 149 N. C. 255, 62 S. E. 1069.

While the report of a board of public works, reciting that the requirements of the municipal charter were duly followed in determining both the damages and benefits occasioned by grading a street, is *prima facie* sufficient to sustain the validity of an assessment, nevertheless evidence *aliunde* showing the conclusion of the board to have been reached without the exercise of judgment, and according to a uniform assessment per front foot, overcomes the presumption arising upon such a report, and establishes the invalidity of the assessment, unless rebutted by independent proof to the 28 L.R.A.(N.S.)

contrary. *Friedrich v. Milwaukee*, 118 Wis. 254, 95 N. W. 126.

An allegation in a complaint in an action to nullify a local assessment, averring that the assessors did not view the premises, or consider the amount proposed to be made a charge thereon or the benefits which would accrue in consequence of the proposed improvement, and did not assess the amount of benefits, states a good cause of action, when the statute under which the assessment purports to have been, and by authority of which it only could have been, laid, requires assessments to be made in proportion to and not in excess of benefits. *Pittelkow v. Milwaukee*, 94 Wis. 651, 60 N. W. 803.

XVI. Failures of the front-foot rule to represent benefits.

a. Rural lands.

The front-foot rule being but a rough and ready method of measuring benefits flowing from a local improvement to property subjected to assessment to defray the expense thereof, it logically follows that it ought not to be employed in any case where it is obvious that it does not and cannot possibly be a standard by which to measure such benefits.

The courts are virtually agreed that this is the case in respect of assessments upon rural lands.

An assessment for the opening and improvement of a highway through a rural district, apportioned according to frontage of the abutting lands, is so manifestly out of relation and correspondence to any possible benefits conferred as to be palpably unreasonable and unjust and in contravention of constitutional provisions forbidding the imposition of unequal and un-uniform taxation for public purposes upon selected individuals. *Re Washington Ave.* 69 Pa. 352, 8 Am. Rep. 255; *Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760; *Kaiser v. Weise*, 85 Pa. 366; *Craig v. Philadelphia*, 89 Pa. 265.

To assess property in the country, which is not laid off in lots, in proportion to its frontage, for the cost of constructing a sewer in an adjacent or nearby street or way, presumptively is unreasonable. *Weed v. Boston*, 172 Mass. 28, 42 L.R.A. 642, 51 N. E. 204.

The completely rural character of the territory in which a tract assessed for a highway improvement is situated protects it from the frontage rule of taxation. *Philadelphia use of Johnson v. Rule*, 93 Pa. 15; *Person's Appeal*, 96 Pa. 140; *Scranton v. Pennsylvania Coal Co.* 105 Pa. 445.

An assessment upon abutting property for the cost of grading streets, levied by a municipal corporation according to the front-foot rule and under the direct authority of an act of the legislature, is valid so far as it is applied to urban property in the populated portions of the city, but invalid and

unenforceable with respect of rural property unimproved, although within the corporate limits. *Hand v. Fellows*, 148 Pa. 456, 23 Atl. 1126; *McCall v. Coates*, 148 Pa. 462, 23 Atl. 1127; *Scranton v. Bush*, 160 Pa. 499, 28 Atl. 926.

In rural neighborhoods and farming districts an assessment for a local improvement cannot constitutionally be made according to the front-foot rule. *McKeesport v. Soles*, 165 Pa. 628, 30 Atl. 1019.

Property not cut up into compact city lots, or built upon as city lots, at a time when a street or highway contiguous thereto is paved, cannot legally be charged with the expense of the pavement according to the front-foot rule of assessment. *Philadelphia v. Gorgas*, 180 Pa. 296, 36 Atl. 868.

Property in rural districts, assessed for a local improvement, can lawfully be assessed only in proportion to the benefits derived from the improvement. As to such property the front-foot rule is not applicable. *Anderson v. Lower Merion Twp.* 217 Pa. 369, 66 Atl. 1115.

The front-foot rule of assessment is not applicable and cannot be constitutionally applied in rural neighborhoods. *Philadelphia v. Manderfield*, 32 Pa. Super. Ct. 373.

The front-foot rule of assessment for the cost of improving a highway is inequitable and does not apply to rural and agricultural property, although within the corporate limits of a city, but such property can be lawfully assessed only in proportion to certain benefits. *Wilson v. Allegheny*, 25 Pittsb. L. J. N. S. 15.

An assessment for the cost of a street improvement, laid in proportion to frontage upon a tract of 40 acres of land unplatted and used exclusively for farm purposes, is invalid. *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487.

The court in Philadelphia use of *Peters v. Keith*, 1 Sadler (Pa.) 359, 2 Atl. 207, declared it well settled that where property is rural there is no power to charge it by the front-foot measure of liability for the cost of paving an avenue upon which it abuts.

It is well settled, said the court in *Allentown v. Adams*, 5 Sadler (Pa.) 253, 8 Atl. 430, that when land in front of which water-service pipes are laid is farm land and suburban property, it cannot be assessed for such an improvement according to the front-foot rule.

The frontage rule of taxation, when applied to country property, is unequal, unjust, and unconstitutional; and in saying this, said the court in Philadelphia use of *Johnson v. Rule*, supra, we but repeat what has been said over and over again in a long series of cases, commencing with the *Washington Avenue Case*, supra, and ending with *Craig v. Philadelphia*, 89 Pa. 268.

Where a street within the corporate limits of a city is improved by grading and paving, and a statute authorizes the cost of such an improvement to be assessed upon abutting property according to the front-foot rule, and the property along the line of 28 L.R.A. (N.S.)

said street constitutes both city lots and rural or farming lands, the former may be lawfully assessed in proportion to its frontage on the street, and the latter according and in proportion to the benefits conferred by the street improvement upon it, but not by the front-foot rule. *Scranton v. Bush*, supra.

While an assessment by the front foot for a street improvement, laid upon rural or farm lands, is so plainly unfair and extortionate that it cannot be sustained, nevertheless an assessment upon lots within city limits and near to the built-up portion of the city, with dwellings around them, although there is a surrounding vacant area, where they are laid out as city lots for building purposes, must be regarded rather as urban than as rural property or farm lands. *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

The front-foot rule of assessment for improvements in streets and highways cannot be applied to rural property; but when the property ceases to be farm lands, and becomes city property, it may lawfully be assessed by that method for such improvements; and the question whether or not the character of the property has changed in any particular locality is one of fact for a jury. *Philadelphia v. Sheridan*, 148 Pa. 532, 24 Atl. 80; *McKeesport v. Soles*, supra.

Although an assessment against rural property, even if situated within the corporate limits of a city, by the front-foot rule, for the cost of paving and curbing a street, is invalid, the character of the property as rural or urban is to be determined by the conditions existing when the improvement is made, and not when the ordinance authorizing the improvement is adopted. *Keith v. Philadelphia*, 126 Pa. 575, 17 Atl. 883.

If it be granted that the power exists in the legislature to annex adjoining territory to a municipal corporation, and it exercises that power in annexing farming lands not laid off into lots and not needed for city purposes, it is very clear that such land must afterwards be taxed by the same rule as other property in the political division to which it belongs at the time. This much is required by the constitutional rule of uniformity. *Weeks v. Milwaukee*, 10 Wis. 243.

Rural land within municipal limits in the state of Pennsylvania is not assessable for street improvements according to its frontage; but if its character is contested, the burden of proving it to be rural land rests on the landowner. *Stewart v. Philadelphia*, 3 Sadler (Pa.) 137, 7 Atl. 192; *Allentown v. Adams*, supra.

b. Property off the line of improvement.

There is also a fairly general agreement among the courts that the front-foot rule is equally inapplicable to measure the benefits to property lying off the line of improvement for which it is assessed to pay.

The contiguous property which is author-

ized to be taxed or assessed specially for a local street improvement is only the property that abuts on the street. *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332.

An assessment for the cost of constructing a sewer, laid upon lots which do not abut upon the line of the work, but lie in another part of the sewer assessment district, imposed according to their frontage, is *prima facie* arbitrary and unreasonable. *Weed v. Boston*, 172 Mass. 28, 42 L.R.A. 642, 51 N. E. 204.

Land in the vicinity of a street cannot be said to be benefited in any degree beyond the general public by the improvement in such street, and therefore cannot be specially assessed to defray the cost of improving it. *Re Fifty-fourth Street*, 165 Pa. 8, 30 Atl. 503; *Re Morewood Ave.* 159 Pa. 20, 28 Atl. 123, 132.

No property can be assessed by the front-foot rule for the cost of a sewer, except such as abuts on the line of the work. *Witman v. Reading*, 169 Pa. 375, 32 Atl. 576; *Parker's Appeal*, 169 Pa. 433, 32 Atl. 574.

When the cost of construction of one branch or line of a sewer is greatly disproportioned to the cost of another branch or line in the same system, an assessment made upon all property in the entire district served by the system, according to the average cost per foot frontage in the whole district, is invalid and illegal, because of necessity some parcels are overcharged and others not charged enough. *Anderson v. Lower Merion Twp.* 217 Pa. 369, 66 Atl. 1115.

A municipal ordinance providing for constructing many sidewalks upon a number of unconnected streets in a wide district, and specially taxing the parcels of abutting property for the cost in proportion to their frontage, is unreasonable and void, because the improvement of any one or more streets cannot be supposed to confer benefits upon property on other streets. *People ex rel. Raymond v. Latham*, 203 Ill. 9, 67 N. E. 403; *People ex rel. Raymond v. Grover*, 203 Ill. 24, 67 N. E. 165; *People ex rel. Hanberg v. Stearns*, 213 Ill. 184, 72 N. E. 728.

c. When benefits are utterly ignored.

It ought also logically to follow that once it is established by competent evidence in a proper proceeding that the question of benefits has not been considered at all, but, on the contrary, has been wholly disregarded in imposing an assessment by the arbitrary application of the front-foot rule, and that the case is one in which such rule is not generally accepted as a *prima facie* measure of benefits,—that the rule has been illegally employed, and, consequently, that the assessment laid by its means is invalid.

There is a respectable number of cases which have so decided. *St. John v. East St. Louis*, 50 Ill. 92; *Morrison v. Chicago*, 142 Ill. 660, 32 N. E. 172; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *State, Hutton, Prosecutor v. West Orange Twp.* 39 N. J. 28 L.R.A.(N.S.)

L. 453; *State, Morris, Prosecutor, v. Jersey City*, 40 N. J. L. 485.

An assessment of the total cost of a street improvement, laid upon the abutting property according to the front-foot rule, regardless of the special benefits accruing from the improvement to such property, and in some instances largely in excess thereof, is invalid and void. *McKee v. Pendleton*, 154 Ind. 652, 57 N. E. 532.

When an assessment is arbitrary, based solely upon the cost of the work, and laid upon the assessed property according to its frontage, without any consideration of the benefits conferred by the improvement, and without regard to such benefits, it is void under statutes requiring assessments to be laid according to the benefits conferred by the improvement upon the property assessed. *Kersten v. Milwaukee*, 106 Wis. 200, 48 L.R.A. 851, 81 N. W. 948, 1103.

If the evidence establishes that a uniform assessment according to frontage for the cost of grading a street is arbitrary, and made regardless of a provision in the municipal charter that the effect of grading as to each lot or parcel of land assessed must be considered and determined as a separate matter, the assessment is void. *Friedrich v. Milwaukee*, 118 Wis. 254, 95 N. W. 120; *Haubner v. Milwaukee*, 124 Wis. 158, 101 N. W. 930, 102 N. W. 578.

The facts must, of course, clearly establish such arbitrary action on the part of the assessors, in order to bring about such a result. *Loewenbach v. Milwaukee*, 139 Wis. 49, 119 N. W. 888.

When an assessment is obviously an arbitrary one, and laid only in accordance with the front-foot rule, without regard to the size, shape, or depth of the parcels of land upon which the burden is laid, or the situation, location, and other circumstances of the property, and by ignoring the question of special benefits, an assessment for a road improvement is invalid. *State, N. Y. & G. L. R. Co., Prosecutor, v. Kearney Twp.* 55 N. J. L. 463, 26 Atl. 800.

When an assessment is required by law to be made for the cost of constructing a sewer, upon the lots especially taxed, in proportion to the benefits they respectively receive from the work, an apportionment made without mention or reference to benefits, and without regard to the value or use of the property assessed, but strictly in proportion to the frontage of such property on the line of the work, raises a strong inference that the requirements of the law have not been observed, since it can scarcely be possible that the improvement in value has been in this exact proportion; and, although the inference is not conclusive, it is an important circumstance tending to show the invalidity of the assessment. *Warren v. Grand Haven*, 30 Mich. 24.

A statute providing for the assessment of the cost of constructing sewers upon the property in the assessment district, in proportion to the front feet of the lands or lots included, and in proportion to the benefits

derived from sewerage improvement, requires the special benefits to the assessed property from the improvement to be taken into account in applying the frontage rule. *Blackwell v. Coeur D'Alene*, 13 Idaho, 357, 90 Pac. 353.

The supreme requisite of an assessment proportioned to special benefits is, in the absence of specific legislative directions, the exercise of judgment and discretion by the assessing authority in the choice of means, or otherwise to reach the required end. *Passett v. New Haven*, 76 Conn. 70, 55 Atl. 579.

To be valid, an assessment laid according to the front-foot rule must substantially approximate an assessment made according to benefits. *Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760.

Assessors directed to assess property for a local improvement in proportion to benefits conferred may take the superficial area, or the frontage, as a basis of computation to ascertain what sum should be charged, but neither method will meet the requirement unless the amount levied is proportioned to the benefits. *Delaware & H. Canal Co. v. Buffalo*, 39 App. Div. 333, 56 N. Y. Supp. 976.

It is the duty of assessors, in determining the amounts which ought to be assessed to lots or parcels of land for the work of filling in a city street, to determine the proportions according to the actual benefits received by the property assessed. An assessment made in any other way is made upon principles contrary to law. *State, Mann, Prosecutor, v. Jersey City*, 24 N. J. L. 662.

When a statute requires a special assessment for a street improvement to be laid only upon the property thereby benefited, and in proportion to the benefits conferred, it is essential to the validity of an assessment apportioned according to frontage, that the property be inspected and examined and found, by the exercise of judgment and upon consideration of facts and circumstances, to be benefited approximately in proportion to its frontage. *Elma v. Carney*, 9 Wash. 466, 37 Pac. 707.

While the judgment of a municipal board of public works as to what property is benefited by a local improvement, and how much it is benefited, when exercised in good faith and uninfluenced by any mistake of fact or misapplication of legal rules, is conclusive, nevertheless it is essential that the judgment and discretion of the municipal authorities be actually exercised; and if they arbitrarily adopt a hard and fast rule of assessment, without exercising any judgment or discretion, and in utter disregard of all other considerations, the assessment will be void. *State ex rel. Eaton v. District Ct.* 95 Minn. 503, 104 N. W. 553.

When commissioners are required by statute to assess the expense of grading a street upon the property benefited, in proportion to the benefit each parcel on the line of the street receives from the improvement, an assessment made by them in pro-

portion to the frontage of property on the line of the work, without the exercise of their judgment in determining the benefits, is invalid, notwithstanding they assert that they did take into account the benefits conferred, and decided such benefits to be in proportion to the frontage of the property assessed, when the record of their proceedings conclusively and manifestly shows that they simply divided the whole expense by the number of lineal feet fronting on the street to get the foot rate, and then merely multiplied the number of front feet by the foot rate to ascertain the amount each proprietor was to pay. *State, Hampson, Prosecutor, v. Paterson*, 36 N. J. L. 159.

When an assessment for a street improvement has been apportioned by the front-foot rule, without regard to the question of benefits conferred by the improvement upon the property assessed, and the proofs establish the fact that such benefits are greatly less in value than the burden imposed, the essential element of a constitutional assessment is lacking, and the assessment must be vacated and annulled. *State, Kohler, Prosecutor, v. Guttenberg*, 38 N. J. L. 419.

An assessment for the cost of opening and extending a city street, laid upon a strip of territory two and one half squares wide upon both sides of the way, and extending for three fourths of a mile along the portions of the street already opened, according to the front-foot rule, without regard to the value of the assessed property as separate parcels, and without ascertaining the amount of benefit to each parcel assessed,—is an erroneous and unequitable basis of taxation, and cannot be sustained. *Re Walnut Street*, 10 Pa. Co. Ct. 173.

When a city charter authorizes the corporation to construct and repair sewers in any street, and assess the whole or any part of the cost thereof upon real estate benefited thereby, in proportion to such benefits, without regard to the cash valuation, the adoption of an arbitrary and illegal principle in assessing the cost of such an improvement, according to the cost thereof in front of the respective lots, without regard to the benefits, vitiates the assessment. *Duluth v. Davidson*, 97 Minn. 378, 107 N. W. 151.

An act under which an assessment for the cost of laying a water main in a public street is laid upon abutting property, not by reason of any benefits conferred upon such property, but for a definite sum, regardless of benefit, is unconstitutional. *Doughten v. Camden*, 72 N. J. L. 451, 3 L.R.A.(N.S.) 817, 111 Am. St. Rep. 680, 63 Atl. 170, 5 A. & E. Ann. Cas. 902.

If the legislature attempts to fix, or authorize a municipality to fix, an arbitrary basis of assessment for local improvements, wholly ignoring the principle of peculiar and especial benefits to the assessed property, the owner, under the guise of taxation, is deprived of his property, without

just compensation, for public use, in violation of the Constitution. *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175.

While a constitutional provision authorizing the legislature to prescribe the manner in which assessments for local improvements may be made upon abutting property, or property benefited by such improvement, or upon both, empowers the legislature to apportion and assess the cost of local improvements according to foot frontage, it does not authorize an assessment by that rule, which wholly ignores and disregards the fundamental rule upon which special assessments are made, namely, that of benefit to the property assessed. *Ibid*.

A provision in a city charter relating to all sewers constructed, relaid, or extended during any one season and throughout the entire city, which contemplates that at the end of the season the cost of all sewers constructed during that period shall be marshaled for the purpose of ascertaining the total cost, and thereupon the city council shall levy and proceed to collect from abutting property an equal sum per foot front, without regard to the valuation of such property or the size or cost of the sewer, which sum shall not exceed \$4 the lineal foot, the rate to be fixed by resolution, and to remain from year to year until it is affirmatively changed by resolution of the council, or until the council decides to follow another plan for the construction and assessment of sewers,—is arbitrary and unreasonable, and an assessment made in accordance with it is invalid and void because of ignoring the basic principle that the special and peculiar benefits to the assessed property which result from a local improvement must govern in such cases. *Ibid*.

XVII. The front-foot rule as affected by the sort of improvement.

a. Improvements under the police power.

At first blush it might be supposed that the character of a local improvement could have no influence in determining the question whether the method, whatever it might be, employed to levy an assessment to pay for it, ought to be approved. In practice, however, it has had an effect in sustaining or impeaching the fairness of the front-foot rule in certain classes of cases.

A little consideration will show that when a local improvement is required in the exercise of the police power, the question of compensatory benefits to the assessed landowner is seldom, if ever, of more than minor importance. He may be, and often is, required to make the improvement at his own expense, regardless of benefit to himself or his property. On the other hand, when a local improvement is made through the employment of the power of eminent domain, the question of compensation to the assessed landowner is frequently of prime, if not vital, importance. In the one 28 L.R.A. (N.S.)

case the use of the front-foot rule probably will be acquiesced in, as, of course, in the other its application is likely to be subjected to close scrutiny.

The construction or repair of a sidewalk in a city street is a conspicuous and typical improvement under the police power.

Assessments by the front-foot rule to defray the expense of new sidewalks are almost universally accepted as just and equitable.

An assessment by a municipal corporation under the authority of an act of the legislature empowering it to construct sidewalks and assess the cost upon the owners of lots fronting upon the line of the work, apportioned according to the number of front feet in the abutting property, is fair, just, and equitable in all ordinary cases. *Hyattsville v. Smith*, 105 Md. 318, 66 Atl. 44; *Wilzinski v. Greenville*, 85 Miss. 393, 37 So. 807.

An allegation that an assessment upon abutting property for the expense of constructing a sidewalk is greater than its just and proportionate share is not sustained when there is no other evidence upon which to base it than that the assessment for paving the sidewalk, assessed by the running foot, is greater upon the particular lot than an assessment at the same rate upon adjoining property. *Dickinson v. Worcester*, 138 Mass. 555.

In the case of *Birmingham v. Klein*, 89 Ala. 461, 8 L.R.A. 369, 7 So. 386, declared *McClellan, Ch. J.*, in delivering the opinion of the court in *Montgomery v. Moore*, 140 Ala. 638, 37 So. 291, this court sustained as a constitutional and valid enactment a statute which authorized the corporate authorities of Birmingham to grade and pave the sidewalks along the streets of the city, and to assess the total cost thereof, although it might be greatly in excess of the value of the benefits to abutting property.

It is true, he added, that this cost was to be assessed on this property "in proportion to the amount of the benefit accruing to the" property owners, but, said he, this only meant that there should be some rule of apportionment of the whole charge having reference to the benefit received by the respective owners, and not that no owner should be charged in excess of actual benefits received. The provision would have been fully complied with through an apportionment according to frontage on the sidewalk of the respective abutting lots, and so the act was construed in the opinion.

The court, in *Independence v. Gates*, 110 Mo. 374, 19 S. W. 728, discussing the principle upon which taxes for local improvements should be levied, said, in some cases it is done by levying an ad valorem tax on the property situated in the district previously designated, in others it is raised on the basis of benefits to be fixed by assessors, in others by the front-foot rule, as it is termed, in others by the superficial area; but it is now almost universally denied that an owner can be compelled to pay the whole cost of the improvement of

the street in front of his lot. In such a case the tax would neither be increased nor diminished by the assessment upon his neighbors, and each particular lot would arbitrarily be made a taxing district and charged with the whole expenditure thereon. It is evident, therefore, that a law for making assessments on this basis could not have in view such distribution of burdens in proportion to benefits as ought to be a cardinal idea in every tax law. It would be an arbitrary command of the law to each lot owner to construct the street in front of his lot at his own expense, according to a prescribed standard; and the power to issue such command could never be exercised by a constitutional government, unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as to keep the sidewalk free from obstruction and fit for passage; but such an idea is clearly inadmissible.

The distinction between the two classes of improvements is marked in the decisions of the courts of New Jersey, which, with more consistency than those of other states, have maintained the necessity of equivalent benefits to the validity of assessments for local improvements.

While it is recognized and settled in this state, said the court in *Van Wagoner v. Paterson*, 67 N. J. L. 455, 51 Atl. 922, that the cost of public streets and other municipal improvements can only be assessed upon abutting property owners to the extent of the benefits conferred, it is still held with us that the whole cost of sidewalks may be assessed upon abutting property irrespective of benefits, and that the cost of gutters may also be so assessed.

The cost of a sidewalk or its improvement in a city may constitutionally be charged upon private property, without regard to the question of benefits conferred, because a sidewalk is subservient and appurtenant to the land upon which it fronts. *State, Agents, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *State, Simmons, Prosecutor, v. Passaic*, 42 N. J. L. 524.

The same distinction is apparent in the legislation and decisions of the state of Illinois.

Under the former Constitution of Illinois it was held in *Ottawa v. Spencer*, 40 Ill. 211, following *Chicago v. Larned*, 34 Ill. 203, that a local assessment upon abutting property for the cost of a street sidewalk, apportioned *pro rata* to the frontage of the lots, was unconstitutional and void because, if the charge was in the nature of a tax, it was not based on the value of the assessed property, neither was it equal and uniform in its incidence, while if it was an exercise of the right of eminent domain, inasmuch as it was not apportioned according to special benefits, the needed element of compensation was lacking.

In 1870, after this decision, Illinois amended her Constitution and provided [art. 9, § 9] that the general assembly

might vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise.

Under that Constitution, assessments for the entire expense of building sidewalks, imposed upon abutting property in proportion to its frontage on the line of the work, were held when made by statutory authority to be constitutional and valid. *White v. People*, 94 Ill. 604; *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143.

In such cases it was said that the question whether or not an assessment for the expense of building a sidewalk, apportioned according to the frontage of the assessed and abutting property, exceeded the benefits conferred, was altogether immaterial. *Ibid.*

If, under this Constitution, property contiguous to a local improvement is specially taxed to pay for it, the burden may be distributed either *ad valorem* or according to frontage, and the resulting benefits need not be considered. *Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471.

The courts of Illinois at this time made a distinction between special taxation and special assessments to pay for local improvements, which Chief Justice Mulkey carefully explained in the last cited case. In cases of special taxation the municipal authorities, said he, may, if they think proper, lay the whole burden upon the contiguous property, and, although theoretically this is permitted on the hypothesis that the benefits will equal the load, yet whether or not this is so cannot be inquired, — the propriety, even the justice of it, unless the commissioners act corruptly, cannot be reviewed. A special assessment differs from special taxation mainly in this, that the assessment cannot in any case or circumstances exceed the benefits the property will derive from the improvement, and the owner of the assessed property, if dissatisfied, has the right to have this question passed upon by a jury, and, if not content with the finding, to have it reviewed by an appellate tribunal. *Ibid.*

This distinction between special taxation and special assessments to meet the expense of local improvements was again stated in *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261.

We have, said the court, in *Chicago & A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077, held in many cases, some of them decided within a very recent period, that in special taxation the benefits are determined by the municipal authority, while in special assessments they are ascertained in the mode prescribed by law.

The only occasion when the courts essayed to interfere in cases of special taxation for local improvements was when the action of the assessing authorities was so arbitrary and unreasonable as to amount to an abuse of power. *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067.

While the question of benefits from a

local improvement is one for the city council to decide in levying a special tax for service pipe connections with a street water main, yet it cannot arbitrarily decide and ordain in the same ordinance that the property on one side of the street is benefited in a greater degree than the property on the other side by the lateral service pipes, simply because the main conduit was more to one side than the other. *Ibid*.

We have held over and over again, declared the court in *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437, that under the statute in pursuance of which the present tax was levied, the determination of the common council is final on the question of benefits, and that the landowner cannot go behind the action of the city council imposing the tax, and inquire what benefit, if any, the property owners receive on account of the improvement.

This continued to be the law in Illinois until 1895; when the legislature intervened by statute and made the determination of city councils respecting benefits from local improvements to the property specially taxed to pay for them, open to judicial review in the same manner as if the property had been specially assessed. *Palmer v. Danville*, 166 Ill. 42, 46 N. E. 629; *Hull v. People*, 170 Ill. 246, 48 N. E. 984; *Birket v. Peoria*, 185 Ill. 369, 57 N. E. 30; *East St. Louis v. Illinois C. R. Co.* 238 Ill. 296, 87 N. E. 407.

Although, since the 1895 amendment, a property owner charged with a share of the cost of a local improvement in front of his property may have the question of resulting benefits passed upon by the courts, the same in cases of special taxation as in cases of special assessments, nevertheless there remain still some radical differences in the methods of levying between special taxes and special assessments. *East St. Louis v. Illinois C. R. Co. supra*.

This somewhat lengthy digression will appear justified by reference to the other Illinois cases holding that the act of 1895 did not apply to special taxes levied upon contiguous property, to pay for sidewalks constructed or repaired under the sidewalk statute enacted twenty years before. *People ex rel. Gleason v. Yancey*, 167 Ill. 255, 47 N. E. 521; *Job v. Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622.

A special tax for the construction of a sidewalk, imposed by municipal ordinance according to the front-foot rule, is valid unless shown to be unjust, unreasonable, and oppressive. *Job v. Alton, supra*.

The Illinois statute of 1875 is strictly a sidewalk act, independent and distinct from other municipal local-improvement laws, and does not authorize an improvement of any other kind. *People ex rel. Raymond v. Field*, 197 Ill. 568, 64 N. E. 544; *People ex rel. Raymond v. Latham*, 203 Ill. 9, 67 N. E. 403.

It is the settled policy of Illinois, according to the court in *Gage v. Chicago*, 203 Ill. 26, 67 N. E. 477, to regard sidewalks

as a kind of local improvement, properly classed by itself.

b. Improvements involving the power of eminent domain.

Inasmuch as in the United States private property cannot be taken from its owner for public use without making him just compensation, it is plain that when a street is opened, extended, or widened, the land taken for the purpose must be paid for either in money or equivalent benefits. Accordingly, in the famous case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, it was held that a special assessment for the entire cost and expense of opening a village street, including both the compensation paid for the land taken and the expenses of all the proceedings connected therewith, imposed by the village ordinance upon the bordering land belonging to the same person who owned the land taken for the street, laid by the arbitrary application of the front-foot rule, in utter disregard of the question of benefits, amounted in effect to a taking of private property for public use without compensation, and was therefore unconstitutional and void. It is, said Mr. Justice Harlan in the opinion of the court in that case, one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public: it is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received.

It will not escape observation, he continued later, that, if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property [i e., the remaining property of a single landowner whose land was taken], without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required in the first instance to open the street at his own cost, without compensation in respect of the land taken for the street; for, by opening the street at his own cost, he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles upon which rests the power to make special assessments upon property, in order to meet the expense of public improvements in the vicinity of such property.

Almost ten years before *Norwood v. Baker*, supra, was decided, the court of last resort in Kentucky held, in *Covington v. Worthington*, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038, that when private property is taken under the power of eminent domain by a city for a street, the other property of the owner fronting on the street thus opened may be required to pay its due proportion of the cost of opening and improving the street, according to the number of feet fronting on the street, just as other property is taxed.

According to the court in that case, it is not a valid objection to a special tax imposed according to frontage upon the property of a landowner whose remaining land has been condemned for a new street, that the burden exceeds in amount the money value received by him for the land condemned. The case is in such direct conflict with the later decision in *Norwood v. Baker*, supra, that it ought no longer to be deemed an authority.

The case of *Bloomington v. Latham*, 142 Ill. 462, 18 L.R.A. 487, 32 N. E. 506, was on all fours with *Norwood v. Baker*, supra. It involved the condemnation of land for a new street, and an assessment of the value of the land taken and of the damage to the remaining land, together with the entire cost of the proceedings, upon other land of the same owners abutting on that taken for the new street. A majority of the Illinois supreme court concluded that this operation was, to all intents and purposes, an unconstitutional taking of private property for public use without making just compensation, and annulled the assessment.

The case of *Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. 730, was also strikingly like that of *Norwood v. Baker*, supra, and the conclusion was the same. In the Virginia case, Chamberlain owned a vacant corner lot upon Grandby and Plume streets, and the city undertook to widen Plume street 10 feet. A strip 10 feet wide for the entire length of Chamberlain's lot was condemned, and \$1,200 was awarded him as compensation. The city accepted and paid the award, and about five months later assessed the rest of the land \$1,500 for peculiar benefits from the improvement, and the court held that the city had no power or authority to levy any such assessment, and accordingly adjudged it void.

Damages paid to abutting property owners for property taken for a public improvement cannot be assessed back on the abutting property, regardless of benefits conferred by the improvement. *Fridman v. Norwood*, 25 Ohio C. C. 258.

"You cannot," said the court in *Dodsworth v. Cincinnati*, 18 Ohio C. C. 288, "condemn property, and pay condemnation money, and then, under the guise of taxation, without reference to benefits, by alleging front-foot assessments, recondemn the money out of the pocket of the owner of the land." Such a proceeding violates the Constitutions, both state and Federal. 28 L.R.A.(N.S.)

A constitutional provision forbidding the taking of private property for public use without making compensation for it in money, and without deduction on account of benefits, forbids the assessing back, upon the remaining lands of the same owner, the cost of taking property for the purpose of a public street. *Cincinnati, L. & N. R. Co. v. Cincinnati*, 62 Ohio St. 465, 49 L.R.A. 566, 57 N. E. 229.

The case of *Cleveland v. Wick*, 18 Ohio St. 303, in which the contrary had been held, was declared unsound and expressly overruled by this decision.

This court, said *Sherwin, J.*, in delivering the opinion of the Iowa supreme court in *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 67 L.R.A. 408, 106 Am. St. Rep. 311, 101 N. W. 141, 3 A. & E. Ann. Cas. 7, has uniformly upheld the frontage rule of assessment regardless of the special benefit to the property, and were it not for the controlling force of *Norwood v. Baker*, supra, we should perhaps feel bound to follow the rule in this case. It should be said, however, that in no case involving this question upon which we have heretofore passed have the facts been similar to these before us now, and hence we have never before been called upon to determine the precise question involved here. "The assessment in this case is so manifestly unequal and unjust, and is so clearly governed by the rule announced by the Supreme Court of the United States in *Norwood v. Baker*, supra, that we are constrained to hold it invalid."

The principle which controlled in *Norwood v. Baker*, supra, came into play and was applied once more in *Martin v. District of Columbia*, 205 U. S. 135, 51 L. ed. 743, 27 Sup. Ct. Rep. 440, in which the Supreme Court of the United States held that, by the acts of Congress authorizing alleys to be opened or widened through squares in Washington, District of Columbia, and providing for an apportionment and assessment of the cost of the land taken for the improvement, and of the expense of the proceedings, upon the property lying within the squares through which the alleys ran, such apportionment and assessment must in any event be limited to the extent of the resulting benefit. In that case assessments of \$650 and \$550 gross, respectively, were laid upon what was left of two abutting lots from which strips of land were taken to widen an alley, and which lots were worth, after the shearing, if the valuation of the land appropriated should be the criterion, at most, \$368 and \$300, respectively. The circumstances were such as to compel the court greatly to limit its previous decisions in *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966, and *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616. The task was assigned to and performed by Mr. Justice Holmes.

In view of the decisions to which we have referred, said he, it would be unfortunate if the present act should be declared unconsti-

stitutional, after it has stood so long. We think that, without a violent construction of the statute, it may be read in such a way as not to raise the difficult question with which we have been concerned. It is true that the jury is to apportion an amount equal to the amount of the damage ascertained, but it is to apportion it "according as each lot or part of lot of land in such square may be benefited by the opening," etc. Very likely it was thought that in general, having regard to the shortness of the alleys, the benefits would be greater than the cost. But the words quoted permit, if they do not require, the interpretation that in any event the apportionment is to be limited to the benefit, and, if it is so limited, all serious doubt as to the validity of the statute disappears.

The case of *Norwood v. Baker*, supra, has several times been distinguished, and is now regarded as strictly limited to cases in the same class. The Supreme Court of the United States had occasion almost as soon as it had been promulgated, to explain and limit the decision. In *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, Mr. Justice Shiras, speaking for the majority of the court, referred to the contention that the decision in *Norwood v. Baker*, supra, had established the principle that the cost of a local improvement could not constitutionally be assessed against abutting property according to its frontage, without a preliminary hearing concerning the benefits to result to the property assessed, and declared that such is not the necessary and legal import of the decision. That, said he, was a case where, by a village ordinance apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the cost and expenses of the condemnation, was thrown upon the abutting property of the person whose land was condemned. This appeared, he added, both to the court below, and to a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. It may be conceded, he continued, that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty, or property without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of *Norwood v. Baker*, supra.

The case was again distinguished by the New York court of appeals in *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130, by saying that, in the former case, the improvement was for the opening of a street through the plaintiff's lands, in which she was undoubtedly entitled to compensation for the land taken, and the right to which she could not be constitutionally denied. The same statute authorized the local au-

thorities to assess the cost of the improvement and the expense of the proceeding upon the remaining lands of the plaintiff, according to frontage and regardless of benefit. The effect of this double proceeding of eminent domain and taxation, said the New York court, was that the plaintiff lost her land without compensation, and was compelled to pay the expense of having it taken away from her, and these provisions of the law were held to violate the Federal Constitution; but in the present case no land is taken from the plaintiff. The proceeding is purely an exercise of the power of taxation. The land abutting on the street is benefited by the pavement or repavement, and should bear the expense. Even where no provision is made by law for the apportionment of such expense according to the frontage of the land abutting on the street, the equity of the principle is so apparent that the rule has been almost universally adopted in the municipalities of this state. The case, therefore, differs from the opening of a street or avenue, the main object of which improvement may, in special cases, be not to benefit the abutting land, but to afford access and communication between separate parts of the city or village, and thus inure to the advantage of the whole municipality.

In *Job v. Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622, the court held the decision inapplicable to the case of a special tax for constructing a sidewalk under the Illinois statute of 1875, levied proportionally to the lot frontage on the line of the work. The court explained that an ordinance adopted by authority of that statute was a determination by the municipality that the tax did not substantially exceed the benefits conferred, and that although that determination was conclusive upon the taxpayer and the courts, and the former was afforded no opportunity to be heard upon the question of benefits anywhere, nevertheless the ordinance, to be valid, must be just and reasonable, and, if not so, would be vacated by the courts, which was sufficient protection to the property owner from oppression.

In *Hadley v. Dagne*, 130 Cal. 207, 62 Pac. 500, the court distinguished the decision in two respects, viz., that the assessment in that case was for the cost of land and the proceedings to condemn it in opening a new street, and not for the improvement of an existing street; and that the laws under which it was made required such assessments to be made according to benefits conferred; whereas the statute in the case at bar required assessments for improving existing streets to be apportioned according to frontage on the line of improvement.

"In no portion of the opinion" in *Norwood v. Baker*, supra, said the California court, "is it intimated that an assessment for the improvement of an existing street upon the lands abutting thereon according to their frontage, within a district designated or prescribed by legislative authority,

is invalid; nor did the court question the correctness of any of its previous decisions, many of which are cited in the opinion, in which assessments under such a rule had been sustained."

The decision in *Norwood v. Baker*, supra, was at first widely accepted as a sweeping condemnation of the front-foot rule of assessment in every case in which it should be used arbitrarily without regard to the benefits conferred upon the assessed property. And when it was subsequently limited in *French v. Barber Asphalt Paving Co.* supra, there was much bewilderment.

In *Minneapolis & St. L. R. Co. v. Lindquist*, 119 Iowa, 144, 93 N. W. 103, the assessment was made for the construction of a storm sewer and laid upon the abutting lots according to the front-foot rule. The trial court, relying upon and following the case of *Norwood v. Baker*, supra, held that the statute authorizing that mode of assessment was unconstitutional in reversing this judgment. The supreme court said that the case had been subsequently explained and a contrary conclusion reached.

The court, in *Scranton v. Levers*, 9 Pa. Dist. R. 176, and *Williamsport v. Lloyd*, 9 Pa. Dist. R. 735, entertained the opinion that the Supreme Court of the United States had decided in that case that an assessment of the entire cost of a public improvement upon abutting property, by the front-foot rule, without reference to special benefits, was in contravention of the 14th Amendment of the Federal Constitution, and therefore void, and that consequently the decision of the Pennsylvania supreme court in *Michener v. Philadelphia*, 118 Pa. 535, 12 Atl. 174, was to be deemed overruled.

It was asserted by McClellan, Ch. J., in delivering the opinion of the court in *Montgomery v. Moore*, 140 Ala. 638, 37 So. 291, that this court had put itself in harmony with the doctrine of the constitutional validity of a statute assessing the total cost of such a street improvement as paving, laying sidewalks, or building a sewer upon the line property, by the front-foot rule, without considering resulting benefits, in the case of *Birmingham v. Klein*, 89 Ala. 461, 8 L.R.A. 369, 7 So. 386, and had so remained, if, said he, "we leave out of view some wabbling in *dicta* superinduced by what we supposed, what was generally supposed, and what three of the judges of the Supreme Court of the United States yet believe, was the effect of that court's decision in the case of *Norwood v. Baker*, supra."

It is difficult, said Knowlton, Ch. J., of the Massachusetts supreme court in *White v. Gove*, 183 Mass. 333, 67 N. E. 359, to understand what is the exact meaning of the majority of the court in *French v. Barber Asphalt Paving Co.* supra, and in the cases that follow it; for they seemingly affirm *Norwood v. Baker*, supra, and distinguish it from the cases then decided. In many state Constitutions, the authority given to the legislative body to enact laws establishing taxation is general, while in others,

as in this commonwealth, the Constitution gives authority only "to impose and levy proportional and reasonable assessments, rates, and taxes." Whether in the later cases the Supreme Court of the United States was considering statutes founded on general legislative authority, while in the earlier case of *Norwood v. Baker*, supra, they assumed that the power was limited to the enactment of laws authorizing only such taxes as are proportional and reasonable, and whether the seeming difference between the earlier decision and the later decisions is due to that fact, we need not consider. Questions in regard to the constitutionality of laws relating to taxes have frequently arisen in this commonwealth, and the test has always been whether the tax was proportional and reasonable.

In *State v. Robert P. Lewis Co.* (*Ramsey County v. Robert P. Lewis Co.*) 72 Minn. 87, 42 L.R.A. 639, 75 N. W. 108, it was held that, under constitutional provisions peculiar to the state, respecting assessments for local improvements and authorizing frontage taxes, an act of the legislature empowering the city of St. Paul to levy an annual tax or assessment upon the lineal foot of lands abutting on the line of water mains to defray the expense of laying the conduits, was valid. Inasmuch, however, as the assessment in the particular case had not been properly computed, a modification of the figures was required.

In the subsequent case of *State v. Robert P. Lewis Co.* (*Ramsey County v. Robert P. Lewis Co.*) 82 Minn. 390, 53 L.R.A. 421, 85 N. W. 207, 86 N. W. 611,—a controversy over the same tax in a later year,—the question of conformity to the state Constitution was deemed to have been settled by the prior decision; the tax, however, was assailed as a violation of the 14th Amendment of the Federal Constitution. and *Norwood v. Baker*, supra, was invoked as authority for its unconstitutionality. Prior to the appearance of that case, said the court in its first opinion, perhaps the trend of the decisions in this country was in support of the theory that the legislative power in respect of special assessments was practically unlimited, and since that case was decided the state courts have not been agreed as to its scope and meaning. Probably no decision emanating from the Federal Supreme Court, for many years, has been so sweeping and at the same time so imperfectly understood and applied. Upon the authority of that decision the court at first concluded that the statute before it was unconstitutional, because it provided for the application arbitrarily of the front-foot rule of assessment, regardless of or greatly in excess of resulting benefits to the assessed property, and thus in effect deprived the owner without due process of law of his estate, and under the guise of taxation appropriated private property to the public use without compensation.

The court, however, found its position in view of *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup.

Ct. Rep. 625, untenable, and granted a re-argument (*vide*, 82 Minn. 402, 53 L.R.A. 421, 85 N. W. 207, 86 N. W. 611).

In the final opinion, receding from its former position and affirming the validity of the assessment, it was said: The decision formerly reached by this court was based wholly upon what were believed to be the principles announced in the case of *Norwood v. Baker*, *supra*. . . . But in the case of *French v. Barber Asphalt Paving Co.* *supra*, and other cases concurrently decided, the Federal Supreme Court has attempted to qualify and limit those principles as applied in *Norwood v. Baker*. While it does not appear that the court has directly denied the soundness of the rule announced, yet the purpose seems to be, in its later expressions, to hold that the principle will not apply when in conflict with the systems of taxation as adopted by a state, unless, in some special case, peculiar and extraordinary hardship is the result. In other words, it is not the principle or rule of assessment which is the test of the validity of the state act, but rather the effect of the application of the rule in particular cases. It may be a sound rule in one case, and not in another. It would be useless at this time to further attempt to define the position of the Federal court as expressed in its later decisions. It is sufficient to say that we are in doubt as to the effect of its holdings. Our state Constitution authorizes the special assessments provided by the statute, and such statute has been held valid, under the constitutional provision, by this court in *State v. Robert P. Lewis Co.* (*Ramsey County v. Robert P. Lewis Co.*) 72 Minn. 87, 42 L.R.A. 639, 75 N. W. 108.

The court adhered to this in the later case of *State v. Macalester College*, 87 Minn. 165, 91 N. W. 484.

The opinions held by this court, it was said in the opinion in *State v. Robert P. Lewis Co.* *supra*, where the validity of the water-frontage tax was after full consideration determined, dispose of the questions again presented on this appeal. Subsequent decisions of the highest Federal court in the land, it was added, have to some extent complicated the subject, but, if we are able to comprehend the result we are required to adopt, this statute should be upheld.

XVIII. The landowner's right to notice and a hearing.

The doctrine is held by some courts that a landowner is no more entitled to notice and a hearing in respect of an assessment upon his property to defray the cost of a local improvement than he is in respect of a general tax to meet the expenses of government. The greater number of the courts, however, hold the contrary.

A statute authorizing the assessment of the cost of a street pavement upon abutting property on the front-foot plan is not open to the objection of unconstitutionality as depriving the citizen of property without 28 L.R.A.(N.S.)

due process of law, merely because it does not provide for a hearing and review. *Rolph v. Fargo*, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049.

When a statute authorizes a municipality to assess the cost of a street improvement upon abutting property on the line of the work in proportion to its frontage, the making of the assessment is a mere matter of measurement and arithmetical computation, and it is not essential to its validity that the assessed property owner should have notice of the proceeding and an opportunity to be heard upon the question of its amount. *Amery v. Keokuk*, 72 Iowa, 701, 30 N. W. 780.

When the designation of the lands to be benefited by a local improvement is intrusted to commissioners, the owners may be entitled to notice and a hearing upon the question whether their lands are benefited and how much, according to a majority of the court in *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921. But the legislature has the power to determine, by the statute imposing the tax, what lands which might be benefited by the improvement are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively decided to be benefited.

As a property owner can never be heard to say that in point of fact his property has not been benefited by a local improvement, in opposition to the declaration of the assessing authorities that it has been, the theory upon which the validity of special assessments rests, *viz.*, that of special benefit to the assessed property as a result of the improvement, is one he never can practically apply. *Seibert v. Tiffany*, 8 Mo. App. 33; *Allen v. Krenning*, 23 Mo. App. 561.

The general principle of law that no person shall be bound by proceedings of a judicial nature affecting his person or his property without having an opportunity to be heard applies to cases of assessment for municipal street improvements. *State, Mann, Prosecutor, v. Jersey City*, 24 N. J. L. 662.

A landowner whose property is to be subjected to a special assessment must be accorded an opportunity to be heard in regard to it. *Arnold v. Knoxville*, 115 Tenn. 195, 3 L.R.A.(N.S.) 837, 90 S. W. 409, 5 A. & E. Ann. Cas. 881.

The owners of property charged with the cost of a local improvement are entitled to be heard upon the question of benefits. *Adams v. Shelbyville*, 154 Ind. 467, 49 L.R.A. 797, 77 Am. St. Rep. 484, 57 N. E. 114; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021.

An opportunity to a landowner to appear

and contest the legality, justice, and accuracy of a proposed assessment against his property to defray any part of the expense of a local improvement, at some stage of the proceedings before the assessment becomes final, is a constitutional right. *Viollett v. Alexandria*, 92 Va. 501, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909; *Heth v. Radford*, 93 Va. 272, 31 S. E. 8; *Norfolk v. Young*, 97 Va. 729, 47 L.R.A. 574, 34 S. E. 886.

The owner of vacant land assessed by a city for water rates, at an arbitrary figure, is entitled at some stage of the proceedings to notice and an opportunity to be heard; and if the statute under which the assessment is laid gives no right to such notice, and affords no opportunity for a hearing before the body empowered to impose such assessment, it is unconstitutional and void. *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564; *Re Union College*, 129 N. Y. 308, 29 N. E. 460; *Re Flower*, 129 N. Y. 643, 41 N. Y. S. R. 644, 29 N. E. 463.

"I am of the opinion," said Earl, J., in delivering the unanimous opinion of the New York court of appeals in *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, "that the Constitution sanctions no law imposing such an assessment [i. e., for the opening, preparing, grading, and regulating of a new street] without a notice to, and a hearing or an opportunity of a hearing by, the owners of the property to be assessed. It is enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of law is to be tested not by what has been done under it, but by what may by its authority be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

The Massachusetts statute of 1897, chap. 420, entitled "An Act Relative to the Sewerage Works of the City of Boston," was held unconstitutional in the case of *Sears v. Street Comrs.* 173 Mass. 350, 53 N. E. 876, because, first, it undertook to give the street commissioners power to levy special assessments on real estate upon other grounds than the receipt of special benefits, and for amounts in excess of special benefits, if any there were, and because, also, it gave the property owners no opportunity to be heard upon their liability to such assessments.

Although a statute providing arbitrarily for assessments of the cost of public improvements upon abutting property by the front-foot rule may be unconstitutional, nevertheless, one that provides for a prima facie application only of such rule, subject to a review and alteration of the assessment by local officials upon the basis of

special benefits to accrue from the improvement to the assessed property, and by which it is the bounden duty of the local authorities to adjust assessments to correspond to such special benefits, is a valid exercise of the legislative power. *Hibben v. Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88.

It is now too well settled to require a discussion of the general proposition, said the court in *Butler v. Worcester*, 112 Mass. 541, that a statute authorizing the cost of local improvements, such as the construction of a sewer system, to be levied by assessment upon the estate thereby benefited, according to the judgment of the municipal authorities in the first instance, and allowing to any party aggrieved by their estimate the right to have it revised by a jury, is within the constitutional power of the legislature.

If an assessment or tax laid upon property fronting upon a street improvement for the cost of such improvement, in proportion to the frontage, is, by the statute authorizing the charge, made subject to correction in conformity with the amount of special benefits conferred by the improvement upon the assessed property, after the property owner has been afforded a fair opportunity to present evidence upon that question, the assessment is valid. *Adams v. Shelbyville*, 154 Ind. 467, 49 L.R.A. 797, 77 Am. St. Rep. 484, 57 N. E. 114; *Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100; *Taylor v. Crawfordsville*, 155 Ind. 403, 58 N. E. 490; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021.

The mere fact that the cost of a street improvement is ordained to be assessed and apportioned upon abutting property according to its frontage does not of itself invalidate an assessment, when the statute under which the ordinance was adopted requires and provides for a hearing upon the question of special benefits, and a correction of the assessment in conformity with the result of such hearing. *McKee v. Pendleton*, 102 Ind. 667, 69 N. E. 997.

An assessment for the cost of a street improvement upon abutting property according to its frontage is valid, where the statute authorizing the improvement and assessment affords the owners of the assessed property an opportunity to be heard before the city council upon the question of special benefits, and requires such council or other municipal body to adjust the assessment so as to conform to the special benefits accruing to the assessed property. *Voris v. Pittsburg Plate Glass Co.* 163 Ind. 592, 70 N. E. 249.

An assessment for the cost of a street improvement upon the abutting property in proportion to its frontage is valid, where the assessing authorities have the power, upon a hearing to which the property owners are entitled, to alter or change the assessment so as to make it conform to the special benefits received by the assessed property from the improvement. *Pitts-*

burgh, C. C. & St. L. R. Co. v. Taber, 168 Ind. 419, 77 N. E. 740, 11 A. & E. Ann. Cas. 808.

When property owners are by law given an opportunity to appear and be heard upon the question of assessing their property according to the benefits it receives from a public street improvement, a timely and seasonable offer upon their part to prove by competent testimony facts which show an assessment complained of to have been made upon the basis of frontage on the street, without regard to benefit or proportionate benefit, and without regard to the form or position of any of the parcels of land, if rejected, and the proof not admitted, constitutes such an error as will vitiate the assessment. State ex rel. Cunningham v. District Ct. 20 Minn. 62, 11 N. W. 133.

A finding by a city council sitting as a board of equalization, at which property owners are by statute entitled to appear and be heard upon the question of benefits to their property from a local improvement, that all the real estate on which special assessments are levied is specially benefited, and shall be assessed for the cost of the construction of a sewer according to the feet frontage, is not so fatally defective as a finding of uniformity and equality of benefits as to render a special assessment void upon a collateral attack. John v. Connell, 71 Neb. 10, 98 N. W. 457.

In *Baltimore v. Scharf*, 54 Md. 499, the court, although declaring it to be well settled that where naught to the contrary appears in a municipal ordinance directing the paving or repaving of a city street, and charging the cost or part of the cost upon property along the line of the work, the presumption is that the corporation decided the improvement to be so far beneficial to the property and its owners that they ought to pay the proportion of the cost of it with which they are charged, and that such decision will be held in the courts to be an adjudication of that question, nevertheless annulled such an assessment upon the ground that the property owners had been given no notice or opportunity to be heard before the assessment was laid, and therefore that it was void for want of due process of law.

After this decision was announced a motion for a reargument was made and granted. At the same time the same questions arose and were discussed in *Baltimore v. John Hopkins Hospital*, 56 Md. 1, and the argument of that case was treated by the court as a reargument of the former case. In the latter case a majority of the judges reached a different conclusion, and held the ordinance and assessment valid. The reasoning of the court to sustain this conclusion was in substance as follows: The question whether a local improvement will benefit a particular district rests in the judgment of the mayor and city council, whose determination is final and conclusive. The law has provided for no appeal from that determination, and the courts have no power to review it. The courts may only pass 28 L.R.A. (N.S.)

upon the naked question of power, and the validity of special assessments founded on the theory of special benefits has been so often and uniformly sustained that such question is no longer open. No abuse of power has been made out. The objection that no notice was given to property owners, or opportunity to them to be heard, so that due process of law was lacking, is founded on a misapprehension of the nature of the power granted by the legislature and exercised by the municipal corporation. The authorizing statute requires no notice. The imposition of an assessment of this sort is an exercise of the taxing power, and not of the power of eminent domain. To hold notice to taxpayers essential to the validity of a law imposing a tax, so that courts can intervene and set the tax aside or stay the collection of it because no notice was given or provided for, would be as much an anomaly in jurisprudence as in legislation.

The formal overruling of *Baltimore v. Scharf*, supra, is reported in 56 Md. 50.

In *Moale v. Baltimore*, 61 Md. 224, it was contended that another paving ordinance was void because, first, the statutory prescriptions had not been strictly pursued; second, because the power to assess had been illegally delegated to a subordinate officer; and, last, because the front-foot rule of assessment had been applied; but the court observed that the ordinances upheld in the preceding cases were so nearly identical with that attacked in the case at bar that it would seem that those cases ought to be conclusive against all the objections alleged as invalidating the latter.

In *Alberger v. Baltimore*, 64 Md. 1, 20 Atl. 958, another ordinance providing for regrading and repaving a city street, and assessing the abutting property to pay for the work, was attacked. The objections made most prominent against the assessments went to the constitutionality of the ordinance under which they were laid and attempted to be enforced. It was objected that the ordinance neither provided for notice nor opportunity to the property owner to be heard before the assessment was made and enforced, and hence was an attempt to appropriate the property of the citizen without due process of law. This constitutional objection was not argued, doubtless, according to the court, for the reason that the question was regarded as definitely settled by the majority opinions in the above cases. The principles held by the majority of the court, in those cases, would seem, said the court, to be quite conclusive of the constitutional question raised, and the objection must therefore be overruled.

Although each of the foregoing cases was decided by a divided court, the question seemed to be at rest.

In the case of *Ulman v. Baltimore*, 72 Md. 587, 11 L.R.A. 224, 20 Atl. 141, 21 Atl. 709, the attack upon the constitutionality of ordinances of this class, in which the property owner was afforded no chance to be heard before his property was charged with an

arbitrary assessment laid according to the front-foot rule, was renewed and proved successful. The court, again dividing, held in that case that an assessment for repaving a city street, apportioned according to the number of front feet upon the abutting property, and made, pursuant to municipal ordinances, without notice to the owners of the assessed property and without opportunity for them to appear and be heard, constitutes a deprivation of property without due process of law, and is unconstitutional and void.

The identical question arising on the record now before us, said McSherry, J., in delivering the opinion of the majority in the case just cited, has been passed upon by this court on several occasions, but is now presented distinctively as a Federal question. When, he continued, the validity of ordinance No. 98 of 1876, passed by the mayor and city council of Baltimore under the act of 1874 (chap. 218), was assailed in *Baltimore v. Scharf*, supra, a majority of the judges who heard that case declared the ordinance void because, among other reasons, it failed to provide for notice to and a hearing of the owners of property bounding on the street directed to be repaved. This municipal legislation was held to be repugnant to the organic law because in effect it took the property of the individual without due process of law,—without giving him an opportunity to be heard before or after the imposition of the tax. A motion for a reargument was made and granted, and three of the five judges who heard it reversed the former ruling, and held the ordinance to be free from constitutional objections. The same result was reached by the same bare majority in *Baltimore v. Johns Hopkins Hospital*, supra, and the ruling was followed in *Moale v. Baltimore* and *Alberger v. Baltimore*, supra. Taking up the terms of the ordinance, Judge McSherry, pointed out that neither the statute under which it was passed, nor any other law or by-law, nor the ordinance itself, made the slightest provision for giving notice to the owners of the assessed property from beginning to end. The entire proceeding, said he, beginning with the act of assembly and ending with the imposition of a lien upon the property, was purely *ex parte*. No opportunity whatever was given to resist the exaction, either by allowing a hearing before the imposition of the tax, or providing for an appeal to a court of law afterwards. The first process served upon the citizen was a peremptory demand for the payment of a burdensome lien — a judgment *in rem* and *in personam* — imposed by a municipal corporation without summons or notice or warning, and without even an opportunity to appeal. If, he added, this be “due process of law,” the provisions of the Federal and State Constitutions, and of Magna Charta itself, are utterly meaningless and void. After examining the authorities in point Judge McSherry concluded that the necessary result was that the court must return to the doc-

trine laid down in *Scharf's Case*, in 54 Md. 499, and recede from the opinion overruling that case and asserting the opposite view. Afterwards a reargument of this case was denied.

In *Baltimore v. Stewart*, 92 Md. 533, 48 Atl. 165, it was held that the front-foot rule of apportionment of the cost of an assessment for repaving a city street is not in and of itself unlawful and void, provided that, before it is put in operation and the assessment made under it is final and conclusive upon the property owner, he has an opportunity to appear and be heard upon the amount of his assessment before somebody, officer or tribunal, authorized to correct and to alter the charge, if inequitable and unjust. Concerning the rule, the court said (p. 552): Now, as to the front-foot rule of apportionment of the cost of the improvement: Prior to the act of 1874, chap. 218, the front-foot rule was prescribed by statute, and had prevailed between 1782 and 1860 under various acts of the assembly, and from 1860 until 1874 under §§ 845 and 847 of Act 4, Code Public Local Laws. The repeal of these last-named sections by the act of 1874 abrogated this rule of apportionment so far as it had been established by legislative enactment, but no further, and the act of 1874 gave to the city an unqualified discretion to adopt by ordinance the same or any other rule by which to ascertain the amount to be paid by each abutting proprietor. Under this power the general ordinance established, or rather re-established, the front-foot rule. The validity of that rule has been recognized by this court in a number of cases since the act of 1874 was adopted. Without referring to all of them, we name *Alberger's Case*, 64 Md. 1, 20 Atl. 988. What was said in *Ulman's Case*, 72 Md. 594, 11 L.R.A. 224, 20 Atl. 141, 21 Atl. 709, of the arbitrary character of that rule had relation to the question then before us, — not the validity of the rule, but the hardship of its application to a case where the party charged with the payment of the assessment has had no opportunity to be heard. It may be well to note in passing that the *Ulman Case* overruled previous cases only in so far as those cases had held that notice and an opportunity to be heard were unnecessary to the validity of such an ordinance; and the effect of overruling those cases was to reassert the doctrine in *Scharf's Case*, supra. The case at bar is different from *Ulman's Case*, because here ample provision was made for giving all parties interested an opportunity to be heard before the ordinance was passed, and therefore to contest the application or adaptation of the front-foot rule to this particular paving, if they saw fit to antagonize the rule.

XIX. The proper method of assessing according to the front-foot rule.

When a rule of apportionment of the cost of a street improvement by frontage is

adopted by municipal ordinance, then each lot, piece, or parcel of land is required to bear its proportion of the whole sum to be raised by the special tax in the ratio its frontage bears to the whole frontage upon the improvement. *Davis v. Litchfield*, 145 Ill. 313, 21 L.R.A. 563, 33 N. E. 888.

When special taxes for local improvements are laid in proportion to frontage, the entire cost of the improvement for which the assessment is made should be ascertained, and each piece of land charged in the proportion its frontage bears to that of all the land abutting on the line of the improvement. *Ware v. Jerseyville*, 158 Ill. 234, 41 N. E. 736.

A uniform and equal assessment upon abutting property for the cost of paving a street, made by the front-foot rule, results from dividing the whole cost of the work among the total property frontage; and any particular lot is not entitled to a reduction of assessment by reason of the fact that the pavement in front of it was less in area than the pavement in other parts of the street. *Philadelphia v. Gorgas*, 180 Pa. 296, 38 Atl. 868; *Scranton v. Koehler*, 200 Pa. 126, 49 Atl. 792.

To justify an assessment upon the property benefited by a street improvement, laid according to frontage, if such property is proportionally benefited by such improvement, it is not essential that any work be done directly in front of the particular piece of property assessed. *Strickland v. Stillwater*, 63 Minn. 43, 65 N. W. 131.

A municipal ordinance that provides for a levy, upon contiguous property, of the whole cost of an improvement, but only to the extent of the cost of such improvement in front of any particular lot or parcel of land assessed, does not impose a special tax upon contiguous property, but arbitrarily lays a burden upon each lot of making the improvement in front of it. *Davis v. Litchfield*, supra.

When the statute requires the cost of a street improvement to be apportioned among the owners of abutting lots in the ratio of the front feet of the respective parcels, the cost of the work done in front of each lot cannot be taken as the measure of the liability of the owner of that particular lot. *Kerr v. Owensboro*, 5 Ky. L. Rep. 863.

A statute chartering a city, and providing that the expense of improving the streets in such city shall be charged to and paid by the lots fronting on such street, affords no authority for the assessment of such expense upon the lots fronting upon the work, specifically lot by lot, work done opposite or fronting on each specific lot being assessed upon that lot alone; and an assessment by such method is void. *Weller v. St. Paul*, 5 Minn. 95, Gil. 70; *Morrison v. St. Paul*, 5 Minn. 108, Gil. 83.

When a statute provides that the cost of a street improvement shall be apportioned and charged to the adjacent property according to the front-feet of each owner, a proper construction of the law requires that the amount shall be apportioned and

charged to each lot separately, according to its respective front, and not that the assessment shall be made and the property charged for work done on its front. Property must bear its just proportion, according to its frontage, of the cost of the whole work. *St. Louis use of McGrath v. Clemens*, 49 Mo. 552.

The requirement of a statute that, in making local assessments for street improvements, each lot shall be charged in proportion to its frontage, does not contemplate that the work in front of each lot shall necessarily be charged to that lot, but that the amount of the whole work shall be ascertained, and each lot shall be charged in the proportion that its frontage bears to that of all the lots assessed. *Neenan v. Smith*, 50 Mo. 525; *Weber v. Schergens*, 59 Mo. 389.

A statute requiring the cost of the construction of a sidewalk to be apportioned among the several abutting lots according to frontage means that the cost of the whole walk shall be apportioned; and an assessment of any particular lot for the exact cost of the work immediately in front of it is void. *Adams v. Green*, 74 Mo. App. 125.

If in distributing the cost of a street improvement upon the abutting property, the accruing benefits to the lots charged are the same percentage of their respective values for both corner lots and inside lots, a grossly disproportionate charge upon the corner lots in comparison with the interior ones will invalidate the tax or assessment. *Downer's Grove v. Findlay*, 237 Ill. 368, 86 N. E. 732.

Under a municipal charter providing that the entire expense of street improvements shall be assessed upon and paid by the lands benefited, in proportion to the benefits received, an assessment which the report of the commissioners shows to have been made by calculating the amount of earth deposited in front of the lot assessed, at the price paid by the contractor for the work, and assessing it upon such lot, is not warranted by the law, and is invalid, and will not sustain a title resting upon a sale of the lot for the nonpayment of the assessment. *State, Baxter, Prosecutor, v. Jersey City*, 36 N. J. L. 188.

An assessment for a street improvement, laid upon each abutting lot or part of lot according to its frontage, for the cost of the improvement opposite, it is illegal and void, when the statute authorizing the imposition of assessments of that character requires the work to be taken as a whole, and the whole cost thereof to be equalized and divided among the various parcels of land assessed to pay for it. *State ex rel. Christopher v. Portage*, 12 Wis. 563.

The court, in *Woodbridge v. Detroit*, 8 Mich. 274, was divided upon the question of the constitutionality of a provision in the city charter authorizing the common council to cause the streets to be paved and graded, and assess the whole expense thereof in front of any particular lot to the centre of the street upon such lot, and then making

the assessment a lien upon the premises until paid, and a personal charge against the owner; but the net result was adverse to the validity of the assessment in the particular case.

The cost of a lateral sewer connection between abutting property and the main sewer in the street may lawfully be assessed in total upon the property thus connected. *Van Wagoner v. Paterson*, 67 N. J. L. 455, 51 Atl. 922.

An assessment upon unimproved land, according to the front-foot rule, of the entire cost of a street extension leading to and through it, including planking which stops a thousand feet away, is not so manifestly unjust that it can be judicially pronounced void as a denial of due process of law, where there are circumstances attending the situation of the land and the relations of the landowner respecting the improvement, and in the nature and character of the work itself and its advantages, which are conceivably consistent with the fairness of such assessment. *Seattle v. Kelleher*, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44.

An assessment authorized by statute to be laid upon abutting property according to its frontage, for the grading and paving of a street, and required by statute to be equal, is not objectionable on the score of inequality, when landowners opposite a public common are required to meet the cost of paving the entire street in front of their property, while the owners of other property are required to meet the cost of pavement only to the middle of the street. *McGonigle v. Allegheny*, 44 Pa. 118.

XX. Estoppel of landowner.

A landowner by consent may waive, or by such conduct as operates as an estoppel *in pais* may preclude himself from taking advantage of, a constitutional provision limiting special assessments for local improvements to the benefits conferred upon the assessed property. *Thornton v. Cincinnati*, 26 Ohio C. C. 33; *Murphy v. Sims*, 27 Ohio C. C. 825; *Frampton v. Sims*, 14 Ohio S. & C. P. Dec. 271.

A landowner, by his conduct and his consent, may estop himself from disputing his liability for an assessment upon his property, even where it has been held to be unconstitutional in respect of other landowners who had not estopped themselves, and whose property was similarly situated. *Bidwell v. Pittsburgh*, 85 Pa. 412, 27 Am. Rep. 602; *Ferson's Appeal*, 96 Pa. 140; *Pepser v. Philadelphia*, 114 Pa. 96, 6 Atl. 899.

Landowners who have petitioned for a local improvement to be made under a statute providing for the assessment of the cost thereof by the front-foot rule upon abutting property; who have actively participated in carrying out the work; who have, from time to time as it progressed, recognized the justice of assessments made for it; and who have virtually at its completion certified that it was properly done,—are estopped from contesting the collection of the assess-

ments notwithstanding the unconstitutionality of such statute as a denial of due process of law. *Shepard v. Barron*, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737.

A landowner who has petitioned for the repaving of a city street in front of his land, when the municipal charter confers upon the city power to do such work at the cost of abutting owners, apportioned among them according to frontage, and the city has no other power, has waived his right to object to an assessment upon his property laid according to that rule, even if the method is contrary to the provisions of the Constitution. *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130.

An assessment for a local improvement is valid, notwithstanding errors and irregularities in the method adopted for apportioning it, or even an unauthorized method, if the owners of the property charged, having full and fair opportunity to do so, do not object to the assessments. *State ex rel. Duluth v. District Ct.* 61 Minn. 542, 64 N. W. 190.

Although a statute, in requiring a municipal council to find affirmatively that the benefits conferred upon assessed property by a local improvement are equal and uniform throughout in respect of all the property assessed, is mandatory in order that an assessment according to the foot frontage be valid, nevertheless an assessed property owner, who is given by the statute an opportunity to be heard upon the question of benefits to his property, and to obtain a modification of the assessment made thereon, and who neglects to avail himself of that opportunity, cannot afterwards maintain an action to enjoin the collection of the assessment. *Morse v. Omaha*, 67 Neb. 424, 93 N. W. 734.

XXI. Conclusion.

It is no longer disputed that the imposition of special assessments to defray the cost of local improvements is to be referred to the taxing power, and it is axiomatic in American constitutional law that the taxing power of the state is unlimited save by explicit provisions in the organic law.

Neither the ordinary provisions of state Constitutions requiring equality or uniformity or both, of taxation and of *ad valorem* taxation, nor yet the 14th Amendment to the Constitution of the United States in respect of due process of law and the equal protection of the laws, forbid the use of the front-foot rule in apportioning an assessment to meet the cost of a local improvement.

And although the right to assess such cost at all rests upon the theory of equivalent benefits, it is now generally conceded that constitutional provisions prohibiting the taking of private property for public use without making the owner just compensation do not operate to prevent the employment of the front-foot rule in the process of laying local assessments for local improvements.

The mere use, then, of the rule in assessing property for such a purpose is not *per se* unconstitutional, unless there is embodied in the fundamental law some explicit provision preventing or restricting its employment.

It is perfectly true that the expense of making a public improvement may not be assessed solely upon selected property in a limited area, except where such property actually or potentially receives from the improvement special benefits beyond those which accrue to the public at large and substantially equal to the burden imposed; but the use of the front-foot rule is not, in and of itself, inconsistent with this principle. The rule may indeed, and frequently does, fairly measure the equation of benefit and burden to the assessed property. When it does so in fact, there is certainly no valid objection to its use. When the conditions are such that all the assessed property appears to enjoy the same benefits in equal degree, the resort to the front-foot rule is *prima facie* justified.

This being so, the validity or invalidity of a particular assessment, when the front-foot rule has not been prescribed, or when another rule has been prescribed by Constitution or statute, does not depend upon the circumstance that the front-foot rule was employed to make the assessment, but whether there were or were not special benefits received from the improvement substantially equivalent to the assessment upon the property, and whether the burden of such assessment has been fairly and equitably distributed among the beneficiaries.

J. B. G.

MISSOURI SUPREME COURT. (Division No. 2.)

CHARLES SCHEURER, Appt.,

v.

BANNER RUBBER COMPANY, Respt.

(227 Mo. 347, 126 S. W. 1037.)

Trial — instruction — absence of evidence.

1. An instruction should not be given where there is no evidence to support it.

Servant — assumption of risk — safety devices.

2. An employee does not assume the risk of a device installed by his master to lessen the risk of injury from the machinery at which he is required to work being permitted by the employer to get out of order, unless he himself has notice of the fact that it is so out of order.

Same — aggravation of injury — master's negligence — liability.

3. A servant who assumes the risk of getting his hand caught in the machine at which he is required to work may hold his master liable for aggravation of his injury 28 L.R.A.(N.S.)

by failure of a device installed to stop the machine in case of such accident to work, so that his arm is drawn into the machine and crushed.

Evidence — negligence — failure of machine to work.

4. Failure of a device installed by a master to stop machinery in case a servant becomes caught therein to work when the need of it arises is *prima facie* evidence of negligence on the part of the master.

Same — frequency of tests.

5. Making tests only at intervals of two or three weeks to determine whether or not a device installed to stop machinery when employees become caught in it is in working order may be found to be negligent, where it is of delicate construction, and tests made have frequently shown it to be out of order.

(March 15, 1908.)

A PPEAL by plaintiff from a judgment of the St. Louis Circuit Court in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Kinealy & Kinealy for appellant.

Messrs. Stern & Hagerman, with Messrs. Watts, Williams, & Dines and Wm. R. Gentry, for respondent:

It is not sufficient for plaintiff merely to show that an accident happened and an injury resulted.

Beebe v. St. Louis Transit Co. 206 Mo. 421, 12 L.R.A.(N.S.) 760, 103 S. W. 1019; Glasscock v. Swafford Bros. Dry Goods Co. 106 Mo. App. 657, 80 S. W. 364; Hester v. Jacob Dold Packing Co. 84 Mo. App. 454; Breen v. St. Louis Cooperage Co. 50 Mo. App. 202.

The machine was perfect, and there is no complaint that any negligence of the defendant caused or contributed to cause the plaintiff to get his hand caught in the machine. Under such circumstances he assumed the risk incident to working at the machine.

Cagney v. Hannibal & St. J. R. Co. 69 Mo. 416; Manning v. Excelsior Laundry Co. 189 Mass. 231, 75 N. E. 254; Sullivan v. Simplex Electrical Co. 178 Mass. 35, 59 N. E. 645.

When the doctrine of *res ipsa loquitur* does not apply, before plaintiff can recover, he must show that his injury was due to a defective appliance or place to work furnished by the master, and that the defect which caused his injury was known to the master, or, by the exercise of ordinary care, would have been known to the master before the injury and for a long enough time to enable the master, by the

exercise of ordinary care, to repair the defect.

Wojtylak v. Kansas & T. Coal Co. 188 Mo. 281, 87 S. W. 506; *Kelley v. Chicago & A. R. Co.* 105 Mo. App. 365, 79 S. W. 973; *Krampe v. St. Louis Brewing Asso.* 59 Mo. App. 277; *Pavey v. St. Louis & S. F. R. Co.* 85 Mo. App. 218; *Herbert v. Mound City Boot & Shoe Co.* 90 Mo. App. 305; *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 147, 10 So. 87; *Wilson v. Louisville & N. R. Co.* 85 Ala. 273, 4 So. 701; *Mobile & B. R. Co. v. Holborn*, 84 Ala. 133, 4 So. 146; *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill. 365; *United States Rolling Stock Co. v. Weir*, 96 Ala. 396, 11 So. 436; *Burke v. National India Rubber Co.* 21 R. I. 446, 44 Atl. 307.

The jury should not be allowed to attempt to guess or speculate as to how much injury would have been caused to the plaintiff if, when his fingers were caught, the safety appliance had worked properly and stopped the machine, and how much injury was caused as the result of the alleged negligence of defendant in so managing its safety brake that it did not work.

Gordon v. Reynolds' Card Mfg. Co. 47 Hun, 278; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Grizzle v. Frost*, 3 Fost. & F. 622; *Cagney v. Hannibal & St. J. R. Co.* and *Sullivan v. Simplex Electrical Co.* supra.

Burgess, J., delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of the city of St. Louis in favor of the defendant, in a suit for damages for personal injuries.

At the time he received his injuries, plaintiff was in the employ of the defendant, and was operating a machine known as a "shaping machine," used for working over old rubber stock, or the remains of rubber sheets out of which rubber shoe heels had been stamped. The sheet of rubber was first warmed up by passing it through a machine with heated rollers, and after being thus warmed and softened it was passed through the shaping machine. The warming machine and the shaping machine were substantially similar, the difference being that in the warming machine the rollers were heated. The machines consisted of two horizontal metal rollers, about 3½ or 4 feet long and 2 feet in diameter, which were caused to roll towards each other, the space between them at the nearest point of approach being about an inch and a half. The rollers stood about 3 feet from the floor, and the operator of the machine caused the rubber sheet to pass between them from the top, and after passing through and down, the operator reached under the roller,

took hold of the projecting end of the sheet of rubber, pulled it up and around the roller nearest him, and then with his left hand pushed the middle of the sheet down between the rollers, just far enough to allow the rollers to grip the sheet, which, by the motion of the rollers, is doubled up and passed through as before. This operation was repeated until the rubber stock was thoroughly worked and in proper condition for use. There were several of these machines set in a row in the room where plaintiff was working, and at the time of the injury, a number of other employees of the company were at work in said room. The rollers on these machines were caused to revolve by a cog wheel connection with the line shaft beneath the floor and under the row of machines. An engine was in the room adjoining this room, and the line shaft from which the machines received their power was connected with the main shaft of the engine by a clutch. When the jaws of this clutch were caused to open, the power of the main shaft of the engine was no longer communicated to the line shaft, and the machines would stop, although the engine might still be running. Plaintiff had been operating these machines in defendant's factory some four or five months prior to the injury. In the room, and in connection with the machines, was a safety device or appliance called an "emergency brake," to be used in case of an accident or injury to an employee by being caught in the machinery. This emergency brake was operated by a horizontal wooden bar or lever, about 2½ inches wide and 1 inch thick, located about 6 feet above the floor and over the machine. One of these bars or levers was placed over each machine. By pulling down on said lever an electric switch was closed, and a current of electricity caused to pass through an electric lock, a certain part in which lock was thus converted into a magnet, which caused a catch to be released, permitting a heavy weight to pull open the clutch on the line shaft, which line shaft was thus disconnected from the main shaft of the engine. By means of a second electric lock, operated by the same current which passed through the lock controlling the clutch, the steam was caused to be shut off from the engine. If both electric locks were in good order when the current was caused to flow by the act of pulling down on the safety lever over the machines, both locks would operate, and thereby not only would the clutch connecting the line shaft with the main shaft be caused to open, but the steam from the engine would also be shut off. If the emergency brake, as the appliance—including lever, current, wires, and locks—was called,

was in good order, the pulling down of the bar or lever over any of the machines would cause the machines to stop almost instantaneously, and the rollers would not thereafter revolve as much as 3 inches. Tacked on each side of the wooden lever over each machine was a sign reading as follows: "Don't touch this rod unless someone is caught in the machinery, or in case of severe accident. Then pull down hard on it, and the machinery will stop. Anyone who pulls this rod when it is not absolutely necessary will be discharged."

On the afternoon of February 13, 1905, the plaintiff was passing a sheet of rubber, weighing about 20 pounds, between the rollers of his shaping machine. He had passed it through the machine once, and had reached down with his right hand under the machine and taken hold of the sheet as it came through, and had pulled it up and around the roller next him. Then, with his right hand holding the top end of the rubber sheet, and his left hand against the middle, he was pressing the rubber towards the space between the rollers, when, either because the flap slipped out of his right hand and struck his left elbow, or for some other reason, the fingers of his left hand got caught, with the rubber sheet, between the rollers. As soon as plaintiff felt his fingers caught, he took hold of the emergency brake bar, which was over his machine, and pulled down on it, but it failed to operate, and he kept pulling until the bar broke. Another employee in the room, hearing him "holler," and seeing his predicament, pulled down on the emergency brake bar over his machine, but that also failed to cause the machinery to stop. Thereupon the defendant's foreman, who had seen what had happened, ran into the engine room and told the engineer to turn the steam off, but by the time this was done, and the momentum of the engine had spent itself, the plaintiff's arm had been drawn between the rollers, its whole length, and the rollers had to be pried apart before he was released. As a result of this crushing of his arm, it was necessary that same night to amputate it at the shoulder socket.

Defendant's foreman testified that the emergency brake was tested about every two weeks, and that it was not tested for "fourteen days or three weeks before it broke." The plaintiff testified that as long as he had been working there he had never seen the foreman test the brake. About three days after the injury, and before any repair or change had been made in the electrical lock controlling the clutch, the foreman was shown it by the engineer, who had taken it down. He testified that there was a part of the electrical lock broken, which break

effectually prevented the lock from operating, and prevented any current from passing through it. The defendant offered no evidence, but at the close of plaintiff's case asked for an instruction in the nature of a demurrer to the evidence, which was refused, and the defendant then announced that it rested. Under the instructions of the court, the jury returned a verdict in favor of the defendant, and judgment was entered accordingly. Plaintiff duly filed his motion for a new trial, which was overruled, whereupon he appealed to this court.

Plaintiff contends that the judgment should be reversed and the cause remanded for new trial by reason of error in the giving of certain instructions. Instructions Nos. 1 and 6 are particularly assailed. The former reads as follows: "The court instructs the jury that if they believe from the evidence that plaintiff received the injuries testified to by him, and that, at the time he received said injuries, he was in the employ of defendant, and that in the performance of his duties as such employee he was then engaged in feeding a mass of soft rubber into and between two rollers revolving towards each other, and that said rollers were caused to so operate by means of a suitable arrangement of cog wheels working into a cog wheel upon a line shaft, which in turn was caused to operate by a clutch upon the main shaft of the engine, and that near said rollers, and for the use of the person feeding said rubber through said rollers, the defendant had placed a horizontal brake lever, which was part of an emergency brake consisting of said lever and an electric battery, wires, electric lock, and a mechanical arrangement of springs, levers, and weight, and that when said horizontal lever was pulled down it would, if all the said parts of said emergency brake were in good repair, cause said clutch to open, and thereby cause said rollers to cease revolving, and if the jury further believe from the evidence that plaintiff, while in the performance of his said duties, got the fingers of his left hand caught between said rollers, and thereupon, and before plaintiff received any injury thereby, immediately pulled down said horizontal brake lever, and that said emergency brake was out of repair in that one of the parts of said electric lock was broken, and that because of that fact the pulling down of said lever by plaintiff failed to cause said rollers to cease revolving, and that because of that fact, if you find it to be a fact, plaintiff's left arm was drawn into and between said rollers, and so badly crushed that plaintiff was compelled to, and did, have it amputated, and if the jury further believe from the evidence that defendant, by the exercise of ordinary care,

would have known of such broken and out-of-repair condition of said emergency brake and electric lock, and that plaintiff, at the time he received said injuries, was exercising ordinary care in the performance of his duties, and for his own safety, then the jury will find in favor of the plaintiff." This instruction, excepting as to the words in italics, which were inserted by the court of its own motion, was asked by the plaintiff, and to the action of the court in modifying the instruction, and giving it to the jury as thus modified, the plaintiff excepted at the time and saved his exception.

The sixth instruction, complained of, is as follows: "The court instructs the jury that plaintiff, by continuing in the employ of defendant, and doing the work he was doing, assumed the risk of getting his fingers caught in between the rollers of the machine at which he was working; if, therefore, you find from the evidence that plaintiff sustained any injury by reason of so getting his fingers caught, and that he would have so sustained injury even if the safety brake had worked perfectly, then plaintiff is not entitled to recover, even though you may further find from the evidence that the injury he received was aggravated by reason of the fact that the safety brake did not stop the rollers as quickly as it was intended to do."

These two instructions, when read together and in connection with each other, in effect told the jury that the plaintiff could not recover if, before using the emergency brake, which failed to operate, he sustained any injury by reason of getting his fingers caught between the rollers; and this although the jury might find that the plaintiff was at the time exercising ordinary care in the performance of his duty, and for his own safety, and that the defendant, by the exercise of ordinary care, would have known of the broken condition of the emergency brake.

Before considering the proposition whether the plaintiff was entitled to recover under the circumstances as stated, we shall first turn our attention to said instruction No. 6, which is, we think, objectionable for more than one reason, and which almost amounts to a peremptory instruction to find for the defendant, as under it we do not see how the jury could return a verdict for the plaintiff. In the first place, there is no evidence that the plaintiff did in fact sustain any injury before he used the emergency brake which was supposed to stop the machinery. The testimony simply is that plaintiff had his fingers caught between the rollers, but there is not a particle of evidence that his fingers were thereby crushed or injured, or that he received any injury of

any kind, before he pulled down on the emergency bar or lever. The defendant's foreman testified that there was an inch and a half of space between the rollers, which was of course sufficient to allow the fingers of any ordinary man to go through without danger of injury to his fingers. However, at the time plaintiff's fingers were caught, he was pushing a sheet of rubber, in a folded condition, between the rollers, so that his fingers were pressed between the rubber, which was in turn, and at the same time, pressed by and between the rollers. This rubber, as the testimony shows, was soft, and there is no testimony, expert or otherwise, to show whether, if only his fingers had been caught, plaintiff would have sustained any injury. Perhaps the rubber was so soft and yielding that the pressure was not sufficient to crush or injure his fingers. This we do not know, there being no evidence in that regard. As the evidence does not show that the plaintiff received any injury prior to the time he pulled down on the emergency bar, there was nothing upon which to predicate that part of the instruction which asks the jury to find whether there was such injury, and the instruction is in that respect erroneous. The instruction is also faulty in that it tells the jury that the plaintiff "is not entitled to recover, even though you may further find from the evidence that the injury he received was aggravated by reason of the fact that the safety brake did not stop the rollers as quickly as it was intended to do." This not only assumes that plaintiff received injury before he used said safety brake, but also assumes that the safety brake did stop the rollers, although not "as quickly as it was intended to do. The evidence is that the safety or emergency brake did not operate at all, and had nothing to do with stopping the rollers, that only having been accomplished by "shutting down the engine," as the foreman expressed it. It is unnecessary to add that an instruction must have evidence to support it.

While admitting that plaintiff assumed the risk of getting his fingers caught between the rollers of the machine about which he was working, and the ordinary risks incidental to his employment, it cannot be said that he assumed the risk attendant upon the failure of this safety brake to operate, and which was placed there to diminish his risk. The defendant having set up this safety appliance for the purpose of diminishing risk, and the fact being so known to the plaintiff, there was an implied obligation on the defendant not to aggravate the plaintiff's risk by an omission to keep the appliance in condition to operate

and do what it was intended and expected to do. By printed notice attached to the brake bar the plaintiff was informed that by pulling down on said bar "the machinery will stop," and he had a right to rely upon the provision made for his safety. If he knew that the appliance was out of order, and still continued to work at and about his machine, it might well be argued that he accepted the increased risk; but the fact is that he did not know it before he received the injury. Defendant's engineer, who installed the apparatus called the "emergency brake," testified that if it worked properly "the machine would stop immediately, and the circumference of the rollers would not go 3 inches after the clutch was disconnected;" so that, if the emergency brake was in condition, the plaintiff's fingers, or at most his hand, could have been caught or crushed. That would have been the utmost extent of his loss, even supposing that the space between the rollers was so narrow that his fingers or hand must necessarily be crushed if caught between the rollers.

The theory, we understand, upon which the court gave instruction No. 6 and instruction No. 1, as modified, to the jury, was that there could be no apportionment of the damages; that is to say, if the plaintiff got his hand into the machinery and suffered an injury by so doing, through his own negligence, and if the injury was increased by reason of the defect in the device for stopping the machinery, there could be no apportionment of the damages, such defect in the safety device not having caused the injury in the first place. The law is that in cases where a plaintiff sustains damages from separate and independent sources, it is the duty of the triers of the facts, although the injuries may be concurrent in point of time, to separate, as best they can from the evidence before them, the amount of damages caused by the defendant's act or negligence; and the difficulty of determining the amount of damages caused by the defendant's negligence, or of separating it from the damage caused by the act of some other party, has never been allowed to stand in the way of a recovery of some damage.

In *Jenkins v. Pennsylvania R. Co.* 67 N. J. L. 331, 57 L.R.A. 309, 51 Atl. 704, it is held that "in an action of tort, if it be impossible . . . to distinguish between the damage arising from the actionable injury and damage which has another origin, the jury should be left to make, from the evidence, the best estimate in their power, . . . and award to the plaintiff compensatory damages for the actionable injury."

In *Gilbert v. Kennedy*, 22 Mich. 117, it is said: Damages will not be denied because 28 L.R.A.(N.S.)

their nature is such that they cannot be accurately measured. If they cannot be measured by a fixed rule, all facts and circumstances tending to show what they are should be submitted to the jury.

In *Occidental Consol. Min. Co. v. Comstock Tunnel Co.* (C. C.) 125 Fed. 244, the court said: "While the plaintiff could not recover remote or speculative damages, based solely on conjecture, it is not deprived from recovering such general damages as are shown by the testimony to have been necessarily occasioned as the result of the breach, although the amount may not be made so absolutely clear and certain as to be easy of computation."

In *Weitzman v. Nassau Electric R. Co.* 33 App. Div. 585, 53 N. Y. Supp. 905, a child struck by an electric car was thrown upon the fender and carried a distance of 32 to 150 feet, where he rolled off, and was killed by being crushed under the wheels. It was held that, irrespective of whether the child was guilty of contributory negligence in the first instance, yet when he was thrown into and upon the fender, of which the employees of the company had knowledge, the company became liable for any further injury which could have been prevented by the exercise of "reasonable care," the question as to the existence of which should have been submitted to the jury.

In *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705, the defendant's roof sloped towards and ran into the outside wall of plaintiff's building. Defendant's roof was covered with tin, and where the roof joined with plaintiff's wall, this tin covering was turned up and carried along plaintiff's wall for a height of about a foot, thus forming a sort of apron for the protection of the wall for that distance above the roof. A hard rain came, and the water, rising above the apron, percolated through and down along the inside of the wall, damaging plaintiff's goods. Some of the water also came from the rain beating against the unprotected portion of the wall above the apron. The court held that the damages should be apportioned, saying: "But for the water falling through the wall above, and not brought down by the defendant's roof, the plaintiff alone was answerable, for the defendant had no part in causing it to flow there. Each cause of the injury was independent of the other. Hence the instruction was proper to allow no damages for the water running into the store through the wall above, provided the apron or flushing was sufficient. True, it is difficult to apportion the damages arising from the insufficiency of the apron; but this cannot exempt the defendant from a positive injury done by casting the flowage of his roof into his neighbor's

store. The rainfall through the wall above a sufficient apron or barrier did not contribute to produce this injury, though it did add to the damage sustained by the plaintiff's goods. Hence it was the duty of the jury to apportion the loss according to the actual injury of the defendant by separating it, as well as they could, upon the evidence, from the loss arising from the openness of the wall above a sufficient apron. . . . The difficulty of separating the damage from each independent cause may be great, but it does not change the nature of the tortious act of the defendant, or relieve him from liability." The doctrine here announced as to the separation or apportionment of damages finds support in *Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209; *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642; *Bradford v. Downs*, 126 Pa. 622, 17 Atl. 884; *Jackson v. Natchez & W. R. Co.* 114 La. 982, 70 L.R.A. 294, 108 Am. St. Rep. 366, 38 So. 701; *Raasch v. Elite Laundry Co.* 98 Minn. 357, 7 L.R.A.(N.S.) 940, 108 N. W. 477; *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9, 19 Am. Dec. 690; *Partenheimer v. Van Order*, 20 Barb. 479, and many other cases.

It should be borne in mind that if the plaintiff in this case sustained injury by reason of the one fact that he got his fingers caught between the rollers of the machine, he would have no case, as he assumed that risk as one of the ordinary risks of his employment; but the action is for injuries to the plaintiff's arm, which necessitated its amputation, and which injuries the petition charges "were directly caused by the negligence of defendant in permitting said emergency brake to become defective and out of repair." The evidence we think clearly shows that the injuries complained of were the direct result of the failure of the emergency brake to stop the machinery, and not the direct result of plaintiff's getting his fingers caught in the machinery, although the said injuries would not have occurred if his fingers had not been so caught.

In *O'Brien v. McGlinchy*, 68 Me. 557, it is said in an opinion by Peters, Ch. J.: "But . . . where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff precluding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant." So, also, in the case of *Pickett v. Lisbon Falls Fibre Co.* 91 Me. 268, 39 Atl. 996, it is held that, to defeat a recovery, the con-

tributory negligence of the injured party must have contributed as a proximate cause of the injury. "If it operated as a remote cause, or afforded only an opportunity or occasion for the injury, or a mere condition of it, it is no bar to the plaintiff's action." But we need not go beyond our own state for decisions supporting the doctrine above announced. See *Lore v. American Mfg. Co.* 160 Mo. 608, 61 S. W. 678; *Bassett v. St. Joseph*, 53 Mo. 300, 14 Am. Rep. 446; *Musick v. Jacob Dold Packing Co.* 58 Mo. App. 322; *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481; *Hull v. Kansas City*, 54 Mo. 598, 14 Am. Rep. 487; *Harrison v. Kansas City Electric Light Co.* 195 Mo. 606, 7 L.R.A.(N.S.) 293, 93 S. W. 951.

In *Lore v. American Mfg. Co.* supra: Judge Gantt, speaking for the court, said: "It must be apparent from what has already been said that the slipping was not the sole cause of the injury. The injury would not and could not have happened but for another cause, to wit, the insufficient and insecure guard around the gearing; and [if] plaintiff was in the exercise of ordinary care at the time she accidentally slipped, and but for the unsafe guard would not have been hurt, then, under the decisions of this court, she is entitled to recover." In *Harrison v. Kansas City Electric Light Co.* supra, wherein is reviewed a number of the cases above cited, Judge Marshall, who delivered the opinion of the court, said: "Many other cases in this state might be cited illustrative of the rule in reference to concurrent negligence constituting proximate cause, but the foregoing cases are sufficient to demonstrate that if a defendant is negligent, and his negligence combines with that of another, or with any other independent intervening cause, he is liable, although his negligence . . . without such other independent intervening cause would not have produced the injury."

The case of *De Grazia v. Piccardo* (1900) 15 Pa. Super. Ct. 107, is on all fours with the case at bar, and we will therefore quote liberally therefrom. In that case the plaintiff was employed to work about a machine called a "macaroni roller," which machine was ordinarily safe to work about. While engaged at his work, either by his own negligence, or in some way unexplained, his left hand was caught between the rollers and crushed, and his arm, being further drawn in the machine, was also injured. There was evidence tending to show that defendant had provided a rope to be used to stop the engine by which the machine was run, and the negligence of the defendant consisted in furnishing an old and defective rope, which broke when an attempt

was made to stop the machinery by pulling said rope. In discussing the facts and the legal questions involved, the court said:

"It may be, as the defendant's counsel argue, that the defendant was not bound to provide a rope by which the machine at which the plaintiff worked could be quickly stopped. If the plaintiff had accepted service knowing that there was no such provision for his safety, it might well be argued that the injury he received was within the scope of the danger which both parties contemplated as incidental to the employment. But having provided it, there was an implied obligation on the defendant not to aggravate the plaintiff's risk by an omission to keep it in the condition in which, under all the circumstances, the plaintiff had a right to expect that it would be kept. Perhaps if the defendant removed the rope, and the plaintiff had continued in his employment with knowledge of the increased risk, it could be urged that he accepted it; but it cannot be asserted that he accepted the risk of its becoming rotten and unfit for the purpose for which it was obviously intended. The principle has been thus stated: 'If a person undertakes to do an act or discharge a duty by which the conduct of another may properly be regulated and governed, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be properly performed shall not suffer loss or injury by reason of his negligence.' It is not too much to say that, presumably, the plaintiff entered and remained in the defendant's employment in the faith that this appliance would be kept in reasonably safe condition. The learned trial judge correctly stated the duty of the defendant and the principle underlying it in the following instruction: 'But the question is, Did this defendant, having adopted this means of stopping the engine, it seeming to be the fact that there was no engineer at the engine continuously,—did he, having adopted that means, and thereby certifying that that was a proper means (and we will assume for the purposes of this case that it was), exercise due care in seeing that that appliance was kept in order?' There was ample evidence to warrant the submission of this question to the jury, and to sustain their finding that, if the rope had been in proper condition, the machine could and would have been stopped before the injuries for which they awarded damages were caused.

"This brings us to the question as to the liability of the defendant for the increased or additional injuries sustained by the plaintiff in consequence of the negligently de-

fective condition of the appliance provided for stopping the machine, assuming that the plaintiff's hand was caught in the rolls without negligence on his part or that of the defendant. Without entering into a discussion of the perplexing doctrine of proximate cause, and its application to this case, we affirm the proposition of the plaintiff's counsel that, under the facts necessarily implied in the verdict, the proximate cause of these additional or increased injuries for which a recovery was permitted was the negligence of the defendant in maintaining an insufficient and unsafe appliance for the stopping of the machine in the event of the occurrence of such an accident, which, under the circumstances, it was the defendant's duty to know might occur. Although this negligence was not the primary cause of the accident, it was the efficient cause of the injuries. Though the plaintiff might have lost the use of his hand by the accident, there was evidence to warrant a finding that he would not have lost the use of his arm if the defendant had exercised due care. It was an accident likely to occur in the use of such a machine, and, although it be conceded that it was not preventable, it does not follow that the employer is not responsible for the consequences which were preventable by the exercise of ordinary care on his part." On the question of the division and computation of damages, the court said: "The difficulty in determining at what precise point the negligence of the defendant became the efficient cause, and of drawing the line between the injuries attributable to accident and those attributable to the defendant's negligence, was not so great in the present case as to be an insurmountable objection to the plaintiff's recovery. There was evidence from which the jury could determine this dividing line with reasonable certainty. The difficulty was not greater than in apportioning damages among those severally liable for the proportion of injury caused by the turning of mine water, culm, sawdust, or the like, in a flowing stream,"—citing *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705, and other Pennsylvania cases.

But defendant's counsel insist that even though the court erred in giving the instructions referred to, the verdict was nevertheless for the right party, as the plaintiff failed to make out a prima facie case of negligence against the defendant, and the verdict should therefore be allowed to stand. The burden, of course, was on the plaintiff to establish, directly or by just inference, some want of care on the part of the defendant to which plaintiff's injury might fairly and reasonably be traced,

"Negligence, like any ultimate fact in issue, may be established as well by reasonable inferences from other facts as by more direct means of proof." *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149; *Barnowsky v. Helson*, 89 Mich. 523, 15 L.R.A. 33, 50 N. W. 989. In the *Blanton* Case, *supra*, the court said: "It is sometimes a close question to determine what inferences from facts may reasonably be drawn; but it is enough for our present purpose to say that we are of opinion that where such a machine as this starts into motion, entirely out of the usual manner of its operation, as shown in the case at bar, its action affords *prima facie* evidence of some want of care in its original construction or then condition, calling for explanation from the party responsible therefor." In that case is cited with approval the case of *Mooney v. Connecticut River Lumber Co.* 154 Mass. 407, 28 N. E. 352, wherein it was held that the starting, without apparent cause, of the carriage of a sawing machine, when left at rest, with "the lever locked which was used to start and stop it," whereby the plaintiff was injured, constituted evidence to support a finding that there was negligence in the construction or condition of the machine with reference to its reasonable safety.

We think, upon the principle announced in the above cases, the failure of the emergency brake to operate so as to stop the machinery was *prima facie* evidence of want of care in its construction or then condition, and that it was for the defendant to rebut such evidence of want of care on its part. But other facts in evidence indicate that defendant was not as careful as it should be in testing this safety appliance, and so discovering its condition before plaintiff was injured by reason of its being out of repair. The employees working at and about the machines were not permitted to test the appliance, and were warned, under penalty of being discharged, not to pull down on the brake bar "unless someone is caught in the machinery, or in case of severe accident." Defendant's foreman, testifying for plaintiff, stated that he generally tested the appliance himself, and that the company had no stated or regular time to test it. "There was several times when we tested it that it did not work, but we fixed it up, and the last time I tested it it worked all right." He further testified that "before Scheurer was hurt, we had tried the automatic brake about every two or three weeks."

Taking into consideration the object for which this safety appliance was installed, and the increased danger to which defendant's employees were exposed in the event 28 L.R.A. (N.S.)

such appliance was out of repair and inoperative, we think that inspections at intervals of two or three weeks were not as frequent as reasonably necessary. It is the duty of the master to see that proper inspections are made of the machinery, tools, and appliances with or about which his servants are at work. "The master must use such reasonable tests to discover defects as ordinary prudence suggests. The amount of care required is measured by the circumstances of each case, depending upon the kinds of machinery used, the risks incident to its use, and the hazard of the business in which it is used. Whether the defendant could have discovered the defect in the hand hold in this case by the exercise of ordinary care was a question for the jury, and not for the court, to determine." *Gutridge v. Missouri P. R. Co.* 105 Mo. 520, 16 S. W. 943. In § 3786 of Mr. Thompson's work on the *Law of Negligence*, the duty of the master in this respect is thus stated: "The master is not only bound to make a reasonably careful inspection of the premises, machinery, tools, and appliances which he provides for the use of his servants, when they come into his hands, but he is also bound to repeat such inspections from time to time, as often as may be reasonably necessary, having regard to the exigencies and risks of his business, to the end that they shall not be used by his servants after they get out of repair in such a sense as to be dangerous."

In this case, the way of testing the appliance was simply to start the engine and then pull down the brake lever to see if the safety appliance would do its work, and this, we infer from the evidence, could consume but little time. That being true, and considering the danger to which the plaintiff was exposed in the event the appliance was out of order, perhaps it would not be too much to expect such test and inspection to be made every morning. It was for the jury to determine that question: we think there was ample evidence to warrant the submission of the question of defendant's negligence to the jury.

The plaintiff was earning \$1.75 a day at the time he was injured, since which time, according to the evidence, he had not been able to obtain permanent employment. He ran errands for people, and in that way was able to earn a few dollars a week. He held "one job as night watchman, at \$1 a night, for the Baden Laundry, but was laid off." There can be no question that the loss of an arm is a grievous affliction, and particularly so to a workman who has to depend upon the work of his hands for subsistence. There are but few occupations open to him

when thus maimed, and his earning capacity is necessarily greatly impaired.

Under the evidence before us, and the principles of law applicable thereto, we are of opinion that the plaintiff has a prima facie good case.

For the errors pointed out, the judgment

is reversed and the cause remanded for new trial.

All concur.

Petition for rehearing denied March 31, 1910.

Note.—*May servant assume the risk of dangers created by the master's negligence.*

Introduction.

In many cases, the broad statement is made without apparent qualification that a servant never assumes the risk of dangers created by the master's negligence; and in other cases, statements are made to the effect that a servant does not assume such risks unless the danger is so great that a reasonably prudent man would not continue to work under the dangerous conditions; or, in other words, unless the servant is guilty of contributory negligence. But if the servant is guilty of contributory negligence, there would seem to be no room, or at least no necessity, for the application of the doctrine of assumption of risk, and the practical effect of such a rule would be to abolish assumption of risk, so far as the master's negligence is concerned.

On the other hand, innumerable cases in the same jurisdictions have held that the servant in the case at bar was precluded from recovering because the risk, although created by the master's negligence, had been assumed by him. Many cases have held that the servant may assume a risk even when it is created by the breach of a duty expressly imposed upon the master by statute.¹ So, too, many cases, in applying or in refusing to apply, the so-called "promise to repair" rule, proceed upon the theory that the servant may assume risks even though created by the master's negligence.²

And it is to be noted that while many decisions in Missouri hold that negligence on the part of the master eliminates any question of assumption of risk, the court in *SCHEURER v. BANNER RUBBER Co.* suggests that if the servant knew that the appliance was out of order, and still continued to work at it, it might well be argued that he accepted the increased risk.

It would be impracticable, if not impos-

sible, to gather all of the cases which discuss the doctrine, or rather doctrines, of assumption of risk, and no attempt has been made to exhaust the cases on any of the points discussed below. The purpose of the note is rather to show the fundamental principles underlying the general doctrine of assumption of risk, and to point out, in a comprehensive way, the causes of much of the apparent conflict in the decisions.

The application of the general doctrine of assumption of risk is frequently modified by extrinsic matters, as where the master had promised to repair a defect, or where the servant was a minor or inexperienced, or was acting directly under the orders of the master, or where there is a statute imposing upon the master the duty of remedying the defect or removing the danger. It is not proposed to discuss the effect that any of these matters may have upon the application of the general doctrine, and cases involving them have been included only when the discussion of the general doctrine is considered of especial value.

It may be stated at the beginning that it is an impossible task to reconcile all of the statements concerning assumption of risk found in the reported cases. The question of assumption of risk enters into a great majority of the very large number of cases dealing with the law of master and servant which are being handed down at the present time; and it could not be expected that all of the decisions, or, rather, the language used in them, would be entirely harmonious. But much of the conflict is more apparent than real, and disappears when the general principles governing the question are borne in mind, together with the particular state of facts that is being dealt with by the court. While there are two distinct and directly contrary views taken of the subject, all jurisdictions, with but two exceptions, are very harmonious in holding to one general rule, and statements made in many jurisdictions, apparently at conflict with this rule, are intended to apply merely to the state of facts presented by the case at bar, and, so limited, are not really in conflict with the general rule asserted by the other decisions in that jurisdiction.

¹ See notes to *Davis v. Forbes*, 47 L.R.A. 190; *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A.(N.S.) 981; *Johnson v. Mammoth Vein Coal Co.* 19 L.R.A.(N.S.) 646; and *Hill v. Saugestad*, 22 L.R.A.(N.S.) 634.

² See note to *Illinois Steel Co. v. Mann*, 40 L.R.A. 782. 28 L.R.A.(N.S.)

Necessity of negligence on part of master to permit recovery.

In every case involving the liability of the master for an injury to a servant, it is elemental that there can be no recovery unless the master has been negligent,—has been guilty of some breach of duty owing by him to the servant;³ at least, there can be no recovery in the absence of some special contract or statute expressly providing therefor.⁴ Consequently, if the servant fails to show that the master has been negligent, he cannot recover; not primarily because he has assumed the risk of the injury, or in any way waived his rights, or failed to exercise due care, but because the master has incurred no liability. If the servant fails to show some breach of duty on the part of the master, he fails to establish even a *prima facie* case. In most, if not in all, employments, some dangers remain after the master has fulfilled his full duty in furnishing the place, appliances, and tools, and in all other ways; and it is a very convenient mode of expression to say, as the courts almost universally do, that the servant assumes the risk of all such dangers, but it seems illogical, at least, to say that the ser-

vant's inability to recover for injuries due to such dangers rests upon his assumption of the risks thereof, since the master's non-liability would appear to rest peculiarly upon the absence of any breach of duty upon his part. In view of this, it is unfortunate that some courts have considered it necessary in some cases to discuss at length both the question of assumption of risk and of contributory negligence or lack of due care on the part of the servant, when they have expressly found that the master was not negligent.⁵

It should be said, possibly, that the court may frequently add the discussion as to assumption of risk after holding that the master was not negligent, merely to show that if it should be mistaken as to the master's negligence, the servant even then could not recover, for he had waived any right thereto that he might have possessed. But that this is the reason for introducing the question of assumption of risk is not always made clear.

That some employments are much more dangerous than others needs scarcely to be stated; but however dangerous the employment may be, if the master has not been negligent in doing his duty to the servant, there can be no recovery.⁶

³ Indianapolis & C. R. Co. v. Love, 10 Ind. 554; Perigo v. Chicago, R. I. & P. R. Co. 52 Iowa, 276, 3 N. W. 43; Wells v. Burlington, C. R. & N. R. Co. 56 Iowa, 520, 9 N. W. 364; Baltimore & P. R. Co. v. State, 75 Md. 152, 32 Am. St. Rep. 372, 23 Atl. 310; Davis v. Forbes, 171 Mass. 548, 47 L.R.A. 170, 51 N. E. 20; Bradburn v. Wabash R. Co. 134 Mich. 575, 96 N. W. 929; Huda v. American Glucose Co. 154 N. Y. 474, 40 L.R.A. 411, 48 N. E. 897; Tucker v. Northern Terminal Co. 41 Or. 82, 68 Pac. 426; Welch v. Carlucci Stone Co. 215 Pa. 34, 64 Atl. 392, 7 A. & E. Ann. Cas. 299; Powell v. Ashland Iron & Steel Co. 98 Wis. 35, 73 N. W. 573.

And in *W. B. Conkey Co. v. Larsen* (Ind.) 29 L.R.A. (N.S.) —, 91 N. E. 163, the court said: "Before a cause of action can be said to be stated, it must appear affirmatively that the plaintiff's injury was the direct result of some fault or negligence of the defendant in respect to the particular cause of the injury."

The evidence must establish some personal fault or neglect of duty on the master's part, or what is equivalent thereto, in order to justify a verdict. *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648.

When a servant demands from his master compensation for an injury received in his service, it is necessary that he trace some distinct fault to the master. *Quincy Min. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240.

And in *Tobler v. Pioneer Min. & Mfg. Co.* (Ala.) 52 So. 86, the court said: "The final question to be determined in every case of an action by the servant against the mas-

ter, as such, is this: Was the master guilty of a breach of duty to the servant who brings the action?"

⁴ By an amendment to the labor law of New York (chap. 1674, Laws 1910), it is provided that if an employee engaged in certain extraordinarily hazardous employments, such as the operation of locomotives, the erection or demolition of steel bridges or buildings, the handling of explosives, etc., is injured without serious or wilful misconduct upon his part, then the master must make certain compensation to him, whether such injury was caused by a necessary risk or danger of the employment, or one inherent in the nature thereof, or was caused by the negligence of the master. This law was upheld at special term in *Ives v. South Buffalo R. Co.* 124 N. Y. Supp. 290, and this decision was affirmed by the appellate division (opinion not yet reported.)

⁵ This confusion is well shown in *Bradburn v. Wabash R. Co.* supra, where the court said: "If the employer is not negligent in exposing the employee to those dangers, he is not liable for any injury resulting, for two reasons: (a) He himself is free from negligence; and (b) the employee has assumed the risk." It would appear that these reasons are not distinct, the second being merely another way of stating the first. In such a case, the servant may be said to assume the risk for the very reason that the master has not been negligent.

⁶ Thus, in *Chicago & A. R. Co. v. Wild*, 109 Ill. App. 38, the court said that the

Very often it is impossible to tell from the opinion and facts given, whether the court finds that the master did in fact fail in his duty to the servant or not; and in many cases it is unnecessary to determine this, for the danger causing the injury was known and appreciated by the servant, and consequently the risk thereof is held to have been assumed by him, whether it was created by the master's negligence, or was merely an ordinary risk incident to the service. In either case, the servant's knowledge of the danger is held to preclude a recovery, and, as has been stated, the master's negligence is immaterial, and it is unnecessary for the court to decide whether he was negligent or not.⁷ So it has been said that the old-fashioned formula as to the distinction between ordinary and extraordinary risks has by no means entirely disappeared, but is largely fading

from vision, because, in so many cases, no one can tell where the one begins and the other ends. This is true, also, with respect to the distinction between usual and unusual risks.⁸

But in many cases this becomes an important question as a matter of pleading. The rule is universal that the servant must allege and prove that his injury was not due to one of the ordinary risks of the service, or, in other words, that the master had been negligent. On the other hand, the weight of authority is to the effect that assumption of risk, as used with reference to risks created by the master's negligence, is an affirmative defense, and consequently must be pleaded and proven by the defendant. Of course, this question of pleading is entirely without the scope of this note, but reference is made to it to show the necessity of keeping clearly in mind the

ordinary risks of a particular business are those which are a part of the natural and ordinary method of conducting the business, even though they might fairly be called extraordinary with reference to a different business, or a different department of the same business.

So, in *Martin v. Des Moines Edison Light Co.* 131 Iowa, 724, 106 N. W. 359, it was said that a servant may properly be held to have assumed the risk of extraordinary dangers which are naturally incident to extraordinary service.

And in *Louft v. C. & J. Pyle Co.* (Del.) 75 Atl. 619, the court said: "Many employments are by their nature dangerous. Some are very dangerous; but such employments, because of their dangers, are not therefore unlawful, nor is the rule of the assumption of risks on the part of the employee changed or modified according to the varying degrees of the danger of the employment, as the servant is presumed to have contracted with reference to all the hazards and risks of such employment."

Although the natural and inherent dangers in the calling of a brakeman are very great, he assumes the risk of injury therefrom as a part of his contract of employment. *Pratt v. Missouri P. R. Co.* 139 Mo. App. 502, 122 S. W. 1125.

As a general rule, a servant assumes all risks ordinarily and usually incident to the service in which he engages, whether they be few or many, small or great. *Roberts v. Virginia-Carolina Chemical Co.* 84 S. C. 283, 66 S. E. 298.

⁷ Thus, in *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334, 66 S. W. 226, the court said: "If the servant knows the danger, it is immaterial whether it was caused by the master's negligence or otherwise."

And the employee assumes the risk of all dangers obviously incident to his employment, whether the employer is negligent or free from negligence in exposing him to such dangers. *Bradburn v. Wabash R. Co.* 28 L.R.A.(N.S.)

supra. And to the same effect was the decision in *Illinois C. R. Co. v. Fitzpatrick*, 227 Ill. 478, 118 Am. St. Rep. 280, 81 N. E. 529.

A servant assumes all the risks and hazards of the service that are open and apparent to him, whether they are necessarily incident to the service or not. *United States Cement Co. v. Koch*, 42 Ind. App. 251, 85 N. E. 490.

A servant assumes all the risks, however created, of which he knows, or which he should have acquainted himself with. *Harrison v. Detroit, Y. A. A. & J. R. Co.* 137 Mich. 78, 100 N. W. 451.

It makes no difference whether the place or appliances are as safe as can be, reasonably safe or not reasonably safe, provided the servant knows the lack of safety and the risk he runs on account of it. *Kenney v. Meddaugh*, 55 C. C. A. 115, 118 Fed. 209.

The principle of assumed risk is independent of the negligence of the employer or the contributory negligence of the employee. *Brouseau v. Kellogg Switchboard & Supply Co.* 158 Mich. 312, 27 L.R.A.(N.S.) 1052, 122 N. W. 620.

"The waiver of the negligence of the defendant," says Mr. Justice Beck in *Wells v. Burlington, C. R. & N. R. Co.* 56 Iowa, 520, 9 N. W. 364, "places the case in the same position as though the defendant had not been negligent; and without the negligence of the defendant there can be no recovery." This statement is quoted with approval in *Tucker v. Northern P. Terminal Co.* 41 Or. 82, 65 Pac. 426.

The introduction at this point of cases holding that the servant may assume the risk of the master's negligence may be somewhat illogical, but they are presented for the purpose of showing one very fruitful cause of much of the apparent conflict in the cases.

⁸ *Rase v. Minneapolis, St. P. & S. Ste. M. R. Co.* 107 Minn. 260, 21 L.R.A.(N.S.) 138, 120 N. W. 360.

fact that, although the courts do not always expressly find that the master was negligent or was not negligent, nevertheless it is fundamental that there can be no recovery unless the master has in fact been negligent, and that the expression "assumption of risk," as applied to the ordinary risks of the service, is not a defense, but is merely a convenient mode of expression, and is only an equivalent of the statement that the master is not an insurer, and is not liable after he has exercised ordinary care for the protection of his servant.

Distinction between ordinary and extraordinary risks.

Thus, it will readily be seen that the dangers which a servant may incur in any employment fall naturally into two classes: First, those risks which are not created by the master's negligence, or the ordinary risks of the service; and second, those risks which are created by his negligence, or extraordinary risks. Although the distinction between these two classes of risks is frequently not noted by the courts, it is clearly recognized and discussed in many cases.⁹

It should be noted at this point that while the most logical classification of the risks to which the servant is exposed divides them into the two classes noted above, *viz.*, non-negligent and negligent risks, some authorities have divided such risks into the "known" and the "unknown"

risks, and the servant, according to these authorities, assumes the known risks, but does not assume the unknown risks. While the result arrived at in these cases is not materially different from that reached by dividing the risks into the negligent and the non-negligent, yet such a classification would seem to be illogical, since it combines in one class both risks for which the master is not in any way responsible and risks for which he is *prima facie* liable. And again, while it may be true, generally speaking, that a servant may be held, as many courts say, to have assumed all known risks, and does not assume unknown risks, yet no court goes to the extent of holding that a servant may recover for injuries due to unknown risks if the master, also, has neither actual nor constructive knowledge of them, for then he is guilty of no breach of duty to the servant. Furthermore, such a classification meets with difficulty in matters of pleading, and also of proof for, by the overwhelming weight of authority, the burden is upon the servant to show that his injury did not result from an ordinary risk of the service, but by the weight of authority the burden is upon the master to show that the risk, if an extraordinary one, was assumed by the servant. Attention has been called to the classification according to whether the risk was known or unknown for the sole purpose of explaining some cases which cannot be readily explained according to the classification adopted in this note.¹⁰

⁹ Choctaw, O. & G. R. Co. v. Jones, 77 Ark. 367, 4 L.R.A.(N.S.) 837, 92 S. W. 244, 7 A. & E. Ann. Cas. 430; St. Louis, I. M. & S. R. Co. v. Mangan, 86 Ark. 507, 112 S. W. 168; Chicago & N. W. R. Co. v. Gillison, 173 Ill. 264, 64 Am. St. Rep. 117, 50 N. E. 657; Armour v. Golkowska, 202 Ill. 144, 68 N. E. 1037; Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 N. E. 65; Kolfski v. Railroad Supply Co. 235 Ill. 146, 85 N. E. 274; Sankey v. Chicago, R. I. & P. R. Co. 118 Iowa, 39, 91 N. W. 820; Martin v. Des Moines Edison Light Co. supra; Clark v. Johnson County Teleph. Co. 137 Iowa, 81, 114 N. W. 554; Rhoades v. Varney, 91 Me. 222, 39 Atl. 552; Frye v. Bath Gas & Electric Co. 94 Me. 17, 46 Atl. 804; Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 Atl. 1005; Murphy v. New York, N. H. & H. R. Co. 187 Mass. 18, 72 N. E. 330; Knisley v. Pratt, 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 986; Whipple v. New York, N. H. & H. R. Co. 19 R. I. 587, 61 Am. St. Rep. 796, 35 Atl. 305; Crandall v. New York, N. H. & H. R. Co. 19 R. I. 594, 35 Atl. 307; McGar v. National & P. Worsted Mills, 22 R. I. 347, 47 Atl. 1092; Texas & N. O. R. Co. v. Kelly, 98 Tex. 123, 80 S. W. 79; Atchinson, T. & S. F. R. Co. v. Mills, 49 Tex. 22 L.R.A.(N.S.)

Civ. App. 349, 108 S. W. 480, second appeal 116 S. W. 852; Dumas v. Stone, 65 Vt. 442, 25 Atl. 1097; Severance v. New England Tale Co. 72 Vt. 181, 47 Atl. 833; Norfolk & W. R. Co. v. Ward, 90 Va. 687, 24 L.R.A. 717, 44 Am. St. Rep. 945, 19 S. E. 849; Nadau v. White River Lumber Co. 76 Wis. 120, 20 Am. St. Rep. 29, 43 N. W. 1135; Powell v. Ashland Iron & Steel Co. 98 Wis. 35, 73 N. W. 573.

So, in Knisley v. Pratt, *supra*, the court said that the rule as to the risks of service, or ordinary risks, is entirely distinct from the rule of obvious risks.

¹⁰ In Hightower v. Gray, 36 Tex. Civ. App. 674, 83 S. W. 254, the court said: "A servant assumes the ordinary risks incident to the particular service in which he has voluntarily engaged. The risks here referred to are those ordinarily connected with the particular work in which the servant is engaged, and with which it will be assumed that he is acquainted. But there are other risks, which may not be incident to the business, which are obvious, that is, such as are manifest to observation, whether they arise from the nature of the business, the manner in which it is conducted, or the use of improper or defective appli-

The "ordinary" risks of the service are best defined as those risks which remain after the master has used all reasonable care to remove them, and do not include any risk or hazard due to the master's negligence.¹¹

Assumption of ordinary risks.

It is a universal rule that a servant, by his very act of entering the service, by his very contract of employment, assumes these ordinary risks of the service, and if he is injured solely because of them, he cannot recover.¹²

It is true that a servant may recover

ances. The same factors figure in both classes of cases, because both rest upon the basis that it is negligence to expose a servant to a danger of which he is ignorant, and it is not negligence to expose him to a danger of which he has knowledge. The liability of the master turns in both instances upon the knowledge of the danger by the servant, the knowledge being presumed in the one case and necessary to be proved in the other. If the servant actually knows or is charged with knowledge of the risks attending his master's work, he assumes such risks, and cannot recover for injuries arising from such risks. All that the servant can demand from the master is that he shall not be exposed to dangers unknown to him."

¹¹ Bunker Hill & S. Min. & Concentrating Co. v. Jones, 65 C. C. A. 363, 130 Fed. 813, writ of certiorari denied in 195 U. S. 629, 49 L. ed. 352, 25 Sup. Ct. Rep. 787; American Sheet & Tin Plate Co. v. Urbanski, 89 C. C. A. 91, 162 Fed. 91; National Enameling & Stamping Co. v. Fagan, 115 Ill. App. 590; Monongahela River Consol. Coal & Coke Co. v. Hardsaw (Ind. App.) 79 N. E. 1062, affirmed on rehearing in (Ind.) 77 N. E. 363; Fitter v. Iowa Teleph. Co. (Iowa) 121 N. W. 48; Emporia v. Kowalski, 60 Kan. 64, 71 Pac. 232; Warren v. Jeunesse (Ky.) 122 S. W. 862; Roff v. Summit Lumber Co. 119 La. 571, 44 So. 302; Texas & N. O. R. Co. v. Kelly and Atchison, T. & S. F. R. Co. v. Mills, supra; Promer v. Milwaukee, L. S. & W. R. Co. 90 Wis. 215, 48 Am. St. Rep. 905, 63 N. W. 90.

The master's negligence in supplying the physical means and agencies for the conduct of the business is not a hazard usually or necessarily attendant upon the business. Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612.

Ordinary risks are such as remain after the master has used all reasonable means to eliminate them. Seley v. Southern P. Co. 6 Utah, 319, 23 Pac. 751, reversed on other grounds in 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530.

A risk which the master has created by doing or permitting something to be done which ought not to have been done, or by

even if injured by some latent danger, unknown to him, which cannot be removed by the master by the exercise of ordinary care, if that danger is known to the latter, and he fails to inform the servant of it; but, in such a case, the recovery is not based upon the mere existence of the danger, but upon the master's negligence in failing to warn the servant, so that, in fact, such a risk is to be classed with those extraordinary risks created by the master's negligence.

The reason why ordinary risks of the service are held to be assumed by the servant by his contract is that he must necessarily have had such risks in mind when

omitting some precaution which, in the exercise of ordinary care, ought to have been taken, cannot be regarded as one of the ordinary risks of any employment. George v. Clark, 29 C. C. A. 374, 56 U. S. App. 505, 85 Fed. 608.

The risks which are not obvious or apparent to ordinary observation, that the employee assumes, are such perils only as exist after the master has used due care to guard the former against danger. Miller v. Missouri, K. & T. R. Co. 95 C. C. A. 65, 169 Fed. 567.

Known dangers which can be obviated by the exercise of reasonable care are not such as are incident to the business. Schermerhorn v. Glens Falls Portland Cement Co. 94 App. Div. 600, 88 N. Y. Supp. 407.

Defects are not ordinary risks of the service. American Smelting & Ref. Co. v. McGee, 84 C. C. A. 573, 157 Fed. 69.

Risks which ought not to have existed, and which would not have existed but for the master's negligence, are not included in the risks assumed as ordinarily incident to the employment. Dumas v. Stone and Severance v. New England Talc Co. supra.

By the expression, "risk ordinarily incident to the work," is meant a risk of injury that does not grow out of an act of negligence on the part of the master. Freeman v. Fuller (Tex. Civ. App.) 127 S. W. 1194.

¹² A servant is conclusively presumed to have assumed the ordinary risks of the employment. This is a part of his contract of service. Schroder v. Montana Iron Works, 38 Mont. 474, 100 Pac. 619.

And in Ross v. Chicago, R. I. & P. R. Co. 243 Ill. 440, 90 N. E. 701, the court said: "The usual and ordinary dangers incident to the service are assumed by the contract of hiring. One entering into an employment which is necessarily more or less dangerous is held to take those dangers into consideration in making his contract to work, and for an injury received from such dangers, the servant cannot recover."

And in Martin v. Des Moines Edison Light Co. 131 Iowa, 724, 106 N. W. 359, the court said: "When a servant enters the employment of a master, he is presumed to have taken into consideration

he made his contract, and that his compensation was fixed in reference thereto.¹³

But the assumption of risks by virtue merely of the contract of employment does not, according to the generally accepted rule, extend beyond the "ordinary" risks of the employment; in other words, the servant does not, merely by entering the employment, assume the extraordinary risks created by the master's negligence.¹⁴

A few cases, particularly in Massachusetts, do hold that if, on entering the employment, the servant knows that the mas-

ter is in some way negligent in the conduct of his business, or in respect to the place, appliances, and tools, the servant will be considered as making his contract with reference to such negligence.¹⁵ This view, however, is against the great weight of authority.

Assumption of extraordinary risks.

It thus appearing that, according to the general rule, the servant does not, by his contract of employment, assume the risk

such danger and exposure to injury as is naturally incident to or connected with such service, even when the master has exercised all reasonable care for his servant's safety."

¹³ Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; Hayden v. Smithville Mfg. Co. 29 Conn. 548; Cumberland & P. R. Co. v. State, 44 Md. 283; Sherman v. Rochester & S. R. Co. 17 N. Y. 156; Stager v. Troy Laundry Co. 38 Or. 480, 53 L.R.A. 459, 63 Pac. 645; Noyes v. Smith, 28 Vt. 59, 65 Am. Dec. 222; Cooper v. Pittsburgh, C. & St. L. R. Co. 24 W. Va. 37.

¹⁴ A. L. Clark Lumber Co. v. Northcutt (Ark.) 129 S. W. 88; Rex v. Pullman's Palace Car Co. 2 Marv. (Del.) 337, 43 Atl. 246; Chicago & N. W. R. Co. v. Gillison, 173 Ill. 264, 64 Am. St. Rep. 117, 50 N. E. 657; Schillinger Bros. Co. v. Smith, 225 Ill. 74, 30 N. E. 65; Sankey v. Chicago, R. I. & P. R. Co. 118 Iowa, 39, 91 N. W. 820; Martin v. Des Moines Edison Light Co. 131 Iowa, 724, 106 N. W. 359; Rhoades v. Varney, 91 Me. 222, 39 Atl. 552; Frye v. Bath Gas & Electric Co. 94 Me. 17, 46 Atl. 804; Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 Atl. 1005; Murphy v. New York, N. H. & H. R. Co. 187 Mass. 18, 72 N. E. 330; Grimm v. Omaha Electric Light & P. Co. 79 Neb. 387, 112 N. W. 620, 114 N. W. 769; Anderson v. Milliken Bros. 123 App. Div. 614, 108 N. Y. Supp. 61; International & G. N. R. Co. v. Meehan (Tex. Civ. App.) 129 S. W. 190; Promer v. Milwaukee, L. S. & W. R. Co. supra.

The very expression, risks naturally incident to or inherent in the employment," exclude *ex vi termini* the idea of negligence. Martin v. Des Moines Edison Light Co. supra.

So, in Klofski v. Railroad Supply Co. 235 Ill. 140, 85 N. E. 274, the court said: "The master's negligence is not an ordinary and usual risk of the employment, hence, the servant does not assume dangers arising therefrom by his contract of hiring, but the servant, knowing of such negligence, may assume the risk, and in such case he assumes it because he knows of it, and not because it is an ordinary one."

There is no implied contract arising out of a contract of service that the servant shall take the risk of the master's negligence. Anthony v. Leeret, 105 N. Y. 591, 12 N. E. 561.

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The master's negligence is not a hazard which the servant, in legal contemplation, is presumed to assume by his contract of employment. Hawley v. Chicago, B. & Q. R. Co. 66 C. C. A. 216, 133 Fed. 150.

¹⁵ Thus, in Bagley v. Wonderland Co. 205 Mass. 238, 91 N. E. 317, the court said that the doctrine of contractual assumption of risk did not apply, for the reason that the defective conditions had come into existence since the servant's contract of employment.

So, in Silvia v. New York, N. H. & H. R. Co. 203 Mass. 519, 89 N. E. 1061, the court said that if there was negligence of the defendant or its superintendent, there was no contractual assumption of risk by the plaintiff, for he could not have contemplated when he entered the service that there would be such negligence.

By the terms of the employment, the servant accepted the permanent appliances as he found them. Griffin v. Joseph Ross Corp. 204 Mass. 477, 90 N. E. 926.

So, in Arnold v. Harrington Cutlery Co. 189 Mass. 549, 76 N. E. 194, where a servant employed in a cutlery factory was injured by being struck by a splinter flying from the steel upon which he was at work, due to the fact that the master was using an unfit quality of steel, the court said: "There is no ground for the contention that he assumed the risk of such an accident. There was no contractual assumption of the risk, for the contract of employment had no reference to the use of this kind of steel; and there was no subsequent assumption of the risk, for it cannot be said as a matter of law that he knew and appreciated the risk."

And in Mahoney v. Dore, 155 Mass. 519, 30 N. E. 366, the court adopted the view that, by his contract of employment, the servant assumes not only the ordinary risks of the service, but also the risks of defects in the places and appliances which existed at that time.

The servant, by entering the service of the master, assumes all known or apparent risks which are incident to it, however dangerous the service may be, even if it might be conducted more safely by the employer. Mundle v. Hill Mfg. Co. 86 Me. 400, 30 At. 16; Frye v. Bath Gas & Electric Co. supra.

"Obvious imperfections in methods or machinery, existing at the time of the employment, cannot be made the basis of a

of dangers created by the master's negligence, the question then arises, When, if ever, does the servant assume such risks?¹⁶

Any breach of the master's primary duties to the servant, such as a failure to use due care in furnishing a reasonably safe place and appliances or tools, renders the master prima facie liable to his servant for any injuries proximately caused thereby. Such is the unquestioned rule, universally recognized at the present time. The converse of this proposition, viz., that a servant does not prima facie assume the risks of dangers created by the master's negligence to perform his primary obligations to the servant, has also been stated so frequently as to become axiomatic.¹⁷

But such liability of the master is only prima facie, and may be rebutted, and is rebutted, according to practically every decision in which the question is expressly before the court and adjudicated by it (with the exception of decisions in Missouri and North Carolina), by proof that the servant, with actual or constructive knowledge of the defects, and an appreciation of the dangers, entered or continued in the employment without complaint of the defects, and without any promise on the part of the master to remedy them. By so entering or remaining in the service with such knowledge of the defects, the servant is held to have assumed the risk of such defects, even though they are the result of the master's violation of his duty.

liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has a right to have and use imperfect methods and tools, and to ask others to enter his employ to aid him in such use, and that in so doing he does not undertake to insure the employee." *Ragon v. Toledo*, A. A. & N. M. R. Co. 97 Mich. 265, 37 Am. St. Rep. 366, 54 N. W. 612. It will be noted that this view is similar to that taken in the Massachusetts decisions.

Dean Huffcutt, in his work on Agency, adopted the view that, so far as defects and dangers which existed at the commencement of the service were concerned, the servant's assumption of risk was based upon the contract; but that his assumption of any dangers thereafter created by the negligence of the master was based upon the maxim, *Volenti non fit injuria*. In many respects this appears to be a logical view, but, as is shown by the court in *Rase v. Minneapolis, St. P. & S. Ste. M. R. Co.* 107 Minn. 260, 21 L.R.A.(N.S.) 138, 120 N. W. 360, although it has some judicial sanction, it has not been enforced with any considerable degree of unanimity or consistency, and does not avail to solve the difficulty of the servant's assumption of risk where the master has violated some statutory duty.

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—the two senses in which the term is used.

Such an assumption of risk is clearly distinct from that assumption of the risk of the ordinary dangers which was discussed in the early part of the note. Assumption of risk, as applied to the ordinary risks of the service, is merely a rhetorical phrase used to connote the idea that the master is not an insurer against injuries resulting from dangers which cannot be removed by the exercise of due care upon his part. In the second sense, assumption of risk has a vastly different significance; it implies negligence on the part of the master and a prima facie liability, but it also implies a waiver of the effects of that negligence if it injures the servant. It is an affirmative defense to rebut that prima facie liability due to proof of the master's negligence.

Assumption of risk in the first sense is not a distinct proposition of law, but merely a mode of expression which adds nothing distinctive. In the second sense it is one of the fundamental principles of the law of master and servant, and is relied upon by the master to relieve himself from the prima facie liability arising from his negligence more than is any other defense which is open to him.¹⁸

As a natural result of this use of the phrase "assumption of risk" in two senses so entirely distinct, much confusion has arisen.¹⁹ It is to be regretted that, on

¹⁶ In *Hawley v. Chicago, B. & Q. R. Co.* supra, the court, after making the general assertion that the master's negligence is not a hazard which the servant, in legal contemplation, is presumed to risk, said that it was very clear that the decedent did not, on entering the service, assume the risk of injury from the hazard which had been created by the master's negligence, but added significantly: "When, if ever, did he assume it?"

¹⁷ 1 Labatt, Mast. & S. p. 620.

¹⁸ Thus, in *Duffey v. Consolidated Block Coal Co. (Iowa)* — L.R.A.(N.S.) —, 124 N. W. 609, the court said: "In the first form herein indicated, a specific pleading of assumption of risk of the ordinary dangers incident to an employment is a mere amplification of the general denial, and adds nothing to it in a legal sense. In the second form herein indicated, it is an affirmative defense, and must be specifically pleaded as such."

¹⁹ In speaking of the necessity of pleading assumption of risk, the court in *Martin v. Des Moines Edison Light Co.* 131 Iowa, 724, 106 N. W. 359, said: "The very common use of this phrase with reference to two widely different legal propositions is doubtless responsible for the confusion here existing. When a servant enters the employment of a master, he is presumed to have taken into

the one hand, the phrase lends itself so readily, in a rhetorical way, to express the condition in which the servant is placed where the master has not been negligent, and that, on the other hand, it has a peculiar, distinctive, technical meaning, embodying a special affirmative defense which relieves the master from the consequences of his negligence. And it is perhaps even more to be regretted that the term is so often used with no explanation as to which meaning is intended. The term has so often been used in the first sense, merely connoting the idea that the master is not prima facie liable, that it is perhaps too much to hope that it may come to be used solely to designate the affirmative defense; but it is to be hoped that more courts will follow the example of the Iowa court,

consideration such danger and exposure to injury as is naturally incident to or connected with such service, even when the master has exercised all reasonable care for his servant's safety. . . . This so-called 'assumption of risk' inheres in the contract of employment or in the relation of master and servant, and need never be pleaded as a defense. A simple denial of the charge of negligence raises the question of this assumption sufficiently for all purposes of the case."

²⁰ See quotation from *Martin v. Des Moines Edison Light Co.* supra, note 19, and from *Duffey v. Consolidated Block Coal Co.* infra, note 21.

²¹ Thus, in *Duffey v. Consolidated Block Coal Co. (Iowa)* — L.R.A. (N.S.) —, 124 N. W. 609, the court said: "The term 'assumption of risk' has come to be used in a twofold sense. It is often said that an employee assumes the ordinary risk that is incident to his employment. This form of assumption of risk is often pleaded by defendants in personal injury cases, although it is quite unnecessary to do so. Assumption of risk in its true sense has reference to those risks arising out of the negligence of the master, when such negligence is known to the employee, and the danger therefrom appreciated by him."

One of the most comprehensive statements as to assumption of risk, embracing the application of the doctrine in both meanings of the term, is made in *Rigsby v. Oil Well Supply Co.* 115 Mo. App. 297, 91 S. W. 460, where the court said: "The servant, upon entering the service of the master, impliedly assumes, by his contract of hire, for the same compensation, the hazards which result from such risks as are ordinarily incident to the employment in which he engages, and in addition to these risks, ordinarily incident, etc., he also, either by entering or continuing in the service, and using, without complaint, defective machinery or appliances, or, without complaint, continuing to labor in an unsafe or dangerous place, assumes the risk of such defective machinery or appliances or unsafe or dangerous

and designate the sense in which the term is used, in some distinctive manner."²⁰

In many cases, as was shown in note 9, the distinction between ordinary and extraordinary risks is noted, but unfortunately, the courts seldom go further, and point out the very vital distinction between the phrase "assumption of risk" as applied to ordinary, and as applied to extraordinary, risks. But the distinction between the two uses of the term has been carefully drawn and very clearly stated in some cases.²¹

—knowledge as an element of assumption of extraordinary risks.

Assumption of risk in the sense of an affirmative defense relied upon by the master to relieve himself from liability for

place, provided he knew not only that the machinery or appliances were defective or the place unsafe, but also knew and understood and appreciated the dangers which were liable to result therefrom."

And in *Denver & R. G. R. Co. v. Burchard*, 35 Colo. 539, 86 Pac. 749, 9 A. & E. Ann. Cas. 994, the court made this same distinction, saying that they were there considering the question of assumption of risk in case the defendant was negligent, and not the case of the risk of danger of an appliance, which every employee assumes.

So, in *Choctaw, O. & G. R. Co. v. Jones*, 77 Ark. 367, 4 L.R.A. (N.S.) 837, 92 S. W. 244, 7 A. & E. Ann. Cas. 430, the court said that in the application of the doctrine of assumption of risk a distinction must be made between those cases where the injury is due to one of the ordinary risks of the service, and when it is due to some altered condition of the service caused by the negligence of the master. If the servant negligently fails to inform himself of the ordinary risks of the service, he will still be held to have assumed them; but he is not presumed to know the risks and dangers caused by the negligence of the master which change the conditions of the service. Nevertheless, if he realizes the danger, and elects to go ahead and expose himself to it, although he acts with the greatest care, he may, if injured, be held to have assumed the risk.

And in *Ross v. Chicago, R. I. & P. R. Co.* 243 Ill. 440, 90 N. E. 701, the court said: "The usual and ordinary dangers incident to the service are assumed by the contract of hiring. One entering into an employment which is necessarily more or less dangerous is held to take those dangers into consideration in making his contract to work, and for an injury received from such dangers the servant cannot recover. There is, moreover, another class of dangers which the servant assumes, not because they were in contemplation at the time of hiring, but because the servant, having obtained knowledge of the existence of such danger after he is employed, elects to continue without

his negligence is dependent wholly upon the knowledge, actual or constructive, of the servant of the existence of the danger.²²

complaint, or promise of his employer to remove the danger after the servant obtains such knowledge. This branch of the rule seems to rest upon a species of waiver, and is expressed by the maxim, *Volenti non fit injuria*."

²² As to servant's assumption of risk of dangers created by the master's negligence which might have been discovered by the exercise of ordinary care on the part of the servant, see note to *St. Louis, I. M. & S. R. Co. v. Birch*, post, 1260.

The doctrine of assumption of risk rests on intelligent acquiescence with knowledge of danger and appreciation of the risks. *Rase v. Minneapolis, St. P. & S. Ste. M. R. Co.* supra.

One of the first principles of assumption of risk is knowledge of the danger. *Malley v. Kelly-Atkinson Constr. Co.* 144 Ill. App. 226, affirmed in 240 Ill. 102, 88 N. E. 234.

So, in *Silvia v. New York, N. H. & H. R. Co.* 203 Mass. 519, 89 N. E. 1061, the court says that there is no contractual assumption of risk of the negligence of the master or his superintendent, but that an assumption of risk of such negligence is wholly dependent upon the servant's knowledge of the danger.

The doctrine of assumed risk applies, and is limited in its application, to dangers which the servant knows or ought to know. *McDonald v. Champion Iron & Steel Co.* 140 Mich. 401, 103 N. W. 829; *Bradburn v. Wabash R. Co.* 134 Mich. 575, 96 N. W. 929; *De Kallands v. Washtenaw Home Teleph. Co.* 153 Mich. 25, 116 N. W. 564, 15 A. & E. Ann. Cas. 593.

The doctrine of assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers. *Millen v. Pacific Bridge Co.* 51 Or. 538, 95 Pac. 196.

²³ *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618; *Chicago, M. & St. P. R. Co. v. Benton*, 65 C. C. A. 660, 132 Fed. 460; *McGlynn v. Brodie*, 31 Cal. 376; *Gisson v. Schwabacher*, 99 Cal. 419, 34 Pac. 104; *Higgins v. Williams*, 114 Cal. 176, 45 Pac. 1041; *Ft. Wayne v. Christie*, 156 Ind. 172, 59 N. E. 385; *Standard Oil Co. v. Fordeck*, 34 Ind. App. 181, 71 N. W. 163; *Smart v. Louisiana Electric Light Co.* 47 La. Ann. 869, 17 So. 346; *Wagner v. Boston Elev. R. Co.* 188 Mass. 437, 74 N. E. 919; *Moynon v. D. S. McDonald Co.* 188 Mass. 499, 74 N. E. 929; *Kerrigan v. Chicago, M. & St. P. R. Co.* 86 Minn. 407, 90 N. W. 976; *Young v. Boston & M. R. Co.* 69 N. H. 356, 41 Atl. 268; *Kotera v. American Smelting & Ref. Co.* 80 Neb. 648, 114 N. W. 945; *Leazotte v. Boston & M. R. Co.* 70 N. H. 5, 45 Atl. 1084; *Edwards v. Tilton Mills*, 70 N. H. 574, 50 Atl. 102; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Eastland v. Clarke*, 165 N. Y. 420, 70 L.R.A. 751, 59 N. E. 202; *Welle v. 28 L.R.A.(N.S.)*

And without knowledge of the extraordinary danger there can be no assumption of risk.²³

Celluloid Co. 175 N. Y. 401, 67 N. E. 609; *Murtaugh v. New York C. & H. R. R. Co.* 40 Hun, 456, 3 N. Y. Supp. 483; *Walker v. Newton Falls Paper Co.* 111 App. Div. 19, 97 N. Y. Supp. 521; *Elms v. Southern Power Co.* 79 N. C. 502, 60 S. E. 1110; *Meehan v. Great Northern R. Co.* 13 N. D. 432, 101 N. W. 183; *Wagner v. Portland*, 40 Or. 389, 60 Pac. 985, 67 Pac. 300; *Doyle v. Pittsburgh Waste Co.* 204 Pa. 618, 54 Atl. 363; *Bartholomew v. Kemmerer*, 211 Pa. 277, 60 Atl. 908; *Esher v. Mineral R. & Min. Co.* 28 Pa. Super. Ct. 387; *Missouri, K. & T. R. Co. v. Milam*, 20 Tex. Civ. App. 688, 50 S. W. 417; *San Antonio & A. P. R. Co. v. Waller*, 27 Tex. Civ. App. 44, 65 S. W. 210; *Gulf, C. & S. F. R. Co. v. Darby*, 28 Tex. Civ. App. 413, 67 S. W. 446; *Smith v. Buffalo Oil Co.* 41 Tex. Civ. App. 287, 91 S. W. 383; *Carbine v. Bennington & R. R. Co.* 61 Vt. 348, 17 Atl. 491; *Drown v. New England Teleph. & Teleg. Co.* 80 Vt. 1, 68 Atl. 801; *Bolton v. Ovitt*, 80 Vt. 362, 67 Atl. 881; *McDuffee v. Boston & M. R. Co.* 81 Vt. 52, 130 Am. St. Rep. 1019, 69 Atl. 124; *Truckers' Mfg. & Supply Co. v. White*, 108 Va. 147, 60 S. E. 630; *McDannald v. Washington & C. River R. Co.* 31 Wash. 585, 72 Pac. 481; *Young v. O'Brien*, 36 Wash. 570, 79 Pac. 211; *Peterson v. Sherry Lumber Co.* 90 Wis. 83, 62 N. W. 948; *Relyea v. Tomahawk Pulp & Paper Co.* 110 Wis. 307, 85 N. W. 960; *Nix v. C. Reiss Coal Co.* 114 Wis. 493, 90 N. W. 437; *Hocking v. Windsor Spring Co.* 125 Wis. 575, 104 N. W. 705.

The doctrine that a servant who has no knowledge, actual or constructive, of an extraordinary risk, is not chargeable with its assumption, is applied in every jurisdiction where the principle of the common law is recognized. 1 *Labatt, Mast. & S.* 638.

And in *Mumford v. Chicago, R. I. & P. R. Co.* 128 Iowa, 685, 104 N. W. 1135, the court said: "The entire doctrine of waiver or assumption of risk is based upon knowledge, actual or implied, and consent, or the equivalent thereof; that is to say, if the injured party, in the exercise of ordinary care, should have known of the defect, he in law is held to a knowledge thereof. If with knowledge, actual or implied, he continues in his master's employ without protest and promise of repair, he is held to have acquiesced in, consented to, and assumed the risk. But without this knowledge, actual or implied, there can be no waiver."

An essential prerequisite to the right of recovery is the fact that the defect in the machinery was unknown to the servant. *King v. Morgan*, 48 C. C. A. 507, 109 Fed. 446.

The servant must have knowledge of the master's negligence in order to assume it. *Hartley v. Chicago & A. R. Co.* 197 Ill. 440, 64 N. E. 382.

In order to assume the risk created by the master's negligence, the servant must have positive knowledge or reasonable means of

But it makes no difference whether the defect existed at the commencement of the employment, or arose thereafter.²⁴

A few judicial statements embodying the rule as to assumption of risk in the second sense will be cited, but it is to be noted that almost innumerable cases stat-

ing the rule or applying it may be found in every jurisdiction with the exception of Missouri and North Carolina, and it may be added that even in these jurisdictions there may be found some early decisions asserting and applying the general rule.²⁵

In a number of cases, it is said that, as

positive knowledge of it. *Dorsey v. Phillips & C. Constr. Co.* 42 Wis. 583.

Assumption of risk implies knowledge of danger. *Baltimore & O. S. W. R. Co. v. Walker*, 41 Ind. App. 588, 84 N. E. 730.

The servant must have actual or constructive knowledge. *Stevens v. United Gas & Electric Co.* 73 N. H. 159, 70 L.R.A. 119, 60 Atl. 848.

Whether or not a risk is assumed depends upon whether or not it is known. *San Antonio & A. P. R. Co. v. Williams* (Tex. Civ. App.) 52 S. W. 89.

²⁴ The servant assumes not only the ordinary risks incidental to the employment, but as well all risks arising and becoming known to him during his service. *Andresik v. New Jersey Tube Co.* 73 N. J. L. 664, 4 L.R.A.(N.S.) 913, 63 Atl. 719, 9 A. & E. Ann. Cas. 1006; *Johnson v. Devoe Snuff Co.* 62 N. J. L. 417, 41 Atl. 936; *Dillenberger v. Weingartner*, 64 N. J. L. 292, 45 Atl. 638.

A servant, by continuing in the employment without complaint, assumes the risks of the defects and dangers which arise during the service, to the same extent that he assumes those which existed when he entered the employment. *St. Louis Cordage Co. v. Miller*, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495.

²⁵ Among the risks and dangers which the servant assumes by entering or continuing in the employment without notifying his master of them are those which arise from the failure of the master completely to discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances to use. *Ibid.*

And in *Ross v. Chicago, R. I. & P. R. Co.* 243 Ill. 440, 90 N. E. 701, the court said: "There is, moreover, another class of dangers which the servant assumes, not because they were in contemplation at the time of hiring, but because the servant, having obtained knowledge of the existence of such danger after he is employed, elects to continue without complaint, or promise of his employer to remove the danger after the servant obtains such knowledge."

Where the negligent breach of duty on the part of the employer augments the hazards of the service, the employee may hold the employer accountable for an injury caused by such negligent breach of duty, unless, by voluntarily continuing in the employer's service, he has assumed such danger. *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210.

A servant has a right to assume in the first instance that the place is safe, and it is for the defendant to show either knowledge, or that the conditions were such that

ignorance was inexcusable. *Calloway v. Agar Packing Co.* 129 Iowa, 1, 104 N. W. 721.

So in *Rush v. Missouri P. R. Co.* 36 Kan. 129, 12 Pac. 582, the court said that if the servant has full knowledge of the danger, and continues in the master's employment without complaint, receiving from the master full pay for his services, he assumes the risk himself of the known danger, and waives any negligence that might otherwise be imputable to the master.

If a servant has knowledge of the circumstances under which the employer carries on his business, and chooses to accept the employment, or continue in it, he assumes such risks incident to the discharge of his duties as are open or obvious. In such cases it is not a question whether the place prepared for him to occupy, and which he assents to accept, might, with reasonable care, have been made more safe. His assent dispenses with the performance on the part of the master of the duty to make it so. *Wood v. Heiges*, 83 Md. 257, 34 Atl. 872.

A servant is conclusively presumed to have assumed the ordinary risks of the employment. This is a part of his contract of service. Beyond this he does not assume any risk, except by express agreement, or where the circumstances are such that he must be presumed to have done so from the fact that he continued in the employment, though the extraordinary danger was known to him, or was so obvious that he must be presumed to have had knowledge of it. *Schroder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619.

And in *Westlake v. Murphy*, 85 Neb. 45. 122 N. W. 684, it was held that a servant, by accepting employment, assumed all the risks of injury caused by the negligence of competent fellow servants, by the dangers arising from the existing conditions, including machinery, appliances, etc., which were known to him, or apparent and obvious to persons of his understanding and experience.

In *Olney v. Boston & M. R. Co.* 71 N. H. 427, 52 Atl. 1097, the court said: "While there are rarely any stipulations expressed in the contract of hiring, by remaining in the service the servant assumes the risk of injury from defects in the machinery furnished him, of which he knows or which reasonable care would disclose to him. Continuance in service with knowledge of the risk is generally conclusive evidence of the servant's agreement to assume it."

If a servant chooses to enter into an employment involving danger of personal injury which the master might have avoided, he takes upon himself the risk of all the

a general rule, a servant never assumes the risk of the master's negligence, but that this rule is subject to an exception where the servant continues in the service with knowledge of the negligence and an appreciation of the danger.²⁶ This, of course, is but a variation of the general rule. There is possibly no valid objection to the statement of the rule in that form, but it should be borne in mind that it is probably contrary to the historical development of the doctrine of assumption of risk. There is authority for the statement

that originally the servant was held to have assumed all the risks which were manifestly incident to the employment, no matter how created, and that any modification of this general doctrine has come with the development of the law.²⁷

—apparently contrary statements as affected by the facts of the case.

As was stated in the introduction, many cases have stated broadly, and without any apparent qualification, that a servant

hazards incident to the employment, the existence of which are known to him, or which are plain and obvious, and which he has no reason to expect will be counteracted or removed. *Chandler v. Atlantic Coast Electric R. Co.* 61 N. J. L. 380, 39 Atl. 674.

In *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648, the court laid down the general rule that if a servant voluntarily enters into or continues in the service without objection or complaint, having knowledge or the means of knowledge of the dangers involved, he is deemed to have assumed the risk.

The risks assumed by an employee are such perils as exist after the employer has used due care and precaution to guard the former against danger by providing him a reasonably safe place to work in, reasonably safe appliances to work with, reasonably safe materials to work upon, and reasonably competent fellow servants to work with; but, when the employee undertakes to use defective or unsafe appliances with knowledge of such unsafe condition, he assumes the increased risk of danger, and the employer is relieved from responsibility to the employee by reason of the employee's knowledge. *Neeley v. Southwestern Cotton Seed Oil Co.* 13 Okla. 356, 64 L.R.A. 145, 75 Pac. 537.

If, with knowledge of the defect, the servant continues in the employment, he assumes the risk. *Geldard v. Marshall*, 43 Or. 438, 73 Pac. 330.

It is well established that the employer must furnish the employee with a safe place to work; but it is just as well established that the employee assumes the risks of apparent peril, even though it is due to the master's negligence. *Johnson v. Tacoma Mill Co.* 22 Wash. 88, 60 Pac. 53.

So, if a servant is aware of negligence on the part of the master in the conduct of his business, he assumes the risk of such negligence in either entering or continuing in such business. *Sanderson v. Panther Lumber Co.* 50 W. Va. 42, 55 L.R.A. 908, 88 Am. St. Rep. 841, 40 S. E. 368.

And so, in *Promer v. Milwaukee*, L. S. & W. R. Co. 90 Wis. 215, 48 Am. St. Rep. 905, 63 N. W. 90, the court said: "The risk consequent upon the failure of the company to properly discharge its duty to the plaintiff, as its employee, is not one of the ordinary risks incident to his employment, and the plaintiff did not assume the conse-

quences of it by accepting and entering upon his work. But if the negligence of the company, or element of danger, though not incident to his employment, was open and obvious, or such that the servant, in the exercise of ordinary care, ought to have observed it and comprehended the danger likely to result, then he assumed the risk if he continued in the employment."

However negligent the master may be, if the servant knows of it, he assumes the risk. *Yess v. Chicago Brass Co.* 124 Wis. 406, 102 N. W. 932.

²⁶ *Lindsay v. New York, N. H. & H. R. Co.* 50 C. C. A. 298, 112 Fed. 384; *Missouri, K. & T. R. Co. v. Wilhoit*, 87 C. C. A. 401, 160 Fed. 440; *Chicago, M. & St. P. R. Co. v. Donovan*, 87 C. C. A. 600, 160 Fed. 826; *Federal Lead Co. v. Swyers*, 88 C. C. A. 547, 161 Fed. 687; *Miller v. Missouri, K. & T. R. Co.* 95 C. C. A. 65, 169 Fed. 567; *Texas & P. R. Co. v. Archibald*, 170 U. S. 663, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777; *Flowers v. Louisville & N. R. Co.* 55 Fla. 603, 46 So. 718; *South Florida R. Co. v. Weese*, 32 Fla. 212, 13 So. 436; *National Enameling & Stamping Co. v. Fagan*, 115 Ill. App. 590; *Martin v. Des Moines Edison Light Co.* 131 Iowa, 724, 106 N. W. 359; *Merrill v. Oregon Short Line R. Co.* 29 Utah, 264, 110 Am. St. Rep. 695, 61 Pac. 85.

The rule that the servant does not assume the risk of the master's negligence was said in *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, to be subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to work in the face of such knowledge, and without objection, without assuming the hazard incident to such a situation.

In *Field v. New York C. & H. R. R. Co.* 86 App. Div. 148, 83 N. Y. Supp. 535, the court held that the principle that before an employee can be held to have assumed the risks connected with his service, the employer must have fully performed the duties enjoined upon him, does not obtain where the employee is cognizant of the danger, and continues his service in the face of that full knowledge.

²⁷ 1 *Labatt, Mast. & S.* 620; *Potts v. Plunkett*, 9 Ir. C. L. Rep. 290.

And as recent as *Indianapolis & C. R. Co.*

never assumes the risk of dangers created by the master's negligence; but it must not be taken from this that the court itself intended that such statements were to be taken literally as an expression of a general rule to be universally applied. The same courts have, without hesitation or question, decided in many other cases that the servant complaining of injuries received because of the master's negligence was precluded from recovering because he had assumed the risk of such negligence. The language of the court must be taken in connection with the particular facts with which the court was dealing. Considering only the conditions under which the servants in these cases were working, and the

particular acts of negligence of which the masters were guilty, it might well be that the servants would never assume the risk; but it is unfortunate that the courts do not so qualify their language as to show that the statements had reference to the facts of the cases at bar only. Such statements, general in form, but in fact limited in application, cannot but be misleading.²⁸

In many cases which contain broad and unqualified statements of the character referred to, there was no occasion for the court to qualify its statement in any way, for, by an examination of the facts, it will be found that the servant did not know of the danger,²⁹ or that the servant was acting directly under the orders of the master,

v. Lowe, 10 Ind. 554, which was decided in 1858, it was contended that an employee could never recover of his employer for injuries received whilst in such employment, and the court deemed it necessary to cite authorities to the effect that there might be a recovery in such a case.

²⁸ As is said in *Laughy v. Bird & W. Lumber Co.* 136 Wis. 301, 117 N. W. 796, many expressions in decided cases exist which are frequently referred to as applicable to facts materially different from those in mind at the time they originated; a much broader meaning being ascribed thereto than was intended or can fairly be given them.

And in *Bier v. Hosford*, 35 Wash. 544, 75 Pac. 867, the court said: "In the opinions of the ablest courts and jurists there may be found language which is proper and accurate, as applied to the facts of the particular controversy under consideration, but is warped from its obvious meaning when applied in a different connection, or to a dissimilar state of facts."

One of the most conspicuous examples of the misleading effect of such general and unqualified statements is found in *Lee v. Missouri P. R. Co.* 195 Mo. 400, 92 S. W. 614, where the court was called upon to decide a case arising in Kansas. The court, applying the so-called Missouri rule, held that as the master had been negligent, there could be no question of assumption of risk in the case. The court admitted that it must yield to the decisions of the highest court of the sister state as to the law of that state, but said that it appeared that the court in *Emporia v. Kowalski*, 66 Kan. 64, 71 Pac. 232, laid down the law in regard to assumption of risk, in effect the same as it had often been declared by the Missouri court. And the Missouri court also quotes from *O'Neill v. Chicago, R. I. & P. R. Co.* 62 Neb. 358, 60 L.R.A. 443, 86 N. W. 1098, which was cited in the *Emporia Case*. In both of these cases, it is true that the court states in general terms that the servant never assumes the risk of the master's negligence, but in the Kansas case, the court was dealing with a defect which could not have been discovered by the servant by any 23 L.R.A. (N.S.)

reasonable investigation, and the court expressly says in another part of the opinion that if a servant knows of negligent conditions, and continues in the service without objection, and without a promise to repair, he is properly held to have assumed the risk. And so, in the Nebraska case, in the very portion of the opinion quoted in the Missouri case, the court shows in express terms that it is speaking of the risks assumed by the contract of employment. The so-called Missouri doctrine has never acquired the slightest foothold in either Kansas or Nebraska.

²⁹ *Chicago, M. & St. P. R. Co. v. Riley*, 76 C. C. A. 107, 145 Fed. 137, 7 A. & E. Ann. Cas. 327; *Northern P. R. Co. v. Altimus*, 179 Fed. 275; *Hopkins v. O'Leary*, 176 Mass. 258, 57 N. E. 342; *Boucher v. Roberson Mills*, 182 Mass. 500, 65 N. E. 819; *Tarnoski v. Cudahy Packing Co.* 85 Neb. 147, 122 N. W. 671; *Goodale v. York*, 74 N. H. 454, 69 Atl. 525; *Jarvis v. Northern New York Marble Co.* 55 App. Div. 272, 67 N. Y. Supp. 78; *Ft. Worth & D. C. R. Co. v. Wrenn*, 20 Tex. Civ. App. 628, 50 S. W. 210; *St. Louis & S. F. R. Co. v. Vestal*, 38 Tex. Civ. App. 554, 86 S. W. 790; *Galveston, H. & S. A. R. Co. v. Udalle* (Tex. Civ. App.) 91 S. W. 330; *Howland v. Standard Mill. & Logging Co.* 50 Wash. 34, 96 Pac. 686.

In *Bunker Hill & S. Min. & Concentrating Co. v. Jones*, 65 C. C. A. 363, 130 Fed. 813, writ of certiorari denied in 195 U. S. 629, 49 L. ed. 352, 25 Sup. Ct. Rep. 787, it did not appear from the evidence that the defendant in error could have discovered that the roof of the stope was in danger of caving, without a particular inspection thereof, or that the timbering was insufficient to secure the loose rock above.

In *Alabama & V. R. Co. v. Groome* (Miss.) 52 So. 703, it appears from an examination of the facts that the defect was of such a character that the servant could not have known of it by an ordinary investigation.

In *Chambers v. Wampanoag Mills*, 189 Mass. 529, 75 N. E. 1093, one of the several looms operated by the servant had become defective, and while it was being re-

or of one standing in his place,³⁰ or had been assured by the master that there was no danger.³¹ Again, it will be found that the negligence complained of was the failure of the master properly to inspect the place or appliances,³² or to give a warning of some impending danger known to him,³³ of which failure the servant would be in no position to know. So in other cases, it will be found that the court had in mind the risks assumed by the servant by his

contract of employment, so that the effect of the servant's knowledge of the master's negligence was not within the contemplation of the court.³⁴ So a servant does not assume the risk resulting immediately, in point of time from the negligent act of the superintendent.³⁵

So, too, other distinguishing facts or circumstances are to be found in other cases which contain a statement of the broad rule, apparently unqualified.³⁶

paired, he kept the other looms going, and had no opportunity of examining the condition of the repairs before starting the loom again.

³⁰ In *McCabe & S. Constr. Co. v. Wilson*, 17 Okla. 355, 87 Pac. 320, the servant, an engineer, knew that a bridge was defective, but he was acting directly under the directions of a superior officer, and also upon the assurances of the superintendent of the defendant's construction gang, that the bridge which fell and injured him was safe.

In *Benzing v. Steinway & Sons*, 101 N. Y. 547, 5 N. E. 449, the servant had been sent into another part of the factory, with which he was wholly unfamiliar.

In *Jenks v. Thompson*, 179 N. Y. 20, 71 N. E. 286, the servant knew nothing at all about the defective scaffold upon which he was sent to work.

³¹ In *McCabe & S. Constr. Co. v. Wilson*, supra, the servant, a fireman, had been assured by the superintendent of construction that the bridge which fell and injured him was safe.

In *Swensen v. Bender*, 51 C. C. A. 627, 114 Fed. 1, the injury was caused by the caving in of a tunnel, due to defective timbering, of which the servant had no knowledge, and the servant had been assured by the master that the place was safe.

³² And in *Denver & R. G. R. Co. v. Warring*, 37 Colo. 122, 86 Pac. 305, the court was dealing with the failure of a railroad company properly to inspect its road.

In *Tennessee, Coal, Iron & R. Co. v. King*, 161 Ala. 345, 50 So. 75, the negligence in question was the failure of the master to inspect the roof of a mine.

³³ In *Postal Teleg. Cable Co. v. Hulsey*, 132 Ala. 444, 31 So. 527, it appears that the particular negligence complained of was the failure of the master's superintendent to give warning of the appearance of danger as the work progressed.

In *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764, the injury resulted from a failure of the master's foreman to give warning of a blast.

In *Simone v. Kirk*, 173 N. Y. 7, 63 N. E. 739, the injury to the servant was caused by the master's failure to warn him of dangerous conditions of which the servant was ignorant.

³⁴ *Northern P. R. Co. v. Tynan*, 56 C. C. A. 192, 119 Fed. 288; *St. Louis, I. M. & S. R. Co. v. Touhey*, 67 Ark. 209, 78 Am. St. Rep. 109, 54 S. W. 577; *Marshall v. St. Louis, I. M. & S. R. Co.* 78 Ark. 213, 115 28 L.R.A. (N.S.)

Am. St. Rep. 27, 94 S. W. 56, 8 A. & E. Ann. Cas. 420; *St. Louis, I. M. & S. R. Co. v. Harmon*, 85 Ark. 503, 109 S. W. 295; *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 So. 740; *Flowers v. Louisville & N. R. Co.* 55 Fla. 603, 46 So. 718; *Piette v. Bavarian Brewing Co.* 91 Mich. 605, 52 N. W. 152.

³⁵ *Consolidated Coal Co. v. Gruber*, 188 Ill. 584, 59 N. E. 254; *Illinois Steel Co. v. Ziemkowski*, 220 Ill. 324, 4 L.R.A. (N.S.) 1161, 77 N. E. 190, affirming 123 Ill. App. 285; *Murphy v. City Coal Co.* 172 Mass. 324, 52 N. E. 503.

In *Nelson v. Smyth Constr. Co.* (Wash.) 109 Pac. 804, the servant was injured by the negligent act of a foreman in turning a stream of water upon a bank of earth, causing it to fall upon the plaintiff.

³⁶ In *Quincy Min. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240, the master was not negligent.

In *Stearns & C. Lumber Co. v. Fowler*, 58 Fla. 362, 50 So. 680, it appears that the plaintiff was injured by the negligence of a fellow servant, and it does not appear that the master was negligent.

In *Warren v. Jeunesse* (Ky.) 122 S. W. 862, the court was criticizing the instructions given by the trial court, to the effect that the servant assumed the ordinary risks by entering the service, when, as a matter of fact, the injury was caused by the defendant's negligence.

In *Puget Sound Electric R. Co. v. Harigan*, 100 C. C. A. 104, 176 Fed. 488, the court approved the following instruction: "Assumption of risk means that one who enters a dangerous employment assumes the hazards which attend that employment which ordinary foresight and reasonable prudence cannot anticipate, and yet are likely to occur." But it appears that the only instruction asked for by the defendant imposed the burden upon the plaintiff of so conducting himself as to avoid all possible injury.

So, also, in *Alabama G. S. R. Co. v. Brooks*, 135 Ala. 401, 33 So. 181, the court stated that a servant does not assume a risk created by the master's negligence, but this statement was in answer to a plea of the master which merely alleged that the servant assumed the risk of the negligence, without further alleging that the risk was an obvious one.

And in *Connors v. Burlington, C. R. & N. R. Co.* 74 Iowa, 383, 37 S. W. 906, the danger was created by another servant of the

—basis of assumption of risk of master's negligence.

There is considerable conflict of opinion as to the basis of the assumption of risk of dangers created by the master's negligence. The so-called "assumption of risk" of ordinary dangers is usually said to be

based upon the contract of employment; but it seems hardly logical to say that, by the terms of the contract of employment, the servant agrees to assume any dangers created by the master's negligence, of which he may acquire knowledge. Yet such is the view taken by many courts.⁸⁷ Other cases base this assumption of risk upon the

master, who was not a fellow servant of the injured servant.

In *Engelking v. Spokane* (Wash.) 110 Pac. 25, the court seems to imply that the servant does not assume the risk of the master's negligence, but the court was dealing with a risk "not likely to be appreciated by a man of ordinary prudence."

In *Southern Coal & Coke Co. v. Swinney*, 149 Ala. 405, 42 So. 808, the servant, engaged at work in the defendant's mine, became sick during the working hours, and left his place of employment, and while leaving the mine along the customary way out, was injured by a car jumping the track, due to the master's negligence.

In *Southern P. Co. v. Lafferty*, 6 C. C. A. 474, 15 U. S. App. 193, 57 Fed. 536, the negligence complained of was the failure of a railroad company to take proper precautions to prevent "live" engines running away.

In *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, the court expressly stated further in the opinion that there was an exception to the broad rule where the servant knew of the defect.

In *Emporia v. Kowalski*, 66 Kan. 64, 71 Pac. 232, the court goes on to say that the servant may assume the risks of dangers created by the master's negligence where they are known to him, or ought to have been known to him by the exercise of ordinary care.

In *Jacobson v. Hobart Iron Co.* 103 Minn. 319, 114 N. W. 951, the court said further in the opinion that whether the servant knew of the defect and appreciated the danger, and therefore assumed the risk, was a question for the jury.

And in *Armour v. Golkowska*, 202 Ill. 144, 66 N. E. 1037, the court said that the duty of the master to provide a reasonably safe place is a positive duty, and the servant does not assume the risk or peril of a breach thereof, but the court went on to say that whether or not the servant knew of the danger and appreciated the risk thereof, so as to assume the hazard as a risk of her employment, was a question for the jury.

In *San Francisco & P. S. S. Co. v. Carlsson*, 89 C. C. A. 45, 161 Fed. 851, the general assertion is made without any apparent qualification, either expressed or inferable from the facts stated; but it cannot be presumed that the statement was so intended, in view of the many decisions of the United States Supreme Court to the contrary.

In *Black v. Virginia Portland Cement Co.* 28 L.R.A.(N.S.)

104 Va. 450, 51 S. E. 831, the court said that any failure on the part of the master to observe reasonable care for the protection of his servant is actionable negligence, and is not within the influence of the doctrine of assumed risk. Similar statements were made without qualification in *Richmond & D. R. Co. v. Norment*, 84 Va. 167, 10 Am. St. Rep. 827, 4 S. E. 211; *Buena Vista Extract Co. v. Hickman*, 108 Va. 665, 62 S. E. 804, and in *Norton Coal Co. v. Murphy*, 108 Va. 528, 62 S. E. 268. But, in the latter case, the court said further in the opinion: "Of course, if the employee knows of the danger, or, in the exercise of due care for his own safety, ought to have known of it, and chooses to remain, he assumes the risk and cannot recover."

⁸⁷ *St. Louis, I. M. & S. R. Co. v. Davis*, 54 Ark. 389, 26 Am. St. Rep. 48, 15 S. W. 895; *German-American Lumber Co. v. Brock*, supra; *Columbia Creasoting Co. v. Beard* (Ind. App.) 89 N. E. 321; *Dempsey v. Sawyer*, 95 Me. 295, 49 Atl. 1035; *Cristanelli v. Saginaw Min. Co.* 154 Mich. 423, 117 N. W. 910.

The principle of assumed risk rests wholly upon contract, whether the risks are created by the negligence of the master, or are ordinarily incident to the employment. *Bauer v. American Car & Foundry Co.* 132 Mich. 537, 94 N. W. 9; *Bradburn v. Wabash R. Co.* 134 Mich. 575, 96 N. W. 929; *Swick v. Aetna Portland Cement Co.* 147 Mich. 454, 111 N. W. 110; *Sipes v. Michigan Starch Co.* 137 Mich. 258, 100 N. W. 447; *Brouseau v. Kellogg Switchboard & Supply Co.* 158 Mich. 312, 27 L.R.A.(N.S.) 1052, 122 N. W. 620; *Cristanelli v. Saginaw Min. Co.* supra.

By continuing in the service with knowledge of the manner in which it is conducted, the servant agrees that the obvious dangers thereof shall constitute a term of the employment. *Britton v. Central U. Teleph. Co.* 65 C. C. A. 598, 131 Fed. 844.

And in *Davis Coal Co. v. Pollard*, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492, the court said: "The law reads into the contract, from the employee's knowledge and silence, his agreement to assume all known and obvious risks. Whether express or implied, assumption of risk is a matter of contract. In either case, the employee whose injury is due to a known or an obvious defect in place or appliances, which he has suffered to continue without objection, cannot hold the employer liable,—not because the employer was not in fact negligent, for he may not have exercised ordinary care; not because the employee was con-

maxim, *Volenti non fit injuria*,³³ while still | other cases seem to confuse the two the-

tributorily negligent, for at the time and under the circumstances of the accident he may have used due care to avoid injury; but because the employee has agreed for a sufficient consideration to absolve the employer, and to assume for himself the risk of such injury." The same views are asserted in *Avery v. Nordyke & M. Co.* 34 Ind. App. 541, 70 N. E. 888; *Wortman v. Minich*, 28 Ind. App. 31, 62 N. E. 85.

So, in *Narramore v. Cleveland, C. C. & St. L. R. Co.* 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298, it was held that assumption of risk is a term of the contract of employment, expressed or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of his duty shall be at his risk. In the course of the opinion the court said: "The acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume."

And in *Brown v. Rome Mach. & Foundry Co.* 5 Ga. App. 142, 62 S. E. 720, the court, in distinguishing between contributory negligence and assumption of risk, says: "However, if he knows the actual condition of things when he contracts, or if he subsequently discovers it, he may not choose to refuse to work. The doing of the work may be such a privilege that he is willing to take the chances of getting hurt; so that he, in the one case, by actually contracting with knowledge of the danger, or, in the other case, by refusing to abandon after knowledge, and thereby waiving the master's breach, raises an implied agreement against himself that he will not hold the master to the obligation of furnishing any safer place, ways of work, servants, or appliances than what already he sees to exist; or, as we say in juridic terminology, he assumes the risk of the delinquencies, and thereafter the law reads this implied agreement or assumption on his part into the contract of employment as a part of it."

Reduced to its last analysis, the doctrine of assumed risk must rest for its support upon the express or implied agreement of the employee that, knowing the danger to which he is exposed, he will assume all responsibility for resulting injury. *Atchison, T. & S. F. R. Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253.

Assumption of risk as to dangers created by the master's negligence is based on contract, which is not contrary to public policy. *Coulter v. Union Laundry Co.* 34 Mont. 590, 87 Pac. 973.

³³ Thus, in *Denver & R. G. R. Co. v. Nor-* 28 L.R.A. (N.S.)

gate, 6 L.R.A. (N.S.) 981, 72 C. C. A. 365, 141 Fed. 247, 5 A. & E. Ann. Cas. 448, the court, in dealing with the question whether a servant might assume the risk of the master's breach of a statutory duty, said, in regard to the general doctrine, that it was error to assume that the law of assumption of risk is created by the contract between the master and the servant. The court said: "It is the law of the land, governing all persons who assume the relation of master and servant. It is over and above the contract, and depends in no manner for its existence upon the agreement of the parties. It is founded upon public policy, the status assumed by master and servant, and upon the maxim, *Volenti non fit injuria*. The law establishing the reciprocal duties and obligations of master and servant never originated out of contract, in the sense that the master and servant ever expressly agreed to them. But the common law imposed these duties and obligations as a regulation of those who assumed this relation, regardless of the desires of the master or the servant."

And in *O'Maley v. South Boston Gaslight Co.* 158 Mass. 135, 47 L.R.A. 161, 32 N. E. 1119, the court said: "The doctrine of assumption of the risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but, as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, *Volenti non fit injuria*."

If a servant has voluntarily assumed the risk of the master's negligence, he is precluded from recovery, either on the ground that he has failed to exercise due care, or as being within the maxim, *Volenti non fit injuria*. *O'Toole v. Pruyn*, 201 Mass. 120, 87 N. E. 608.

And in *Ross v. Chicago, R. I. & P. R. Co.* 243 Ill. 440, 90 N. E. 701, the court said: "This branch of the rule seems to rest upon a species of waiver, and is expressed by the maxim, *Volenti non fit injuria*."

Where a servant voluntarily continues in service with knowledge of the defects created by the master's negligence, the maxim, *Volenti non fit injuria*, has the effect to debar him from a recovery for injuries caused thereby. *Mundle v. Hill Mfg. Co.* 86 Me. 400, 30 Atl. 16; *Frye v. Bath Gas & Electric Co.* 94 Me. 17, 46 Atl. 804.

In *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* 40 Mont. 508, 107 Pa. 499, the court said that the weight of modern authority is to the effect that the doctrine of assumption of risk, while, in most cases, perhaps, incident to the relation of master and servant, does not grow out of any express or implied contract between the parties, but rather is founded in the principle, resting upon a sound basis of public policy, that he who consents to an act will not be heard to claim that he is wronged by it.

ories.³⁹ And again, other cases speak of the action of the servant in remaining in the service with knowledge of the negligence, as an independent act of waiver, although possibly these courts do not intend to announce a theory distinct from that implied in the maxim.⁴⁰

Ordinarily, it is not a matter of much importance whether assumption of risk is made to depend upon an implied contract or upon the maxim, *Volenti non fit injuria*,

or upon an independent act of waiver; for in either case, it is the knowledge of the servant that the master has been negligent that prevents a recovery. But where the negligence complained of is the master's breach of a statutory duty, the distinction becomes of vital importance, for one line of authorities,⁴¹ proceeding upon the theory that assumption of risk is based upon contract, holds that the courts will not recognize nor enforce as against an

³⁹ Thus, in *Faulkner v. Mammoth Min. Co.* 23 Utah, 437, 66 Pac. 799, the court said: "Assumed risk is a contract, and may be implied as well as expressed. When a servant enters upon or continues in a service with full knowledge that it is dangerous, and is fully aware of the extent of the danger to which he is exposed, there is an implied contract of assumed risk, by which, on the principle of the maxim, '*Volenti non fit injuria*,' the servant waives his right to recover for injuries received by him in such service."

And in *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 464, the court said: "It is well settled that a servant assumes the obvious risks of the service into which he enters, even if the business be ever so dangerous, and if it might easily be conducted more safely by the employer. This is implied in his voluntary undertaking, and it comes within a principle which has a much broader general application, and which is expressed in the maxim, '*Volenti non fit injuria*.' The reason on which it is founded is that, whatever may be the master's general duty to conduct his business safely in reference to persons who may be affected by it, he owes no legal duty in that respect to one who contracts to work in the business as it is."

⁴⁰ Thus, in *Illinois, C. R. Co. v. Fitzpatrick*, 227 Ill. 478, 118 Am. St. Rep. 280, 81 N. E. 529, the court said that the assumption of risk as to dangers created by the master's negligence does not rest wholly upon the contract of hiring, express or implied, but rather upon a waiver which is evidenced by the servant's continuing in the employment with a full knowledge of the danger. The court goes on to say: "Where the servant has knowledge of a danger in connection with the place where he is required to labor, or in connection with the appliances with which he is to do his work, and, with such knowledge, he voluntarily elects to continue in the service without complaint, and without any promises of the master to remedy the defect, he must be held to assume the risks from such known defects, and waives all claim, by thus continuing in the employment, to damages resulting to him from such defect. In such case it is wholly immaterial that the defect exists as a result of gross negligence on the part of the master."

So, also, in *Perigo v. Chicago, R. I. & P.* 28 L.R.A. (N.S.)

R. Co. 52 Iowa, 276, 3 N. W. 43, the court said: "The doctrine of these cases is that the negligence of the defendant, in furnishing defective or improperly constructed machinery and implements, is waived by remaining in the employment without protest or promise of amendment. The waiver of the negligence of the defendant places the case in the same position as though the defendant had not been negligent; and without the negligence of the defendant, there can be no recovery."

So, in *Knisley v. Pratt*, 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 986, the court said that the rule as to the risks of service, or ordinary risks, is entirely distinct from the rule of obvious risks; the former resting upon contract, while the latter rests upon an independent act of waiver on the part of the servant.

There is no implied contract arising out of a contract of service that the servant shall take the risk of the master's negligence; but it is a complete answer to the question of negligence that the plaintiff had full knowledge of the situation, and continued in the employment. *Anthony v. Leet*, 105 N. Y. 591, 12 N. E. 561.

So, in *Pollich v. Sellers*, 42 La. Ann. 623, 7 So. 786, it is stated that a servant, by remaining in the master's employment after discovery of the defect, is deemed to have assumed the risks incident to the service, and to have waived any claim for damages for injuries therefrom.

And in *Branstrator v. Keokuk & W. R. Co.* 108 Iowa, 377, 79 N. W. 130, the court, in speaking of the effect of a promise to repair defects, said that the promise to repair is only important as rebutting the inference that defects are waived by continuance in employment with knowledge of their existence.

Where the obvious risks of the business result in injury, the inability of the employee to sue is due to the fact that he voluntarily assumed those risks, not necessarily under an implied contract to do so, but by an independent act of waiver, evidenced by his entering the employment with a full knowledge of all the facts. *Knisley v. Pratt*, supra; *Drake v. Auburn City R. Co.* 173 N. Y. 466, 66 N. E. 121; *Rooney v. Brogan Constr. Co.* 113 App. Div. 813, 99 N. Y. Supp. 939.

⁴¹ The leading case of this character is *Narramore v. Cleveland, C. C. & St. L. R. Co.* 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed.

employee an agreement, express or implied, on his part, to waive the performance of a statutory duty of the master, imposed for his benefit, and in the interest of the public; while another line,⁴² asserting that the doctrine is based upon the maxim, and not upon contract, holds that the maxim is as applicable in case of an injury due to the master's breach of a statutory duty as to any breach of duty. There is much conflict upon this question, as will be seen by a reference to the annotation upon the subject.⁴³

Apparent modification of the general rule in some states.

In a few states some apparent modifications of the general rule have appeared and been sustained by a number of decisions. It has been thought best to group cases of this character by states, in order to show their proper relation to the other decisions in the same jurisdiction. It may be well at this point, also, to note one or two decisions which hold that a servant

does not assume the risk of the master's negligence, although the decisions are against the weight of authority.⁴⁴

—Illinois.

In Illinois the general rule prevails, although there are statements in numerous cases which would seem to imply that some other rule or rules prevail in that jurisdiction. In a number of cases the statement is made, apparently without qualification, that a servant never assumes the risk of the master's negligence.⁴⁵

And again the broad statement is made, without apparent qualification, that a servant never assumes the risk of the master's negligence unless the danger is so great that a reasonably prudent man would refuse to work in the face of it; this is, of course, but another way of stating that where the master is negligent, the servant does not assume the risk of such negligence, and may recover unless his contract amounts to contributory negligence.⁴⁶

Other cases, however, make it clear that

298 (writ of certiorari denied in 175 U. S. 724, 44 L. ed. 337, 20 Sup. Ct. Rep. 1021), the opinion being written by Judge Taft.

⁴² *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A.(N.S.) 981, 72 C. C. A. 365, 141 Fed. 247, 5 A. & E. Ann. Cas. 448, writ of certiorari denied in 202 U. S. 616, 50 L. ed. 1172, 26 Sup. Ct. Rep. 764; *St. Louis Cordage Co. v. Miller*, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495.

⁴³ See notes to *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A.(N.S.) 981; *Johnson v. Mammoth Vein Coal Co.* 19 L.R.A.(N.S.) 646; and *Hill v. Saugestad*, 22 L.R.A.(N.S.) 634.

⁴⁴ A limitation of the general doctrine that a servant assumes the risk of known defects, even if due to the master's negligence, is suggested in *Southern P. Co. v. Yeargin*, 48 C. C. A. 497, 109 Fed. 436 (writ of certiorari denied in 183 U. S. 695, 46 L. ed. 394, 22 Sup. Ct. Rep. 932), where it was stated that it is manifest that employees ought not, in all cases, to be regarded as having voluntarily assumed the risk of injury merely because they remain in the service with knowledge that certain implements or appliances are out of repair, or that there is a defect in equipment; if the risk is very imminent and obvious, the servant cannot be heard to complain; or, if he is the first to discover a defect, and continues to use the implement without advising his employer of its condition, it may be well to presume that he assumed the risk; but if the master places defective tools or insufficient appliances, and requires him to use them, and the servant is not guilty of negligence in so doing, it would seem that the master ought not to be absolved from liability for his neglect of duty merely because the servant was aware of the defect 28 L.R.A.(N.S.)

before being hurt, and did not retire from the service.

In the early Wisconsin case of *Chamberlain v. Milwaukee & M. R. Co.* 11 Wis. 239, the court laid down the doctrine that the servant assumes only such risks as remain when the business is conducted with ordinary care and prudence; but this decision is entirely against the rule as laid down by the later Wisconsin cases.

⁴⁵ *La Salle v. Kostka*, 190 Ill. 130, 60 N. E. 72; *Ide v. Fratcher*, 194 Ill. 552, 62 N. E. 814; *Hinchliff v. Robinson*, 118 Ill. App. 450.

⁴⁶ Thus, in *Chicago Hair & Bristle Co. v. Mueller*, 203 Ill. 558, 68 N. E. 51, the court said: "Extraordinary perils arising from the negligence of the master are not assumed unless they are known and voluntarily encountered, or are obvious, and expose the servant to dangers so imminent that an ordinarily prudent man would anticipate injury as so probable that, in view of it, he would not, even upon the order of the master, continue in the performance of his employment under like circumstances." And to the same effect were statements in *Chicago & A. R. Co. v. House*, 172 Ill. 601, 50 N. E. 151; *Gundlach v. Schott*, 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332; *Malott v. Hood*, 201 Ill. 202, 66 N. E. 247; *Harte v. Fraser*, 104 Ill. App. 201; *Illinois Steel Co. v. Ryska*, 200 Ill. 280, 65 N. E. 734.

And the *Mueller* Case cites with approval *Swift & Co. v. O'Neill*, 187 Ill. 337, 58 N. E. 416, in which the court, after stating that while it is true that where an employee who becomes informed of defects in the place must be held to have assumed the risk, nevertheless that rule is subject to well-defined qualifications, said: "The question whether a servant is barred of a right of re-

these decisions are not to be taken in the broad sense that the language might indicate, but that the language was in fact modified by the particular facts of the cases; and in a number of the more recent cases it is expressly held that a servant assumes the risks of dangers, even if created by the master's negligence, if such dangers are known or ought to be known to him.⁴⁷

—Michigan.

The doctrine seems to have been adopted in some Michigan decisions that there is no distinction between assumption of risk, as applied to the risks created by the master's negligence, and those risks which remain after the master has fulfilled his full duty; and it is held that the servant assumes the risk of all dangers which

cover for injuries incurred by working in an unsafe place or using appliances known by him to be defective, on the ground of assumed risk, is, in fact, based upon the rule that one cannot recover for an injury to the incurring of which he has contributed by his own negligence." And the court further said: "If the danger is obvious, knowledge of that fact will, of course, be attributable to the employee; but if, as already said, the risk is no more than that under which a prudent person would, under like circumstances, continue his employment, then certainly he cannot, as a matter of law, be held to assume the risk."

⁴⁷ St. Louis Nat. Stock Yards v. Morris, 110 Ill. App. 107; Jones & A. Co. v. George, 227 Ill. 64, 81 N. E. 4, 10 A. & E. Ann. Cas. 285; Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 N. E. 65; Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328; Chicago & E. I. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74; Armour v. Golkowska, 202 Ill. 144, 66 N. E. 1037; Consolidated Barb Wire Co. v. Maxwell, 116 Ill. App. 296; Eblin v. American Car & Foundry Co. 143 Ill. App. 386, affirmed in 238 Ill. 176, 87 N. E. 385; Omaha Packing Co. v. Murray, 112 Ill. App. 233.

And a servant who knows that there are dangerous defects on the premises where he works, and does not make complaint and ask for repairs or improvements necessary for his safety, assumes the risk involved, whether he acquired the knowledge before he entered the service or afterwards. Cichowicz v. International Packing Co. 206 Ill. 346, 68 N. E. 1083; Illinois C. R. Co. v. Fitzpatrick, 227 Ill. 478, 118 Am. St. Rep. 280, 81 N. E. 529.

So, in McCormick Harvesting Mach. Co. v. Zakzewski, 220 Ill. 522, 4 L.R.A. (N.S.) 848, 77 N. E. 147, the court said: "The true rule in this regard is that the servant assumes not only the ordinary risks incident to his employment, but also all dangers which are obvious and apparent; and, if he voluntarily enters into, or continues in the service, knowing, or having the means of knowing, its dangers, he is deemed to have assumed the risks, and to have waived all claims against the master for damages in case of personal injury resulting from such dangers."

And in Klofski v. Railroad Supply Co. 235 Ill. 146, 85 N. E. 274, the court, after stating that there is no conflict between the cases which hold that a servant may assume

the risk of the master's negligence, and that other class of cases which hold that the negligence of the master is not one of the risks which the servant assumes by his contract of hiring, says: "The master's negligence is not an ordinary and usual risk of the employment, hence the servant does not assume dangers arising therefrom by his contract of hiring, but the servant, knowing of such negligence, may assume the risk; and in such case he assumes it because he knows of it, and not because it is an ordinary one."

That the Illinois court did not intend to confuse the two doctrines of assumption of risk and contributory negligence, and to hold that there could be no assumption of risk unless the conduct of the servant amounted to contributory negligence, is clearly shown in Chicago & E. I. R. Co. v. Heerey, supra. The trial court had charged the jury to the effect that, as the master had been negligent, the servant could not be held to have assumed the risk of such negligence unless his conduct had been such as to render him chargeable with contributory negligence. Such a charge was held erroneous by the supreme court, which said: "Contributory negligence and assumption of risk are entirely different things in law. Although the two questions may both arise under the facts of a case, yet they are wholly separate and distinct. Every person suing for a personal injury must show that he was in the exercise of ordinary care and caution for his own safety, so that the question of contributory negligence may be involved in every case; but an employee may have assumed a risk by virtue of his employment, or by continuing in such employment with knowledge of the defect and danger, and if he is injured thereby, although in the exercise of the highest degree of care and caution, and without any negligence, yet he cannot recover."

And in Cichowicz v. International Packing Co. supra, the court said: "To say that the servant assumes no risks except such as cannot be obviated by the adoption of reasonable measures of precaution by the master is to abolish the doctrine altogether. Under such a rule, the master is liable in every case where he has been negligent, although the servant knows of the danger, and voluntarily encounters it without objection; and if the master has been guilty of no negligence, he has a complete defense, regardless of any question of the assumption of risk by the servant. Counsel do not contend that

are "obviously" incident to the business, regardless of the cause of such risks.⁴⁸

But even in Michigan the vital distinction between risks created by the master's negligence and those ordinarily incident to the business has been noted in some of the later cases.⁴⁹

—Utah.

The earlier decisions in Utah proceed apparently upon the theory that a servant never assumes the risk of the master's negligence; ⁵⁰ or, at least, he does not when

the risk is not so imminent that to continue in the employment would be negligence on the part of the servant.⁵¹

But later cases have followed the general rule recognized in the other jurisdictions, and hold that the rule that the servant does not assume the dangers and perils occasioned through the negligence of his employer is subject to the exception that a servant does assume such dangers and risks when he knows of them, or they are so obvious that knowledge may be presumed, and with such knowledge he accepts or con-

the doctrine of assumed risk has been abolished, but in effect insist that every case is excepted from its operation."

In regard to some of the cases which seem to lay down a different rule, the court says: "In *Chicago & A. R. Co. v. House*, supra, the cause of danger was unknown to the servant, and resulted from negligence of the master. In *Western Stone Co. v. Musical*, 196 Ill. 382, 89 Am. St. Rep. 325, 63 N. E. 664, there was evidence of an order by the foreman to work in a dangerous place, and the servant obeyed the command. The question was whether the servant was guilty of negligence, or whether he acted as a reasonably prudent person would, in view of the command and the duty of obedience. In *Swift & Co. v. O'Neill*, supra, there was a promise to remedy the defect complained of, and in such a case the servant is only barred by his own contributory negligence. If the risk is no greater than that under which a prudent person would continue the employment, he may recover in case of injury. Where the question is one of negligence on the part of the servant, then the rule is that he must not only know of the defect, but know that it renders the employment dangerous."

That the language used in some of the decisions was apparently conflicting was recognized in *Chicago City R. Co. v. Enroth*, 113 Ill. App. 285, where the court speaks of the "later" expressions of the supreme court, implying that there had been a change in the rule. The court said: "The later expressions of the supreme court are to the effect, in substance, that if the servant knows, or, by the exercise of ordinary care, should have known, of the master's negligence, subjecting the former to risks or dangers in the course of his employment, he assumes such risk, and cannot recover for an injury caused thereby, unless there is some special circumstance shown, as that he acted in obedience to an order of the master, or that there was a promise on the part of the master to remedy the defect complained of, or perhaps in some other cases."

⁴⁸ *McGinnis v. Canada Southern Bridge Co.* 49 Mich. 466, 13 N. W. 819; *Bradburn v. Wabash R. Co.* 134 Mich. 575, 96 N. W. 929; *Brouseau v. Kellogg Switchboard & Supply Co.* 158 Mich. 312, 27 L.R.A. (N.S.) 1052, 122 N. W. 620.

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The doctrine of the assumption of obvious risks applies as well to those which arise or become known to the employee during the employment, as to those in contemplation at the original hiring. *De Kallands v. Home Teleph. Co.* 153 Mich. 25, 116 N. W. 564, 15 A. & E. Ann. Cas. 593.

⁴⁹ Thus, in *McDonald v. Champion Iron & Steel Co.* 140 Mich. 401, 103 N. W. 829, the court said that where the servant shows that the injury received was in consequence of the master's negligence, and was not due to the ordinary risks of the service, the burden is upon the master to show that the servant fully comprehended the danger.

And in *Clemens v. Gem Fibre Package Co.* 153 Mich. 495, 117 N. W. 187, the court held that if the machinery was not in proper condition, the servant would assume only such risks as the jury should find were known, or ought to have been known, and appreciated by him.

⁵⁰ *Pidcock v. Union P. R. Co.* 5 Utah, 612, 1 L.R.A. 131, 19 Pac. 191; *Seley v. Southern P. Co.* 6 Utah, 319, 23 Pac. 757, reversed on other grounds in 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *Hill v. Southern P. Co.* 23 Utah, 94, 63 Pac. 814; *Hone v. Mammoth Min. Co.* 27 Utah, 168, 75 Pac. 381.

⁵¹ *Mangum v. Bullion, B. & C. Min. Co.* 15 Utah, 534, 50 Pac. 834; *Faulkner v. Mammoth Min. Co.* 23 Utah, 437, 66 Pac. 709.

In the latter case the court said: "The doctrine of assumed risk by the employee does not lessen the master's implied duty to supply and maintain a reasonably safe place for the performance by the servant of the work required of him, except when the place furnished and maintained is so obviously unsafe that a reasonably prudent person would not attempt to work in it, and with a full and intelligent understanding of its defects, or after a failure to exercise reasonable care to ascertain its condition, gave full consent, express or implied, to abide by the consequences which might follow from its use."

In *Higgins v. Southern P. Co.* 26 Utah, 164, 72 Pac. 690, the court said that the servant assumed the risk of the injury, but in this case he had failed to obey the printed instructions given him to examine the tool by which he was injured.

tinues in his employment without complaint or protest.⁵³

—West Virginia.

In West Virginia the courts have frequently laid down the proposition that if a servant wilfully or willingly encounters dangers which are known to him, or are notorious, the master is not responsible for an injury occasioned thereby.⁵³

This rule is somewhat modified in one case, where the following propositions were laid down by the court: While the general rule of law is that an employee, knowing of defects in machinery, appliances, or in his working place, and still continuing in service, assumes risks, and cannot recover from his employer damages for injury arising from such defects, yet the rule is not without exception. Mere continuance in service with such knowledge is not *per se* negligence in the employee. He need not stop work in every instance of knowledge of a defect, but may run some risk by continuing service, provided the defects be not plainly dangerous, or be not such as ought to induce a prudent, careful man to believe that accident would probably ensue, and that, looking to his safety, he ought not to continue the work.⁵⁴

Under such a statement of the rule, the difference between assumption of risk and contributory negligence is very slight, to say the least; and it is to be noted that, in the general rule stated above, the two defenses are grouped; neither risks willingly encountered (assumption of risk) nor risks wilfully encountered (contributory negligence) afford the servant a cause of action.

—Wisconsin.

The courts of Wisconsin have shown a tendency to minimize the distinction between assumption of risk and contributory negligence, and to hold that assumption of risk (as applied to dangers created by the master's negligence) is but a phase of contributory negligence.⁵⁵

But it is to be noted that the effect of this confusion of the two doctrines in Wisconsin (so far as the question discussed in this note is concerned) is not to take away the defense of assumption of risk where the master is negligent, but merely to change the terminology of the defense; these cases in effect hold that if the servant knows, or ought to know, that the master has been negligent, and still continues in the employment, his conduct is in all cases negligence which contributes to the injury, and precludes a recovery. The North Carolina doctrine, on the other hand, although confusing the two doctrines, takes away the defense of assumption of risk in those cases in which the conduct of the servant, according to the generally accepted standard, has not been negligent.

The Missouri doctrine.

The so-called Missouri doctrine is in direct conflict with the general rule stated above, and under it the master's negligence precludes any reliance upon the defense of assumption of risk, and the only defense open to the master is that of contributory negligence.

This rule was early adopted,⁵⁶ and although a large number of decisions seem unwilling to apply it to its fullest ex-

⁵³ Merrill v. Oregon Short Line R. Co. 29 Utah, 264, 110 Am. St. Rep. 695, 81 Pac. 85; Garity v. Bullion-Beck & C. Min. Co. 27 Utah, 534, 76 Pac. 556; Leach v. Oregon Short Line R. Co. 29 Utah, 285, 110 Am. St. Rep. 798, 81 Pac. 90; Tuckett v. American Steam & Hand Laundry, 30 Utah, 273, 4 L.R.A. (N.S.) 990, 116 Am. St. Rep. 832, 84 Pac. 500.

⁵⁴ Berns v. Gaston Gas Coal Co. 27 W. Va. 285, 55 Am. Rep. 304; Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. 53; Humphreys v. Newport News & M. Valley Co. 33 W. Va. 135, 10 S. E. 39; Davis v. Nuttallburg Coal & Coke Co. 34 W. Va. 500, 12 S. E. 539; Seldomridge v. Chesapeake & O. R. Co. 46 W. Va. 569, 33 S. E. 293; Purkey v. Southern Coal & Transp. Co. 57 W. Va. 595, 50 S. E. 755.

⁵⁵ Graham v. Newburg Orrel Coal & Coke Co. 38 W. Va. 273, 18 S. E. 584.

⁵⁶ See notes to Limberg v. Glenwood Lumber Co. 49 L.R.A. 33 and Rase v. Minneapolis, St. P. & S. Ste. M. R. Co. 21 L.R.A. (N.S.) 138. And see also Nadau v. White River Lumber Co. 76 Wis. 120, 20 Am. St. 28 L.R.A. (N.S.)

Rep. 29, 43 N. W. 1135; Powell v. Ashland Iron & Steel Co. 98 Wis. 35, 73 N. W. 573; Koepeke v. Wisconsin Bridge & Iron Co. 116 Wis. 92, 92 N. W. 558; Revolinski v. Adams Coal Co. 118 Wis. 324, 95 N. W. 122; Pautz v. Plankinton Packing Co. 113 Wis. 47, 94 N. W. 654.

And in Powell v. Ashland Iron & Steel Co. supra, the court, in holding that there was no real practical difference between the defense of assumption of risk and that of contributory negligence, said that, of course, assumption of risk of the ordinary dangers of the employment, where the master was not negligent, had nothing to do with contributory negligence, but the assumption of risks created by the master's negligence was merely a phase of contributory negligence.

⁵⁷ In Conroy v. Vulcan Iron Works, 62 Mo. 39, it was held that when the instrumentality with which the servant is required to perform his service is so glaringly defective that a man of common prudence or sense would not use it, the master could not be responsible for damages resulting from it. In such a case the serv-

tent, and some have expressly repudiated it, still the overwhelming weight of authority, especially among the later decisions, supports the rule as stated.

The language used in some decisions is of such a character as to leave apparently no doubt of the intention of the court expressly to hold that negligence on the part of the master will deprive him of the de-

fense of assumption of risk, leaving contributory negligence as the only defense open to him.⁵⁷

The decisions are very numerous which support this so-called Missouri doctrine, and which have permitted a recovery for injuries caused by the master's negligence, although the servant knew of such negligence, and could not have recovered under

ant would be guilty of recklessly exposing himself to danger, and would have to abide the consequences. But when the servant incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or when it is reasonable to suppose that it may be safely used with great care or skill, a different rule prevails. And this statement was quoted with approval in *Stoddard v. St. Louis, K. C. & N. R. Co.* 65 Mo. 514.

And in *Devlin v. Wabash, St. L. & P. R. Co.* 87 Mo. 545, the court said that a servant was not bound to quit the service, nor did he assume all risks from want of repair, unless the conditions were such, to his knowledge, that it would be necessarily dangerous to the mind of a prudent man to incur it.

⁵⁷ The decision in *Dakan v. G. W. Chase & Son Mercantile Co.* 197 Mo. 238, 94 S. W. 944, probably goes as far in asserting and upholding the Missouri rule as any. The court says: "If the peril of the servant in the performance of his duty is increased by the negligence of the master, and if the servant, knowing that the master has been thus negligent, and that that negligence has rendered the performance of his duty more hazardous, continues in the performance of that duty, a question of contributory negligence then arises,—not a question of assumption of risk. Language is sometimes used by text writers and in some judicial opinions which seems to indicate that, under the circumstances just mentioned, there is an assumption of risk by the servant, but such language is not carefully chosen, or, if it is intended literally as expressed, it does not state the rule of law as declared by this court; it is not the law in Missouri."

The so-called Missouri rule is laid down in *Blundell v. W. A. Miller Elevator Mfg. Co.* 189 Mo. 552, 88 S. W. 103, as follows: "If the master fails in his duty, and if the servant knows, or by the exercise of ordinary care could know, that the appliances furnished are not altogether or reasonably safe, the servant is not obliged to refuse to use the appliances or quit the service if he reasonably believes that, by the exercise of proper care and caution, he can safely use the appliances, notwithstanding they are not so reasonably safe; and if he does so, and exercises ordinary care and caution, and is injured, he does not waive his right to compensation for injuries received in consequence thereof, nor is he guilty of negligence."

And in *Yongue v. St. Louis & S. F. R. Co.* 28 L.R.A. (N.S.)

133 Mo. App. 141, 112 S. W. 985, the court said that although there was some conflict among the earlier cases, all of the latest decisions dealing with the defense of assumption of risk held that the retention of service after being apprised of a defective appliance was relevant only to the defense of contributory negligence.

And in *Garaci v. Hill O'Meara Constr. Co.* 124 Mo. App. 709, 102 S. W. 594, the court said: "The entire subject of the master's nonliability on account of abnormal conditions arising by the neglect of his duty is relegated and to be ascertained and determined by the principles of law with respect to contributory negligence."

"The nonliability of the master where the servant knows of the defect is properly placed on the ground of contributory negligence, rather than of assumption of risk." *Settle v. St. Louis & S. F. R. Co.* 127 Mo. 336, 48 Am. St. Rep. 633, 30 S. W. 125.

The knowledge of the servant that the master has neglected his duty (*Wendler v. People's House Furnishing Co.* 165 Mo. 527, 65 S. W. 737), or even an express contract between the master and the servant (*Blanton v. Dold*, 109 Mo. 75, 18 S. W. 1149), does not convert the danger arising therefrom into a risk of the employment assumed by the servant.

The doctrine of assumption of risk has no application where the master is negligent. *George v. St. Louis & S. F. R. Co.* 225 Mo. 364, 125 S. W. 196.

When the master is chargeable with negligence, there can be no assumption of risk. *Strickland v. F. W. Woolworth & Co.* 143 Mo. App. 528, 127 S. W. 628.

The servant assumes all the risks of the service, in the absence of active negligence on the part of the master. *Chrismer v. Bell Teleph. Co.* 194 Mo. 189, 6 L.R.A. (N.S.) 492, 92 S. W. 378.

Assumption of risk, being essentially contractual, disappears from view when negligence is found to be the producing cause of the injury. *Mack v. Chicago, R. I. & P. R. Co.* 123 Mo. App. 531, 101 S. W. 142.

A plea which alleged that the negligence of the master was known to the servant does not constitute a defense to the action, on the theory of an assumption of risk. *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167.

Under the Missouri doctrine it is unnecessary for the plaintiff to allege that he was ignorant of the defect. *Cole v. St. Louis Transit Co.* 183 Mo. 81, 81 S. W. 1138.

The existence of the master's negligence excludes the implication of an assumption of risk on the part of the servant. *Shore*

the general rule adopted in other jurisdictions.⁵⁸

Many other cases have applied, or at least recognized, the Missouri doctrine as the law in that state.⁵⁹

In other cases, without expressly stating that the servant does not assume the risk of the master's negligence, the courts have said that mere knowledge of such negligence will not preclude a recovery.⁶⁰

In many cases the court has said that

the servant never assumes the risk of the master's negligence unless the danger is so great and imminent that a reasonably prudent man would not incur it.⁶¹ This, of course, in effect abolishes assumption of risk, although retaining the term to designate one form of contributory negligence. In a few cases the court, in adopting this terminology, states that assumption of risk, as used in this sense, is but another term for contributory negligence.⁶² Such a use

v. American Bridge Co. 111 Mo. App. 278, 86 S. W. 905.

In Bennett v. Crystal Carbonate Lime Co. (Mo. App.) 124 S. W. 608, the court said that, generally speaking, it is the law of Missouri, as declared by the supreme court, that the servant no longer assumes the risk arising from the master's negligence, however obvious the risk may be.

⁵⁸ Hamilton v. Rich Hill Coal Min. Co. 108 Mo. 364, 18 S. W. 977; O'Mellia v. Kansas City, St. J. & C. B. R. Co. 115 Mo. 205, 21 S. W. 503; Wendler v. People's House Furnishing Co. and Cole v. St. Louis Transit Co. supra; Lee v. Missouri P. R. Co. 105 Mo. 400, 92 S. W. 614; George v. St. Louis & S. F. R. Co. supra; Robbins v. Big Circle Min. Co. 105 Mo. App. 78, 79 S. W. 480; Houts v. St. Louis Transit Co. 108 Mo. App. 686, 84 S. W. 161; Yongue v. St. Louis & S. F. R. Co. supra.

⁵⁹ Lee v. Missouri P. R. Co. supra; Phippin v. Missouri P. R. Co. 190 Mo. 321, 93 S. W. 410; Daken v. G. W. Chase & Son Mercantile Co. supra; Brady v. Kansas City, St. L. & C. R. Co. 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195; Koerner v. St. Louis Car Co. 209 Mo. 141, 17 L.R.A. (N.S.) 292, 107 S. W. 481; Tinkle v. St. Louis & S. F. R. Co. 212 Mo. 445, 110 S. W. 1086; Zellars v. Missouri Water & Light Co. 92 Mo. App. 107; Nash v. Dowling, 93 Mo. App. 156; Parsons v. Hammond Packing Co. 96 Mo. App. 372, 70 S. W. 519; Cothron v. Cudahy Packing Co. 98 Mo. App. 343, 73 S. W. 279; Zongker v. People's Union Mercantile Co. 110 Mo. App. 382, 86 S. W. 486; Deckerd v. Wabash R. Co. 111 Mo. App. 117, 85 S. W. 982; Shore v. American Bridge Co. 111 Mo. App. 278, 86 S. W. 905; Warren v. Chicago, B. & Q. R. Co. 113 Mo. App. 498, 87 S. W. 585; Stafford v. Adams, 113 Mo. App. 717, 88 S. W. 1130; Obermeyer v. F. H. Logeman Chair Mfg. Co. 120 Mo. App. 59, 96 S. W. 673, affirmed in (Mo.) 129 S. W. 209; Longree v. Jackes-Evans Mfg. Co. 120 Mo. App. 478, 97 S. W. 272; Mack v. Chicago, R. I. & P. R. Co. 123 Mo. App. 531, 101 S. W. 142; Huston v. Quincy, O. & K. C. R. Co. 129 Mo. App. 578, 107 S. W. 1045; Kirby v. Manufacturers' Coal & Coke Co. 127 Mo. App. 588, 106 S. W. 1069; McGuire v. Quincy, O. & K. C. R. Co. 128 Mo. App. 677, 107 S. W. 411; Yongue v. St. Louis & S. F. R. Co. supra; Denker v. Wolff Mill. Co. 135 Mo. App. 340, 115 S. W. 1035; Reickert v. Hammond Packing Co. 136 Mo. App. 565, 118 S. W. 525; 28 L.R.A. (N.S.)

Pratt v. Missouri P. R. Co. 139 Mo. App. 502, 122 S. W. 1125; O'Brien v. Western Implement Mfg. Co. 141 Mo. App. 331, 125 S. W. 804; Wilson v. United R. Co. 142 Mo. App. 676, 121 S. W. 1083; Trent v. Lechtman Printing Co. 141 Mo. App. 437, 126 S. W. 238; Jewell v. Excelsior Powder Mfg. Co. 143 Mo. App. 200, 127 S. W. 598; King v. St. Louis & S. F. R. Co. 143 Mo. App. 279, 127 S. W. 400; Patrum v. St. Louis & S. F. R. Co. (Mo. App.) 129 S. W. 1041; Kile v. Union Electric Light & P. Co. (Mo. App.) 130 S. W. 89.

And the so-called Missouri doctrine was expressly asserted and adhered to in McMurray v. St. Louis, I. M. & S. R. Co. 225 Mo. 272, 125 S. W. 751, decided in February, 1910, where the court said that the rule of assumption of risk never applies to a case where the evidence shows that the injury was attributable to the negligence of the employer, for the reason that, where his negligence is the proximate cause of the injury, it can no longer be truthfully said that the injury was attributable to an assumption of risk.

⁶⁰ Huhn v. Missouri P. R. Co. 92 Mo. 440, 4 S. W. 937; Hamman v. Central Coal & Coke Co. 156 Mo. 232, 56 S. W. 1091; Sheperd v. St. Louis Transit Co. 189 Mo. 362, 87 S. W. 1007; Clippard v. St. Louis Transit Co. 202 Mo. 432, 101 S. W. 44; Warner v. Chicago, R. I. & P. R. Co. 62 Mo. App. 192; Smith v. Little Pittsburg Coal Co. 75 Mo. App. 177; Booth v. Kansas City & I. Air Line, 76 Mo. App. 516; Harriman v. Kansas City Star Co. 81 Mo. App. 124; Adams v. McCormick Harvesting Mach. Co. 95 Mo. App. 111, 68 S. W. 1053; Depuy v. Chicago, R. I. & P. R. Co. 110 Mo. App. 110, 84 S. W. 103; Robertson v. Hammond Packing Co. 115 Mo. App. 520, 91 S. W. 161.

⁶¹ Devlin v. Wabash, St. L. & P. R. Co. 87 Mo. 545; Bender v. St. Louis & S. F. R. Co. 137 Mo. 240, 37 S. W. 132; Hurst v. Kansas City, P. & G. R. Co. 163 Mo. 303, 85 Am. St. Rep. 539, 63 S. W. 695; Brancs v. St. Louis Car Co. 213 Mo. 698, 18 L.R.A. (N.S.) 701, 112 S. W. 511; Coin v. John H. Talge Lounge Co. 222 Mo. 489, 25 L.R.A. (N.S.) 1179, 121 S. W. 1; Neves v. Green. 111 Mo. App. 634, 86 S. W. 508.

⁶² Thus, in Herbert v. Mound City Boot & Shoe Co. 90 Mo. App. 305, the court said that the facts of the case may be such that if the servant assumes the risk of unusual dangers in such sense as to preclude him

of the phrase, however, is very misleading, for in most jurisdictions there is a very important distinction between the two terms.⁶³

Another variation of the form of statement of the Missouri rule is found in some cases which hold that a servant is not obliged to quit the employment, and does not assume the risk if it is reasonable to suppose or believe that a defective appliance may be safely used by the exercise of ordinary care.⁶⁴

The duty of the master to use ordinary care in furnishing safe instrumentalities and places to his servant is held in some cases to be a continuing duty, so that though the servant may know that the duty has been neglected in the past, the

master is not thereby relieved of it, nor does the servant assume the risk.⁶⁵

In *Labatt, Master & Servant*, p. 730, it is said that the recent courts have shown a tendency to fall in line with those of other jurisdictions, but the more recent decisions do not show such a tendency, and the Missouri doctrine is reasserted again and again without any qualification.

Some courts base the Missouri doctrine upon the ground that it is against public policy for the courts to permit the master to contract against the consequences of his own negligence.⁶⁶

In some decisions the courts have recognized the fact that they are not in harmony with the courts in other jurisdictions,⁶⁷ while others assume that their rule

from holding the defendant liable, he is really guilty of contributory negligence.

The conclusion that there can be no assumption of risk where the master is negligent in no way restricts or limits the rule that where the risk is so obviously dangerous that an ordinarily prudent man would refuse to expose himself, and the servant, under such circumstances, proceeds and is injured, he cannot recover. This latter rule, however, does not rest upon the doctrine of assumed risk, but upon the doctrine of contributory negligence. *Strickland v. F. W. Woolworth & Co.* supra.

⁶³ As to distinction between assumption of risk and contributory negligence, see notes to *Limberg v. Glenwood Lumber Co.* 49 L.R.A. 33, and *Rase v. Minneapolis, St. P. & S. Ste. M. R. Co.* 21 L.R.A. (N.S.) 138.

⁶⁴ *Huhn v. Missouri P. R. Co.* supra; *Soeder v. St. Louis, I. M. & S. R. Co.* 100 Mo. 673, 18 Am. St. Rep. 724, 13 S. W. 714; *Mahaney v. St. Louis & H. R. Co.* 108 Mo. 191, 18 S. W. 895; *O'Mellia v. Kansas City, St. J. & C. B. R. Co.* supra; *Minnier v. Sedalia, W. & S. W. R. Co.* 167 Mo. 99, 66 S. W. 1072; *Haviland v. Kansas City, P. & G. R. Co.* 172 Mo. 106, 72 S. W. 515; *Benham v. Taylor*, 66 Mo. App. 308; *Adams v. Kansas & T. Coal Co.* 85 Mo. App. 486; *Auams v. McCormick Harvesting Mach. Co.* and *Robbins v. Big Circle Min. Co.* supra; *Studenroth v. Hammond Packing Co.* 106 Mo. App. 480, 81 S. W. 487; *Houts v. St. Louis Transit Co.* supra.

And in *Minnier v. Sedalia, W. & S. W. R. Co.* supra, the court said that it was the law, not only in Missouri, but almost universally, that if the master furnishes defective tools, and the servant knows of it, he is not obliged to refuse to use the tools or quit the service of the master, if he reasonably believes that he can use the appliances in safety by means of due care and caution.

⁶⁵ *Settle v. St. Louis & S. F. R. Co.* 127 Mo. 336, 48 Am. St. Rep. 633, 30 S. W. 125; *Pauck v. St. Louis Dressed Beef & Provision Co.* 159 Mo. 467, 61 S. W. 806; 28 L.R.A. (N.S.)

Wendler v. People's House Furnishing Co. 165 Mo. 527, 65 S. W. 737.

⁶⁶ Thus, in *Charlton v. St. Louis & S. F. R. Co.* 200 Mo. 413, 98 S. W. 529, the court said that assumption of risk rests on contract, and a servant cannot, consequently, assume the risk of the master's negligence, because it is a fundamental proposition that it is against public policy for a master to contract against his own negligence.

It is against public policy to allow a master to relieve himself by contract from liability for his own negligence, and what the law forbids to be done by express contract, it will not assist to be done by implying a contract. *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167.

The law will not permit any person to contract against his own negligence. *Strickland v. F. W. Woolworth & Co.* supra.

It is against public policy to permit the master to contract against his own negligence. *George v. St. Louis & S. F. R. Co.* 225 Mo. 364, 125 S. W. 196.

The additional risks produced by the master's negligence are not and cannot be assumed by the servant by express or implied contract. *Huston v. Quincy, O. & K. C. R. Co.* supra.

⁶⁷ Thus, in *Clippard v. St. Louis Transit Co.* supra, the court, after asserting the Missouri rule, said: "It may be that our court has gone further upon this question than many courts, but we see no reason for now overturning the long line of decisions upon the question."

And in *Obermeyer v. F. H. Logeman Chair Mfg. Co.* 120 Mo. App. 59, 96 S. W. 673, the court speaks of "the unique doctrine established by our supreme court."

In *Chandler v. St. Louis & S. F. R. Co.* 127 Mo. App. 34, 106 S. W. 553, it was held that under the Federal law which prevailed in the Indian territory, a servant knowing of a defect must be held to have assumed the risk thereof; but the court added that, had the cause of action arisen in Missouri, there might have been a recovery.

is the generally accepted rule, and apparently do not realize that it is contrary to that recognized in practically every other state.⁶³ That there is, or has been, con-

siderable conflict in the decisions, is recognized in a number of cases.⁶⁴

Some cases deny a recovery, on the ground of assumption of risk, where the

⁶³ Thus, in *Dakan v. G. W. Chase & Son Mercantile Co.* 197 Mo. 238, 94 S. W. 944, the court said: "Language is sometimes used by text writers and in some judicial opinions which seems to indicate that under the circumstances just mentioned there is an assumption of risk by the servant; but such language is not carefully chosen, or, if it is intended literally as expressed, it does not state the rule of law as declared by this court."

And in *Minnier v. Sedalia, W. & S. W. R. Co.* supra, the court said: "It is also the law, not only in this state, but almost universally, that if the master fails in his duty to his servant to furnish safe appliances, and if the servant knows, or by the exercise of ordinary care could know, that the appliances furnished are not altogether or reasonably safe, the servant is not obliged to refuse to use the appliances, or quit the service of the master, if he reasonably believes that, by the exercise of proper care and caution, he can safely use the appliances, notwithstanding they are not so reasonably safe; and if he does use them, and exercise such care and caution, and is injured, the servant does not waive his right to compensation for injuries received in consequence, nor is he guilty of contributory negligence."

And in *George v. St. Louis & S. F. R. Co.* 225 Mo. 364, 125 S. W. 196, in which a servant recovered for injuries due to the master's negligence, of which he knew, the court said: "And all the authorities, text writers and courts, unite in holding that if the master negligently fails to furnish his servant such a place, and the latter is injured in consequence thereof, then it cannot be successfully maintained that such injury was the result of a risk assumed by him; but, upon the contrary, such injury must be attributed to the dereliction of duty on the part of the master, and he is liable in damages therefor."

The rule is almost universal that the servant does not assume the negligence of the master who fails in his duty to furnish the servant with reasonably safe instrumentalities to perform his work. *O'Brien v. Western Implement Mfg. Co.* 141 Mo. App. 331, 125 S. W. 804.

In *Lee v. Missouri P. R. Co.* 195 Mo. 400, 92 S. W. 614, the court was called upon to decide a case arising in Kansas, and it said that while some Kansas decisions hold that a servant might assume the risks of a known defect, the court in *Emporia v. Kowalski*, 66 Kan. 64, 71 Pa. 232, laid down the law as to assumption of risk in effect the same as that declared by the Missouri courts. But in the Kansas case the court, after stating in broad terms that the servant never assumed the risk of the master's negligence, was careful to state that the defect was not patent nor observable, 28 L.R.A. (N.S.)

and was not known and could not have been known by the servant, in the exercise of ordinary care in the performance of his duty. In support of its decision, the Missouri court also cited *O'Neill v. Chicago, R. I. & P. R. Co.* 62 Neb. 358, 60 L.R.A. 443, 86 N. W. 1098, but the latter case expressly points out that the servant was ignorant of the defect, and therefore did not assume the risk thereof.

And in *Charlton v. St. Louis & S. F. R. Co.* 200 Mo. 413, 98 S. W. 529, the court, in speaking of the *Lee Case*, said: "In that case it became necessary to examine the decisions of the supreme court of Kansas, and to ascertain the state of the law on questions of assumed risks and contributory negligence. As a result, it was held that there is no substantial conflict between the decisions of this court and that. We may proceed, therefore, to a consideration of this case, levying tribute and relying indiscriminately on the pronouncements and doctrines of either court."

⁶⁴ Thus, in *Marshall v. Kansas City Hay Press Co.* 69 Mo. App. 256, it is said that if the doctrine of *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113, was overruled by *Settle v. St. Louis & S. F. R. Co.* 127 Mo. 342, 48 Am. St. Rep. 633, 30 S. W. 125, it was restored and vitalized by the ruling in *Steinhauser v. Spraul*, 127 Mo. 541, 27 L.R.A. 441, 28 S. W. 620, 30 S. W. 102. If so, the restoration lasted for a very brief period.

And it was said in *Yongue v. St. Louis & S. F. R. Co.* 133 Mo. App. 141, 112 S. W. 985, that the doctrine that a servant might assume the risk of the master's negligence was not then in force in that state, although there were some cases of both earlier and later dates which tended to support that view.

And in *Garaci v. Hill O'Meara Constr. Co.* 124 Mo. App. 709, 102 S. W. 594, the court recognized the fact that many of the courts had adopted the rule that a servant with knowledge may assume the risk of dangers, even if created by the master's negligence; but states that such is not the rule adopted by the Missouri supreme court. In regard to the conflict existing in some Missouri decisions, the court said: "It appeared to us that the court adverted to the former rule as hereinbefore stated in *Mathis v. Kansas City Stock Yards Co.* 185 Mo. 434, 84 S. W. 66, and we followed it, announcing our views in *Lee v. St. Louis, M. & S. E. R. Co.* 112 Mo. App. 372, 87 S. W. 12; but since that adjudication, the court of last resort has reiterated the ruling in the earlier cases, in *Blundell v. Wm. A. Miller Elevator Mfg. Co.* 189 Mo. 552, 88 S. W. 103."

"Those of the profession, either on the bench or at the bar, who have had occasion in the past to investigate the adjudications in Missouri upon that department of the

injury results from the manner in which the master conducts his business, even though there might be a safer way of doing it.⁷⁰ But the scope of the rule which affords immunity to the master while conducting his business in his own way is confined within the limits of reasonable care.⁷¹

Even under the Missouri doctrine, a servant assumes the risk of defects which it is his duty to discover and repair.⁷²

law treated of as assumption of the risk will have discovered a wonderful conflict, and those who may in the future be called upon to examine the cases in search of precedents will no doubt be able to find able and well-considered opinions by learned judges which can be used as authority on either side of pending questions arising in this branch of our jurisprudence." Lee v. St. Louis, M. & S. E. R. Co. supra.

⁷⁰ Bradley v. Chicago, M. & St. P. R. Co. 138 Mo. 293, 39 S. W. 763; Harrington v. Wabash R. Co. 104 Mo. App. 603, 78 S. W. 662; Saversnick v. Schwarzschild & Sulsburger, 141 Mo. App. 509, 125 S. W. 1192.

⁷¹ Shore v. American Bridge Co. 111 Mo. App. 278, 86 S. W. 905.

Within the somewhat wide limits of reasonable care, a master may conduct his business in his own way, and the risks of injury from such methods are risks assumed by the servant as a part of the contract of employment. Dickerson v. Jenkins (Mo. App.) 128 S. W. 280; and to the same effect was the decision in Sutherland v. Garetson-Greaseon Lumber Co. (Mo. App.) 130 S. W. 40.

⁷² Roberts v. Missouri & K. Teleph. Co. 166 Mo. 370, 66 S. W. 155.

So, a servant employed to handle defective cars as well as sound cars cannot recover for injuries due to defects in a car, of which he has been advised. Hager v. Terminal R. Asso. 207 Mo. 302, 105 S. W. 744.

⁷³ Thus, where the plaintiff was injured in using a defective clawbar, the court in Harris v. Kansas City Southern R. Co. (Mo. App.) 124 S. W. 576, although admitting that the defendant was negligent in furnishing the plaintiff with the defective tool, nevertheless held that the plaintiff assumed the risk of using the bar in the manner that he did, although the court expressly stated that the plaintiff was not guilty of contributory negligence. After speaking of the conflict apparent among the Missouri cases, the court said that it believed that there was a distinct doctrine with respect to the risks assumed by a servant engaged in performing a commonplace work with a simple appliance, a defect in which is well known to the servant, when an injury occurs through the manner and mode of using the appliance, and it might have been averted by performing the work in another way.

In Fugler v. Bothe, supra, the opinion of Judge Rombauer, which was approved, by the supreme court, stated that the case 28 L.R.A. (N.S.)

As has been stated, the Missouri doctrine has not been accepted to its fullest extent in all of the later cases. One apparent modification is where the servant is injured by a simple tool furnished by the master.⁷³ But in many jurisdictions a rule prevails that the master is not responsible for injuries to his servant caused by defects in simple tools, and it may be possible that this group of Missouri cases proceeded upon

was one in which the servant, who was injured by the falling of a plank upon which he was standing, knew of the danger much better than did the master. However, it must be said that the decision seems to tend very strongly to repudiate the so-called Missouri doctrine.

Steinhauser v. Spraul, supra, was a case of a ladder which was too short for the use to which it was put by the servant. The majority of the court agreed upon reversing the judgment for the plaintiff, but upon different grounds, and the opinion is of little value upon this point, but it certainly cannot be said to support the Missouri rule.

One of the latest cases in the Missouri supreme court, in which the so-called Missouri doctrine is apparently limited, or, at least, is not applied to its broadest extent, is Mathis v. Kansas City Stock Yards Co. supra. Here the alleged defective appliance was a plank used by an engineer to stand upon in order to reach parts of the engine, and it was held that the plaintiff assumed the risk thereof, as he knew and appreciated the danger. The dissenting opinion, however, proceeds upon the theory that the question was wholly as to the defendant's negligence, and took the view that the majority did not properly consider that question. The prevailing opinion is not very explicit as to just what rules of law it is intended to apply, but from the minority opinion it seems clear that the majority proceeded upon the theory that the master was not negligent, and the "assumption of risk" spoken of had reference to the ordinary incidental risks of the employment. But in Lee v. St. Louis, M. & S. E. R. Co. supra, it is said that in the Mathis Case the court reverted to the old doctrine, and revived so much of the law of assumption of risk as rests upon the maxim, *Volenti non fit injuria*, or assent to risk, apart from the ordinary hazard of the employment, which is assumed by implication in the contract. The later Missouri opinions, however, do not recognize the Mathis Case as repudiating the Missouri doctrine. Blundell v. Wm. A. Miller Elevator Mfg. Co., and Garaci v. Hill O'Meara Constr. Co. supra.

In Holloran v. Union Iron & Foundry Co. 133 Mo. 470, 35 S. W. 260, the servant was held to have assumed the risk, but he was at work on an unfinished building, and there is at least a suggestion that the only damage was due to that fact, and not to the negligence of the master.

the theory that the master had not been negligent in respect to such tools, and if this hypothesis is true, then this group of cases would not be opposed to the Missouri doctrine. In a few cases, the so-called Missouri doctrine is expressly repudiated.⁷⁴ In other cases there is *dicta* to the effect that the servant may assume the risk of the master's negligence.⁷⁵ And in very many of the earlier cases the court, without discussion of the question, apparently proceeds upon the theory that a servant may assume the risk of the master's negligence; but these cases can be of little authority upon the question, in view of the large number of cases which expressly uphold the Missouri doctrine, and which number includes nearly every one of the more recent decisions.

In numerous Missouri cases the servant has been held to have assumed the risks of the danger causing the injury, inasmuch as it was ordinarily incident to the service; and in other cases he has been held not to have assumed risks of which, as a matter of fact, he was ignorant. These cases would, of course, add nothing to the discussion, for all authorities agree that the ordinary risks incident to the service are assumed by the very contract of employ-

ment, and that a servant never assumes extraordinary risks of which he has no knowledge, actual or constructive.

In many of the earlier Missouri decisions the court does not pass upon the question of the master's negligence, and it is impossible to say whether he was considered negligent, so as to afford any opportunity for the application of the Missouri doctrine.

The North Carolina rule.

In North Carolina the courts have enunciated a distinct doctrine, which, however, arrives at the same practical result as that reached by the Missouri courts in applying the so-called Missouri doctrine; and in fact, in stating the rule, they employ the same language as is used in a large number of the Missouri courts.

According to this North Carolina doctrine, a servant does not assume the risk of dangers created by the master's negligence merely because he knows of them, but is held to assume such risks only when a reasonably prudent man would refuse to continue at work in face of the danger. Such a rule, as has been stated in connection with the discussion of the Missouri doctrine, in effect abolishes the distinction

⁷⁴In *Rigsby v. Oil Well Supply Co.* 115 Mo. App. 297, 91 S. W. 460, second appeal, 130 Mo. App. 128, 108 S. W. 1128, the court expressly denies that it is the rule, either of that court or of the Missouri supreme court, that in no case does the servant assume the risk of the master's negligence. The court goes on to say: "Nearly or about all, and possibly all, of those risks which are assumed by the servant, aside from those ordinarily incident, etc., upon the doctrine of knowledge of and assent to the risk, arising under that branch of the law under this head, resting upon the maxim, *Volenti non fit injuria*, are risks which arise by the negligence of the master; and that there may be an assumption in such case is beyond controversy. . . . Such risks are treated as extra hazards, and the servant's assumption thereof is predicated upon the theory of his knowledge and appreciation of the dangers, and voluntary assent thereto, as happily expressed in the maxim, *Volenti non fit injuria*, involving the idea that he who consents cannot receive an injury."

But in a concurring opinion, Goode, J., notes the two lines of conflicting cases in that state, and says that the latest decision of the supreme court in that state (*Blundell v. Wm. A. Miller Electric Mfg. Co.* supra), adhered to the so-called Missouri doctrine, and consequently he could not entirely concur in the opinion of the majority, but did concur in the result.

In *Moore v. St. Louis Wire Mill Co.* 55 Mo. App. 491, the court, citing *Fugler v. Rothe*, supra, said: "We are, therefore, 28 L.R.A. (N.S.)

justified in the belief that we will hear nothing more of the 'immediate-and-threatening-danger doctrine.'"

⁷⁵Thus, in *Alcorn v. Chicago & A. R. Co.* 108 Mo. 81, 18 S. W. 188, the language used seems to imply that the court adopted the general, and not the Missouri, rule, but this is *dicta*, for, at the close of the opinion, the court expressly says that the injuries were due to the servant's own negligence.

Another recent Missouri decision which apparently repudiates the so-called Missouri doctrine is *Coin v. John H. Talge Lounge Co.* 222 Mo. 488, 25 L.R.A. (N.S.) 1179, 121 S. W. 1. In this case the servant attempted to hold the master liable for the latter's failure to fulfil his promise to add certain safety appliances to machinery, but it appeared that the master was under no duty to furnish such appliances, unless that duty had been created by his mere promise to furnish them. The court held that there was no such duty on the part of the master, and consequently the question of the servant's assumption of risk of the master's negligence did not arise in the case; but the court enunciated a doctrine at variance with the so-called Missouri doctrine. The court said: "If the servant, before he enters the service, knows, or if he afterwards discovers, or, by the exercise of ordinary observation or reasonable skill or diligence in his department of service, he may discover, that the machine or appliances in connection with which he is to labor are unsafe or unfit, and if, notwithstanding such knowledge, he voluntarily enters into or continues in the employment without objection or complaint,

between assumption of risk and contributory negligence, but retains the terminology, and thus adds to the confusion upon this subject.⁷⁶

In a few of the more recent decisions in North Carolina, the court has gone to the extent of holding that a servant does not assume the risk of dangers created by the master's negligence if he knows of them,

he is deemed to assume the risk of danger thus known, and to waive any damages against the master in case it shall result in injury to him."

⁷⁶One of the fullest discussions of the North Carolina rule is found in *Hicks v. Naomi Falls Mfg. Co.* 138 N. C. 319, 50 S. E. 703, where it is held that if the master is negligent in regard to appliances and tools furnished to his employees, and such negligence is the proximate cause of the injury to the employee, the latter shall not be barred of recovery by the mere fact that he may be aware of the increased danger, and is barred only when the danger is so great and imminent that his conduct in reality amounts to contributory negligence. The court said that the test is whether or not, under the facts and attendant circumstances, including the nature of the defect and danger, the risk is one which a reasonable man should incur by continuing to work under existing conditions.

And the court in *Pressly v. Dover Yarn Mills*, 138 N. C. 410, 51 S. E. 69, after referring to the doctrine of the *Hicks* Case, said: "This is, in effect, referring the question of assumption of risk, where the injury is caused by the negligent failure of the employer to furnish a safe and suitable appliance, to the principles of contributory negligence."

There appears to be no equivocation in the language used by the court in *Marks v. Harriet Cotton Mills*, 138 N. C. 401, 50 S. E. 769, 3 A. & E. Ann. Cas. 812, when it says that if the defendant seeks to avoid the result of its negligence in changing its method of work by requiring the servant to clean up a machine while it is running, instead of stopping it for that purpose, then it must go further than simply show a knowledge of the change and an appreciation of the danger, and also show that a reasonably prudent man would not, under like circumstances, have operated the machine; and this would be a question for the jury.

"It is only where a machine is so grossly or clearly defective that the employee must know of the extra risk that he can be deemed to have voluntarily and knowingly assumed the risk." *Sims v. Lindsay*, 122 N. C. 678, 30 S. E. 19. This is quoted with approval in *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611, and the court goes on to say that if one takes service with a railroad company which, under the North Carolina 28 L.R.A.(N.S.)

and that the only defense in an action for such injuries is the plaintiff's own contributory negligence.⁷⁷

It has been frequently stated by the court in North Carolina that a plaintiff will not be held to have assumed the risk in undertaking to perform a dangerous work unless the act itself is so obviously dangerous that in its careful performance

decisions, is guilty of negligence *per se* in failing to use automatic couplers, this would not absolve the railroad company from liability for its negligence in not using the safety device. "The doctrine of 'assumption of risk' is more reasonable, and extends no further than that, if a particular machine has become injured or dangerous, and the employee, seeing the danger, does not report its condition, but goes on with his work in disregard of it, he assumes the risk." In failing to report a defect discovered in the course of his employment, the servant might well be deemed guilty of contributory negligence.

In *Bolden v. Southern R. Co.* 123 N. C. 614, 31 S. E. 851, assumption of risk is spoken of as a distinct affirmative defense, but without any discussion as to what the distinction is.

Of course, where the servant does not know of the defect, and he is charged with no duty of inspection, there can be no question of risk under the North Carolina doctrine. *Womble v. Merchants' Grocery Co.* 135 N. C. 474, 47 S. E. 493.

⁷⁷Thus, in *Bennett v. Caroline Mfg. Co.* 147 N. C. 620, 61 S. E. 463, the court held that it is settled that the servant does not assume the risk of injury arising from his master's negligence, although in this case the servant, as a matter of fact, knew of the defect and appreciated the danger.

And in *Sibbert v. Scotland Cotton Mills*, 145 N. C. 308, 59 S. E. 79, the court said that if the machinery became defective after the plaintiff began to work, he was not required to abandon his employment,—he did not assume the risk incident to danger by reason of the master's negligence.

And in *Leggett v. Atlantic Coast Line R. Co.* (N. C.) 67 S. E. 249, the court said: "The doctrine of assumption of risk has no application here, for it is not contended by plaintiff that he is entitled to recover unless he should satisfy the jury that the cause of the death of his intestate was the negligence of the defendant. It is elementary that while an employee assumes all those risks naturally incidental to the work, he does not assume those arising exclusively from his master's negligence."

Attention should be called to chapter 56 of the Private Laws of 1897 of North Carolina, which applies solely to railroad companies, and which was held to be valid in *Coley v. North Carolina R. Co.* 128 N. C. 534, 57 L.R.A. 817, 39 S. E. 43, rehearing 129 N. C. 407, 57 L.R.A. 834, 40 S. E. 195. The court further held that it removed,

the inherent probabilities of injury are greater than those of safety.⁷⁶

In a number of the earlier North Carolina cases, the court discusses the question of the servant's contributory negligence, but ignores the question of assumption of risk, although it would appear that the facts present a case in which the latter doctrine might be applied, or, at least, a contention that it did apply might well be made.⁷⁹

In a few cases the trial court, in its charge to the jury, gave the general rule as to the assumption of the risks, either separately or in connection with the North Carolina rule; but in these cases the judgment was in favor of the servant, and consequently the appellate court was not called upon to pass upon the correctness of the charge, which was more favorable to the appellant than the so-called North Carolina rule.⁸⁰

It has been said that there are two distinct defenses of contributory negligence which the master may rely upon to defeat a recovery for injuries caused by his negligence: First, where the servant has been guilty of contributory negligence in remaining in the employment which exposed him to the risk in question; second, where the servant has been guilty of contributory negligence in respect to the particular act which was the immediate cause of his injury.⁸¹ And it may be that the North Carolina courts have in mind the first de-

fense when they speak of the servant's assuming the risk when he remains at work under conditions which should cause a reasonably prudent man to cease. This seems to be a reasonable inference to be drawn from some of the decisions.⁸² But it is certainly misleading to use the term in a sense entirely different from that in which it is ordinarily used. Furthermore, the test used to determine the servant's assumption of risk in that sense is the same test universally applied to determine contributory negligence; viz., was the servant's conduct that of a reasonably prudent man, acting with due regard for his own safety?

Statutes abolishing or abrogating assumption of risk.

Some statutes have expressly abolished, either wholly or in part, the defense of assumption of risk in cases where the master has been negligent. Thus, the New York statute⁸³ provides that in any action brought for personal injuries or for death from any cause, "including open and visible defects," the fact that an employee continues in the service of the employer after he has discovered or been informed thereof shall not be an assumption of the risk of injury therefrom, either as a matter of fact or as a matter of law. This provision, however, does not apply in case the

so far as railroads were concerned, the defense of assumption of risk where injuries were caused by defects in machinery, ways, or appliances, as it expressly provided that any contract or agreement, express or implied, to waive the benefit of the law, should be null and void; but as the defense of contributory negligence is based upon tort, and not upon contract, this defense is not taken away by the statute.

⁷⁶ *Coley v. North Carolina R. Co.* supra; *Orr v. Southern Bell Teleph. & Teleg. Co.* 132 N. C. 691, 44 S. E. 401; *Hicks v. Naomi Falls Mfg. Co.* supra; *Rushing v. Seaboard Air Line R. Co.* 149 N. C. 158, 63 S. E. 890.

⁷⁹ *Crutchfield v. Richmond & D. R. Co.* 76 N. C. 320; *Bean v. Western North Carolina R. Co.* 107 N. C. 731, 12 S. E. 600; *Cox v. Norfolk & C. R. Co.* 123 N. C. 604, 31 S. E. 848.

⁸⁰ *Jones v. American Warehouse Co.* 138 N. C. 546, 51 S. E. 106; *Wilkie v. Raleigh & C. F. R. Co.* 127 N. C. 203, 37 S. E. 204.

⁸¹ *Labatt, Mast. & S.* 581.

⁸² Thus, in *Hicks v. Naomi Falls Mfg. Co.* 138 N. C. 319, 50 S. E. 703, the court says that it must not be considered that all distinction between assumption of risk and contributory negligence has been done away with, but does not make clear in what cases the defense of assumption of risk might be available to the master where the defense of contributory negligence

would not be. After stating that it is sometimes desirable that the two defenses should be submitted to the jury under separate issues, the court said: "It is only where the sole default imputable to the employee arises from the fact that he has continued to work in the presence of a known defect and observed danger that the question is immaterial, and may be submitted under the one issue or the other."

And in *Rittenhouse v. Wilmington Street R. Co.* 120 N. C. 544, 26 S. E. 922, the court said that the issue of contributory negligence embraces both carelessness on the part of the servant, and also the reckless remaining in the place of danger; or, as it is there termed, reckless assumption of risk.

Some suggestion of a similar meaning of the phrase "assumption of risk" is made in *Silvia v. New York, N. H. & H. R. Co.* 203 Mass. 519, 89 N. E. 1061, where the court said: "It is contended that the plaintiff assumed the risk in the sense in which the expression is used in connection with the question whether a plaintiff was in the exercise of due care; that is, that, knowing all about the conditions, and knowing that there was danger, he went on taking his chances when the chances were such that due care required him to stop."

⁸³ *Laws 1910, chap. 352, § 202.*

employee, upon discovering a defect, does not report it within a reasonable time to the master, unless it appears that the master already knows of it, or should have known of it by a reasonable inspection. It would seem that a failure to report defects after a discovery thereof might easily be referred to contributory negligence.

In Texas, the statute⁸⁴ provides that in suits by employees against railroads for personal injuries caused by their wrong or negligence, the plea of assumed risk, where the ground of the plea is knowledge or means of knowledge of the defect and danger, shall not be available in the following cases: First, where the employee, having an opportunity so to do, shall have informed the master of the defect if he does not already know of it; second, where a person of ordinary care would have continued in the service with a knowledge of the defect and danger.

In North Carolina, the statute⁸⁵ provides that any servant or employee who shall suffer injury by the negligence, carelessness, or incompetency of any other servant, employee, or agent of the company, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company. This statute has been held valid, and to take away the ordinary defense of assumption of risk, notwithstanding the servant may have known of the danger.⁸⁶

Statutes of the character of the one in North Carolina are not to be confused with other statutes which specifically impose some duty upon the master, and which, under the rules adopted by some states, eliminate the defense of assumption of risk in case the master has failed to perform that duty imposed by statute. Under the North Carolina statute the defense is taken away, even though the particular duty violated by the master is not one imposed by statute.

Summary

In conclusion it may be stated that the general rule is that a servant assumes the risk of the master's negligence where, with knowledge thereof, he continues in the employment without complaint and promise to repair on the part of the master; the contrary rule prevails by the weight of authority at the present time in Missouri, and a rule which leads to the same practical result also prevails in North Carolina. The apparent great conflict among the decisions outside of the two states named is due al-

most entirely to two very evident causes: First, the use of the phrase "assumption of risk" in two distinct senses, one of which has no reference to a case in which the master is negligent; second, the use by the courts of broad statements which are correct as applied to the particular situation with which the court is dealing, but, taken out of their setting, and applied to other states of fact, are incorrect and entirely misleading.

It is suggested that both of these causes of confusion could be easily removed if the courts would briefly designate the particular sense in which the term is used, and would, in making the broad statement that a servant never assumes the risk of the master's negligence, expressly limit the statement to the facts of the case at bar, and thus give no opportunity for the possible but incorrect inference that it was intended to be taken literally as an unqualified rule. It is suggested, also, that it would be still better if the courts would cease to use the term altogether to designate, on the one hand, merely the idea embraced in the rule that the master is not an insurer, and, on the other hand, what is nothing more than one phrase of contributory negligence. In such a case, the term "assumption of risk" could be used to designate that particular affirmative defense which the master relies upon to relieve himself from responsibility for his negligence where the servant, although not guilty of contributory negligence, yet, with knowledge of the master's negligence, remains in the service. In this latter use it has a peculiar, distinctive meaning which is entirely distinct from either of the other defenses mentioned above.

The doctrine of assumption of risk frequently works great hardship upon the servant, who is often driven to work under dangerous conditions because he feels that he must retain the employment to gain a livelihood for himself and his family. This fact is recognized by many courts even in applying the rule, and denying a recovery on that ground. And again it has been said that the doctrine operates most effectually in favor of the master who most openly neglects his primary duties to the servant. But the courts are not the makers of the law, and must apply the law as they find it. Owing to the unquestionable hardship frequently worked by the doctrine, and the ever-increasing dangers of modern industry, it may well be that the other states will follow the example of New York, and abol-

⁸⁴ Gen. Laws 1905, chap. 163, p. 386.

⁸⁵ Private Laws 1897, chap. 56.

⁸⁶ 28 L.R.A. (N.S.)

⁸⁶ Coley v. North Carolina R. Co. supra.

ish the defense both as a matter of law and as a matter of fact where the master has been negligent, thus adopting the so-called "unique" doctrine of Missouri.

W. M. G.

WASHINGTON SUPREME COURT.

ARTHUR McKENZIE, Resp't.,
v.
NORTH COAST COLLIERY COMPANY,
Appt.

(55 Wash. 495, 104 Pac. 801.)

Servant — miner — unsafe timbering.

1. A miner does not assume the risk of the unsafe timbering of the mine, although the timbers are set by the miners themselves, where it is done under the supervision of the boss and they are paid extra for such work.

Same — unsafe battery — master's liability.

2. A miner working on a slope does not assume the risk of injury from the unsafe condition of a battery or dam maintained above him to keep loosened materials from rolling upon him, where such condition could only be discovered by examination, since the duty to maintain it in a safe condition is upon the master.

Same — inspection.

3. A mine owner owes the duty to his servants who are working on a slope in the mine to inspect batteries or dams which are erected to prevent loosened materials from rolling down on them, to see that they are reasonably safe.

Same — fellow servant — negligence.

4. That a battery or dam in a mine to prevent loosened material from rolling down a slope upon miners working below was erected by the miners themselves does not relieve the master from liability to one of them who is injured by its insufficiency, where he had no part in its construction.

Trial — contradictory instructions — right to complain.

5. One who asked erroneous instructions which were given cannot complain that they contradicted other instructions which were also given by the court.

Note. — As to servant's assumption of risk of changing conditions of the working place during progress of work, see note to *Citrone v. O'Rourke Engineering Constr. Co.* 19 L.R.A. (N.S.) 340. Upon the question, May a servant assume the risk of dangers created by the master's negligence, see note to *Scheurer v. Banner Rubber Co.* ante, 1207. As to servant's assumption of risk of dangers created by the master's negligence which might have been discovered by the exercise of ordinary care on the part of the servant, see note to *St. Louis, I. M. & S. R. Co. v. Birch*, post, 1250.
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Same — particulars.

6. The court cannot enter into particulars in instructing the jury in an action to recover damages for personal injuries, so as to inform them just what acts would be negligent and what would not.

Damages — excess — reduction.

7. An award of \$30,000 to a miner, twenty-four years old when injured, and who was earning about \$150 per month, will be reduced on appeal to \$22,000, although the lower part of his body is paralyzed so that he can move about only on crutches and has no control over his bowels and urinary organs, where the testimony shows that time may effect a slight improvement in his condition.

(November 4, 1909.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed on condition of remission of damages.

The facts are stated in the opinion.

Messrs. Kerr & McCord, for appellant:

The plaintiff assumed the risk of the unsafe timbering.

Roccia v. Black Diamond Coal Min. Co. 57 C. C. A. 587, 121 Fed. 451; *Harvey v. Mountain Pride Gold Min. Co.* 18 Colo. App. 234, 70 Pac. 1001; *Cully v. Northern P. R. Co.* 35 Wash. 245, 77 Pac. 202; *Kreigh v. Westinghouse, C. K. & Co.* 11 L.R.A. (N.S.) 684, 81 C. C. A. 338, 152 Fed. 120; *Glenmont Lumber Co. v. Roy*, 61 C. C. A. 506, 126 Fed. 524; *Breckinridge & P. Syndicate v. Murphy*, 18 Ky. L. Rep. 915, 38 S. W. 700; 1 *Labatt, Mast. & S.* p. 609; *Consolidated Coal Co. v. Bokamp*, 181 Ill. 1, 54 N. E. 571.

A temporary room in a mine, formed by excavation of ore, and used as a working place to get out ore lying around its sides, is not within the rule requiring the master to furnish a safe place for his servant to work in.

Petaja v. Aurora Iron Min. Co. 106 Mich. 463, 32 L.R.A. 435, 64 N. W. 335, 66 N. W. 951; *Oleson v. Maple Grove Coal & Min. Co.* 115 Iowa, 74, 87 N. W. 736; *Island Coal Co. v. Greenwood*, 151 Ind. 476, 50 N. E. 36; *Holland v. Durham Coal & Coke Co.* 131 Ga. 715, 63 S. E. 290; *Coal & Min. Co. v. Clay* (Consolidated Coal & Min. Co. v. Floyd) 51 Ohio St. 542, 25 L.R.A. 856, 38 N. E. 610; *Smith v. Hecla Min. Co.* 38 Wash. 454, 80 Pac. 779; *Finalyson v. Utica Min. & Mill. Co.* 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 510; *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999; *Ohio & M. R. Co. v. Percy*, 128 Ind. 197, 27 N. E. 479; *Hanley v. California Bridge & Constr. Co.*

127 Cal. 232, 47 L.R.A. 597, 59 Pac. 577; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017; Vaughn v. California C. R. Co. 83 Cal. 18, 23 Pac. 215; Heald v. Wallace, 109 Tenn. 346, 71 S. W. 80.

Messrs. Brady & Rummens and George H. Bailey, for respondent:

The servant may rely upon the superior knowledge of the master, and may believe that the master will not expose him to unnecessary dangers.

Christianson v. Pacific Bridge Co. 27 Wash. 582, 68 Pac. 191; Hilgar v. Walla Walla, 50 Wash. 470, 19 L.R.A.(N.S.) 367, 97 Pac. 498; Ohio & M. R. Co. v. Percy, 128 Ind. 197, 27 N. E. 479; Hanley v. California Bridge & Constr. Co. 127 Cal. 232, 47 L.R.A. 597, 59 Pac. 577; Kelley v. Fourth of July Min. Co. 16 Mont. 484, 41 Pac. 273.

If an entry or room in a mine has been made so that the employees must pass to and fro in it, or must be engaged in working in a place thus permanent or quasi permanent in character, the general rule is that the duty of the master to provide a safe place to work ought to apply.

Holland v. Durham Coal & Coke Co. 131 Ga. 715, 63 S. E. 290; Highland Boy Gold Min. Co. v. Pouch, 61 C. C. A. 40, 124 Fed. 148; Union P. R. Co. v. Jarvi, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65.

Workmen in a mine have a right to look to the master for a discharge of his duty to see that the working places in a mine, where props are necessary to keep the mine from caving in, are propped, and that the working places are frequently inspected to ascertain whether the props are put up, and to see that the workmen put the props up as the work progresses; and a failure to perform that duty is negligence.

Green v. Western American Co. 30 Wash. 87, 70 Pac. 310; Costa v. Pacific Coast Co. 26 Wash. 138, 66 Pac. 398; Shannon v. Consolidated Tiger & P. Min. Co. 24 Wash. 119, 64 Pac. 169; Christianson v. Pacific Bridge Co. and Hilgar v. Walla Walla, supra; Western Stone Co. v. Muscial, 196 Ill. 382, 89 Am. St. Rep. 325, 63 N. E. 665; Kelley v. Fourth of July Min. Co. supra; Barnett & R. Co. v. Schlapka, 208 Ill. 426, 70 N. E. 343; Jancko v. West Coast Mfg. & Invest. Co. 34 Wash. 556, 76 Pac. 78; DeMase v. Oregon R. & Nav. Co. 40 Wash. 108, 82 Pac. 170; Gundlach v. Schott, 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332; Bunker Hill & S. Min. & Concentrating Co. v. Jones, 65 C. C. A. 363, 130 Fed. 813; Highland Boy Gold Min. Co. v. Pouch, supra.

Having knowledge of the defects, the defendant assumed the risk of all dangers to plaintiff from such defects while he was working under the battery.

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Columbia & P. S. R. Co. v. Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25; McMillan v. North Star Min. Co. 32 Wash. 579, 98 Am. St. Rep. 908, 73 Pac. 685; Shannon v. Consolidated Tiger & P. Min. Co. supra; Johnson v. Bellingham Bay Improv. Co. 13 Wash. 455, 43 Pac. 370; Island Coal Co. v. Risher, 13 Ind. App. 98, 40 N. E. 158; Dixon v. Bausman, 17 Wash. 304, 49 Pac. 540; Parke County Coal Co. v. Barth, 5 Ind. App. 159, 31 N. E. 585; Mosgrove v. Zimbleman Coal Co. 110 Iowa, 169, 81 N. W. 227; Ross v. Shanley, 185 Ill. 390, 56 N. E. 1105; Himrod Coal Co. v. Clark, 197 Ill. 514, 64 N. E. 282.

The duty to guard against defects and want of repair in appliances is a continuing one, and the master is chargeable with knowledge of all defects which might have been discovered upon reasonable inspection.

1 Dresser, Employers' Liability, p. 195; Green v. Western American Co. and Himrod Coal Co. v. Clark, supra.

Dunbar, J., delivered the opinion of the court:

This is an action for damages for personal injuries received by respondent while employed as a miner in the appellant's coal mine. The pertinent allegations of the complaint were as follows: That, in order to render the chutes of said mine a safe place in which to work, it was necessary that the walls of said chutes, after the pillars of coal had been excavated, be pressed and held apart by means of timbers and appliances; that on the 21st day of October, 1907, while the plaintiff was in the employ of the defendant and engaged in digging coal from the pillars at chute 14 between crosscuts 2 and 3 in said mine, by reason of the negligence of the defendant in failing to provide the plaintiff with a safe place in which to work, by reason of its negligence in failing to keep the walls in and about chutes 12, 13, and 14, and between them and above the place where plaintiff was working, when the pillars had been drawn, securely timbered, braced, and held apart and in place, the coal, stone, and earth of said walls, above the place where the plaintiff was working, without fault on the part of the plaintiff and without warning to him, gave way and fell down upon the plaintiff and crushed him, and caused the injuries hereinafter alleged. The answer put in issue the charge that the defendant had failed to furnish plaintiff a safe place in which to work, and set up affirmatively assumption of risk, contributory negligence, and the negligence of fellow servants. The cause was tried to a jury, the defendant's motion for an instructed ver-

dict was denied, and the trial resulted in a verdict in behalf of plaintiff for \$30,000. A motion for a new trial having been by the court overruled and judgment entered, the defendant appeals to this court.

In order to make the complaint intelligible, it is necessary to give a brief description of the mine. The vein of coal lay at an angle of 85 degrees to the gangway. The vein being worked was 9 feet thick. A slope had been driven down on the vein at a workable angle, and the coal was blocked off into squares in the usual way. The gangway was tunneled in from the side of the mountain, and from said gangway, at distances 35 feet apart, chutes 5 by 6 feet were driven up through the middle, a distance of about 200 feet. These chutes were intersected every 25 or 30 feet by crosscuts 4 feet square. These crosscuts were for the double purpose of admitting air to the operatives and the removal of timber used in the propping of the mine. In removing the coal two miners worked in each chute, beginning at the top of the upper crosscut and working toward the main gangway below. Each miner removed the coal to the center of the block on his side of the chute. The props were set about 3 feet apart throughout the mine, and immediately above each crosscut the miners built a battery to protect themselves against the fall of coal, rock, and *débris* which was constantly falling by reason of the squeezing and settling of the walls. Upon the removal of the soft coal at the center of the vein, the walls began to squeeze together and loosen the coal. It is conceded that no limitation was placed upon the use of timbers by the miners, and that the timber was furnished for that purpose.

While the record in this case is very voluminous, and the disagreement of counsel as to what the record shows has necessitated a careful examination of the whole, and while the case is important not only by reason of its practical results on the coal mining business, but by reason of the size of the verdict, most of the practical questions involved have been settled by the verdict of the jury. For instance, on the question which seems to have been deemed vital by the learned counsel for appellant, *viz.*, whether the falling mass which injured the respondent came directly from above battery B, located just above crosscut 4, in chute 14, or whether it started from chute 13 and on its descent bore westward and entered chute 14, above where respondent was working, there is a sharp conflict of testimony, and, without stopping to review it, it is plain that there was competent testimony from unimpeached witnesses tending to establish each conflicting theory. This

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was admitted by counsel for appellant in his motion for an instructed verdict, when he stated that under the proofs before the jury the caving or falling of the coal, rock, and *débris* through the falling of which respondent was injured came either, under the proofs of the respondent, from a point above battery B, or it came, as shown from the testimony of the appellant, from chute 13 in the mine. So that, whatever the responsibility may have been in either event, the case comes here on the legally established fact that the injury was done to respondent from coal and rock falling from a point above battery B, and therefore necessarily by reason of the breaking of battery B. The same thing may be said of the condition of battery B both before and after the accident. And so as to the notice that was given to Nesbit, the pit boss, of the dangerous condition of said battery B just prior to the time when the respondent commenced work in chute 14, and also during the time that he was working there. If the jury believed the testimony of Arthur Provence and Dan McKenzie, discarding altogether the deposition of Campbell McPherson, which seems to be a little contradictory, it would have been fully justified in concluding that the mass in question fell from battery B; that battery B was in a dangerous condition when respondent went to work in chute 14; that Nesbit, the pit boss, knew of this condition; that respondent did not know of it, but worked under the explicit charge and directions of Nesbit. And it has by its verdict said that it did believe their testimony in these particulars. So that they must be accepted here as the facts of the case.

It also appears from the testimony of the appellant, through its representative Nesbit, the pit boss, that it was his duty to inspect the mine where these men were working, and that the duty was his alone, as shown by the following excerpt from his testimony on cross-examination:

Q. You go in there, don't you, Harry, for the purpose of seeing how the timbers and things are looking, and how the batteries are, and whether the place is safe, and whether the miners propped it up all right?

A. Yes; to see that the men are working.

Q. Yes; to see that they are doing it all right?

A. Yes, sir.

Q. It is not only to protect yourselves, but to protect the working place of the mine?

A. Yes, sir.

Q. You were the only man that was doing that?

A. Yes, sir.

It also appears from the testimony of re-

spondent's witnesses that, while the miners did the timbering and set the props, such work was done under the direction and control of the boss, who passed upon its efficiency and sufficiency. That it was not a part of the men's work for which they received compensation is shown by the fact that what work they did of that kind the boss paid them extra for. In the light of these facts, there is no assumption of risk on the part of the respondent, and the court did not commit error in refusing appellant's motion for an instructed verdict.

The appellant insists that the doctrine of safe place is not applicable to a coal mine, and relies upon *Smith v. Hecla Min. Co.* 38 Wash. 454, 80 Pac. 779, to sustain that contention. But we think the trial court properly interpreted that case, and it does not appear from an examination of the opinion that it was the intention of the court to announce the bald rule that the doctrine of a safe place did not apply under any circumstances to a coal mine; but simply announced that, under some circumstances, it was the duty of the servant to investigate. The portion of the instruction which the court was criticizing in that case was as follows: "It is sufficient to say, however, that the law does not under any circumstances exact from the servant the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation. Beyond this he has a right to assume without inquiry or investigation that his employer has discharged his duty of furnishing him with a reasonably safe place in which to perform his duties,"—regarding which this court said: "The meaning of much of this instruction is obscure. The last part thereof is clearly erroneous. The law does require the servant to use some diligence in ascertaining defects, and in protecting himself from the dangers to be reasonably apprehended therefrom,—such diligence and care as a man of ordinary prudence would exercise under the same circumstances. He must, to protect himself from injury, use diligence commensurate with the dangers known by him to be incident to the character and place of work wherein he is employed." It would be doing injustice to the reputation of the court to conclude that it intended to make the announcement that under no circumstances would the doctrine of safe place apply to the operation of a coal mine. There can be nothing sacred about a coal mine, as such, which relieves it from liability under circumstances which would create a liability on the part of other employers. The court in the *Smith Case*, *supra*, in the course of its argument, pointed out the

fact that coal mining was known to be fraught with danger. But many other employments are also fraught with danger. In fact, it may be said that every employment is fraught with some danger. So that, after all, it is simply a question of degree, and the amount of care which the servant must exercise is equally a question of degree. The principle is the same in one employment as another, and the circumstances surrounding each particular case must be considered before it can be determined whether the servant can absolutely rely on the doctrine of safe place, whether he cannot rely upon it at all, but in staying in the employment assumes the risk, or whether the reliance upon the master and his own caution are to some extent mutual. There is such a dissimilarity in the way in which coal itself is mined that the same rule in regard to the assumption of risk cannot be applied. In mining a flat vein of coal, where the miner stands facing the breast of coal in which he is digging, one kind of danger is to be apprehended. But where he is digging in a vein which is nearly perpendicular, and is on the top of the coal, another character of danger may beset him. In this case, as we have seen, he was digging from the top of the chute down. The employment might appropriately be likened to the digging of a well, with the exception that that which he dug was taken out below instead of being hoisted above for exit. So that it might as well be said, in a case where the servant is injured through the alleged negligence of the master in not maintaining safe appliances for hoisting, or in not making provision to prevent the caving of the earth in the body of the wall, that the doctrine of safe place did not apply to well digging.

The first case cited by appellant, *viz.*, *Roccia v. Black Diamond Coal Min. Co.* 57 C. C. A. 567, 121 Fed. 451, we think does not sustain its contention. In that case the court laid down the rule, which is unquestionably correct, that, if the workman exposes himself to dangers that are so threatening or obvious as likely to cause injury at any moment, he is, notwithstanding any promise of his employer, guilty of contributory negligence if he remain at the work. In other words, as the court said: "He assumes the risk of the danger which he knows and appreciates." This decision followed the case of *District of Columbia v. McElligott*, 117 U. S. 621, 29 L. ed. 946, 6 Sup. Ct. Rep. 884, where the same principle was announced. But what were the circumstances to which this rule was applied? The court said: "Plaintiff in error was an experienced miner, and had been for years at work in the mine. It was his

special duty to timber the mine and to look out for and remedy the very dangers which caused his injury. No one in the mine knew so well as he the perils to which in this particular occupation he was exposed. This is not a case where an employee, unaware of the perilous nature of his employment, remains at work under a request for or promise of assistance of the master; nor is it the case of one who was under disability or was incapable of estimating the danger. The dangers were such as in his regular employment it was his duty to deal with. They were confessedly visible and obvious to him. They were the natural result of the progress of the work of mining." But in the case at bar, instead of being the special duty of respondent to look after the batteries and other supports, it was the special duty of the pit boss, not only according to the testimony of respondent's witnesses, but according to the admissions of the pit boss. Consequently the same rule could not apply. The next case cited (*Cully v. Northern P. R. Co.* 35 Wash. 241, 77 Pac. 202) is equally inappropriate.

We cannot review all of appellant's cases within the appropriate limits of an ordinary opinion, but from an examination we think as a rule they fall as far short of sustaining appellant's contention as the case just above mentioned, in addition to the fact that many of them lay down rules on contributory negligence, master and servant, and the effects of promise to mend on the part of the master, which are opposed to the uniform holdings of this court. It must be borne in mind that there was no apparent danger here that was brought to the attention of the respondent. We are speaking now, of course, from the standpoint of the respondent's testimony. The condition of battery B was not discoverable from the place where the respondent was working, and the distinction must be borne in mind between an injury which occurs from a defect or a wrongful operation in the machinery or thing with which the servant is working, and an injury which is produced by contact with something which is disconnected from the work. Its condition could only be discovered by an examination, and it was not the respondent's duty to make such examination. Its dangerous condition had been disclosed to the pit boss by prior workmen, so that there seems to be no question of imminent or apparent danger in the case.

The appellant insists that testimony should not have been admitted tending to show the condition of the batteries, or the liability of the appellant for anything except the alleged negligence in allowing the

walls to fall, and that there was nothing in the complaint upon which the testimony in regard to inspection could be based. But the duty of maintaining a safe place must necessarily carry with it the duty of making such inspection as is necessary to maintain the safe place. From the undisputed testimony, including the testimony of the pit boss, this case is brought within the announcement made by the court in *Green v. Western American Co.* 30 Wash. 87, 70 Pac. 310, viz.: "The general duty is also imposed upon the operator to see that the working places in the mine where props are necessary to keep the mine from caving in are propped; and that the working places are frequently inspected to ascertain whether the props are put up; and to see that the workmen put up the props as their work progresses. A failure to do this is negligence." It is true that was an action brought under the statute, but the announcement was of the general law. It is too well settled for discussion that the pit boss was not a fellow servant of respondent, but was a vice principal of the appellant. So far as establishing the negligence of the master is concerned, it may be admitted that he is not an insurer, and therefore does not warrant the safety of his employees or his plant; but he must use reasonable precaution, and his duty to guard against defects or want of repair is a continuing one. Under the testimony in this case, we think the jury was warranted in finding that the appellant was guilty of negligence. Conceding that battery B had been constructed by the servants, it is admitted that it had not been constructed by the respondent, which brings the case within the rule announced in *Cheatham v. Hogan*, 50 Wash. 465, 22 L.R.A. (N.S.) 951, 97 Pac. 499, where it was said: "When one servant of a master constructs a scaffold for a particular purpose of the master, uses it for that purpose, and then leaves it standing, and the master afterwards directs another servant who had no part in its construction, to use it for another purpose, the master adopts the scaffold as his own, and thereby guarantees that it is a safe place on which to work." While in this instance the battery was used for the same purpose, the principle of responsibility is not thereby changed.

The appellant urges error in the giving and refusing to give certain instructions. The instructions given and proffered are very lengthy, and we do not feel justified in setting them forth here. But from an examination of them we are not prepared to say that reversible error was committed. The instructions of the court stated the law correctly, and, while it is true that some

of the instructions are in a sense contradictory, the contradictory instructions were asked for by appellant, and plainly should not have been given under the established facts of the case. But the appellant, having asked for erroneous instructions, cannot complain because they were contradictory.

Counsel for appellant earnestly insists that the court erred in refusing to instruct the jury exactly how far the doctrine of safe place applied to coal mining cases, but this was requiring more of the court than the law requires of it. It is not practical for a court to enter into particulars in instructing a jury. Its duty is to announce general principles applicable to the issues, and the jury must apply them to the particular facts proven in the case. For instance, the court instructed the jury as follows: "In determining that degree of care which the defendant was required to use, you should determine it by the standard of ordinary care; that is, by that degree of care which a reasonably safe, careful, prudent, cautious, skilful, and competent coal mine operator would use to protect his employee from the dangers of the character which injured the plaintiff." This was a proper announcement of the law, and the test given was the test of ordinary care. The court could not proceed to tell the jury that a reasonably careful, prudent, etc., coal mining operator should inspect the coal mine every day or every two days, and tell it just what a sufficient inspection was. These are determinations to be made by the jury after applying the principles of the law given by the court to the facts proven. Considering the whole case, we are unable to determine that any prejudicial error was committed by the court in the trial of the cause.

The contention is also made that the verdict is excessive, the result of passion and prejudice. This is always a difficult proposition for the court to deal with, for so many elements enter into the attempted calculation which are not susceptible of calculation at all. When we go beyond an estimate of what would constitute a comfortable or reasonable provision for life for the injured or disabled person, and undertake to compensate for pain, embarrassment, or mental anguish of any kind, we enter the realms of conjecture and speculation; for what would embarrass a person of one temperament, or of one character of mental endowment, would not affect another who was either possessed of a different temperament or was philosophical enough to disregard it. That which would produce the keenest

mental anguish in a sensitive nature would have but little effect on one of a coarser mold and of less refined nature. In spite of these difficulties, however, the doctrine is well established that these are elements of damage which may be taken into consideration. So that all that the court can do is to see that the jury approximates a sane and temperate estimation, taking into consideration the feelings of the ordinary person as we can best understand them. The respondent was twenty-four years old at the time of the accident. That he is a helpless cripple for life is probably established. At the time of the trial he was able to go about on crutches, both of his legs being paralyzed. But the doctors testified that there had been some slight improvement since the first shock, and, while they testified in substance that the chances of permanent improvement were very slight, there is still some hope under their testimony of considerable improvement. According to his own testimony, he labors under the embarrassment of having no control of his bowels or urinary organs. Whether this difficulty will be alleviated in any degree is problematical. Considering the testimony of the physicians and the tendency of nature to work cures, we think there is room for the indulgence of hope in this particular. According to the consensus of calculations made by standard mortuary tables, his expectancy was from the time of the accident about thirty-eight and one half years. The complaint limited the amount of his earnings to \$150 per month. It is true he was earning about \$7 a day when he was hurt, but this was under specially favorable circumstances so far as compensation was concerned. There is no reasonable probability that he could continue through life to find so remunerative an employment. Neither does the calculation take into consideration the probability that an ordinary man would not for so long a time be permitted by the ordinary vicissitudes of life, or even by his own inclination, to work every day in the month for so long a period. So that there must be a common-sense application of these tabulated calculations. Taking into consideration the amount of money expended by the respondent in attempting to effect a cure, and the presumably permanent condition in which we now find him, we think that an available interest on \$22,000, after deducting his legitimate expenses, would under all the circumstances be a reasonable compensation; and we therefore reduce the verdict to that amount.

If the respondent remits the amount of

\$8,000 from the judgment within twenty days from the receipt of the remittitur in the trial court, the judgment will be affirmed; otherwise it will be reversed.

Rudkin, Ch. J., and Parker, Mount, and Crow, JJ., concur.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,

v.
FRED R. BIRCH.

(89 Ark. 424, 117 S. W. 243.)

Servant — assumption of risk — knowledge.

A servant does not assume the risk of injury from the negligence of his master merely because he could have discovered and avoided it by the exercise of ordinary care; his assumption of such risk depending upon his actually being aware of and appreciating the danger.

(March 1, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Hempstead County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. James H. Stevenson, E. B. Kinsworthy, and Lewis Rhodon, for appellant:

It is the duty of a servant to inform himself of the risks incident to his employment, and he is held to a knowledge of those of which he has opportunity to know.

St. Louis & S. F. R. Co. v. Marker, 41 Ark. 542; Southwestern Teleph. Co. v. Woughter, 56 Ark. 206, 19 S. W. 575; Fordyce v. Edwards, 65 Ark. 98, 44 S. W. 1034; Arkadelphia Lumber Co. v. Bethea, 57 Ark. 76, 20 S. W. 808; Little Rock M. R. & T. R. Co. v. Leverett, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50.

Messrs. J. D. Conway and William H. Arnold, for appellee:

The servant did not assume the risk.
Thomp. Neg. § 4614.

McCulloch, Ch. J., delivered the opinion of the court:

The plaintiff, F. R. Birch, while working for the defendant railway company as switchman in the company's yards at Hope, Arkansas, received personal injuries alleged to have been caused by negligent acts of defendant's servants, and he instituted the 28 L.R.A. (N.S.)

present action to recover damages for said injuries. A jury awarded him damages in the sum of \$1,500, and the defendant appealed.

The injury occurred in the following manner: The plaintiff was foreman of a switch engine, and was engaged in switching some box cars loaded with blocks of wood consigned to a heading mill at Hope. The door of one of these cars was standing open, and as plaintiff, after having set the coupling on one end of the car, ran along beside the car for the purpose of going to the other end to uncouple it from another car, some of the blocks of wood fell out of the car door, and one of them struck him, inflicting a serious injury. He testified that the switch engine bumped against the car with unusual force,

Note. — Servant's assumption of risk of dangers created by the master's negligence, which might have been discovered by the exercise of ordinary care on the part of the servant.

As is shown in a note to Scheurer v. Banner Rubber Co. ante, 1207, it is essential that a servant should know of the master's negligence in order that he may be held to have assumed the risk thereof, but it is a general rule that it is not necessary that the servant shall have been actually informed by the master of the negligent condition,—it is sufficient that he in some way acquires the knowledge. Nor is it, according to the great weight of authority, necessary that the servant should have actual knowledge,—constructive knowledge is sufficient. If a defect is so plain that a servant must know of it unless he shuts his eyes to his surroundings, he will be held to have assumed the risk the same as if the master had actually informed him of it.

As is said in Campbell v. Mullen, 60 Ill. App. 497, it is not so much knowledge as a means of knowledge that is important.

It is frequently said that a servant assumes all the "obvious" risks of the service, and again that he assumes all the risks of the service of which he knows or "ought to know." While all cases will probably agree that either statement is a correct statement of the rule, there is considerable difference of opinion as to what are obvious risks, and what risks the servant ought to know in addition to those which he actually does know.

In some cases, doubtless, the court has held that the servant assumed the risk of dangers, although they were unknown to him, and could not have been known to him even by the exercise of due care; but it will be found that in such cases the court was referring to the so-called assumed risks of the service, which remained after the master had done his full duty to the servant. (For the different senses in which this term is used, see note to Scheurer v. Banner Rubber Co. ante, 1207.)

Cases in which the defense of assumption

and caused the blocks to fall out of the car and strike him. Recovery is sought on the ground that it was necessary for the plaintiff to pass along beside the car in the discharge of his duties, and that the defendant was guilty of negligence in leaving the door of the loaded car standing open so that its contents could be jolted out. The testimony shows that the loaded car came into the yards of defendant over the Arkansas & Louisiana Railroad from Ozan, Arkansas. It was the duty of the plaintiff and his switch crew to move cars when directed by the yard clerk. There was a car inspector, whose duty it was to inspect cars, but there is evidence to the effect that it was not his duty to report the finding of open doors, but to report only defects in cars.

of risk exists, if at all, because of the servant's constructive knowledge, and not the actual knowledge, of the danger, are frequently complicated by the question whether his knowledge of the defect or of the danger was equivalent to an actual appreciation of the danger. This possible distinction between mere knowledge and appreciation is not within the scope of this note, but it should be borne in mind that many cases do make such a distinction, and hold that, in order to have the defense of assumption of risk available, it must appear not only that the servant knew of the defective conditions, but also that he fully appreciated the dangers arising therefrom.

The rule most frequently given is that a servant assumes the risk if the dangerous conditions are known, or would be known if he had exercised ordinary care. The same rule has been stated in various forms, as a servant does not assume the risk of dangers unknown to him or of which, by the exercise of ordinary care, he would not know. And again it is frequently stated that the servant does not assume the risk of a danger of which he has no knowledge, or which, as a reasonably prudent man, he is not bound to anticipate. But, on the other hand, these cases do not place upon the servant a duty to search for latent defects, or to make any investigation to discover whether the master has performed his duty. A large number of cases expressing the foregoing rules are gathered in a note to *Burnside v. Peterson*, 17 L.R.A.(N.S.) 76, and it is considered unnecessary to present other cases following this general rule.

It is undoubtedly true that the courts have, in a large number of cases, made the statement that a servant is chargeable with knowledge of defects which "might have been known to him by the use of due care," or some equivalent form of statement in a merely academic way,—the facts of the case not requiring the court to determine just the nature of the burden imposed thereby upon the servant. It is generally held that this formula does not require the servant to make any inspection to discover defects, and it is certainly very difficult to determine 28 L.R.A.(N.S.)

The court gave the following instruction at the request of plaintiff, which was objected to by defendant: "(1) In this case, if you find from a preponderance of the evidence that the car from which the timber fell which struck the plaintiff was received by the defendant, and the doors of said car were open at the time said car was received and at the time the plaintiff undertook to remove the same; and that an ordinarily prudent person acting in the place of the railway company would have anticipated an injury to an employee like or similar to the one in this case; and if you further find that said injury was caused by a failure to keep the door closed, or to close the same before or at the time the car was removed,—then you may find for the plaintiff, if you

just the particular duty which such a test does impose upon the servant, further than taking notice of the conditions which mere ordinary observation would bring to his notice.

For example, some courts, as will be shown hereafter, hold that a servant will be deemed to have constructive knowledge only of defects which are "plainly observable," and that no duty of exercising due care to acquire knowledge of such defects is imposed upon the servant. But it might be argued that the servant should use "due care" to notice defects which are plainly observable.

In some jurisdictions, however, the courts have expressly declared that it is not the duty of the servant to exercise even due care in learning of defects, but prescribe some other test which does not impose so great a duty.

Test in Federal court.

The doctrine of the Federal courts, as laid down by the United States Supreme Court, is that the servant assumes the risks of those dangers due to the master's negligence which are known to him or which are plainly observable by him, but that he is not obliged to use even ordinary care in ascertaining or discovering the defects. In other words, knowledge of the defects will not be presumed unless the defects were plainly observable.

Thus, in *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, the court said: "Those [risks] not obvious, assumed by the employee, are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of structures or appliances which, by the exercise of reasonable care of the master, may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation."

And in *Rockport Granite Co. v. Bjornholm*, 53 C. C. A. 429, 115 Fed. 947, the court said that the doctrine of the Supreme

further find that said plaintiff was acting with the care of an ordinarily prudent person at the time he undertook to have the engine coupled to said car for the purpose of removing it." The court also gave the following instruction, among others, at the request of the defendant: "(2) You are instructed that, where a person voluntarily enters the service of a railway company as a switchman, he assumes all the risks and hazards ordinary and incident to such employment, and he is presumed to have contracted with reference to such risks and hazards, and he not only assumes all risks and hazards ordinary and incident to such employment, but all risks and hazards which he could have known by the exercising of ordinary care and diligence; and if

you find from the evidence that plaintiff so knew, or by the exercise of ordinary care and diligence could have known, of the condition of the car, how it was loaded, and whether the door was open or not, then the plaintiff is presumed to have contracted and assumed the risks and hazards incident to the duties as switchman in connection with said car and load of blocks." The contention of learned counsel is that the above-quoted instruction given at the instance of the plaintiff is erroneous, because it ignores the question of assumed risk. This instruction was predicated on the theory of negligence on the part of defendant in leaving the car door open so as to expose the switchman to danger. His right of recovery was made to depend entirely upon such negli-

Court was that it was not the duty of the servant to use ordinary care in ascertaining the condition of the employer's appliances, but there rested on him the peril only of defects known to him or plainly observable by him.

So, in *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, it was held that an employee assumes the risk of injury from defective appliances furnished by his employer only when the defect is known to or plainly observable by the employee.

And this rule of the Federal court has been followed in numerous cases. *Davidson v. Southern P. Co.* 44 Fed. 476; *New York, N. H. & H. R. Co. v. O'Leary*, 35 C. C. A. 562, 93 Fed. 737; *Mexican C. R. Co. v. Murray*, 42 C. C. A. 334, 102 Fed. 264; *Lindsay v. New York, N. H. & H. R. Co.* 50 C. C. A. 298, 112 Fed. 384; *Kenney v. Meddaugh*, 55 C. C. A. 115, 118 Fed. 209; *Texas & P. R. Co. v. Swearingen*, 59 C. C. A. 31, 122 Fed. 193, affirmed in 196 U. S. 51, 49 L. ed. 382, 25 Sup. Ct. Rep. 164; *Chicago, M. & St. P. R. Co. v. Riley*, 76 C. C. A. 107, 145 Fed. 137, 7 A. & E. Ann. Cas. 327; *Missouri, K. & T. R. Co. v. Wilhoit*, 87 C. C. A. 401, 160 Fed. 440; *Chicago, M. & St. P. R. Co. v. Donovan*, 87 C. C. A. 600, 160 Fed. 826; *Federal Lead Co. v. Swyers*, 88 C. C. A. 547, 161 Fed. 687; *Central Coal & Coke Co. v. Williams*, 97 C. C. A. 597, 173 Fed. 337.

A charge upon the subject of the knowledge by a fireman of the absence of brakes on the engine on which he had ridden 50 or 60 miles is not erroneous where it amounts solely to a direction to the jury that the man was bound to use his eyes, and if, by their use, he could see the defect, he was bound thereby, even though he had not observed it; but that he was not bound to make a careful examination of every part of an engine upon which he was fireman, in order to charge the railway company with negligence, or exonerate himself from the charge of contributory negligence. *Choctaw, O. & G. R. Co. v. Holloway*, 191 U. S. 334, 48 L. ed. 207, 24 Sup. Ct. Rep. 102.

In *National Steel Co. v. Hore*, 83 C. C. A. 578, 155 Fed. 62, the court said that the 28 L.R.A.(N.S.)

defect which the servant sees, or should see if ordinarily observant, may present dangers so obvious that the law will conclusively presume that he did know the danger.

Unusual and extraordinary risks which are not incident to the service can be said to have been assumed by the employee only when it is shown that he had full knowledge of their existence, or ought reasonably in the exercise of ordinary prudence and intelligence to have had such knowledge. *Pennsylvania R. Co. v. Jones*, 59 C. C. A. 87, 123 Fed. 753.

Test in Arkansas.

The earlier Arkansas cases apparently do not go as far as does the court in *St. Louis, I. M. & S. R. Co. v. Birch*.

Thus, in *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50, the court said: "The fact that he might have known of defects, or that he had the means and opportunity of knowing of them, will not preclude him from a recovery unless he did in fact know of them, or in the exercise of ordinary care ought to have known of them. He is not bound to make an examination to find defects."

This statement is quoted with approval in *Choctaw, O. & G. R. Co. v. Thompson*, 82 Ark. 11, 100 S. W. 83, and, in *Little Rock & Ft. S. R. Co. v. Voss* (Ark.) 18 S. W. 172, the *Leverett* Case is also cited with approval; but it is to be noted that in the quotation given the court apparently confuses the general rule with the rule as stated in the *BIRCH* CASE.

And in *Fordyce v. Edwards*, 60 Ark. 438, 30 S. W. 758, second appeal, 65 Ark. 98, 44 S. W. 1034, the court said that a servant could not blindly go ahead regardless of consequences, but that it was his duty to make such an inspection as ordinary care would require of one whose duty it is to take notice of obvious defects.

Test in Minnesota.

The test of "ordinary observation" has been adopted by the Minnesota courts.

gence on the part of the defendant, and the exercise of due care on his own part. He did not assume the risk of danger created by the negligent act of the employer, unless he was aware of the danger and appreciated it. The fact that he could, by the exercise of ordinary care, have discovered and avoided the danger, did not constitute an assumption of the risk where it arose by reason of negligence of the master, though he might have been guilty of contributory negligence which would have prevented a recovery. *Choctaw, O. & G. R. Co. v. Jones*, 77 Ark. 367, 4 L.R.A. (N.S.) 837, 92 S. W. 244, 7 A. & E. Ann. Cas. 430. In this respect the instruction given at the instance of the defendant was too favorable to it, for the jury were therein told, in effect, that,

Thus, in *Rase v. Minneapolis, St. P. & S. Ste. M. R. Co.* 107 Minn. 260, 21 L.R.A. (N.S.) 138, 120 N. W. 360, the court lays down the following rules: "The test of 'knowledge of danger' is not the exercise of ordinary care to discover danger, but whether the danger was known to or plainly observable by the employee. The test of 'appreciation of risk' is whether the servant understood the risk, or, by the exercise of ordinary observation, ought to have understood it." The court went on to say that to hold that the servant assumes the risks which he knew, or ought to know from the exercise of the care of the ordinarily prudent man, would break down all distinction between assumption of risk and contributory negligence, and assumption of risk would become a question of care. While the servant is bound to use his eyes and to see what is open and apparent to anyone using his eyes, he is not required to look for danger. It was the master's duty both to observe and inspect, the servant's merely to observe.

And in *Hendrickson v. Ash*, 99 Minn. 417, 109 N. W. 830, the court said: "Although many courts hold to the contrary, it has always been the rule in this state that it is not enough that the servant knew, or ought to have known, the actual character and condition of the defective instrumentality furnished for his use. He must also have understood, or by the exercise of ordinary observation ought to have understood, the risks to which he was exposed by their use."

A servant assumes the risk of injuries from dangers which he, by the use of his senses, ought to have known. *Sherman v. Chicago, M. & St. P. R. Co.* 34 Minn. 259, 25 N. W. 593.

Test in Texas.

In Texas the rule is that a servant is chargeable with knowledge of such defects only as are known to him or open to observation (*Missouri P. R. Co. v. Lehmborg*, 75 Tex. 61, 12 S. W. 838; *Pippin v. Sherman, S. & S. R. Co.* [Tex. Civ. App.] 58 S. W. 961; *Ramm v. Galveston, H. & S. A. R.* 28 L.R.A. (N.S.)

notwithstanding the negligence of the defendant, if the plaintiff "knew, or by the exercise of ordinary care and diligence could have known, of the condition of the car, how it was loaded, and whether the door was open or not," then he is deemed to have assumed the risk of the danger. This is not correct, as already stated.

Now, there is no testimony tending to establish the fact that the plaintiff knew that the door was open when he attempted to run past the car to uncouple it. He testified that he did not know it, and that is the only testimony on the subject. There is evidence sufficient to have warranted the jury in finding that he could have ascertained, by the exercise of ordinary care, that the car door was open, and that it was dangerous

Co. [Tex. Civ. App.] 92 S. W. 426); or those risks of which in the ordinary discharge of his duty he must have acquired the knowledge (*Peck v. Peck*, 99 Tex. 10, 87 S. W. 248; *Missouri, K. & T. R. Co. v. Hannig*, 91 Tex. 350, 43 S. W. 508; *Bookrum v. Galveston, H. & S. A. R. Co.* [Tex. Civ. App.] 57 S. W. 919; *International & G. N. R. Co. v. Shaughnessy* [Tex. Civ. App.] 81 S. W. 1026; *Galveston, H. & S. A. R. Co. v. Stoy*, 44 Tex. Civ. App. 448, 99 S. W. 135; *Galveston, H. & S. A. R. Co. v. Bonn*, 44 Tex. Civ. App. 631, 99 S. W. 413; *Galveston, H. & S. A. R. Co. v. Udalle* [Tex. Civ. App.] 91 S. W. 330); and the servant is not bound to exercise due care to know of a defect (*Taylor, B. & H. R. Co. v. Taylor*, 79 Tex. 104, 23 Am. St. Rep. 316, 14 S. W. 918; *Price v. Consumers' Cotton Oil Co.* 41 Tex. Civ. App. 47, 90 S. W. 717); for it is not the servant's duty to inspect the appliances given him by the master (*Jones v. Shaw*, 16 Tex. Civ. App. 290, 41 S. W. 690; *St. Louis & S. W. R. Co. v. Schuler*, 46 Tex. Civ. App. 356, 102 S. W. 783); so a servant is not required to exercise even ordinary care to discover defects even patent in the appliances furnished by the master (*Gulf, C. & S. F. R. Co. v. Davis*, 35 Tex. Civ. App. 285, 80 S. W. 253).

A servant assumes the risk of injuries if he knows of them, or must have necessarily learned of them in the course of the work. *Missouri Valley Bridge & Iron Co. v. Ballard* (Tex. Civ. App.) 116 S. W. 93. And to the same effect was the decision in *Bonn v. Galveston, H. & S. A. R. Co.* (Tex. Civ. App.) 82 S. W. 808.

And in *Horton v. Ft. Worth Packing & Provision Co.* 33 Tex. Civ. App. 150, 76 S. W. 211, the court said: "The law of assumed risk does not impose on the servant the duty of discovering or trying to discover that the master has failed to perform the duty he owes the servant, but treats as risks of the employment, outside of the ordinary hazards, only those that arise from dangers of which the servant has actual knowledge, or which are obvious, so that knowledge thereof will be imputed to him."

And in *Quinn v. Galveston, H. & S. A. R.*

to pass along close to it. This would have been contributory negligence, but it could not have constituted an assumption of a risk which arose by reason of the master's negligence, except in the sense that a person assumes the risk of his own negligence. *Mammoth Vein Coal Co. v. Bubliss*, 83 Ark. 567, 104 S. W. 210; *St. Louis, I. M. & S. R. Co. v. Mangan*, 86 Ark. 507, 112 S. W.

168; *Narramore v. Cleveland*, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298.

Other instructions requested by the defendant and refused were fully covered by those given, and no prejudicial error is found.

Judgment affirmed.

Co. (Tex. Civ. App.) 84 S. W. 395, the court said: "We think it is one of the principles of law that is now well established in this state that the assumption of risk exists only in connection with a risk or danger known to the servant, or (what is the same thing in legal contemplation) one which the circumstances necessarily charge him with knowledge of."

The rule is stated somewhat more broadly in a few cases.

Thus, in *Robinson v. Ft. Worth & R. G. R. Co.* 99 Tex. 110, 87 S. W. 667, it was held that the servant assumed the risks of which he had actual knowledge, or of such as he would necessarily have acquired knowledge by the exercise of ordinary care for his own safety.

And in *St. Louis Southwestern R. Co. v. Hynson*, 101 Tex. 543, 109 S. W. 929, the court said: "He assumes the risks of a danger of which he has actual knowledge, and of such hazards as he would have learned by the exercise of that ordinary circumspection which a prudent man would have used in the particular employment." Similar language was used or approved in *Bonnet v. Galveston, H. & S. A. R. Co.* 89 Tex. 76, 33 S. W. 334; *Kansas City Southern R. Co. v. Williams (Tex. Civ. App.)* 111 S. W. 106.

So, in *Texas & N. O. R. Co. v. Davidson*, 49 Tex. Civ. App. 85, 107 S. W. 949, it was held that the trial court did not err in charging the jury to the effect that the servant, in addition to the ordinary risks of the service, assumed "such others as he must necessarily have known of in the ordinary discharge of the duties of his service," and in failing to charge that the servant assumed such risks as he, "by the use of ordinary care and caution, could have known."

Miscellaneous tests.

And in a number of other decisions the test has been stated in such a form as to convey the idea that the servant is not obliged to exercise due care in any way to acquire knowledge of the master's negligence; but, of course, the occasional use by the court of language different from that generally used cannot be taken as an indication that the court means to adopt a different rule. Language appropriate in one case might be erroneous as applied to the facts and circumstances of another.

The test, as applied in *Alton Paving, Bldg. & Fire Brick Co. v. Hudson*, 176 Ill. 270, 52 N. E. 256, is whether, in the "exercise of his faculties," the servant ought to have known of the danger.
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Where a defect cannot be "readily detected" by a servant, and it is no part of his duty to inspect the appliance, he is not chargeable with notice thereof. *Austin v. Appling*, 88 Ga. 54, 13 S. E. 955.

A servant does not assume risks of danger which would not appear from an "ordinary inspection." *Postal Teleg. Cable Co. v. Likes*, 225 Ill. 249, 80 N. E. 136.

And in *Wallace v. Bach*, 36 Ky. L. Rep. 69, 97 S. W. 418, the court said: "He is under no obligation or duty to critically, or at all, examine the premises to see and guard against occult dangers. If, however, the danger is so obvious or patent that the employee could not but know of it, except by closing his eyes and refusing to see that which was visible to a cursory observation, then, if he is injured, he cannot hold his employer liable."

Where the defense relied on is the assumption by the servant of the risk to which he was subjected, it must appear, with reasonable certainty, either that he was specifically informed of such risk, or that it was so obvious as that it could not have escaped his attention, due regard being had for his intelligence and opportunities. *Johnson v. Christie*, 117 La. 911, 42 So. 421.

The law is settled in Pennsylvania that an employee in accepting the employment assumes all risks ordinarily incidental thereto, and "all other risks open and obvious, the dangerous character of which he has had an opportunity to observe." *Bowen v. Pennsylvania R. Co.* 219 Pa. 405, 68 Atl. 963.

In *Whipple v. New York, N. H. & H. R. Co.* 19 R. I. 587, 61 Am. St. Rep. 796, 35 Atl. 305, and in *Crandall v. New York, N. H. & H. R. Co.* 19 R. I. 594, 35 Atl. 307, it is stated that a servant assumes all the risks arising from the nonperformance of the master's duty, of which he has knowledge, or of which he has competent means of knowledge. And in the *Whipple Case* it is also stated that the servant assumes all the risks which may be ascertained by reasonable observation. Of course, the expression "competent means of knowledge" is very indefinite, but the other language used materially limits it.

The servant is only required to see and comprehend those imperfections which are "so significant as ordinarily to attract the attention of a person" under the same or similar circumstances in the exercise of ordinary care. *Laughy v. Bird & W. Lumber Co.* 136 Wis. 301, 117 N. W. 796.

In *Bryce v. Chicago, M. & St. P. R. Co.* 103 Iowa, 665, 72 N. W. 780, the court says

that what a man ought, by the exercise of reasonable diligence, to know, he does know. And this was quoted with approval in *Olson v. Hanford Produce Co.* 118 Iowa, 55, 91 N. W. 806. But in the Bryce Case the phrase "reasonable diligence" is used interchangeably with reasonable observation, while in the Olson Case it is used as the equivalent of ordinary care, and it is probable that the court intended to follow the general rule.

In *Muldorney v. Illinois C. R. Co.* 36 Iowa, 462, the court said that it was the servant's knowledge, and not his means of knowledge, which affected his right to recover; this rule, however, is not in accord with that adopted by the later Iowa cases.

W. M. G.

KANSAS SUPREME COURT.

D. P. SMITH

v.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Appt.

(82 Kan. 136, 107 Pac. 635.)

Servant — railway engineer — reliance on care of master.

1. A railway engineer is not bound to know every defect existing in the ties and rails of the track over which he runs his engine. If the track, ties, and rails are in place, he has the right to assume that the company has discharged its obligation to keep them in reasonably safe repair.

Same — defective ties and rails — assumption of risk.

2. In an action by a railway engineer against the company to recover for personal injuries received in the derailment of his engine caused by defective ties and rails, where the defects had existed for such a length of time that the railway company was bound to have notice of them, and where it was shown that the engineer had no knowledge of the defects and no opportunity of knowing of their existence, except such as came to him in operating his engine over the track, held that the risk as to the condition of the roadbed was not one which he assumed.

Same — injury — notice — waiver.

3. In the action mentioned in the preceding paragraph, the answer set up as a defense the failure of the plaintiff to give notice in writing of his claim for injuries within thirty days, as provided in the contract of employment. At the trial the plaintiff without objection testified that someone from the claim department of the company came to his house three weeks after the accident, and took from him a written statement concerning the accident and his injuries. The defendant then introduced in evidence the written statement itself, signed by the plaintiff, stating the time, place, manner, and cause of his being injured, and

the nature and extent of his injuries. Held that the taking of the written instrument constituted a waiver by the company of the failure to give the notice.

(Porter, J., dissents in part.)

(March 12, 1910.)

APPEAL by defendant from a judgment of the District Court for Brown County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. M. A. Low and Paul E. Walker, for appellant:

It will be presumed that the accident was due to one of the risks assumed by the plaintiff in the course of his employ-

Note. — Assumption by train employee of risks due to defects in tracks or roadbed.

Upon the question, May a servant assume the risk of dangers created by the master's negligence, see note to *Scheurer v. Banner Rubber Co.* ante, 1207.

As to servant's assumption of risk of dangers created by the master's negligence, which might have been discovered by the exercise of ordinary care on the part of the servant, see note to *St. Louis, I. M. & S. R. Co. v. Birch*, ante, 1250.

This note is confined to cases involving injury to train men, such as conductors, engineers, firemen, and brakemen, whose duties are confined to the actual running of the train only, and does not include injuries to brakemen or other employees engaged in making up trains or coupling cars, etc., and whose opportunity of acquiring knowledge of the condition of the track is different and greater than that of one engaged solely in the actual operation of the train.

And this note is also confined to defects in the tracks or roadbed, and does not include injuries due to structures erected near or over the tracks, as in such cases the opportunity of acquiring knowledge of the defects would, of course, be much greater than of defects in the track or roadbed.

In regard to the distinction between a train man's duty in respect to defective tracks and roadbed, and in respect to other defects connected therewith, the court in *Northern Alabama R. Co. v. Shea*, 142 Ala. 19, 37 So. 796, said: "Train men do not assume the risks of defective track conditions. They have a right to assume that the track is safe. It is not their duty, but the duty of other employees, to keep it in proper condition. The acquaintance which train men are required to have with the premises, and to acquire which they are carried over the road on trains before being put in charge of trains, is more an acquaintance with the line, so to say, than with the track. They must know, and, in the way indicated, they are taught, the conditions of the line in the respect of stations, stopping places, switches,

ment, or to accident, until the contrary is shown by positive and satisfactory evidence.

Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593; *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 600, 7 Pac. 204; *Atchison, T. & S. F. R. Co. v. Ledbetter*, 34 Kan. 326, 8 Pac. 411; *Atchison, T. & S. F. R. Co. v. Tindall*, 57 Kan. 719, 48 Pac. 12; *Lane v. Missouri P. R. Co.* 64 Kan. 755, 68 Pac. 626; *Wood, Mast. & S. § 382*; 2 *Labatt, Mast. & S. § 883*.

The plaintiff assumed the risk of accident from the condition of the track.

Walker v. Scott, 67 Kan. 814, 64 Pac. 615; *Kansas City, M. & O. R. Co. v. Loosley*, 76 Kan. 103, 90 Pac. 990; *Missouri P. R. Co. v. Click*, 78 Kan. 419, 96 Pac. 796.

Messrs. Joseph G. Waters, John C.

sidings, grades, curves, and distances. With these things they have to do; but not with the track itself in respect of its condition and maintenance."

The general rule asserted by practically all of the cases cited below, and not repudiated by any, is that a train man has a right to assume that the track and roadbed are safe, that it is not his duty to make an investigation in order to discover defects, and, in the absence of any knowledge, actual or constructive, of the defects, he will not be held to have assumed the risks thereof. But this is also the general rule as to assumption of risk in all cases of master and servant, as is shown in a note to *Scheurer v. Banner Rubber Co.* ante, 1207. The distinctive feature in respect to the assumption of risk by train men of defects in the track or roadbed is the question whether there is anything in the occupation of a train man from which may be inferred knowledge of the dangerous condition of the track or roadbed. In other words, whether knowledge of the defective condition may be imputed to the train man merely because of the fact that he has had occasion to run over the track a greater or less number of times.

A train man does not assume the risk of defective tracks or roadbed merely because of his contract of employment. *Union P. R. Co. v. O'Brien*, 1 C. C. A. 354, 4 U. S. App. 221, 49 Fed. 538, affirmed in 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618; *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50; *Smith v. Erie R. Co.* 67 N. J. L. 636, 59 L.R.A. 302, 52 Atl. 634.

The risk of injury from a defect in a track negligently permitted to remain unrepaired is not one of the risks of the service assumed by a conductor. *Osterhout v. Jersey City, H. & P. Street R. Co.* 73 N. J. L. 42, 62 Atl. 190.

And a knowledge of defects in a roadbed is not inferable from the mere fact that the servant had been accustomed to run trains over it. *Georgia P. R. Co. v. Davis*, 92 Ala. 300, 25 Am. St. Rep. 47, 9 So. 252; *Jackson Lumber Co. v. Cunningham*, 141 Ala. 206, 37 28 L.R.A. (N.S.)

Waters, and John F. Kerrigan, for appellee:

In the absence of previous knowledge of the defective condition, the plaintiff had the right to assume that no such dangerous condition existed.

Brown v. Atchison, T. & S. F. R. Co. 31 Kan. 15, 1 Pac. 605.

Porter, J., delivered the opinion of the court:

On the evening of June 7, 1907, D. P. Smith, an engineer in the employ of the defendant, was running an engine pulling a freight train from Horton to Topeka. When about 5 miles from Horton, at the foot of a long, steep grade, and at a tangent of a curve, the engine was derailed, and the

So. 445; *Northern Alabama R. Co. v. Shea*, supra; *Madden v. Minneapolis & St. L. R. Co.* 32 Minn. 303, 20 N. W. 317; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518.

Where there is no evidence that the engineer had any knowledge of the defects existing in the roadbed, except the fact that he had been over the road a few times with freight trains, it was held, in *Walker v. McNeill*, supra, that there was no evidence sufficient to warrant an instruction upon the defense of assumption of risk.

A brakeman cannot be held chargeable with knowledge of defects in a track or in structures near the track, where he had been but two months upon the road, and had always passed the station where he was injured in the nighttime. *Illinois C. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593.

A motorman does not assume the risk of his car slipping on wet grass growing upon the tracks, where his only knowledge of the danger was such as could be acquired by passing over the track without stopping, several times a day for three months. *Mann v. Illinois Central Traction Co.* 236 Ill. 30, 86 N. E. 161.

Before it can be said that an engineer assumed the risk of a defective roadbed, it must be made to appear that he was warned of the danger, or that it was patent and open. *Western R. Co. v. Russell*, 144 Ala. 142, 113 Am. St. Rep. 24, 39 So. 311.

But, in *Dunbar v. Central Vermont R. Co.* 79 Vt. 474, 65 Atl. 528, where there was nothing in the case to show whether the plaintiff knew the condition of the road or not, save what might be inferred from the fact that he had recently run his train over it several times without accident, it was held error for the court to take no note of that fact as a ground for inference either way, and to assume that the servant did not know of the defect, and to submit the case accordingly, thereby casting the burden upon the defendant of showing assumption of risk.

And other courts have stated that a court cannot, as a matter of law, say that a train man knows of defective conditions of the track or roadbed where his only knowl-

plaintiff received injuries to recover damages for which he brought this action. The jury returned a verdict in his favor for \$2,000, and the defendant appeals.

The engine which the plaintiff was running belonged to the 1,600 type or class, very large and heavy. The track where the accident occurred had been constructed for twenty years and was of 60-pound rails, somewhat worn. On account of the lightness of the rails, a rule of the company limited the speed of engines of this type to 15 miles an hour. The petition alleged that the derailment was caused by defective ties and rails. Among other defenses, the answer set up that the plaintiff was guilty of contributory negligence in running his engine at a high rate of speed, in excess of

15 miles an hour. The plaintiff testified that he was familiar with the rule limiting the speed, and was running 15 miles an hour. The witnesses for the defendant placed various estimates on the speed of the train from 20 to 40 miles an hour. The derailment and overturning of the engine, and the fact that twenty of the freight cars were piled in confusion on the right of way, tended strongly to discredit the engineer's testimony, but we cannot say as a matter of law that it was physically impossible for this to have resulted with the train running at a speed of 15 miles. The speed of the train was under all the evidence a question for the jury, and as to this fact their verdict must stand. The jury made a special finding that the neg-

edge thereof was such as would be acquired by riding over the track in the performance of his duty. *Louisville, E. & St. L. Consol. R. Co. v. Miller*, 140 Ind. 685, 40 N. E. 116; *Fluhrer v. Lake Shore & M. S. R. Co.* 121 Mich. 212, 80 N. W. 23; *Hamilton v. Michigan C. R. Co.* 135 Mich. 95, 97 N. W. 392; *Mehan v. Syracuse, B. & N. Y. R. Corp.* 73 N. Y. 585.

A conductor whose trains pass rapidly from station to station, and whose duties are in the operation of the train, and not in track construction, cannot be said, as a matter of law, to have a reasonable opportunity of seeing that ties are broken or decayed, or that ballast has not been sufficiently placed or may have become displaced. *Louisville, E. & St. L. Consol. R. Co. v. Miller*, *supra*.

There is no burden resting upon a train employee of investigation or inquiry in regard to defects in tracks or roadbed. *Georgia P. R. Co. v. Davis and Northern Alabama R. Co. v. Shea*, *supra*; *Western R. Co. v. Russell*, 144 Ala. 143, 113 Am. St. Rep. 24, 39 So. 311; *Little Rock, M. R. & T. R. Co. v. Leverett*, *supra*; *Dolan v. Sierra R. Co.* 135 Cal. 435, 67 Pac. 686; *Dale v. St. Louis, K. C. & N. R. Co.* 63 Mo. 459; *Gulf, C. & S. F. R. Co. v. Moore*, 28 Tex. Civ. App. 603, 68 S. W. 559; *Dunbar v. Central Vermont R. Co.* *supra*.

In *Western R. Co. v. Russell*, 144 Ala. 142, 113 Am. St. Rep. 24, 39 So. 311, an engineer who had been warned that there had been a heavy rainfall along his route, and had been cautioned to look out for high water at waterways, was injured by running into a washout. In regard to the engineer's assumption of the risk of such danger after the notification, the court said: "It was not the duty of the engineer on any such general notice, to do more in the way of examination of the roadways or waterways than could be done consistently with the performance of his own duties as engineer."

A train hand is not required by law to examine a trestle to ascertain whether it is defective. *Dolan v. Sierra R. Co.* *supra*.

A conductor, in the absence of actual knowledge of a defect in a track, will not

be deemed to have assumed the risks thereof, as it was not part of his duty to pay particular attention thereto. *North Chicago Street R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 706.

And in *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206, the court said: "The peril consisted in the defective construction of the road and its appurtenances, its culverts and bridges, which the fireman could know nothing about, and which he could not have discovered by the exercise of ordinary precaution and prudence; indeed, he was not required to know anything about that; the implied undertaking of his employers, that the road and culverts and bridges were properly constructed and safe for the passage of trains, was sufficient for him."

And in other cases it has been held generally that if a train man does not know of defects in the track or roadbed, he does not assume them. *Clapp v. Minneapolis & St. L. R. Co.* 36 Minn. 6, 1 Am. St. Rep. 629, 29 N. W. 340; *Wilkie v. Raleigh & C. F. R. Co.* 127 N. C. 203, 37 S. E. 204; *Texas & P. R. Co. v. McClane*, 24 Tex. Civ. App. 321, 62 S. W. 565; *Galveston, H. & S. A. R. Co. v. Fitzpatrick* (Tex. Civ. App.) 91 S. W. 355.

A train man does not assume the risk of defects in a roadbed where he has not been warned thereof, and as a matter of fact does not know of them. *Georgia P. R. Co. v. Davis*, *supra*.

And in *Smith v. Erie R. Co.* 67 N. J. L. 636, 59 L.R.A. 302, 52 Atl. 634, it was held that the risk of injury from a defect in a railroad track or roadbed negligently permitted to remain in bad repair is not among the ordinary and natural risks that are assumed by a train man, and is not assumed unless it becomes known to him, or is so obvious that, by the exercise of ordinary care on his part, it would be observed.

An engineer, in the absence of actual knowledge of the defect, does not assume the risk of injuries due to a defective rail. *Clapp v. Minneapolis & St. L. R. Co.* *supra*.

However, if a servant has full knowledge of the defects, but nevertheless continues

ligence of the defendant consisted in having defective ties and rails. Some of the defendant's own witnesses testified that the inside ball of the rail was worn, and that a rail in that condition on a curve is unsafe. Witnesses for the plaintiff testified that there were at least six rotten and defective ties at the place where the derailment occurred. There was therefore some evidence to sustain a finding of the jury to the effect that the derailment was caused by defective ties and rails, and that these defects had existed for such a length of time that the defendant was bound to have notice of them. If the jury believed the plaintiff's testimony that he did not know the condition of the ties and rails, it disposes of the defense of assumed risk.

in the employment without complaint, he will be deemed to have assumed the risks thereof. *Moss v. Johnson*, 22 Ill. 633; *McCauley v. Springfield Street R. Co.* 169 Mass. 301, 47 N. E. 1006; *Paris, M. & S. P. R. Co. v. Stokes* (Tex. Civ. App.) 41 S. W. 484; *Gulf, C. & S. F. R. Co. v. Moore*, supra.

Where a servant had been a baggage man and a brakeman for six years, and had been on defendant's road for three months, and had worked on a gravel train ballasting the track, and during that employment had often been on and about a side track, it was held, in *Atchison, T. & S. F. R. Co. v. Aisdurf*, 47 Ill. App. 200, that he was clearly chargeable with the manner in which the side track was ballasted.

In Missouri, where the weight of authority is to the effect that a servant never assumes the risk of the master's negligence, it has been held in a number of cases that, if the company fails in its duty in respect to furnishing a reasonably safe track or roadbed, it is responsible for injuries resulting therefrom to the train man. *Porter v. Hannibal & St. J. R. Co.* 60 Mo. 160; *Dale v. St. Louis, K. C. & N. R. Co.* supra; *Devlin v. Wabash, St. L. & P. R. Co.* 87 Mo. 545.

And in *Devlin v. Wabash, St. L. & P. R. Co.* supra, the court said: "It does not follow, because the rails were old, light, and well worn in places, to the knowledge of the plaintiff, that he was bound to pursue the inquiry and determine for himself and at his own peril whether the road was or was not fit for use." The court goes on to say, however, that the servant's conduct in this matter bore on the question of contributory negligence, and not on assumption of risk.

In *Chicago G. W. R. Co. v. Price*, 38 C. C. A. 239, 97 Fed. 423, the court said: "The rule is that the danger from the defects of the railroad or machinery furnished the employee must have been so obvious and threatening that a reasonably prudent man in his situation would have avoided them, in order to charge the injured servant with contributory negligence because he continued in the discharge of his duty, and thereby assumed the risks."

This statement in fact eliminates the de-
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Southern Kansas R. Co. v. Michaels, 57 Kan. 474, 46 Pac. 938; *Atchison, T. & S. F. R. Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253; *Brinkmeier v. Missouri P. R. Co.* 69 Kan. 738, 77 Pac. 586. There are doubtless cases the extreme logic of which would seem to justify holding that an engineer has equal opportunities with the railway company to know every defect existing in the ties and rails in the track over which he runs his engine, but in our judgment so to hold is contrary to the weight of reason. The more recent tendency of the courts is against any extension of the doctrine of assumed risk. The present case is obviously different from one where an employee constantly engaged in work in and about a railroad yard is injured by a defect in the

fense of assumption of risk, but the court does not make it clear whether this statement was intended as a general rule applicable in all cases of master and servant, or was to be applied only to a case of a train man and his assumption of risks of defects in a roadbed. If the statement was intended as a general rule, it is clearly against the weight of authority.

Although a brakeman may know that a track is defective and assume the risk thereof, he does not thereby necessarily assume the increased risk created by the running of his train at a dangerous rate of speed over such defective track. *Lawhorn v. Millen & S. R. Co.* 97 Ga. 742, 25 S. E. 492.

The question whether or not a railroad track is in such bad condition that no person of ordinary intelligence and prudence would have incurred the risk of using it is for the jury, where the evidence is not such as to leave no room for two opinions. *Morgan v. Rainier Beach Lumber Co.* 51 Wash. 335, 22 L.R.A.(N.S.) 472, 98 Pac. 1120.

In *McCabe & S. Constr. Co. v. Wilson*, 17 Okla. 355, 87 Pac. 320, the plaintiff, an engineer, knew that the bridge which gave way and injured him was defective, but he had been assured by the superintendent of the defendant's construction gang that the bridge was safe, and had been directed to proceed with his engine upon the bridge. The court held that the engineer did not assume the risk of the injury in question, but does not expressly put it upon the ground that he was acting under the immediate directions of a superior, and in accordance with assurances of safety by a servant charged with the duty of inspection.

In some cases the broad statement is made that a train man does not assume the risk arising from defective tracks or roadbed. *Knapp v. Sioux City & P. R. Co.* 71 Iowa 41, 32 N. W. 18; *Trask v. California Southern R. Co.* 63 Cal. 96. In connection with these cases, it should be noted that the court was probably dealing with a case in which the train man was not aware of the defects, and consequently the broad statement was true as applied to the facts of the particular case.

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tracks, the condition of which he is required to know. Thus, in *Clark v. Missouri P. R. Co.* 48 Kan. 654, 29 Pac. 1138, a brakeman was held to have assumed the risk as to the condition of the roadbed, where he had equal knowledge with the master of the defects which caused his injury. To the same effect is *Missouri P. R. Co. v. Click*, 78 Kan. 419, 96 Pac. 796. On the other hand, in *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 1 Am. St. Rep. 266, 16 Pac. 146, it was held that the conductor of a train is not required to know all the defects and obstructions that may exist on the road over which he runs. What reason can be suggested why the same rule should not apply to an engineer? It is true that the duties of a conductor require him to remain on the inside of the train, while the duties of an engineer oblige him to keep his eyes on the track; but the engineer's lookout is always ahead to see if the track is clear, and he is not required to examine the condition of the ties and rails. It is sufficient for him to know that they are in place, and, if they are, he has the right to assume that the company has discharged its obligation to keep them in reasonably safe repair.

When the plaintiff entered the employ of the railway company, he executed a written agreement which provided that, if he sustained any personal injury while in the service of the company for which he might make claim for damages, he would within thirty days thereafter give notice in writing to the general or claims attorney, stating the time, place, manner, cause, and extent of his injuries, and his claim therefor, and that his failure to give such notice should constitute a bar to any suit on account of such injuries. The contract of employment was introduced in evidence by the defendant, and there was no showing by the plaintiff that he gave any notice of the injury. At the close of the evidence, the defendant requested the court to instruct the jury that if they found from the evidence that the plaintiff voluntarily signed the contract, and did not give the notice provided therein, and that the railway company had not waived the giving of such notice, their verdict should be for the defendant. The court refused to give this instruction, but gave one in which the jury were told that the contract was not binding on the plaintiff, and the fact that he did not comply with the agreement and give such notice constituted no defense to the action. In our view, this raises the only question in the case. Conceding that the provision requiring notice of the claim was 28 L.R.A. (N.S.)

a reasonable and lawful one, that plaintiff was bound thereby, and that the instruction given by the court was erroneous, the error must be regarded as wholly immaterial, for the reason that on the trial the defendant introduced evidence showing a waiver by the company of this provision of the contract. Plaintiff himself testified without objection that someone from the claim department of the company came to his house three weeks after the injury, and took from him a written statement about the wreck. The defendant then introduced in evidence the written statement itself, which states the time, place, manner, and cause of his being injured, and the nature and extent of his injuries. It is signed by the plaintiff. The only detail in which it fails to comply with the provisions of the contract as to notice is in not stating the amount of his claim for injuries; but manifestly this omission would not be sufficient to deprive him of his right to maintain the action. Being in the nature of a forfeiture, the provision must be strictly construed. A similar provision in the contract was involved in *Missouri, K. & T. R. Co. v. Walker*, 79 Kan. 31, 99 Pac. 209. The question there arose upon the pleadings, but it was held that the provision may be waived, that no consideration is necessary to support a waiver, and that it is not necessary to show facts amounting to technical estoppel in order to constitute waiver of such a provision. Whether the written statement which the defendant obtained from the plaintiff be regarded as a sufficient compliance with the condition requiring notice to be given, or the action of the defendant in taking the statement be considered as a sufficient excuse for the failure of the plaintiff to give the notice, is not important. It is well established that the courts will not enforce a forfeiture where the conduct of the other party is sufficient upon which to base a reasonable excuse for the default. *Hartford Life Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671. At the top of the statement made to the claim agent there is this pencil memorandum: "Horton, July 24-07,"—indicating that the statement was made on that date, which was more than thirty days from the date the injuries were received. The plaintiff, however, testified that he made and that the agent took the statement within three weeks after the accident. The majority of the court is of the opinion that, since the defendant offered no evidence to the contrary further than what appeared by the memorandum referred to, there was no

question of fact in regard to waiver that should have been submitted to the jury.

The judgment is therefore affirmed.

Johnston, Ch. J., and Burch, Mason, Smith, Graves, and Benson, JJ., concur.

Porter, J., dissenting:

I think the instruction requested should have been given, and that it was error for the court to withdraw from the consideration of the jury the contract of employment on the ground that it was not binding on the plaintiff. If the written statement was in fact taken by the claim agent after the expiration of thirty days from the time of the accident there was, of course, no waiver, and the question whether there was such a waiver should have been submitted to the jury. With these exceptions I concur in all that is said in the opinion.

Petition for rehearing denied.

IOWA SUPREME COURT.

RHODA BROWN, Admr., etc., of C. F. Brown, Deceased,
v.
WEST RIVERSIDE COAL COMPANY,
Appt.

(— Iowa, —, 120 N. W. 732.)

Trial — negligence — jury.

1. The question of a master's negligence in storing powder, dynamite, and dynamite caps in dangerous quantities in the room provided for the storing of workmen's tools, clothing, and lunches, and which is used by them for refuge from storms, is for the jury.

Master — explosives — injury — evidence.

2. The negligence of a master in storing dynamite in dangerous quantities in a room provided for the use of workmen is not negatived by the fact that an explosion is an unusual and extraordinary occurrence.

Trial — evidence — inference.

3. The absence of direct evidence as to the cause of the death of an employee whose body was found near a building in which dynamite had been stored will not prevent a finding by the jury that it was caused by an explosion of dynamite by a lightning stroke, if known facts point to that inference.

Master — explosives — lightning.

4. A master who negligently stores high explosives in a room provided for the use of workmen in storing tools and clothing and seeking shelter from storms cannot escape liability for the death of a workman 28 L.R.A. (N.S.)

killed by an explosion, by the fact that it was caused by lightning.

Action — death — proof.

5. To maintain an action for the death of an employee through the explosion of dynamite negligently stored in a room provided for his use, plaintiff is not bound to demonstrate the manner in which the explosives were ignited.

Proximate cause — negligence — accident.

6. A master's negligence in storing dynamite in a place where its accidental ignition will endanger the lives of his employees is the proximate cause of the death of a servant through its explosion, notwithstanding the cause of the explosion is purely accidental or wholly unknown.

Evidence — presumption — care.

7. The presumption of care on the part of one killed through the alleged negligence of another, where there is no witness of the accident, is sufficient to take to the jury the question of the absence of contributory

Note. — Liability of master for injuries due to the explosion of dynamite by lightning.

The unusual question of the liability of the master engaged in blasting in quarries and mines, for injuries resulting from an explosion of the dynamite by lightning, was passed upon in *Baccelli v. North River Stone Co.* 133 App. Div. 449, 18 N. Y. Supp. 29, where it was held that a master was not bound to anticipate that, in the use of electric exploders, there was a substantial danger in a thunderstorm, when it did not appear that any precaution was in any way prescribed in the regulations of the commissioner of labor, nor that any precaution was deemed necessary in any other quarry or mine where such exploders were in use.

An employee who, knowing and appreciating the risk, voluntarily places himself in a position of danger with respect to a dynamite magazine located on the premises of his employer, was held in *Davis v. Somers-Cambridge Co.* 75 Ohio St. 215, 79 N. E. 233, not to be entitled to recover for personal injuries occasioned by the accidental explosion of such magazine without fault on the part of the employer, although such employee may not have known and realized all the possible consequences of the danger. The dynamite in this case exploded during a thunderstorm, but whether the explosion was due to a bolt of lightning or to some other accidental cause was unknown.

Upon the question, May a servant assume the risk of dangers created by the master's negligence, see note to *Scheurer v. Banner Rubber Co.* ante, 1207.

As to servant's assumption of risk of dangers created by the master's negligence, which might have been discovered by the exercise of ordinary care on the part of the servant, see note to *St. Louis, I. M. & S. R. Co. v. Birch*, ante, 1250. W. M. G.

negligence on his part, in the absence of clear and unmistakable proof to the contrary.

Trial — jury — assumption of risk.

8. The question of the assumption of risk on the part of an employee whose duties require him to be near stored dynamite is for the jury, where he was inexperienced, and not shown to have appreciated the gravity of his peril.

Master — negligence — evidence.

9. A master may be found to be negligent in using a single room of a small shanty for the convenience and shelter of workmen, for the storage of dynamite, and for the installation of a telephone, the electricity from the wires of which may cause an explosion of the dynamite.

(April 8, 1909.)

A PPEAL by defendant from a judgment of the District Court for Polk County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. Parker, Hewitt, and Wright, for appellant:

The burden was upon the plaintiff to show actual negligence by the defendant with respect to the manner of keeping or using the explosives.

12 Am. & Eng. Enc. Law, 2d ed. pp. 502, 503, notes 2, 5; 19 Cyc. Law & Proc. p. 12, notes 66, 67; Walker v. Chicago, R. I. & P. R. Co. 71 Iowa, 658, 33 N. W. 224; Tuckachinsky v. Lehig & W. B. Coal Co. 199 Pa. 515, 49 Atl. 308; 2 Am. & Eng. Enc. Law, Supp. p. 1086; Brown v. Thomas Blackwell Coal & Min. Co. 124 Ky. 324, 99 S. W. 299; People v. Sands, 1 Johns. 78, 3 Am. Dec. 296.

The maintenance of the telephone and wires in the shanty was not negligent in law or in fact, as there was no allegation or proof of any defect of construction or lack of insulation in the shanty, or of the wires leading thereto and therefrom.

Southern Bell Teleph. & Teleg. Co. v. McTyer, 137 Ala. 601, 97 Am. St. Rep. 62, 34 So. 1020; Jackson v. Wisconsin Teleph. Co. 88 Wis. 243, 26 L.R.A. 101, 60 N. W. 430; Joyce, Electric Law, § 453, p. 470; Southwestern Teleg. & Teleph. Co. v. Robinson, 16 L.R.A. 545, 1 C. C. A. 684, 2 U. S. App. 205, 50 Fed. 810.

Since the defendant cannot be held to be responsible for the lightning striking in any particular place, Brown's death, being due either to lightning stroke or to explosion caused by direct lightning stroke, has not been proven to be due to any negligence upon the part of the defendant with respect to the location of its supply of explosives, and the submission of the cause to 28 L.R.A.(N.S.)

the jury, on the theory that the place of storage of the dynamite was negligence, was error.

McClain v. Garden Grove, 83 Iowa, 235, 12 L.R.A. 482, 48 N. W. 1031; Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist. 96 Pa. 65, 42 Am. Rep. 520; Bruswitz v. Netherland's American Steam Nav. Co. 64 Hun, 262, 19 N. Y. Supp. 75; Knox v. New York, L. E. & W. R. Co. 69 Hun, 93, 23 N. Y. Supp. 198; 1 Shearm. & Redf. Neg. 5th ed. § 39.

If the deceased was killed while seeking shelter in, or going to seek shelter in, the shanty, he was guilty of contributory negligence such as would, as a matter of law, prevent his recovery, because the possibility of explosion being caused by lightning stroke must be presumed to have been as well known to deceased as to the defendant.

St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495.

It was only as to assumption of risks arising from alleged negligent method and place of keeping explosives, in the shanty with the telephone, that defendant made allegations and had the burden of proof.

Martin v. Des Moines Edison Light Co. 131 Iowa, 724, 106 N. W. 359; Sankey v. Chicago, R. I. & P. R. Co. 118 Iowa, 39, 91 N. W. 820.

Whether the alleged negligent cause which contributes to an accident is or is not legally proximate is not determined with reference to the order in which the several contributing elements succeed each other, but with reference to the efficiency of those elements.

21 Am. & Eng. Enc. Law, p. 486-b; Neilson v. Gilbert, 69 Iowa, 691, 23 N. W. 666; De Camp v. Sioux City, 74 Iowa, 394, 37 N. W. 971; McClain v. Garden Grove, supra; Burk v. Creamery Package Mfg. Co. 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793; Phinney v. Illinois C. R. Co. 122 Iowa, 494, 98 N. W. 358; Parmenter v. Marion, 113 Iowa, 297, 85 N. W. 90.

The rule of contemplation of possible injury or damage, or contemplation of consequences, is the test of negligence.

21 Am. & Eng. Enc. Law, 2d ed. p. 486.

The defendant will not be liable in negligence for failing to provide against that which a man of ordinary foresight and prudence could not reasonably have anticipated.

21 Am. & Eng. Enc. Law, p. 480-g; Watters v. Waterloo, 126 Iowa, 190, 101 N. W. 871; Handelun v. Burlington, C. R. & N. R. Co. 72 Iowa, 709, 32 N. W. 4; Harvey v. Clarinda, 111 Iowa, 529, 82 N. W. 994; Horn v. Chicago, M. & St. P. R. Co. 124 Iowa, 284, 90 N. W. 1068; Burk v. Creamery Package Mfg. Co. supra.

A party who takes reasonable care to guard against accidents arising from ordinary causes is not liable for accidents arising from extraordinary causes.

Blyth v. Birmingham Waterworks Co. 11 Exch. 781; *Liming v. Illinois C. R. Co.* 81 Iowa, 248, 47 N. W. 66; *Doyle v. Chicago, St. P. & K. C. R. Co.* 77 Iowa, 607, 4 L.R.A. 420, 42 N. W. 555; *Hazzard v. Council Bluffs*, 79 Iowa, 106, 44 N. W. 219; *Osborne v. Van Dyke*, 113 Iowa, 557, 54 L.R.A. 367, 85 N. W. 784.

In order that the mere keeping of explosives may be made the basis of an action for damages resulting from an explosion thereof, the facts shown as to the keeping of said explosives must be such as to constitute a nuisance.

Joyce, Nuisances, §§ 44, 383; *Laflin & R. Powder Co. v. Tearney*, 131 Ill. 322, 7 L.R.A. 262, 19 Am. St. Rep. 34, 23 N. E. 389; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Tuckachinsky v. Lehigh & W. B. Coal Co.* supra; *Cook v. Anderson*, 85 Ala. 99, 4 So. 713.

Mr. Thomas A. Cheshire for appellee.

Weaver, J., delivered the opinion of the court:

The defendant, a coal mining corporation, was engaged in the work of sinking a shaft for mining purposes near the city of Des Moines. The deceased was not a miner by occupation, but had for a short time been employed by the defendant doing work at and about the top of the shaft. After a few weeks of this service, he was put in charge of an engine used in hoisting the excavated material. This engine was not inclosed by any building, the only shelter for the engineer being a small roof or canopy not affording protection against severe storms. The boiler and engine stood north of the shaft, and about 60 feet farther to the north and west was a small frame shanty or building about 10 feet square, in which was a telephone connected with the city system. It was also used as a place where the workmen left their coats and tools, where they sometimes gathered at lunch time, and found shelter from the storms. In it the defendants also deposited powder and dynamite supplied from time to time for use in blasting. The work was being pushed both day and night, the men being employed in three shifts of eight hours each. The deceased was upon the night shift. At least 25 pounds of dynamite were used every twenty-four hours, and, instead of having large quantities of the explosive stored in advance, it was the practice to purchase and bring in boxes of 25 to 50 pounds each, as the progress of the work required, and these boxes were stored in

the shanty above described. For some time prior to the date in question, little or no black powder had been used, and a remnant of some 25 or more pounds of that material had been permitted to remain in the same room. On July 17, 1905, a 25-pound box of dynamite was delivered, not more than one half of which had been used at the time of the accident. There was also a supply of dynamite caps for use in exploding blasts. Brown knew, in a general way at least, of the uses made of the shanty. At times he attended to telephone calls, and sometimes carried powder and dynamite from the building to the shaft.

Early in the morning of July 19, 1905, and before the night shift of workmen had been relieved, there occurred a violent rain-storm, accompanied by thunder and lightning, during which the dynamite and powder in the shanty exploded, instantly killing Brown and his four fellow workmen, constituting the entire force then on the work. It is supposed that some, if not all, of the number had gathered in the shanty for shelter from the storm, and that the explosives were ignited by a stroke of lightning. There is no living witness of any of the immediate circumstances of this calamitous occurrence, except a woman who, from a distance of a mile and a half, noticed the lightning stream down in the direction of the shanty and saw the explosion follow almost instantaneously. The nearest neighbor first upon the scene after the explosion, and while the storm was still in progress, found the broken strands of telephone wire dragging on the ground and noticed that from time to time they emitted sparks. To this witness the sound of the powder explosion and the noise of the thunder following the fatal lightning stroke seemed to unite in a single crash. A witness who was at the shanty during the evening before noticed the unused powder, dynamite, and caps, and says that the caps, or some of them, were directly under the telephone instrument. These caps are described as being very sensitive and easily exploded; each having a small copper wire attached, through which to fire the charge by a spark from an electric battery. The body of Brown was found about 30 feet from his engine and 40 feet from the location of the shanty. His legs were torn off, but the remainder of his body was not badly mutilated. There were no powder marks on his face. The bodies of his comrades were for the most part torn in fragments. From these circumstances it is argued by plaintiff that Brown was not in the shanty at the time of the explosion, but was either at his engine or at some point between the engine and the shanty. The defendant is charged

with negligence in failing to provide the deceased with a safe place to work, in storing and keeping powder, dynamite, and caps in the building which was the only place provided for the workmen to deposit their tools, clothing, and lunch, and in bringing into said shanty, where such explosives were kept, a telephone connected with wires upon which electric currents were admitted or liable to be conducted, without due regard to the danger of such wires becoming overcharged and causing an explosion such as did in fact result. To this claim the defendant interposes a denial of all negligence on its part. It also pleads that the deceased had been at work in said employment for a considerable period, and was familiar with the conditions there prevailing, and with such knowledge had voluntarily continued in the service without objection or complaint, thereby assuming the risk, if any, attendant thereon. At the close of plaintiff's testimony in chief, the defendant moved for a directed verdict in its favor on the grounds: (1) Of an entire failure of evidence to show negligence on the part of the defendant; (2) failure of the evidence to show that defendant's negligence, if any, was the proximate cause of the intestate's death; and (3) failure of evidence to show that said intestate was himself free from negligence contributing to his death. This motion being overruled, the defendant offered evidence tending to show the general manner in which the work at and about the shaft had been carried on during the time deceased was in its service, the use to which the shanty was ordinarily put, and the knowledge and notice which deceased had of the conditions there prevailing. The motion for a directed verdict was thereupon renewed and again overruled. Certain requests for instructions to the jury were also submitted to the court and refused. After verdict had been returned for the plaintiff, the defendant moved for a new trial, assigning as grounds therefor alleged errors of the trial court in its rulings and instructions, and insufficiency of the evidence to sustain a recovery of damages. This motion being denied and judgment entered on the verdict, the defendant appeals.

1. The first assignment of error argued by counsel is grounded upon the refusal of the trial court to hold, as a matter of law, that plaintiff had failed to establish any negligence on the part of the defendant with respect to the matters alleged in the petition. Argument would hardly seem necessary to show the unsoundness of this proposition. There is, of course, no negligence in the mere fact that defendant employed explosives in sinking the shaft of its

mine, for such is the usual and approved, if not a necessary, method by which work of this kind is accomplished; but the fact that such dangerous instrumentalities may be properly used without exposing the employer to a charge of negligence does not by any means imply that he is discharged from the ordinary obligation to use reasonable care to protect his servants against injury therefrom. Indeed, reasonable care demands increased watchfulness and greater caution in proportion to the dangerous nature of the instrumentality employed; that is, "due care" means care which is reasonably commensurate with a known danger and the seriousness of the consequences which are liable to follow its omission. This rule is too familiar and fundamental in the law of negligence to call for any discussion or array of authorities. The negligence charged in this case is not founded upon the use of explosives in the prosecution of the defendant's work, but in the alleged lack of care in keeping and storing them. This, under all ordinary circumstances, is a question of fact. For the court to say as a matter of law that in storing powder, dynamite, and dynamite caps in dangerous quantities in the same and only room provided for the use of the workmen for refuge from the storm, and keeping their tools, clothing, and lunches, the defendant exercised the full measure of its duty in the premises, would in our judgment be a very serious encroachment upon the time-honored province of the jury. It is no answer to this charge that there was no other convenient place to keep these explosives. The construction of a sufficient shelter or receptacle for that purpose, detached from the assembling place of the workmen, was a matter of but a few moments, or at the most few hours, work and very slight expense, and, to say the very least, the question whether reasonable care did not require such precaution was a fair one for the consideration of the triers of fact. Nor is negligence negatived by the fact that the explosion was an unusual or extraordinary occurrence, if there was negligence in creating the conditions. *Dulligan v. Barber, Asphalt Paving Co.* 201 Mass. 227, 87 N. E. 567.

2. It is also argued that, even if the defendant was negligent in keeping the explosives in the shanty, we are wholly without evidence from which to find that this failure of duty was the proximate cause of the disaster. "Who can tell," counsel ask, "what was the cause of the explosion,—whether lightning or some reckless or thoughtless act of the workmen? If it was lightning, who can tell whether the stroke was not itself fatal to the men there as

sembled, independent of the resulting explosion? If the death of the party resulted by the explosion of the powder and dynamite, and they were discharged by a bolt of electricity, is not this an independent intervening agency which breaks the line of causation between the defendant's negligence and the death of the plaintiff's intestate?" The argument is a plausible one, but we think it cannot prevail. It is very true that it is not within human power to discover and make known with certainty all of the immediate circumstances attendant upon this tragedy, but such exact and detailed proof is not required. Courts and juries are not infrequently confronted by cases in which the ultimate facts of cause and effect are to be found, not so much from direct proof of the circumstances as they exist at the instant of the injury complained of, as from proof of conditions existing before and after its occurrence. For instance, in the recent case of *Lunde v. Cudahy Packing Co.* 139 Iowa, 688, 117 N. W. 1063, the body of the deceased was found upon the floor of the room in which he was employed, and there had been no eyewitness of the cause or manner of his death, yet the circumstances were such as to show with moral certainty that he had fallen into the wheel pit, through which he had been whirled upon the spokes of the wheel and cast out again. The plaintiff is not required to make his case beyond a reasonable doubt. It is sufficient if the circumstances be such as to justify a reasonable inference of the truth of the matters charged. 2 Enc. Ev. p. 956.

In most cases the relation between cause and effect is a matter of inference only, but the conclusion is none the less satisfactory to the reasonable mind. A finding that the life of the deceased in this case was destroyed by the explosion of the powder and dynamite, and not by the lightning stroke, has ample support in the record. The place where the body was found and the manner in which it was dismembered point unmistakably to the explosion as an all-sufficient explanation of the cause of his death, while there is not the slightest circumstance to support the theory that he was killed by lightning. In *Brownfield v. Chicago, R. I. & P. R. Co.* 107 Iowa, 258, 77 N. W. 1038, we stated the rule to be that "when a cause is shown which might produce an accident in a certain way, and an accident happens in that manner, it is a warrantable presumption, in the absence of showing of other cause, that the one known was the operative agency in bringing about the result." It is here shown without dispute that the explosives were in the shanty, that they were discharged wrecking the building, and that the persons first coming to the

scene of destruction found the bodies, or the remnants of the bodies, of the five workmen scattered in and about the ruins. No other efficient cause for such results is shown, and to argue the possibility that these men were stricken dead by lightning is to indulge in conjecture pure and simple. Nor are we able to say that, if the explosives were discharged by an electric bolt entering the building, it demonstrates the intervention of an independent agency which breaks the line of causation from defendant's negligent act, and renders the death of the deceased so clearly accidental or providential that no right of recovery exists. This feature of the case presents a question upon which there is much confusion in the authorities, and decisions may readily be found that, where some uncontrollable manifestation of nature unites with human negligence in causing injury to persons or property, the negligence of the human agent is treated as a condition, and not a cause of the injury, and relieves him from legal liability. The origin of this rule is hinted at in the ancient formula by which every destructive exhibition of the laws of nature was denominated "an act of God," from which idea it was easy to reach the pious conclusion that an injury which had been caused or contributed to by the hand of God ought not to be made the basis for the recovery of damages before human tribunals: but this theory has been discarded by many courts, and among them is our own. The subject was treated with great thoroughness by Mr. Justice McClain in *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co.* 130 Iowa, 123, 5 L.R.A. (N.S.) 882, 106 N. W. 498, 8 A. & E. Ann. Cas. 45, and by Mr. Justice Deemer in *Vyse v. Chicago, B. & Q. R. Co.* 126 Iowa, 90, 101 N. W. 736. The rule is there laid down that, when negligence of a responsible person concurs with a flood or storm or other so-called "act of God" in producing an injury, the party guilty of such negligence will be held liable for the injurious consequences, if the injury would not have happened but for his failure to exercise care. These precedents are of such recent date, and treat the subject so exhaustively, that we need not here reopen the discussion farther than to say we are still satisfied with the legal and logical soundness of the rule there announced. That a person whose negligence is the primary cause is not excused because a stroke of lightning intervenes to precipitate an injury, see *Jackson v. Wisconsin Teleph. Co.* 88 Wis. 243, 26 L.R.A. 101, 60 N. W. 430. The general subject of proximate cause and intervening agencies in cases of negligence is also treated quite fully in *Burke v. Creamery Package Mfg. Co.* 126 Iowa, 730,

106 Am. St. Rep. 377, 102 N. W. 793; Fishburn v. Burlington & N. W. R. Co. 127 Iowa, 483, 103 N. W. 481; Phinney v. Illinois C. R. Co. 122 Iowa, 488, 98 N. W. 358; Gould v. Schermer, 101 Iowa, 588, 70 N. W. 697.

It is to be observed in this connection that plaintiff charges the defendant not only with negligence in keeping the explosives in the shanty, but also alleges that it negligently increased the hazard thus created by establishing a telephone in the same room with connecting wire or wires, upon which, in case of storms, an overcharge of electricity was liable to be conducted, causing the ignition of the powder, dynamite, or caps. The fact of installing and connecting the telephone as alleged is not denied, but it is said there is no evidence that this condition had anything to do with the accident. No witness testifies—none can testify—that lightning did strike the building, or that electricity in dangerous force did enter it over the wire; but proof of a condition which rendered such results possible was a material circumstance with reference to the safety of the place. See *Jackson v. Wisconsin Teleph. Co.* supra. The liability of telephone wires to be surcharged with electricity during violent storms is well known to all persons familiar with their use. It is shown by plaintiff's witnesses that the broken end of this particular wire continued to emit sparks for some time after the explosion, indicating that, by reason of the condition of the atmosphere, or because of contact with other conductors carrying heavy currents, electricity in quantities capable of doing the alleged mischief was being brought into the immediate vicinity where the explosives had been stored; but we think it is not incumbent upon the plaintiff to point out or demonstrate the manner in which the explosives were ignited. Indeed, it would not necessarily be a defense to the action, even if the record should demonstrate beyond all doubt that the immediate cause of the explosion was not chargeable to the negligence of any person. If the defendant was negligent in depositing the powder and dynamite in a place where their accidental ignition would necessarily endanger the lives of its servants, such negligence would be the proximate cause of the resulting injury, notwithstanding the source of the spark which explodes them be purely accidental or wholly unknown. *Tissue v. Baltimore & O. R. Co.* 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667. That blasting powder and other high-power explosives of modern invention are liable to accidental ignition, with destructive consequences, even where apparently reasonable care is exercised to prevent such occurrence, 28 L.R.A. (N.S.)

has been too frequently proven by recurring disasters to call for argument, and, if there be lack of reasonable care in storing them too near the servant's place of work, such negligence is not purged by the exercise of care in other respects.

3. As in all personal injury cases, there must be testimony from which the jury can properly find freedom from contributory negligence on the part of the deceased, in order to sustain a recovery of damages. In this respect it is contended that the plaintiff has failed. It must be remembered, however, that in the utter absence of living witnesses, there is a presumption that the deceased, actuated by the natural instincts of self-preservation, was in the exercise of reasonable care for his own safety. *Phinney v. Illinois C. R. Co.* 122 Iowa, 492, 98 N. W. 358; *Hopkinson v. Knapp & S. Co.* 92 Iowa, 328, 60 N. W. 653; *Dalton v. Chicago, R. I. & P. R. Co.* 104 Iowa, 28, 73 N. W. 349; *Mynning v. Detroit, J. & N. R. Co.* 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147; *Lyman v. Boston & M. R. Co.* 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976; *Cassidy v. Angell*, 12 R. I. 447, 34 Am. Rep. 600; *Johnson v. Hudson River R. Co.* 20 N. Y. 65, 75 Am. Dec. 375. True, this presumption is not conclusive, and may be rebutted by proof of circumstances tending to the opposite conclusion, but such proof can rarely, if ever, be made so clear and unmistakable as to enable the court to dispose of the issue thus presented as a matter of law. We find no such showing here, nor do counsel point out any fact or circumstance which they rely upon to overcome this presumption. Even if it should be said that reasonable care on the part of the deceased would have forbidden his entrance to the shanty under the circumstances then surrounding him, it is a sufficient answer that it is by no means certain that he did enter or was in the building when the explosion occurred. The question of contributory negligence was properly left to the jury.

4. The conclusions already announced dispose of the principal issues presented in this case, except the defense of assumption of risk, pleaded by the defendant. It is a familiar doctrine that the servant assumes all risks which inhere in or are incident to the nature and kind of service which he undertakes to perform, and, if such service involves the use of explosives or other dangerous instrumentalities, he takes upon himself the chances of all injury to which he may be exposed by their reasonable and proper use; but, as we have often had occasion to say, the servant does not assume any risk created by the negligence of his master, unless he knows and appreciates, or as a reasonably prudent person ought to.

know and appreciate, the peril arising from the master's negligence, and chooses to remain in the service,—in which latter event he is barred from the recovery of damage if injured. Assumption of risk on account of the master's negligence is an affirmative defense. It has been properly pleaded in the case before us and presents the most seriously debatable question argued by counsel. A careful consideration of the record inclines us to the view that in this, as in other respects mentioned, there was no error in submitting the issue to the jury. It must not be overlooked that, as already stated, this defense is affirmative in character, and that the issue thus presented is one of fact, on which the parties are entitled to have a verdict unless the opposing view is one upon which reasonable minds are not likely to differ. The testimony tends to show that, until coming into the service of the defendant, Brown had no experience in mining or in sinking mine shafts. It does not appear that he had any prior experience in works of excavation or in the care or use of explosives. He had been a butcher, farmer, and had had some experience with threshing machines. The boiler he was using at the defendant's mining shaft was part of a threshing outfit belonging to him. While it is shown that at times, though not repeatedly, he carried dynamite from the shanty to the shaft, and doubtless knew in a general way that it was a powerful explosive, it is at least doubtful whether he was aware of its sensitive character, or understood the gravity of the peril to which those working in the vicinity were thereby exposed. The seeming indifference or confidence manifested by the defendant's managers in depositing and keeping these materials in the same shelter provided for the use and convenience of the workmen would naturally quiet the fears of an inexperienced employee. So far as shown, he was given no instructions or warning concerning the danger to be apprehended from this source. There is no charge of negligence in failing to warn or instruct the deceased with respect to this danger, but, in considering his conduct with reference to the question of assumption of risk, the fact whether he did have such notice or warning is relevant and material, because the rule as to assumption of risk has its basis in the servant's actual or constructive knowledge of the peril to which he is exposed. *Reed v. Stockmeyer*, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186. See also cases collected in 2 Labatt's Master & Servant, § 271, note. Bearing upon the care required of the master in keeping and handling explosives, and assumption of risk therefrom by the servant, the cases of 28 L.R.A.(N.S.)

Mather v. Rillston, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464, and *Welch v. Bath Iron Works*, 98 Me. 361, 57 Atl. 88, are quite in point. In view, therefore, of all the circumstances disclosed by the record, and the law which places the burden of establishing this defense upon the master, we cannot say there was any error in submitting it to the finding of the jury.

5. Other questions argued by counsel are incidental or subsidiary to those already considered, and we shall not attempt their minute consideration. It is urged, and for the purposes of the case it may be conceded, that defendant is not necessarily chargeable with negligence because it kept dynamite near the shaft, or because it installed the telephone in the shanty for the conveniences of its business; but it does not follow from this concession that the use of a single small room for the installation of the telephone, for the deposit of the explosives, and for the general convenience and shelter of the workmen, did not together constitute a dangerous combination which due care would have avoided.

In one of its instructions to the jury, the court, as the record would seem to indicate, used the word "prudent," where it evidently intended to say "imprudent;" but the whole trend and substance of the charge makes the inadvertence so very clear that we cannot conceive of any juror of average intelligence being thereby misled, and it is incredible that the defendant suffered any prejudice therefrom. We have often held that mere verbal inaccuracies of this kind are not reversible errors. *Flam v. Lee*, 116 Iowa, 289, 93 Am. St. Rep. 242, 90 N. W. 70; *Meyer v. Baird*, 120 Iowa, 597, 94 N. W. 1129; *Schaefer v. Anchor Mut. F. Ins. Co.* 133 Iowa, 205, 100 N. W. 857, 110 N. W. 470; *Smith v. Aetna L. Ins. Co.* 115 Iowa, 217, 56 L.R.A. 271, 91 Am. St. Rep. 153, 88 N. W. 368.

No ground for setting aside the verdict being shown, the judgment of the District Court is therefore affirmed.

Petition for rehearing denied, September 28, 1909.

KENTUCKY COURT OF APPEALS.

H. L. SMITH'S ADMINISTRATOR, Appt.,
v.
NORTH JELICO COAL COMPANY.

(131 Ky. 196, 114 S. W. 785.)

Master — failure to prop mine roof —
death of miner — liability.

The employer of a miner engaged in cutting into a seam of coal, whose employment

requires him to see that props are placed as fast as needed, is not liable for the miner's death, due to his failure to prop the roof soon enough, so that it falls upon and kills him.

(Nunn, J., dissents.)

(December 18, 1908.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Knox County, entered upon a directed verdict for defendant in an action brought to recover damages for the killing of plaintiff's intestate, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. W. C. Marshall and S. B. Dish-

man & Son, with Mr. James Andrew Scott, for appellant:

The defendant is liable, as he had undertaken to make the place of work safe.

White House Coal Co. v. Cochran, 13 Ky. L. Rep. 636; McFarland v. Harbison & W. Co. 26 Ky. L. Rep. 746, 82 S. W. 430; Labatt, Mast. & S. §§ 2, 279a; George T. Stagg Co. v. Brightwell, 28 Ky. L. Rep. 1220, 92 S. W. 8; Gaines & Co. v. Johnson, 133 Ky. 507, 105 S. W. 381; Pfisterer v. Peter, 117 Ky. 501, 78 S. W. 450; Ashland Coal & I. Co. v. Wallace, 101 Ky. 628, 42 S. W. 744, 43 S. W. 207; Louisville Bolt & Iron Co. v. Hart, 122 Ky. 731, 92 S. W. 951; Cohankus Mfg. Co. v. Rogers, 29 Ky. L. Rep. 747, 96 S. W. 437; Vansesse v. Catsburg Coal Co. 159 Pa. 403, 28 Atl.

Note.—*Applicability of rule as to safe place where the conditions of work are changing.*

This subject is treated in an exhaustive note to Citrone v. O'Rourke Engineering Constr. Co. 19 L.R.A.(N.S.) 340. And upon the somewhat analogous subject of applicability of rule as to safe place where servants are engaged in the work of removing dangerous conditions, see note to Neagle v. Syracuse, B. & N. Y. R. Co. 25 L.R.A.(N.S.) 321.

In the earlier note it is shown that there is a well-recognized exception to the rule requiring the master to furnish a reasonably safe place for his servant where the conditions of the place are constantly changing as the work progresses.

This exception to the rule is thus stated in Bridges v. Los Angeles P. R. Co. 156 Cal. 492, 25 L.R.A.(N.S.) 914, 105 Pac. 586: "Where the place in which the work is to be done and the appliances to be used are in themselves as safe as can reasonably be expected, and the danger arises necessarily in the doing of the work, the master has discharged his duty when he has furnished to the employee suitable means of obviating the danger."

And in Rocky Mountain Bell Teleph. Co. v. Bassett, 178 Fed. 768, the court said: "If the work is one of construction or repair, the risks incident to the place and the work are assumed by the employee, and the master's duty of maintaining a safe place is not so broad as to charge him with injuries to the employee which result from the place becoming unsafe under exigencies created in the progress of the work, which could not have been anticipated. But where an employee is called from other work, and is set to work in an excavation, he has the right to assume that the master has investigated the conditions, and that the place was safe, unless the danger is plain and obvious."

This exception has been recognized and applied in the following cases, where the servant was injured while engaged in performing the work indicated: Graham v. 28 L.R.A.(N.S.)

Thrall (Ark.) 129 S. W. 532 (construction and equipment of sawmill plant); Tobler v. Pioneer Min. & Mfg. Co. (Ala.) 52 So. 86 (repairing tracks over furnaces in iron plant); Wight v. Cumberland Teleph. & Teleg. Co. (Ky.) 125 S. W. 718 (removing telephone wires strung in close proximity to electric light wires); Gunzfsky v. People's Gaslight & Coke Co. 145 Ill. App. 255 (excavating for wall); Lammey v. Center Coal Min. Co. (Iowa) 123 N. W. 356 (mining); Dunn v. Great Lakes Dredge & Dock Co. (Mich.) 126 N. W. 833 (excavating canal); Robichaud v. Mendell, 75 N. H. 391, 74 Atl. 1049 (erecting a scaffold for use of masons); Lewis v. Gehlen, 136 App. Div. 855, 122 N. Y. Supp. 89 (constructing building); A. H. Jacoby Co. v. Williams (Va.) 65 S. E. 491 (grading down rocky hill); McPherson v. Great Northern R. Co. 140 Wis. 473, 122 N. W. 1022 (repairing bridge).

In speaking of the duty resting upon the master while the conditions of the place are changing with the progress of the work, the court in Tobler v. Pioneer Min. & Mfg. Co. supra, said: "The duty which originally rests upon the master to furnish safe ways, works, and machinery for the time being, and for the purpose of construction or repair, is suspended."

Other cases, however, hold that the master's duty is in no wise lessened by the fact that the progress of the work necessarily changes the condition and increases the danger. He still must use reasonable care to make the place reasonably safe, although in such a case the result of his care may not, as a matter of fact, render the place as safe as it would be if the progress of the work did not necessarily change the conditions.

Thus, in Gorsegner v. Burnham, 142 Wis. 486, 125 N. W. 914, the court said the duty of making a place reasonably safe in no wise ceased because of the fact that repairs were in progress; that, at most, would be one of the circumstances bearing on the question of what would constitute reasonable safety, and on the measure of notice to an employee of the existence of some de-

200; *Eddy v. Aurora Min. Co.* 81 Mich. 548, 46 N. W. 17; *Lexington & C. County Min. Co. v. Stephens*, 104 Ky. 502, 47 S. W. 321.

Messrs. James D. Black, B. B. Golden, and Pitzer D. Black for appellee.

Barker, J., delivered the opinion of the court:

H. L. Smith, the decedent of the appellant, was engaged in operating a coal-cutting machine in the coal mines of appellee in Knox county, Kentucky. At the time of the accident which caused his death, he was engaged in what is called "turning a room" from one of the main entries. The passage-way which he was cutting was about 10 feet wide, and was to extend some little distance from the main entry before the room was turned. Smith had cut in some 8 or 10 feet, and the coal had been taken out. The top of the mine was of slate, and had a hill seam running across it. At best the top was bad, being what the miners term a "rotten top," and the hill seam, which was a large crack through which water percolated into the mine, made it still worse. Smith's business was simply to undercut the coal with a machine which was operated by compressed air, and then there were men, called "shovelers" and "shooters," whose business it was to come in and bore holes in the face of the coal, which were loaded with powder, and the coal so undercut was blown down by the explosion of

the powder, after which the shovelers would remove it by loading it into cars, by which it was transported to the mouth of the mine and onto the tippie. It was also the duty of these shovelers and shooters to pull down any loose, overhanging slate, and to carry it out of the room, so that it would be out of the way. It was their duty to observe whether the slate was about to fall, or in danger of falling, and this they did by tapping it with picks or shovels, judging by the sound as to whether there was any immediate danger of its falling. If there was, it was their duty to pull down the slate so as to prevent its falling on the miner operating the machine. The evidence shows, however, that there was always danger of slate falling after the coal was removed for any considerable space, and it appears that, in order to make the roof of a mine safe when the coal is removed, it is necessary at short distances to prop the roof with logs or props cut for and adjusted to that purpose. There were other men in attendance or employment who are called "gin men," which word seems to be a contraction of the word "general," and means men who have no special employment in the mines, but who do general work, such as bringing in props, or doing any other thing which they are ordered to do. One of the duties of the gin men was to bring in props whenever, in the opinion of the miner, it was necessary for safety to prop the roof of the mine where the operation was going for-

fects or perils. "The duty persisted to make the place reasonably safe."

And the exception to the safe-place rule does not free a master from liability for injuries received by working in a place which became dangerous by the progress of the work, where such danger could have been foreseen and guarded against by the exercise of reasonable care and prudence on the part of the master. *Flanagan v. F. W. Carlin Constr. Co.* 134 App. Div. 236, 118 N. Y. Supp. 953.

So, the exception to the safe-place rule is inapplicable where the servant is acting under the immediate direction of the master's representative (*Bennett v. Crystal Carbonate Lime Co.* [Mo. App.] 124 S. W. 608), or is working with an assurance by the master that there is no danger (*Owensboro v. Gabbert*, 135 Ky. 346, 122 S. W. 178), or where the place was dangerous when the servant was set at work (*Buchanan v. Murayda* [Tex. Civ. App.] 124 S. W. 973).

So, the exception does not apply where the injury did not result from the changing conditions in the prosecution of the work, but from the negligence of the master's foreman in an entirely different matter. *Casey v. Kelly-Atkinson Constr. Co.* 240 Ill. 416, 88 N. E. 982.

Where a servant, in digging a trench,

was injured by its caving in, which was caused by the negligence of the master in connection with another trench, about 3 feet from the one in which the servant was digging, it was held in *Rocky Mountain Bell Teleph. Co. v. Bassett*, supra, that the exception to the safe-place rule was not applicable.

And the master is liable when the necessary and transient dangers of the service, created by the progress of the work, are increased without warning by the negligence of the master. *Cleveland, C. C. & St. L. R. Co. v. Foland* (Ind. App.) 88 N. E. 787.

In many cases cited in both the earlier note and the present one, it is said that the servant assumes the risks which are created by the changing conditions of the work. The risks arising, however, from dangers created by the progress of the work, are considered as ordinary dangers, and therefore to have been within the contemplation of the parties when the servant entered the employment. Such ordinary risks are the risks which remain after the master has fully performed his duty; in other words, where the master is not negligent; and consequently the reason that the servant cannot recover for injuries received by dangers due to the changing condition of the work is not primarily because he has as-

ward. Just before the decedent went into the room where he met with the accident which caused his death, the shooters and shovelers cleaned it up and made such investigation as led them to believe that it was safe, and they informed the decedent that they were ready for him to cut. He went in with his machine, and, after cutting there some little time, a large piece of slate which had become loosened fell upon him, and so crushed him as to cause his death in a few weeks thereafter. To recover damages for this accident this action was instituted; the petition alleging that the master was negligent in failing to furnish him with a safe place in which to work. The answer placed in issue the material allegations of the petition, and pleaded contributory negligence. Upon the trial of the case, after plaintiff's evidence was all in, the trial court awarded the defendant a peremptory instruction to the jury to find for it; and to test the correctness of this ruling this appeal is prosecuted.

There is no doubt that the evidence shows the roof of the room where the decedent was working was bad, and its natural danger was enhanced by the existence of the hill seam running across it. This condition was known to all the employees, being perfectly obvious to the eye. The evidence for plaintiff shows that, while it was the duty of the shooters to pull down loose slate and carry it out, after all, it was the duty of the decedent to judge of the safety of his sur-

roundings himself. The very work that he was doing made the room dangerous unless it was propped, and it was his duty, whenever he needed or thought he needed props, to call for them, and the gin men were required to bring them in and put them up. The evidence shows that after the coal is taken out for any considerable space the room becomes dangerous. And this must necessarily be so. The enormous pressure of the mountain from above has a tendency to crush in the top of the mine after the coal which had formerly supported it has been removed, and when the coal was removed for any considerable space, ordinary care for his own safety required the decedent to have the room propped. This he failed to do in time to prevent the injury which occurred to him. The situation in which the decedent was placed constitutes an exception to the general rule that the master must furnish the servant with a safe place in which to work. The danger of the place in which he was working was made or created by the very work which the servant was doing. Every time he cut out a block of coal, he increased the danger of the roof falling in, unless it was propped as before explained. The decedent did not call for props, and when he had taken out sufficient coal to cause the pressure from above to break the slate, so that it fell upon him, the resulting injury was caused by his own fault, and of necessity his estate must suffer this loss.

sumed such risks, but because the master is not liable, not having been guilty of any breach of the duty owing to the servant.

Upon the question, May a servant assume the risk of dangers created by the master's negligence? see note to *Scheurer v. Banner Rubber Co.* ante, 1207.

Of course, if, in connection with the changing conditions of the work, the master is negligent, and the servant is injured directly because of such negligence, then the servant may be said to have assumed the risk if, with knowledge of such negligence, he continues in the service without complaint and promise to repair on the part of the master. In such a case, the master must rely expressly upon the servant's assumption of risk to relieve himself of the negligence, but, in the other case, as was said, the servant does not make out even a *prima facie* cause of action.

The question presented by cases of this character, therefore, is rather one involving the duty of the master, than one involving the effect of a contract or waiver by the defendant, and these cases are more properly referable to the so-called safe-place rule than to the rule as to assumption of risk. It is to be noted in *SMITH v. NORTH JELLICO COAL Co.*, that the court does not in any way suggest a reference to the rule as to as-

sumption of risk, but bases its decision entirely upon the ground that the case was not a proper one for the application of the doctrine of safe place.

Although the courts do frequently confuse the rule, and invoke the doctrine of assumed risk apparently as a defense for the master when he has not been guilty of any breach of duty for which he is even *prima facie* liable, it would seem that it is much more logical, and certainly much less misleading, to place the nonliability of the master squarely upon the ground upon which his nonliability in such cases must ultimately end, *viz.*, the absence of any duty upon his part toward the servant to remove the dangers causing the injury. The doctrine of assumption of risk could then be used in the only place in which it is a distinct proposition of law; *viz.*, where it is an affirmative defense relied upon by the master to relieve himself from liability for injuries which are caused by his negligence, and for which he is *prima facie* liable.

As to servant's assumption of risk of dangers created by the master's negligence which might have been discovered by the exercise of ordinary care on the part of the servant, see note to *St. Louis, I. M. & S. R. Co. v. Birch*, ante, 1250. W. M. G.

Labatt, in his work on Master and Servant, § 588, says: "One special application of the general conception underlying the rule stated in the preceding section is that, where the work is of such a character that, as it progresses, the environment of the servant must necessarily undergo frequent changes, the master is not bound to protect the servants engaged in it against the dangers resulting from those changes." In *Durst v. Carnegie Steel Co.* 173 Pa. 162, 33 Atl. 1102, it was held that where the place, as it stands when the work begins, is perfectly safe, and the danger can only arise as the work progresses, and be caused by the work done, it is not the duty of the employer to stand by during the progress of the work, to see when a danger arises; that it is sufficient if he provides against such danger as may possibly or probably arise, and gives the workmen the means of protecting themselves. In *Cleveland, C. C. & St. L. R. Co. v. Brown*, 20 C. C. A. 147, 34 U. S. App. 769, 73 Fed. 970, it was held that the duty of a master to provide his servants a safe place in which to work does not attach where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done. To the same effect is *Baird v. Reilly*, 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884; *O'Connell v. Clark*, 22 App. Div. 466, 43 N. Y. Supp. 74. The evidence, as said before, showed that it was the duty of the decedent to call for props when he needed them, and that it appears the danger of the place where he was working was constantly changing and increasing as the work progressed, unless the roof was propped. It necessarily results that, as he failed to take the ordinary precaution to prevent injury to himself, he alone must bear the resulting injury.

For these reasons, we are of opinion that the trial court correctly ruled in awarding the peremptory instruction to the jury to find for the defendant at the close of plaintiff's evidence.

Judgment affirmed.

Nunn, J., dissenting (filed January 20, 1909): 135 Ky. 834, 123 S. W. 256.

The facts as stated in the opinion delivered do not agree with my construction of them. Therefore it is necessary for me to state my reasons for dissenting. A misunderstanding by the court of the facts as they appear in the record is the only way that I can account for the result.

In considering this case, it should be kept in mind that the court was not asked to reverse a judgment based upon a verdict of a properly instructed jury, but its duty, and only duty, was to carefully examine the rec-

ord, and ascertain, first, whether appellant stated in his pleadings a cause of action; if so, then to determine whether he introduced any or a scintilla of testimony sustaining his alleged cause of action. If it was found that he had complied with these requirements, he was entitled to have his case submitted to the jury. All the decisions of this court on the question sustain the proposition. If appellant introduced any testimony supporting his alleged cause of action, it is then the duty of this court to reverse the action of the lower court in giving the peremptory instruction. It was a violation of the lower court's lawful duty to usurp the functions of the jury in weighing the evidence, and deciding the case as it thought the evidence warranted. The Constitution of the state guarantees to persons the right of trial by jury, and, when a court takes this right from a person, it usurps its power. It is not contended that appellant failed to state a cause of action in his pleadings. Therefore the only question to be considered is: Was there any or a scintilla of evidence introduced sustaining appellant's cause of action? Upon this matter I will not content myself with the bare assertion that there was; but will quote from the testimony of each and every witness introduced, showing that there was not only a "scintilla," but much testimony sustaining his cause of action.

There were ten witnesses introduced, only seven of whom gave testimony upon the question involved. The other three were the widow, the administrator, and the physician who attended him, by whom the extent of Smith's injuries and the cause of his death were shown. It is conceded that the law required appellee to furnish Smith a reasonably safe place in which to perform his work, and to use reasonable care to keep it reasonably safe for that purpose. This is a general rule of law that cannot be successfully controverted. The term, "reasonably safe place," must be construed in connection with the work to be performed. There cannot be found in a coal mine, powder house, or similar places, a safe place to labor. The meaning of the phrase is that the master must use due care, considering the place where the work is to be done, in making the place reasonably safe and in keeping it so. If the character of the work is unusually dangerous, there then arises the necessity of more care on the part of the master to provide and keep a reasonably safe place for the protection of the employee, and more care is also required on the part of the employee to save himself from injury. The following quotation from the case of *Pfisterer v. Peter*, 117 Ky. 501, 78 S. W. 450, emphasizes this principle, to wit: "A master

employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work or by which he is to be surrounded shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and, when he employs one to enter into his service, he impliedly says to him that there is no other danger in the place, the tools, and the machinery than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty; and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects."

I will now proceed to show from the record that appellee did not furnish Smith a reasonably safe place to work, or use any care whatever to put and keep it in a reasonably safe condition.

James Woodward, the helper of Smith at the time he received his injuries, in speaking of the place where Smith was killed, testified as follows:

Q. Now, tell the jury if there was a hill seam there, and, if there was, where it ran with reference to the entry?

A. Yes; there was one.

Q. Describe that seam the best you can, as if you were describing a crack in a room? The width or depth, and how it ran with reference to the entry and neck of the room?

A. It ran across the entry and across into the corner of the room neck.

Q. Which side of the room neck?

A. Left-hand side.

Q. Tell the jury what kind of a top that was at this room neck and along that entry at that place.

A. Most of it was bad top.

Q. What do you mean by "bad top"—rotten top?

A. Yes, sir.

Q. Do you know whose duty it was to look after that?

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A. I suppose the bank boss was supposed to look after it.

Q. To what extent was that bad top around in that neighborhood?

A. Most of it around there was bad.

George Owens, with reference to the same subject, testified as follows:

Q. Describe the condition at the top of that mine where the room neck was turned off where Smith was hurt?

A. I don't know whether the room was cut the last time I was in there before he was hurt. There was loose slate hanging in places. It is called a bad entry.

Henry Davidson testified as follows:

Q. Tell the jury if you know what was the condition of that top?

A. It was a pretty bad top.

Q. What is a bad top?

A. Loose, bad top.

Q. Is there such a thing as a rotten top?

A. Yes, sir.

Q. Tell the jury whether or not this was rotten?

A. Yes; it was rotten.

Q. Did you notice any hill seam there?

A. Yes.

Q. Explain to the jury. If they weakened the top, how they do it?

A. It runs in on the rib and weakens one side of it.

Q. State whether or not the slate is more liable to fall where there is a hill seam than where there is none?

A. Yes, sir.

Q. What ought to be done to make it safe in case of a hill seam?

A. It ought to be timbered to make it safe.

We find that there was ample proof that appellee failed to furnish Smith a reasonably safe place to work; but it is said or intimated in the opinion that it was the duty of Smith to call for props and place them so as to protect himself. This is not the fact. It was not his duty to clean up this room or entry, and make them safe by the use of props or by other means.

The witness Woodward, in speaking of the duties of Smith, testified as follows:

Q. The only thing he (Smith) was connected with was simply running that machine?

A. Yes.

Q. The company had other men to look after props and other work?

A. Yes.

Witness Owens said:

Q. In cutting that entry, Smith had nothing to do about fixing the roof?

A. No, sir; it wasn't his duty to fix the roof.

Witness Davidson testified as follows:

Q. What duties are incumbent on the man who runs the machine?

A. Cut coal for the loaders.

Q. In what way do they ascertain where to cut? Who directs them to the place where they shall cut?

A. The man that loads the coal.

Q. What are the duties of the machine man with reference to looking after the safety of the roof where he works?

A. He ain't got any, I don't suppose.

Q. Who does that?

A. The loaders.

Q. State whether or not it is the duty of the machine man, when he goes to cut this coal, after he understands a place is ready—is it his duty to look after the roof or safety of a place where he cuts?

A. They hardly ever do. He takes the loader's word for whatever he tells him.

Thomas Profit gave the following testimony:

Q. State what you do as a loader?

A. I clean the place up ready for the machine man to cut.

Q. Does the machine man get any part of your wages?

A. No, sir.

Q. Do you have any connection with his wages in your work? Does he pay you anything, or do you pay him anything out of your wages?

A. No, sir.

Q. Does the machine man have anything to do with what you do?

A. No, sir.

Q. What does the machine man do?

A. He cuts coal.

Q. Operates the machine?

A. Yes, sir.

Q. Is that all he does?

A. Yes, sir.

John Profit also said:

Q. Are you acquainted with the duties of the machine man?

A. Yes, sir.

Q. What does he do?

A. He just cuts the coal.

Q. After he cuts the coal, does he have anything further to do with it?

A. No, sir.

Q. After he cuts the place, what does he do with his machine?

A. Loads it up and goes to another place, where it is cleaned up.

Q. How does he know where to go when the place is ready?

A. The loaders generally tell him.

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Q. How do they report to him?

A. When they get a place cleaned up, they tell him it is ready.

Q. When you tell him it is ready, what does he understand that to mean?

(Defendant objects. Objection sustained.)

It was the duty of the loaders to clean up the room and pull down the loose slate, and prop the entry for the protection of the machine man and his helper.

The witness Aaron Jones testified that he and one Mullens were employed by appellee as loaders, and continued as follows:

Q. Where was he (Smith) when you saw him last, before the slate fell on him?

A. Unloading his machine to cut that.

Q. Who had charge of that place where the slate fell on him?

A. Me and Richard Mullens.

Q. Your duties were to load coal?

A. Yes, sir.

Q. What other duties did you have?

A. Pull down all loose slate.

Q. Who did you pull the slate down for, and what for?

A. For the machine man, to keep it from falling down in his way.

Q. What do you mean when you say you are ready for him to go to work?

A. I've done my duty.

Q. What does he understand?

A. That I have done my duty.

Q. Does he understand that you have tested it and made it safe?

A. Of course, he does.

Q. It is the duty of the loader to notify the machine man when he is ready?

A. Yes, sir.

The witness Owens testified as follows:

Q. What was the duty of the loader as to preparing the place for the machine man to work?

A. It was his place to see that the place was all right for the machine man, and pull down loose slate, and see that the props were all right.

Q. State whether or not the machine man had anything to do about looking after the roof of the mine where he worked, or whether that was his duty?

A. I don't suppose it was his duty.

Q. To whom was he to look for conditions?

A. He was to go to the loader if the place was not in shape. He looked to the loader to see that his place was all right.

The witness Thomas Profit also testified:

Q. How long have you followed the occupation as a loader?

A. About seven or eight years.

Q. Tell all the duties of a loader?

A. To see that the room is cleaned up. Pull down the loose slate and fix it up for the machine man to cut.

Q. Why does he pull the slate down.

A. To keep the machine man from getting hurt.

Q. Who is it that looks after the safety of the place where the machine man works?

(Defendant objects; objections sustained.)

Q. Did the company have anybody to inspect these places and make them safe for these men?

A. Yes.

Q. Who was that?

A. Gin hands.

See the quotation from his testimony, copied above.

The witness John Profit said:

Q. What particular employment did you have in the mines, and do you have now?

A. Loading coal.

Q. How long have you been engaged in that occupation?

A. Eight or nine years.

Q. Tell the jury what is the duty of a coal loader, and what he does.

A. His duty is to clean up, I suppose, and pull down the slate.

Q. What does he load?

A. Coal.

Q. What else do you do, if anything?

A. That's all—load coal and set timber.

Q. Do you do anything else?

A. Yes, sir; pull slate.

I have shown that there is testimony in the record that the place where Smith was put to work was very unsafe. Indeed, this is conceded in the opinion by the court. I have also shown that it was not Smith's duty to make or keep it in a safe condition. This duty devolved upon the loaders or "bank boss," Martin. I will now proceed to show that the bank boss, Martin, marked the place, which was, in effect, an order to Smith to cut this room neck, where he was killed; that Martin knew of the hill seam, which crossed the roof of the entry at an angle of about 45 degrees, and entered the place that Smith was directed to cut; that he told a witness that he was going to prop it, and that he also knew of the rotten condition of the roof, and so did the loaders, for some time before Smith was killed. And there is not the slightest testimony appearing in the record that they or any of them informed Smith of these conditions, nor is there any testimony showing that Smith knew of these facts, except from the statements of some of the witnesses to the ef-

fect that they supposed he knew, as the defects were patent to them.

The witness Aaron Jones, one of the loaders, after stating that Smith had made one cut in that room the evening before to a depth of 4½ or 5 feet, continued as follows:

Q. Had you seen the bank boss, David Martin, after that first cut, had been taken out?

A. No, sir.

Q. When had you seen him?

A. That morning before I finished taking it out.

Q. Whereabouts?

A. Right at that place.

Q. What was said between you and him at that time?

A. Nothing more than he said he was going to set timber.

Q. Where?

A. On the entry.

Q. On the entry of this room that had been drawn off at this time?

A. Beyond the entry, where the hill seam went across.

Q. How did this hill seam run with reference to this room neck?

A. I think it run kinder anglin into the neck.

Q. Martin was there on that morning before you had moved all the coal?

A. Yes, sir.

Q. Did you call his attention to the hill seam?

A. No, sir; it was plain for everybody to see.

Q. He said that he was going to have timber put there?

A. Yes, sir.

Q. Did he say for what purpose?

A. Across that hill seam in the entry.

Q. What did he say about it being needed?

A. Just said he was going to put it there.

Q. Did he say why?

A. No, sir; because I knowed what he was going to put it there for.

Q. What was the reason he was going to put that timber there?

A. To keep slate from falling.

Q. Did he know who had been cutting in that place?

A. Yes, sir.

Q. How do you know?

A. He saw Smith waiting for another place to cut before he came down there.

Q. How do you know?

A. He said he did.

Q. How did you know that Mr. Martin knew that Mr. Smith was working on that entry?

A. Every bank boss knows exactly where his machine men are at work.

Q. Did he understand that Smith would be back there to work when you got that coal moved that morning?

A. Yes, sir.

That the loaders knew of this defect, see the quotations from other testimony.

The statement in the opinion that "Smith had cut in some 8 or 10 feet and the coal had been taken out" is a mistake; and there is not the slightest testimony in the record supporting it. All the witnesses who spoke upon the subject stated that there had been only one cut made in the room with the machine, and that it would only cut 4½ or 5 feet, and the coal had been taken out of that, preparatory for Smith to make another cut. When he was making the second cut, sitting on his board, about 9 feet in length, facing the coal in the room, and managing his machine, he received his injuries, which shows that he was inevitably sitting near the edge of the entry. The testimony shows that the piece of slate that fell was 6 or more inches thick, 6 or 7 feet long, and 4 or 5 feet wide; that it first gave way in the edge of the entry at the hill seam, and ran to a feather-edge in the room.

The witness Davidson, after describing the board and the machine that Smith was using, and the depth of the first cut, stated that it required two cuts with the machine to undermine the coal in the room, which was 10 or more feet wide, and continued as follows:

Q. Now, after he has made these cuts and there is a hill seam across the entry, running to that neck, is there any trouble about the bank boss timbering that to make it safe?

A. No, sir.

Q. Is that the usual and proper way to make it safe, to timber it? (Defendants object. Objections sustained.)

Q. If the hill seam ran clear across, would it not tend to strengthen it?

A. Yes; it would have saved the entry.

Q. It would have prevented the slate from starting to break in the entry and running on down in the neck?

A. Yes.

The court concludes its opinion by saying in effect, that it appeared from the evidence that it was the duty of Smith to call for props when he needed them, and, having failed to do so, he could not recover. It is true the testimony shows that, when any employee in the progress of his work, discovered any dangerous place, it was his duty to make it known, and have it made safe, or do it himself. This is a self-evident proposition; but in this case there was no evidence whatever that Smith discovered

these defects, or had any information with reference thereto. At least two of the witnesses of the seven testified that they had no knowledge of these defects prior to the falling of the slate, but it is shown that the bank boss, Martin, at least, knew of this hill seam, and regarded it as being dangerous, and said that he was going to have it propped. At the time he made this statement, he knew he had marked out this dangerous place for Smith to cut a room, and knew that Smith was then waiting for the room to be prepared for him to make another cut; but, notwithstanding this knowledge on his part, he not only suffered and permitted, but in effect ordered, Smith to continue to work before it was propped, and without giving him warning of the danger. But, suppose the proof does show that Smith saw the hill seam, it is not decisive of the fact that he knew the danger and risk incident thereto, and that he was assuming in working thereunder. The proof only shows that he had been working in the mine as a machine man for about twelve or eighteen months. There is not a scintilla of evidence that he had ever been engaged to remove slate or to prop rooms or entries to make them safe. In view of these facts, the following quotation from *Ashland Coal & I. R. Co v. Wallace*, 101 Ky. 640, 42 S. W. 747, 43 S. W. 207, is in point, to wit: "Defects in the roof of a mine which might be perfectly apparent to the eye of a competent inspector might have no significance to a laborer or an employee who had had no experience in this special employment; and it would be unreasonable to charge him with contributory negligence simply because he sees defects, unless a reasonably intelligent and prudent man would, under like circumstances, have known or apprehended the risks which those defects indicated. The dangers, and not the defects alone, must be so obvious that a reasonably prudent man would have avoided them, in order to charge the servant with contributory negligence." Appellee's position in this case, which is in effect sustained by the opinion of the court, is that every laborer in its mine must look out for himself; that he must stop his work, investigate the conditions of his surroundings, and, if he finds dangerous places, he must make them safe. To do this would require a loss of time to each hand of thirty or more minutes a day; and would of necessity require that every man, upon entering a mine, be an experienced miner. However, this is not true, unless there be a special contract to that effect. It would change all rules of law with reference to the subject, and would involve the coal companies in such a loss that they could not survive any length of time. In addition to this, employees should not be

required to bear this loss of time, unless there is a special contract to do so. As this action was brought under the provisions of the Constitution and statutes, it was not required of appellant to allege and prove that Smith did not know of the defects in the roof and the dangers incident thereto; but it devolved upon appellee to allege and prove that he did know, not only of the defects, but also of the dangers likely to result therefrom.

In the case of *Lexington & C. County Min. Co. v. Stephens*, 104 Ky. 508, 47 S. W. 323, the court, after discussing the principle applicable to an action brought for personal injuries when death did not ensue, said: "But it must also be remembered that a recovery in such cases is authorized by the common law, and that at common law no recovery can be had for injuries resulting in the immediate death of the person injured. The right to recover in case of death is authorized by the Constitution and statutes enacted by the legislature, which give an absolute right to recover where death ensues from the negligence or wrongful act of the defendant, and it will be observed that the statute makes no reference to the knowledge or contributory negligence of the decedent; and, while it may be true that the administrator or heir would not be allowed to recover in a case where the decedent had knowledge of the danger or risk he was about to incur, yet such negligence is matter of defense, and, to be made available, must be pleaded and proved by the defendant. Any other construction of the law would, in effect, make it a dead letter, for the reason that, the injured party being dead, it would be impossible to prove that he was not aware of the danger, or that he could not, with reasonable diligence, have ascertained the danger." I have shown from the record that appellee's mine in which Smith was employed to labor was defective and dangerous; that he lost his life by reason thereof; that it was the duty of appellant to make the place where Smith was injured reasonably safe, and to use ordinary care to keep it so; that it was not the duty of Smith to do this, but this duty was assigned to the bank boss and the loaders, and they utterly failed to perform their duty in this respect.

The only question left is as to the contributory negligence of Smith. There is no proof that he was negligent, except a few of the witnesses assume that he knew of the defects in the roof, because, in their opinion, the defects were patent. There was not the slightest intimation that Smith had any experience or knowledge in examining the roof of mines for the purpose of ascertaining de-

fects and securing them with props. He was an experienced machine man. The question of the contributory negligence of Smith, barring a recovery, should unquestionably have been submitted to the jury, and the court erred in refusing to do this. The case of *Ashland Coal & I. R. Co. v. Wallace*, supra, was one where the facts were very similar to the case at bar. It appears that in that case the person injured was an experienced miner, and was, at the time of his injuries, laying track in an entry of the mine. In that case the court said: "In actions like this, questions of negligence are for the jury to determine. The ordinary care which parties are required to use in the discharge of their respective duties varies so much with the situation of the parties and the circumstances of each particular case that the policy of the law to relegate these questions to juries has been long settled. The application of these rules of law to this case clearly authorizes its submission to the jury. The testimony does not present a record where all reasonable men must draw the inference either that the plaintiff was guilty of, or that the defendant was free from, negligence. The testimony is conflicting. It is probable that, if the mine owner in this case had sent an experienced, suitable, and competent person after the removal of the coal by Harris on Saturday evening, to inspect the roof of this entry at that place, the defects would have been discovered and remedied; and as to the contributory negligence of decedent which is complained of, in view of the fact that he was primarily employed as a track layer by the day,—at \$1 a day,—and it not being his special duty to see after the safety of the roof of the entry, we think he had a right to presume that the defendant had inspected and knew the roof from which this coal had been so recently removed to be reasonably safe. This work was performed in dark passages in the earth, with no light to guide decedent except the flickering rays of the small lamp in his hat, which rendered it specially difficult for him to have noted other than obvious defects." See also the cases of *Crabtree Coal Min. Co. v. Sample*, 24 Ky. L. Rep. 1703, 72 S. W. 24, and *McFarland v. Harbison & W. Co.* 26 Ky. L. Rep. 746, 82 S. W. 430.

In view of the facts stated and the authorities cited, I am compelled to dissent from the opinion of the court, delivered in this case.

A petition for rehearing having been filed, Hobson, J., on December 17, 1909, handed down the following response:

When this case was pending before us on appeal, the transcript was read by five of

the seven judges, and the case most thoroughly discussed on several occasions in consultation before the opinion was rendered, after which a majority of the court reached the conclusion that the judgment awarding a peremptory instruction to the jury to find for the defendant should be affirmed.

On the petition for a rehearing, the transcript has been re-read by two of the judges,
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and all of the material parts of the evidence read in consultation to the whole court, and we have again thoroughly discussed and considered the question involved, and we still think the original opinion contains a correct exposition of the law governing the case, under all the facts, as shown in the transcript.

The petition for rehearing is therefore overruled.

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2. A bank which holds a warrant issued to it by a municipal corporation under an agreement between the bank and a contractor, whereby the bank was to furnish

the contractor money for the construction of a bridge for the city, as security for which all warrants and payment therefor were to be issued to the bank, has no authority, by reason of such agreement, to compromise a dispute between the contractor and the city as to the amount due the former, by accepting the warrant against the express direction of the contractor, where it purports to be in full payment and is for a less amount than that claimed by the creditor to be due him, so as to work an accord and satisfaction between the contractor and the city. *Matheney v. Eldorado*, 28: 980, 109 Pac. 166, 82 Kan. 720.

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2. Exclusive possession by the owner of the record title for three years after the execution of a tax deed for the property extinguishes the tax title. *Kathan v. Comstock*, 28: 201, 122 N. W. 1044, 140 Wis. 427.

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1. A railroad company which permits a leaky oil car to stand near where cattle are rightly accustomed to graze along a highway and its unfenced track, so that the oil forms pools, the drinking of which will be injurious to the cattle, is bound to guard the pools, or drive away cattle which it sees drinking the oil. *St. Louis, I. M. & S. R. Co. v. Newman*, 28: 83, 127 S. W. 735, — Ark. —. (Annotated)

2. A constable killing, in obedience to a valid municipal ordinance, a dog running at large without a muzzle, is not subject to punishment under a statute providing a penalty for wilfully killing dogs. *State v. Clifton*, 28: 673, 67 S. E. 751, 152 N. C. 800. (Annotated)

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Finality of decision for purpose of appeal.

1. Appeals from decrees directing members of a social club to pay assessments, disallowing the claim of receivers for special assessments against them, and allowing claims against the assets of the club, will lie without waiting for a final decree distributing its assets. *Rogers v. Boston Club*, 28: 743, 91 N. E. 321, 205 Mass. 261.

Record on appeal.

2. Error in sustaining an objection to a question which showed on its face the

relevancy and materiality of the evidence called for is not available on appeal, where the record fails to show what the answer would have been, or what was proposed to be proved; the test being whether the error complained of was prejudicial, and not whether the evidence was material. *Sayre v. Woodyard*, 28: 388, 66 S. E. 320, 66 W. Va. 288.

3. The omission from the record in a criminal prosecution of any plea and joinder of issue may be cured after a writ of error has been allowed, by certification to the appellate court of a *nunc pro tunc* order placing upon the record, by way of amendment, the fact that plea had been made before the jury was impaneled and sworn and issue joined. *State v. Gibson*, 28: 965, 68 S. E. 295, — W. Va. —.

4. A recital in the defendant's brief on appeal that "the court erred in overruling the motion of the defendant made at the close of the evidence, that the jury be directed to return a verdict for defendant," sufficiently assigns error as to the overruling of a motion to instruct the jury to find in defendant's favor under Neb. Acts 1907, chap. 162. *Waxham v. Fink*, 28: 367, 125 N. W. 145, 86 Neb. 180.

Objections and exceptions.

5. A verdict not directed can be set aside on motion if from the whole record it is clearly wrong, and it is not necessary, in order to get the case before the reviewing court, to except to the rulings of the trial judge rather than to move to set aside the verdict. *Simonds v. Maine Teleph. & Teleg. Co.* 28: 942, 72 Atl. 175, 104 Me. 440.

Dismissal.

6. Where a full examination of the merits of an appeal shows that cross appellants are entitled to no relief except that already granted by the trial court, a motion by appellants to dismiss the cross appeal may be disregarded. *Hamilton v. Allen*, 28: 723, 125 N. W. 610, 86 Neb. 401.

Presumptions.

7. On appeal in a civil action, where the record shows that the jury were sworn, it will be presumed that they were fairly sworn, if the form of oath administered does not appear. *First Nat. Bank v. Lowther-Kaufman Oil & C. Co.* 28: 511, 66 S. E. 713, 66 W. Va. 505.

8. The bill of exceptions should not be stricken on appeal, on the ground that the prevailing party did not have the statutory period allowed, after notice that a bill of exceptions had been filed, in which to file his objections and amendments thereto, where it does not appear that such right was not waived, as the presumption is that notice was given and that opportunity to inspect and object was had, although the record is silent as to that fact. *Kroll v. Close*, 28: 571, 92 N. E. 29, 82 Ohio St. 190.

9. Objection that the record does not show that the prisoner was in court when the verdict was rendered cannot be raised 28 L.R.A.(N.S.)

on appeal, where there is no evidence that he was not in court at such time, and the record affirmatively shows his presence in court when the jury was impaneled and after the verdict was rendered, since from such facts a presumption of his presence during the intervening period arises. *State v. Gibson*, 28: 965, 68 S. E. 205, — W. Va. —.

What reviewable generally.

Condition of record as affecting reviewability, see *supra*, 2-4.

10. The appellate court will not pass upon the merits of a plea of fraud, which was offered by way of amendment after the striking of a general allegation of fraud because not sufficiently specific, which was wrongfully stricken, as *res judicata*, as the ruling striking the amendment was not upon the merits. *Dolvin v. American Harrow Co.* 28: 785, 54 S. E. 706, 125 Ga. 699.

Objections as to which party is estopped.

11. One who asked erroneous instructions which were given cannot complain that they contradicted other instructions which were also given by the court. *McKenzie v. North Coast Colliery Co.* 28: 1244, 104 Pac. 801, 65 Wash. 495.

Review of discretionary matters.

12. The reasonableness of an allowance to the administrator for funeral expenses of the deceased, in the absence of statutory or testamentary provision, may be reviewed on appeal, when the facts are uncontroverted. *Kroll v. Close*, 28: 571, 92 N. E. 29, 82 Ohio St. 190.

Questions not raised below.

13. A conviction for resisting the execution of a warrant will not be reversed because of absence of direct evidence to show that the place where the attempt at execution was made was within the jurisdiction of the officers issuing and attempting to execute it, if all the parties take it for granted at the trial that it was so. *Appling v. State*, 28: 548, 128 S. W. 866, — Ark. —.

14. Admission of hearsay evidence, without objection and exception, affords no ground for complaint in the appellate court. *State v. Gibson*, 28: 965, 68 S. E. 295, — W. Va. —.

Errors waived or cured below.

15. Error in sustaining an objection to a proper question is cured by admitting an answer to another question covering the same subject-matter. *State v. Gibson*, 28: 965, 68 S. E. 295, — W. Va. —.

Review of facts.

16. A jury finding in accordance with plaintiff's evidence, that two skylights, each 6 feet long and 3 feet wide, together with an opening in the wall 7 feet by 4 feet, and two windows, all located in that part of a room 16 feet by 32 feet, with an "L" 16 feet square, in which was located a hot water vat level with the floor, into which plaintiff, a servant, while working in such room, stepped, to his injury, did

not admit sufficient light to enable him to see the vat, is not so contrary to the physical facts as to require a reversal, where neither the location in the room nor the dimensions of a brine tank, which it is claimed obstructed the light, appears, and there is evidence tending to show that the skylights were obscured by dirt and smoke, that there was a pile of lumber which also cut off some of the light, and that a slight vapor was rising from the hot water vat, although the accident occurred shortly after noon on a January day, the record not showing as to whether the day was bright and clear or dark and gloomy. *Wichita Ice & C. S. Co. v. Sheppard*, 28: 648, 108 Pac. 819, 82 Kan. 509.

17. To justify an appellate court in overturning a verdict, tending to support which there is some evidence, on the ground that it is contradicted by the natural laws or by some established principle of mathematics, mechanics, physics, or the like, the indisputable physical facts must demonstrate beyond any reasonable doubt that the evidence is false and that the verdict is without support in fact or law. *Wichita Ice & C. S. Co. v. Sheppard*, 28: 648, 108 Pac. 819, 82 Kan. 509.

18. The law court will not interfere with a finding of fact by a single justice on conflicting testimony, where the inferences from other facts proved in the case are not inconsistent with the finding. *Stewart v. Finkelstone*, 28: 634, 92 N. E. 37, 206 Mass. 28.

19. The appellate court, having no jurisdiction to review facts in an action at law, cannot review the facts upon appeal from the allowance of a claim against a decedent's estate, where the claim is for a legal demand and no defense is made which could not have been interposed in a suit at law. *Re McVicker*, 28: 1112, 91 N. E. 1041, 245 Ill. 180.

Grounds for reversal.

20. It is not reversible error to entertain a motion to strike out a separate defense to an action at the trial, if the defense is insufficient in law and has not been demurred to. *Ampersand Hotel Co. v. Home Ins. Co.* 28: 218, 91 N. E. 1099, 198 N. Y. 495.

21. A statute which provides that reversals shall not be ordered for errors which do not affirmatively appear prejudicially to have affected the substantial rights of the party complaining, when it appears that substantial justice has been done, does not authorize the affirmance of a judgment upon the ground that it is in accordance with the view of the facts which the reviewing court itself might derive from the conflicting evidence, where it is based on a verdict rendered under the apparent influence of a materially erroneous instruction, or by a jury made up in part of persons disqualified on account of interest. *Broadway* 28 L.R.A.(N.S.)

Mfg. Co. v. Leavenworth Terminal R. & B. Co. 28: 156, 106 Pac. 1034, 81 Kan. 616.

22. It is reversible error to transfer to the chancery court against the objection of the plaintiff an action properly triable at law. *First Nat. Bank v. Reinman*, 28: 530, 125 S. W. 443, — Ark. —.

23. In an action in form to recover the purchase price of chattels, where the cause of action is in fact for damages for breach of the agreement to purchase, a recovery upon the theory of the pleader will not be disturbed on appeal, if the judgment is not in excess of the amount plaintiff would have recovered had he proceeded in the proper way. *Lincoln v. Charles Alshuler Mfg. Co.* 28: 780, 125 N. W. 908, 142 Wis. 475.

24. On appeal by defendants from a decree in equity, failure of the trial court to dismiss the suit for misjoinder of plaintiffs and of causes of action does not require a reversal, where the record clearly shows that appellants were in no wise prejudiced thereby. *Hamilton v. Allen*, 28: 723, 125 N. W. 610, 86 Neb. 401.

25. The allowance, upon due notice and argument, and a long time prior to the trial, of an amendment of a complaint in an action to recover damages for delay in transportation of live stock, changing the point of destination from the end of the defendant's line, as originally alleged, to a point beyond such line, is not prejudicial to the defendant, where the amendment is in accordance with the allegations of the answer as to the place of destination, and the court strictly confines the damages to the loss occasioned by the neglect of defendant on its own line. *Fell v. Union P. R. Co.* 28: 1, 88 Pac. 1003, 32 Utah, 101.

26. Unduly limiting the cross-examination of a witness is not reversible error if no prejudice results therefrom. *Kennedy v. Modern Woodmen of America*, 28: 181, 90 N. E. 1084, 243 Ill. 560.

27. It is not reversible error to refuse to permit a question to be put to a witness who was a bystander at a time when a horse was injured, as to a remark which he made to the driver, if it is not made to appear that the expected answer would be relevant to any issue in the case. *Weller v. Camp*, 28: 1106, 52 So. 929, — Ala. —.

28. A modification of an instruction as to the specific evidence the jury is to consider, so as not to include that of a particular person, is not reversible error, if his testimony was included by a general charge as to consideration of evidence. *Kennedy v. Modern Woodmen of America*, 28: 181, 90 N. E. 1084, 243 Ill. 560.

29. Error in charging that proof of loss was sufficient under the terms of the insurance policy is harmless, where it appears from uncontradicted evidence that proof of loss had been waived. *St. Paul F. & M. Ins. Co. v. Mittendorf*, 28: 651, 104 Pac. 354, — Okla. —.

30. It is error to retain upon the jury, over a challenge, resident taxpayers of a city against which a judgment is sought, at least where there is no difficulty in procuring jurors whose impartiality is unquestioned. *Broadway Mig. Co. v. Leavenworth Terminal R. & B. Co.* 28: 156, 106 Pac. 1034, 81 Kan. 616.

31. It is not reversible error for the court to permit a jury trial, although notice of election to try the case to a jury was not given, as required by statute. *Sholin v. Skamania Boom Co.* 28: 1053, 105 Pac. 632, 56 Wash. 303.

Judgment.

32. An allowance to the administrator of \$150 for the burial casket of the deceased, an old man with no immediate family surviving, who had been a sailor and engineer on small steamers, and of simple tastes and habits and modest and economical expenditures, will be reduced to \$100 on appeal, where the decedent's estate was only \$798.32, and the burial expenses, embracing the casket, exceeded one fourth of that amount,—especially where it appears that the sole legatees objected to the purchase of such an expensive casket, and the administrator was a person having knowledge of his duties as such. *Kroll v. Close*, 28: 571, 92 N. E. 29, — Ohio St. —. (Annotated)

33. On error to the overruling of a motion for a new trial on the ground of the inadequacy of the damages found by the jury in an action to recover for personal injuries, the reviewing court may reverse the judgment of the trial court, and grant a new trial on the ground that the verdict is not sustained by sufficient evidence. *Toledo Railways & L. Co. v. Mason*, 28: 130, 91 N. E. 292, 81 Ohio St. 463. (Annotated)

34. On appeal from an order issuing out of a suit founded upon a creditor's bill, temporarily enjoining the prosecution of a suit for the same cause of action in a foreign court, where it clearly appears that the prosecution of such foreign action cannot be restrained, the appellate court must direct the dismissal of the bill as to the prayer for an injunction in order to save the parties to the suit further expense resulting from the endeavor to secure impossible relief. *Guardian Trust Co. v. Kansas City S. R. Co.* 28: 620, 171 Fed. 43, 93 C. C. A. 285.

35. A decision rendered on appeal, which is palpably erroneous, may be corrected on second appeal. *Henry v. Atchison, T. & S. F. R. Co.* 28: 1088, 109 Pac. 1005, — Kan. —.

36. That a point was involved in the record of a first appeal does not preclude its consideration and determination on a second appeal, where it was not brought to the attention of or considered by the court on the former appeal. *Henry v. Atchison, T. & S. F. R. Co.* 28: 1088, 109 Pac. 1005, — Kan. —.

APPEARANCE.

1. The appearance of a nonresident defendant in an action after the limitation period has run will not deprive plaintiff of the right to a judgment against property which he attached within the limitation period, although defendant is no longer subject to a personal judgment. *Sater v. Roche*, 28: 702, 126 N. W. 925, — Iowa, —.

2. The appearance of a nonresident defendant in an action commenced by attachment, after the limitation period has elapsed, does not authorize a personal judgment against him, where process was not served upon him within the limitation period. *Sater v. Roche*, 28: 702, 126 N. W. 925, — Iowa, —.

APPLIANCES.
Master's duty as to, see Master and Servant.

APPLIANCES.

Master's duty as to, see Master and Servant.

APPORTIONMENT.

Of costs, see Costs.

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Of insurance loss, see Evidence, 57; Insurance, 8.

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One who is assaulted upon the street, without provocation, by a much heavier man, and has applied to him in a tone that can be heard 175 feet distant the vilest of epithets, is entitled, although he was not physically injured by the assault, to such compensation for the indignities and vilification as money can afford. *Carrick v. Joachim*, 28: 85, 52 So. 173, — La. —. (Annotated)

ASSESSMENTS.

On members of social club, see Appeal and Error, 1; Clubs.

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ASSIGNMENT FOR CREDITORS.

As to bankruptcy matters, see Bankruptcy.

One who takes from a debtor an as-

signment of property sufficient to pay all the debts of the assignor, under the agreement that he will pay them, cannot avoid liability to creditors on their claims. *Dycus v. Brown*, 28: 190, 121 S. W. 1010, 135 Ky. 140.

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In motion for new trial, see New Trial, 2.

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Amendment of declaration so as to make action one in tort, see Pleading, 2.

1. A discharged employee cannot await the termination of the contract period of service to hold the employer liable for the wages which would have accrued had he continued in the service to the expiration of the term. *Derosia v. Firland*, 28: 577, 76 Atl. 153, — Vt. —. (Annotated)

2. One who pays an illegal tax to secure the rebate allowed by law for prompt payment cannot recover the money paid where, under the statute, he has a right to test in court the right to enforce the tax, and the taxing district has applied the money to the purposes for which it was collected. *Louisville v. Becker*, 28: 1045, 129 S. W. 311, — Ky. —.

ASSUMPTION OF RISK.

By servant, see Master and Servant, 10-15.

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Effect of appearance of nonresident on rights of plaintiff in attachment, see Appearance.

Effect of discharge in bankruptcy on bond executed to release attached property of bankrupt, see Bankruptcy, 6.

Judicial notice of, see Evidence, 1.

When action is commenced, see Limitation of Actions, 8.

Sufficiency of delivery of chattels sold as against attachment, see Sale, 2.

Sufficiency of service of process, see Writ and Process, 1.

ATTORNEYS.

Allowing attorney's fee against defendant in action to enforce special assessment, see Constitutional Law, 3.

Counsel fees as elements of damages for ejection of passenger, see Damages, 2.

Attorneys' purchase for resale of subject-matter of their employment, see Evidence, 10, 42.

Delay in instituting suit caused by interference by stranger with attorneys, see Limitation of Actions, 1.

AUTOMATIC SPRINKLER.

Provision in insurance policy as to maintaining, see Insurance, 2, 3.

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AUTOMATIC VENDING MACHINE.

License tax on, see License, 9.

AUTOMOBILES.

It is not negligence *per se* for a man riding a bicycle along a street in front of an automobile to attempt to cross the road in front of the machine, if it was so far behind him that it might reasonably have been expected that the driver would see him, and could and would, by the exercise of proper care, so manage the machine as to avoid a collision; but the question is one for the jury under all the circumstances of the case. *Rogers v. Phillips*, 28: 944, 92 N. E. 327, — Mass. —.

BAILMENT.

Burden of proof as to negligence of bailee, see Evidence, 19.

Opinion evidence on question of negligence of bailee, see Evidence, 35.

One hiring horses to draw castings along a public road does not convert a team by detaching it from the wagon on which it is working, and attaching it to one of his own which has become stalled on a defective road, to assist in getting it out, so as to render him liable for an accident to it while it is so engaged. *Weller v. Camp*, 28: 1106, 52 So. 929, — Ala. —.

BANKING.

See Banks.

BANKRUPTCY.

Right to proceed in bankruptcy against insolvent who purchases goods on credit without disclosing facts, see Fraud and Deceit, 1.

Jurisdiction.

1. Where bankruptcy proceedings are not begun within four months of the filing of a preferential mortgage, so that the Federal court has no jurisdiction thereof, the state court may, if the proceedings are begun within the prescribed time, act under a state statute which makes such mortgage, when properly attacked, operate as a voluntary assignment for the benefit of all creditors; and it is immaterial that the bankrupt has, in the meantime, secured a discharge from the bankruptcy court. *Louisville Dry Goods Co. v. Lanman*, 28: 363, 121 S. W. 1042, 135 Ky. 163. (Annotated)

Rights in assets; title and rights of trustee.

Right of bank which has undertaken to hold bankrupt's deposit as a fund for creditors to set-off deposit against its own claim, see Banks, 3.

2. A trustee in bankruptcy has a right to recover money which has been deposited in bank by the bankrupt, for the benefit of all his creditors. *Wagner v. Citizens' Bank & T. Co.* 28: 484, 122 S. W. 245, — Tenn. —.

Presentation of claims; what claims provable.

3. That a claim against a bankrupt

grows out of a partnership venture does not relieve the partner holding it from the necessity of presenting it to, and having it audited by, the bankruptcy court. *Dycus v. Brown*, 28: 190, 121 S. W. 1010, 135 Ky. 140.

4. A claim for loss on a contract by which one party was to buy produce with money furnished by the other, and to ship it to the latter for sale, after which the net profits were to be divided, is provable in bankruptcy proceedings against the former, so as to be barred by the discharge if the creditor had notice of the proceedings and that a loss was likely to result from the undertaking, although, at the time of the proceedings, the produce had not all been disposed of, so that the amount of the claim was not then ascertained. *Dycus v. Brown*, 28: 190, 121 S. W. 1010, 135 Ky. 140.

5. The bankruptcy, before the time arrives, of one who has promised to return the amount paid for stock of a corporation if it is surrendered within a certain time, does not prevent the claim upon the contract from being a fixed liability, absolutely owing, at the time of the bankruptcy, so as to be provable under the bankruptcy act, since the promisee may treat the bankruptcy as a repudiation of liability and immediately bring an action for damages. *Re Neff*, 28: 349, 157 Fed. 57, 84 C. C. A. 561.

(Annotated)

Discharge; effect.

See also *supra*, 4.

6. A discharge in bankruptcy releases liability on a bond executed to release property of the bankrupt attached less than four months before the commencement of bankruptcy proceedings, where the bankruptcy statute makes attachments levied against the bankrupt within that time void, although the giving of the bond had released the attachment before the commencement of the bankruptcy proceedings. *Crook-Horner Co. v. Gilpin*, 28: 233, 75 Atl. 1049, 112 Md. 1.

(Annotated)

7. Creditors having notice of all steps taken in bankruptcy proceedings against their debtor occupy the same attitude, so far as the barring of claims is concerned, as though they had been mentioned in the petition. *Dycus v. Brown*, 28: 190, 121 S. W. 1010, 135 Ky. 140.

8. A debtor who has secured goods with the fraudulent intention not to pay for them cannot avoid an action in the state court for fraud by securing a discharge in bankruptcy upon a voluntary petition presented by him. *Louisville Dry Goods Co. v. Lanman*, 28: 363, 121 S. W. 1042, 135 Ky. 163.

9. Inducing the abandonment of a suit on a note and surrender of the instrument by a promise to pay the same, when falsely made to secure time to conceal assets and take advantage of bankruptcy proceedings, is not such fraud as will prevent the discharge of the debt in such proceedings. *Jenkins v. Pilcher*, 28: 423, 125 N. W. 355, 160 Mich. 349.

(Annotated)

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BANKS.

Acceptance by bank as agent for contractor for public work of warrant in full payment, see *Accord and Satisfaction*.

Right of trustee in bankruptcy to bank deposit, see *Bankruptcy*, 2.

Notice to bank officer or employee as notice to bank, see *Notice*.

Authority of cashier.

1. The cashier of a bank has no authority to bind the bank by his promise that one signing paper without consideration, to replace that of the cashier, to enable the bank to pass inspection, shall not be held liable thereon, and one signing such paper is chargeable with notice of such want of authority, and acts at his peril in relying on the promise. *State Bank v. Forsyth*, 28: 501, 108 Pac. 914, — Mont. —.

(Annotated)

2. A bank cashier has no authority, simply by virtue of his office, to accept for the bank, unknown to the directors thereof, a qualified indorsement on a promissory note, irrespective of whether the note is an original one presented for discount, or one taken in judgment or in renewal of a pre-existing note. *First Nat. Bank v. Lowther-Kaufman Oil & C. Co.* 28: 511, 66 S. E. 713, 66 W. Va. 505.

(Annotated)

Application of deposit.

3. A bank which, through its president, as one of the creditors of a manufacturing company, has agreed with it and the other creditors that the assets of the company shall be collected and deposited in the bank, to be divided among all creditors *pro rata*, cannot, upon the institution of bankruptcy proceedings against the corporation, set off the fund so accumulated against its own claim, since the fund is a trust deposit for specific purposes, created with the knowledge and consent of the bank, and it cannot, for purposes of set-off, treat it as the individual property of the corporation. *Wagner v. Citizens' Bank & T. Co.* 28: 484, 122 S. W. 245, — Tenn. —.

(Annotated)

BATTERY.

See *Assault and Battery*.

BENEFITS.

Estoppel by receiving, see *Estoppel*, 5.

Resting assessment of benefits upon prospective action in completing improvement, see *Public Improvements*, 1.

BENEVOLENT SOCIETIES.

Insurance by, see *Insurance*.

BEST AND SECONDARY EVIDENCE.

See *Evidence*, 23.

BETTERMENTS.

Retaining jurisdiction to settle amount of allowance for, see *Equity*, 5.

BICYCLES.

Negligence of person riding, see *Automobiles*.

BILLS.

See Statutes.

BILLS AND NOTES.

- Promise by cashier to one signing note without consideration, see Banks, 1.
- Admissibility of notes in evidence, see Evidence, 28.
- Joint judgment against maker and indorser of paper, see Parties, 3.
- Authority of agent to take notes in payment, see Trial, 13.
- Competency of maker as witness in action by assignee against administrator of assignor, see Witnesses, 1.

Consideration.

- Want of consideration as defense, see *infra*, 6.
- Imputed notice of lack of consideration for note, see Notice, 1.

1. The surrender by a bank of paper which it holds against its cashier, in exchange for that of a stranger, is sufficient consideration to enable it to enforce the substituted paper. *State Bank v. Forsyth*, 28: 501, 108 Pac. 914, — Mont. —.

Indorsement and transfer.

- Acceptance by bank cashier of qualified indorsement on note, see Banks, 2.
- Parol evidence as to indorsements, see Evidence, 33.

2. The one whose name stands first among those of several persons who place their names on the back of a note before delivery cannot, upon paying the note, compel the others to contribute towards the amount paid, in the absence of any express agreement that they should, be equally bound. *Porter v. Huie*, 28: 1039, 126 S. W. 1069, — Ark. —.

Renewal; extension.

- Acceptance by bank of qualified indorsement on renewal of note, see Banks, 2.

Ratification by payee of act of agent in obtaining renewal note, see Principal and Agent, 5.

3. An agent who takes up a past-due note with money furnished by the maker cannot give such note validity, as a negotiable instrument, by indorsing thereon an extension of time, so as to render one to whom it has been fraudulently reissued by such agent a bona fide holder. *Thiel v. Butker*, 28: 1065, 51 So. 500, 125 La. 473.

4. The maker of a promissory note which has been fraudulently reissued after maturity by an agent, after payment thereof with funds furnished by the maker, is not liable on the dishonored paper, provided he has acted in good faith. *Thiel v. Butker*, 28: 1065, 51 So. 500, 125 La. 473.

Defenses.

5. Breach of a parol warranty of a chattel may be set up as a defense to an action on a promissory note which recites that its consideration is the purchase price of such chattel, but is otherwise silent as to terms, representations, and warranties, since 28 L.R.A.(N.S.)

such recital indicates that the terms of the sale have been integrated in the writing. *Pryor v. Ludden & B. Southern Music House*, 28: 267, 67 S. E. 654, — Ga. —.

(Annotated)

6. Want of consideration is a defense to the enforcement of a note by the payee against the maker, although it purports on its face to have been given for value received. *State Bank v. Forsyth*, 28: 501, 108 Pac. 914, — Mont. —.

BONA FIDE PURCHASER.

Of personalty, see Sale, 7-9.

BONDS.

- Executed to release property of bankrupt, see Bankruptcy, 6.
- Increasing penalty of bond in prosecution for abandonment by husband, see Constitutional Law, 1.
- Release of surety on bond of insurance agent, see Principal and Surety, 1.
- Right of surety on bond of public officer to recover from other officer for loss through latter's neglect to require proper settlement of accounts, see Principal and Surety, 2, 3.
- Issue of, in excess of authorized indebtedness, see State.
- Railroad aid bonds, see Railroads, 1.

BONUS.

Contract to pay bonus to electric railway, see Contracts, 8, 18, 19; Evidence, 34.

BOOK.

Secondary evidence of contents, see Evidence, 23.

BOUNDARIES.

Of mining location, see Mines, 1, 2.

BREACH.

- Of contracts generally, see Contracts, 30.
- Of covenant, see Covenants and Conditions.

BRIDGES.

- Acceptance of warrant in payment for construction of, as accord and satisfaction, see Accord and Satisfaction.
- Estoppel to deny liability for building of, see Estoppel, 1.
- Presumption of negligence from carrying away of railroad bridge by high water, see Evidence, 16.
- Flooding of land caused by construction of, see Limitation of Actions, 4.
- Right of private action for negligent destruction of, see Nuisance.
- Compelling railroad to construct highway bridge over tracks, see Railroads, 7.
- Duty of builder of, to provide for passage of water, see Trial, 18; Waters, 4.

Defects; injuries on.

Evidence in action for injuries caused by fall of, see Evidence, 46.

1. The mere fact that a bridge is narrower than the highway, and that the barriers extend from the side of the bridge at right angles instead of being at an acute angle with the stream, does not constitute a wrongful construction, within the meaning of a statute rendering the county board of chosen freeholders liable for injury resulting from the wrongful neglect to erect, rebuild, or repair the bridges over which they have control. *Halm v. Board of Chosen Freeholders* (N. J. Err. & App.) 28: 946, 76 Atl. 1014, — N. J. —.

2. Lighting a bridge by artificial light is not a part of its erection, rebuilding, or repairing, within the meaning of a statute rendering the county board of chosen freeholders liable for injury resulting from the wrongful neglect to erect, rebuild, or repair the bridges over which they have control. *Halm v. Board of Chosen Freeholders* (N. J. Err. & App.) 28: 946, 76 Atl. 1014, — N. J. —.

BROKERS.

A real-estate broker who, to secure the terms on which he is authorized to sell, effects an intermediate sale to one who for a bonus is willing to comply with the owner's terms and hold the property subject to such terms as the true purchaser can meet, thereby securing a commission of which his principal is ignorant, is bound to account to him for it. *Easterly v. Mills*, 28: 952, 103 Pac. 475, 54 Wash. 356.

BROTHERS.

Fiduciary relation between, see Evidence, 3, 4.

BUILDING CONTRACT.

See Contracts, 4, 5, 31.

BUILDINGS.

Building restrictions in covenants, see Covenants and Conditions, 1, 3-7.

Injury by electric wires in moving building through street, see Electricity, 1, 2.

Injunction to compel modification of building so as to comply with building restrictions, see Injunction, 2, 3.

Negligence of independent contractor placing fire escapes on, see Master and Servant, 25, 26.

Master's duty to inspect fire escapes erected by independent contractor, see Trial, 11.

BURDEN OF PROOF.

In general, see Evidence, 2-22.

BY-LAWS.

Of social clubs, see Clubs, 2.

CANCELATION OF INSTRUMENTS.

1. An oil and gas lease in which there is no express provision requiring additional 28 L.R.A.(N.S.)

wells cannot be canceled in equity for failure to drill such wells. *McGraw Oil & G. Co. v. Kennedy*, 28: 959, 64 S. E. 1027, 65 W. Va. 595.

2. A parent, who conveys real property to his son in consideration of the son's agreement, evidenced by a separate instrument in the form of a bond in a penal sum the payment of which is conditioned on failure to perform, to support and maintain the parent during the remainder of his life, may, in an equitable action for breach of the agreement, have the deed or conveyance set aside or the amount due under the agreement made a charge or lien against the land, or such other relief as the equities between the parties may justify, irrespective of whether or not the agreement of support be considered a condition subsequent, as the form thereof is immaterial. *Bruer v. Bruer*, 28: 608, 123 N. W. 813, 109 Minn. 260. (Annotated)

CARBONATED BEVERAGES.

Negligence in bottling of, see Trial, 4, 5.

CARE.

Presumption of, see Trial, 3.

CARRIERS.

Injunction against filing of rates by, with interstate commerce commission, see Interstate Commerce Commission.

Attempting to compel railroad to construct and operate spur track to private establishment as a taking of property, see Constitutional Law, 5, 6.

Mandamus to compel construction and operation of side track and switch to private establishment, see Mandamus, 5.

Proximate cause of injury to passenger, see Proximate Cause, 2.

Directions as to route.

1. A carrier's agent selling a passage ticket is not bound to volunteer information unsought with respect to the route over which it must be used. *McKinley v. Louisville & N. R. Co.* 28: 611, 127 S. W. 483, — Ky. —.

2. A ticket agent at a union junction point at which a passenger changes cars is not, when asked by him when a train leaves for his destination, bound to ascertain which route his ticket requires him to take, and see that he takes the right train; but performs his duty, in the absence of any special request, by stating the times at which trains leave over the several routes which reach the passenger's destination. *McKinley v. Louisville & N. R. Co.* 28: 611, 127 S. W. 483, — Ky. —.

Who are passengers.

3. One who goes to a railroad station a few minutes before the arrival of his train is entitled to the rights of a passenger, although his intention is merely to leave his

hand baggage, and depart again to transact some personal business before train time, where by statute the railroad company is required to keep its station open at least an hour before the arrival of trains; and he may therefore hold the railroad company liable for an injury due to the unsafe condition of the premises. *Metcalf v. Yazoo & M. V. R. Co.* 28: 311, 52 So. 355, — Miss. —. (Annotated)

Ejection of passenger.

Damages for wrongful ejection, see Damages, 2.

Evidence in action for ejection, see Evidence, 41.

4. A railroad company is not liable for ejecting from its train a woman whose ticket was not good on its road, and who refused to pay fare, about a mile from the station at which she embarked in a city in the night, where she made no request to be put off at any other place, except to be returned to the embarking point, if the place of ejection is as convenient to her as any place along the line, unless she should be returned to the embarking point or carried to destination. *McKinley v. Louisville & N. R. Co.* 28: 611, 127 S. W. 483, — Ky. —. (Annotated)

Injuries in getting on or off.

Proximate cause of injury, see Proximate Cause, 2.

Correctness of verdict for plaintiff, see Trial, 23.

5. The failure of a carrier fully to stop a train at the destination of a passenger, and afford him an opportunity to alight with safety, is culpable negligence. *Walters v. Missouri P. R. Co.* 28: 1058, 109 Pac. 173, 82 Kan. 739.

6. A railroad company is not liable for injury to a passenger who falls from a train in consequence of the attempt of its brakeman to prevent his alighting from it after it is in motion. *Chesapeake & O. R. Co. v. Bell*, 28: 773, 68 S. E. 398, — Va. —.

7. A person who is not given a reasonable time to alight from a train before it continues on its journey is bound to minimize the possible loss to the company because of its wrongdoing by staying on the train, and not attempting to leave it after it is in motion, to the peril of his life and limb, with the view of holding the company liable in case of injury. *Chesapeake & O. R. Co. v. Bell*, 28: 773, 68 S. E. 398, — Va. —.

8. A passenger who, at the imperative direction of the conductor, alights in the nighttime from a passenger train as it is passing his destination at a speed of 3 or 4 miles an hour, is not negligent as matter of law, where the conductor directed him as to the manner of alighting, and it was not so dark as to prevent the passenger from seeing where he was stepping. *Walters v. Missouri P. R. Co.* 28: 1058, 109 Pac. 173, 82 Kan. 739.
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Carriers of freight.

Amendment of complaint in action for damages for delay, see Appeal and Error, 25.

What constitutes interstate shipment, see Commerce, 1.

Ratification by shipper of contract limiting liability, see Contracts, 25.

Duress in obtaining signature to contract limiting liability, see Duress.

Interest on amount recovered for injuries to stock, see Interest, 2.

Mandamus to compel carrier to make provision for transportation of coal, see Mandamus, 7, 8.

Question for jury as to whether shipper has bound himself to sign contract limiting liability, see Trial, 9.

9. A coal operator does not lose his rights under W. Va. Code 1906, § 2364, which provides that railroad corporations shall without discrimination make reasonable provision for the transportation of coal mined and coke manufactured and offered for transportation along their lines, and imposes a penalty for violation of the act, merely because negotiations for a contract for the transportation of his coal have failed, as the act is mandatory. *State ex rel. Mt. Hope Coal Co. v. White Oak R. Co.* 28: 1013, 64 S. E. 630, 65 W. Va. 15.

10. A carrier is not liable to the consignor for failure to deliver to the consignee an interstate shipment of intoxicating liquor which, after arrival at destination and storage in defendant's warehouse, has been seized over the carrier's protest by officers acting under warrant issued in conformity to a statute authorizing seizures of liquors in possession of any person for unlawful use, where the consignor has actual notice of such seizure in time to bring an action to recover the goods, under a provision of such law requiring the keeping of such liquors for thirty days before being destroyed or forfeited to the state, and providing that during that period any person may bring an action for its recovery, although such law may be unconstitutional, if it has never been declared so, since the carrier may presume that the consignor had abandoned the liquor as subject to the process which seized it. *Southern Express Co. v. Sotille Brothers*, 28: 139, 67 S. E. 414, — Ga. —. (Annotated)

11. A carrier, by wrongfully refusing to deliver goods upon demand made promptly after notice to the consignee to remove them, renders itself liable for their destruction upon the following day by an unprecedented flood, as the carrier, because of the wrongful detention, held the goods at its own risk. *Henry v. Atchison, T. & S. F. R. Co.* 28: 1088, 109 Pac. 1005, — Kan. —.

12. A shipper of cattle may rightfully

refuse to sign a special contract limiting the carrier's common-law liability, if the preliminary negotiations relating to the shipment did not result in a valid agreement that it shall be made under such a contract, although he knows the custom of carriers to require written contracts and, in the course of long experience as a shipper, had always signed written contracts, and, following the negotiations, intended to sign a contract of the kind he had been using for similar shipments, although he was not familiar with the terms thereof. *St. Louis & S. F. R. Co. v. Gorman*, 28: 637, 100 Pac. 647, 79 Kan. 643.

13. A contract between shipper and carrier fixing the value of property to be transported as a basis for carrier's charges, which shall be binding on the shipper in case of loss, is not forbidden by the provision of the Carmack amendment of the Hepburn act of Congress, that no contract shall exempt the carrier from liability for loss of property caused by itself or by any connecting carrier. *Bernard v. Adams Exp. Co.* 28: 293, 91 N. E. 325, 205 Mass. 254.

(Annotated)

14. A shipper who by his authorized agent fills out a printed receipt blank which is tendered to, and the terms thereof accepted by, the carrier, is bound by a clause therein limiting the carrier's liability, since, by himself preparing the receipt, the shipper made it his own contract, notwithstanding the blank form when furnished by the carrier already contained the liability clause. *Perrin v. United States Express Co.* (N. J. Err. & App.) 28: 645, 74 Atl. 462, — N. J. —.

(Annotated)

CARS.

Effect of difficulty in obtaining on seller's liability for delay, see Sale, 3.

Duty of one accepting order f. o. b. to procure and load cars, see Sale, 4.

CASE.

No action lies to recover for the loss of his bargain by one who had contracted to purchase property, against another who induced the vendor to break his contract and transfer title to him, unless the vendor acted against his will or contrary to his purpose by coercion or deception. *Swain v. Johnson*, 28: 615, 65 S. E. 619, 151 N. C. 93.

(Annotated)

CASHIER.

Authority of, see Banks, 1, 2.

Imputing knowledge of, to bank, see Notes, 1.

CATTLE YARDS.

Forbidding maintenance of, in residence district, see Municipal Corporations, 2.

CAUSE.

Presumption and burden of proof as to, see Evidence, 13.

Proximate cause, see Proximate Cause. 28 L.R.A. (N.S.)

CAVEAT EMPTOR.

Application of rule to purchase at judicial sale, see Judicial Sale, 1.

CERTIFICATE.

Of performance of contract, see Contracts, 29.

Admissibility in evidence, see Evidence, 24.

CERTIORARI.

1. If the court attempts to enforce an order to allow an inspection of papers, the one against whom it is entered may appeal from the order imposing the punishment; and therefore a writ of certiorari will not lie to review an order of inspection, where the statute authorizes such writ only where no appeal is allowed. *State ex rel. Seattle General Contract Co. v. Superior Court*, 28: 516, 106 Pac. 150, 56 Wash. 649.

2. An order for inspection of books and papers in possession of defendant may be reviewed on appeal from the final judgment which may be entered in the case, and therefore cannot be taken up under a writ of review, where the statute authorizes such writ only where no appeal is provided. *State ex rel. Seattle General Contract Co. v. Superior Court*, 28: 516, 106 Pac. 150, 56 Wash. 649.

(Annotated)

CHARGE.

On devisee, see Wills, 11.

CHARITIES.

What are charities.

1. A bequest for masses for testator and certain specified relatives being, under the doctrine of the Catholic Church, for the benefit of all mankind, is a valid public charity, and not subject to statutory provisions governing the creation of private charities. *Re Kavanaugh*, 28: 470, 126 N. W. 672, — Wis. —.

Conditions; existence and capacity of beneficiaries.

2. A statute requiring a devise of land to be made directly to the beneficiary, and not to a trustee, is not applicable to public charities or in cases where the will works conversion of the property into personalty. *Re Kavanaugh*, 28: 470, 126 N. W. 672, — Wis. —.

3. A devise of real estate for the celebration of masses, being for a public charity, is not invalid, although title is not vested in anyone. *Re Kavanaugh*, 28: 470, 126 N. W. 672, — Wis. —.

Definiteness; discretion of trustee.

4. A bequest for masses for certain specified purposes, to be used under direction of specified persons, is not void for uncertainty. *Re Kavanaugh*, 28: 470, 126 N. W. 672, — Wis. —.

CHARTER.

Construction of railroad charter, see Railroads, 8.

CLAIMS.

Against bankrupt estate, see Bankruptcy, 3-5.

Against city, presentation of, see Municipal Corporations, 5.

CLASS LEGISLATION.

See Constitutional Law, 2, 3.

CLERGYMAN.

Libel of, see Libel and Slander, 1.

CLOUD ON TITLE.

Tender out of court of amount due on mortgage as basis for right to removal of mortgage from record as cloud on title, see Mortgage, 5.

One whose only title to land is under a tax deed made to a grantee, who was dead when it was executed, which was delivered to the former as the heir of the grantee, who caused the deed to be recorded and paid the taxes on the land, but who never took actual possession, cannot maintain an action to quiet title, or for an injunction against one who holds under the government title and who is in actual possession of the land. *Baker v. Lane*, 28: 405, 109 Pac. 182, 82 Kan. 715.

CLUBS.

Appeal from decrees directing members to pay assessments, see Appeal and Error, 1.

Bill in equity by receiver to recover dues from members, see Equity, 3, 4.

1. Members of a social club cannot avoid paying their dues to its receiver on the theory that they have not, because of the receivership, enjoyed the expected benefits of membership, where they accrued before the receiver was appointed. *Rogers v. Boston Club*, 28: 743, 91 N. E. 321, 205 Mass. 261.

2. Under by-laws of a social club permitting assessments to be made by a majority of an executive committee and constituting one fourth of the committee a quorum, the assessments must be made by a majority of the committee, and not of the quorum. *Rogers v. Boston Club*, 28: 743, 91 N. E. 321, 205 Mass. 261.

COAL.

Duty of railroad to make provision for transportation of, see Carriers, 9; Constitutional Law, 6; Mandamus, 5, 7, 8.

CODEFENDANTS.

Dismissal as to one; right of other to complain, see Dismissal and Discontinuance, 1.

COKE.

Duty of railroad to make provision for transportation of, see Carriers, 9; Constitutional Law, 6; Mandamus, 5, 7, 8.

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COMITY.

See Conflict of Laws.

COMMERCE.

As to interstate commerce commission, see Interstate Commerce Commission.

Regulating carriers and transportation.

1. The passage of a shipment of live stock between points within a state, for a short distance over the territory of another state, renders the shipment one of interstate commerce, so as to render inapplicable thereto a state statute requiring common carriers of live stock within the state to maintain a minimum rate of speed unless prevented by unavoidable cause, as such statute does not apply to interstate commerce. *Missouri, K. & T. R. Co. v. Yeibengood*, 28: 985, 109 Pac. 988, — Kan. —.

Regulating and licensing sales, etc.

2. A state constitutional clause prohibiting the conveying of intoxicating liquors from one place within the state to another place therein, in the absence of prohibitory legislation by the state, is not within the scope and operation of a Federal statute subjecting interstate shipments of intoxicating liquors to state laws passed in the exercise of their police power. *High v. State*, 28: 162, 101 Pac. 115, 2 Okla. Crim. Rep. 161.

3. Conveying intoxicating liquors which have been shipped from another state, from a railway station to the home of the consignee, is a part of the interstate commerce transportation, and is not violative of a state constitutional clause prohibiting the conveying of intoxicating liquors from one place within the state to another place therein, as such provision has no application to interstate shipments, until there has been a delivery thereof. *High v. State*, 28: 162, 101 Pac. 115, 2 Okla. Crim. Rep. 161.

4. Under the interstate commerce clause of the Federal Constitution, a resident of one state may order and receive a shipment of whisky from another state, and convey it in the original package from the depot at which the shipment arrives to his home. *High v. State*, 28: 162, 101 Pac. 115, 2 Okla. Crim. Rep. 161.

5. The sale within the state of a frame for a portrait, made in another state, to fill an order taken by a solicitor in the former state, cannot be so separated from the rest of the dealings between the nonresident maker and the purchaser as to sustain the imposition of a license tax under Ala. act of March 7, 1907, § 17, where the order for the portrait contemplated its delivery in an appropriate frame, which the purchaser of the portrait should have the option of buying at the factory price. *Dozier v. State*, 28: 264, 30 Sup. Ct. Rep. 649, 218 U. S. 124, 54 L. ed. 965. (Annotated)

COMMISSIONS.

Of real estate agent, see Brokers.

Review by courts of orders of, see Courts, 1.

COMMITTEE.

Of incompetent, see Incompetent Persons.

COMMON CARRIERS.

See Carriers.

COMPROMISE AND SETTLEMENT.

Power of agent of public contractor to compromise dispute with city as to amount due him, see Accord and Satisfaction, 2.

CONCLUSIVENESS.

Of architect's certificate, see Contracts, 29.

Of judgment, see Judgment, 2-4.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL FEE.

Creation of by will, see Wills, 8.

CONDITIONS.

Conditions precedent to right of action, see Action or Suit.

Precedent to suit, see Action or Suit, 1.

To performance of contract, see Contracts, 29.

Relating to real property, see Covenants and Conditions.

In insurance contract, see Insurance.

Notice of injury as condition precedent to master's liability, see Master and Servant, 2, 3.

In telegraph blank, see Telegraphs, 3.

CONFIDENTIAL RELATION.

Burden of establishing, see Evidence, 3, 4.

CONFIRMATION.

Of judicial sale, see Judicial Sale, 3.

Of sale under power in mortgage, see Mortgage, 8.

CONFLICT OF LAWS.

As to telegrams.

1. The courts of the forum will not, in an action to recover damages for nondelivery of a telegram, enforce a provision of a contract for transmission of the message limiting the liability of the company, which is void under the public policy of the forum, although it is valid in the state where the contract was made and in that where the breach occurred, so that no action could have been brought for the breach in either state. *Fox v. Postal Teleg. Cable Co.* 28: 490, 120 N. W. 399, 138 Wis. 648.

(Annotated)

As to marriage.

2. A marriage between parties within a class prohibited by the law of their domicil, enacted in another state where it is valid, is valid at the domicil, in the absence of legislative enactment that such marriages outside of the domicil shall be invalid therein, although resort was made to the foreign state for the purpose of avoiding 28 L.R.A.(N.S.)

the domiciliary law. *State v. Hand*, 28: 753, 126 N. W. 1002, — Neb. —.

(Annotated)

CONSIDERATION.

For note, see Bills and Notes, 1.

For contracts, generally, see Contracts, 4, 5.

Parol evidence as to, see Evidence, 34.

Sufficiency of, as question for jury, see Trial, 12.

CONSPIRACY.

To burn insured property as defense to recovery where property is otherwise destroyed, see Insurance, 13.

CONSTABLE.

Liability for killing dog, see Animals, 2.

CONSTITUTIONAL LAW.

Ex post facto laws.

1. An amendatory act increasing the penalty of a bond essential to the suspension of sentence in a prosecution against a husband for abandonment is *ex post facto* as to prior offenses. *State v. McCoy*, 28: 583, 127 N. W. 137, — Neb. —.

Equal protection and privileges.

2. A statute making void assignments of wages or salaries when given as security for loans tainted with usury is invalid where no such provision is made with respect to other instruments or conveyances given to secure such debts. *Massie v. Cassina*, 28: 1108, 88 N. E. 152, 239 Ill. 352.

3. The legislature may allow an attorney's fee against one whose delinquency makes necessary a proceeding to enforce a special assessment for public improvements against his property, although no such fee is allowed in his favor. *Engbretsen v. Gay*, 28: 1062, 109 Pac. 880, — Cal. —.

Due process; right to life, liberty, and property.

4. A requirement by the state that railroad companies whose lines intersect public highways laid out after the construction of a railroad, shall, without compensation, construct and maintain such safety devices as are reasonably necessary for public safety, being referable to the police power, is not a taking of private property for public use, in violation of the Constitution. *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 28: 298, 108 N. W. 231, 98 Minn. 380.

(Annotated)

5. The attempt by the state to compel a railroad company to construct and operate a spur track to a private mill is void, as a taking of property for private use without due process of law. *Northern P. R. Co. v. Railroad Commission*, 28: 1021, 108 Pac. 938, — Wash. —.

6. Requiring a railroad company, under a statute providing that railroad corporations shall make "reasonable provision" for the transportation of coal mined along their lines, to construct a switch and side track on its right of way, as a reasonable

provision for the transportation of coal offered for shipment by the coal operator, does not amount to a command that the carrier enter into a contract for reasonable provisions for the transportation of such coal, or that it build and maintain a permanent structure on its right of way, nor to the taking of the private property of the carrier for private use without due process of law, but is a mere command for the temporary use by such carrier of a part of its right of way for the purpose of performing a duty imposed upon it by law. *State ex rel. Mt. Hope Coal Co. v. White Oak R. Co.* 28: 1013, 64 S. E. 630, 65 W. Va. 15.

7. A statute making invalid the assignment of any salary unless it is in writing, signed and acknowledged by the assignor and his or her husband or wife, and the assignment entered on the justice's docket and a copy served upon the employer, is invalid as interfering with the constitutional rights of liberty and property of the one earning it. *Massie v. Cessna*, 28: 1108, 88 N. E. 152, 239 Ill. 352.

Police power.

See also *supra*, 4.

8. The state may, in the exercise of its police power, impose upon railroad companies whose lines intersect public highways laid out after the construction of the railroad, the uncompensated duty of constructing and maintaining at such crossing all such safety devices as are reasonably necessary for the protection of the traveling public. *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 28: 298, 108 N. W. 261, 98 Minn. 380.

9. The legislature may, under the police power, provide for the assessment of a fixed proportion of the cost of a public sanitary sewer upon abutting property by the front-foot rule, so that each parcel pays for the cost of its local service sewer without regard to the benefits actually accruing to the property. *Chicago, M. & St. P. R. Co. v. Janesville*, 28: 1124, 118 N. W. 182, 137 Wis. 7.

Impairing obligation of contracts.

10. A decree for the future payment of alimony is, as to instalments past due and unpaid, within the protection of the full faith and credit clause of the Federal Constitution, provided that no modification of the decree was made prior to the maturity of such instalments, unless, by the law of the state in which the decree was rendered, its enforcement is so completely within the discretion of the courts of that state that they may annul or modify the decree, even as to overdue and unsatisfied instalments. *Sistare v. Sistare*, 28: 1068, 30 Sup. Ct. Rep. 682, 218 U. S. 1, 54 L. ed. 905.

11. Decrees of the New York courts for the future payment of alimony are not subject to annulment or modification by those courts as to overdue and unsatisfied instalments, so as to deprive such decrees of the protection, as to past-due and unpaid in-

stalments, of the full faith and credit clause of the Federal Constitution. *Sistare v. Sistare*, 28: 1068, 30 Sup. Ct. Rep. 682, 218 U. S. 1, 54 L. ed. 905.

CONSTRUCTION.

Of contracts, see *Contracts*, 17-20.
Of insurance policy, see *Insurance*.
Of wills, see *Wills*.

CONTEMPT.

Statute permitting enforcement by contempt proceedings of order for inspection, see *Discovery and Inspection*.

CONTINUANCE AND ADJOURNMENT.

The court may grant a continuance to permit the securing of a copy of a contract, proof of which is necessary to the decision of the case, where objection is made to its proof by parol evidence. *Sholin v. Skamania Boom Co.* 28: 1053, 105 Pac. 632, 56 Wash. 303.

CONTRACTS.

Impairing obligation of, see *Constitutional Law*, 10, 11.

As to covenants, see *Covenants and Conditions*.

Duress as ground for cancelling, see *Duress*.

Estoppel to avoid contract for duress, see *Estoppel*, 5.

Of infants, see *Infants*.

As to mortgages, see *Mortgage*.

Of municipal corporation, see *Municipal Corporations*, 3, 4.

By agent, see *Principal and Agent*.

Reformation of, see *Reformation of Instruments*.

Rescission of land contract, see *Vendor and Purchaser*, 4.

1. An agreement to make a contract in the future is not binding unless all the terms and conditions are agreed upon, and nothing is left to future negotiations. *St. Louis & S. F. R. Co. v. Gorman*, 28: 637, 100 Pac. 647, 79 Kan. 643.

Parties.

2. The mere signing of one's name to a contract does not make him a party thereto, if the contract states that it is between other parties, and the person so signing is not mentioned therein. *Shriner v. Craft*, 28: 450, 51 So. 884, — Ala. —.

Implied agreements.

Estoppel to recover on implied contract, see *Estoppel*, 2.

3. Where one's land has been appropriated without first securing the right, as a railway right of way, and a road constructed thereon, he may waive his remedies in ejectment, injunction, and trespass, and, assuming that the company could acquire the land in condemnation proceedings, waive such proceeding, and sue as upon an implied contract to pay the reasonable value of the land taken. *Boisé Valley Constr. Co. v. Kroeger*, 28: 968, 105 Pac. 1070, 17 Idaho, 384.

Consideration.

For bills or notes, see Bills and Notes, 1, 6.

Parol evidence as to consideration, see Evidence, 34.

Effect of inadequacy of consideration for option on right to performance of contract to convey after option has been accepted, see Specific Performance, 2.

Sufficiency of consideration as question for jury, see Trial, 12.

4. The promise by one party to a building contract to pay more for the work than the amount called for in the contract, upon the refusal or threatened refusal of the contractor to go on with the work, the original contract still remaining in force, is without consideration and unenforceable. *Shriner v. Craft*, 28: 450, 51 So. 884, — Ala. —. (Annotated)

5. A promise of additional compensation, to induce a contractor who has abandoned his work because of insufficiency of the compensation to proceed with his contract, is enforceable after the contract has been performed in reliance thereon. *Evans v. Oregon & W. R. Co.* 28: 455, 108 Pac. 1095, — Wash. —.

Mutuality.

6. Acceptance, within the time limited, of an option to purchase real estate, removes the objection to the enforcement of the contract on the ground of want of mutuality. *Smith v. Bangham*, 28: 522, 104 Pac. 689, 156 Cal. 359.

7. A contract for the sale of land is not void for lack of mutuality from the fact that it is not enforceable against the vendee, because he did not sign the memorandum, as required by the statute of frauds, at least, where the statute provides that a party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed or offers to perform it. *Harper v. Goldschmidt*, 28: 689, 104 Pac. 451, 156 Cal. 245.

Definiteness.

8. An electric railway bonus contract by the terms of which the bonus is payable as soon as the railway company or its assigns have constructed and put in operation its road from B. to a certain described strip of land, and afforded a specified service thereon, is certain and definite as to the time the obligation matures. *Boisé Valley Constr. Co. v. Kroeger*, 28: 968, 105 Pac. 1070, 17 Idaho, 384.

Offers and their acceptance; options.

Effect as to strangers of decree for specific performance of option contract, see Judgment, 3.

Specific performance of, see Specific Performance.

See also *supra*, 6.

9. The acceptance, within the time specified, of an option which had been given for a nominal consideration to purchase real estate belonging to a husband, supersedes 28 L.R.A. (N.S.)

the wife's declaration of homestead upon the property made with notice of the option, after it had taken effect. *Smith v. Bangham*, 28: 522, 104 Pac. 689, 156 Cal. 359. (Annotated)

10. One contracting for the conveyance of land upon demand must make the demand within a reasonable time, and is not privileged to postpone performance on his part indefinitely. *Smith v. Bangham*, 28: 522, 104 Pac. 689, 156 Cal. 359.

Statute of frauds.

Demurrer to complaint showing that contract was within statute of frauds, see Pleading, 9.

See also *supra*, 7.

11. A promise by an owner of timber lands who has contracted to have the timber removed and manufactured into lumber, to hold back the amount which the contractor has promised to pay another to do the logging, and pay it to him, is not a promise to pay the debt of another within the statute of frauds. *Dale v. Gaither Lumber Co.* 28: 407, 68 S. E. 134, 152 N. C. 651.

12. A written contract or memorandum of sale is necessary to enforce against one tenant in common a contract for sale of real estate negotiated by his cotenant, although he authorizes the latter in writing to make the sale. *Hartenbower v. Uden*, 28: 738, 90 N. E. 298, 242 Ill. 434. (Annotated)

13. Neither a draft of a deed nor a written notice to execute the same is sufficient to satisfy the requirements of the statute of frauds as to a memorandum of the sale of real estate, where they do not contain the terms of sale. *Hartenbower v. Uden*, 28: 738, 90 N. E. 298, 242 Ill. 434.

14. A promise signed by the promoter of a corporation to pay for stock taken by a subscriber upon its surrender within a certain time is not invalid under the statute of frauds because not signed by the subscriber. *Re Neff*, 28: 349, 157 Fed. 57, 84 C. C. A. 561.

15. Under a statute providing that no action shall be brought to charge any person upon any contract for the sale of real estate unless the promise be in writing and signed by the person to be charged, a vendor who has not signed a contract cannot maintain an action to charge the vendee thereon, although the latter has expressed his assent in writing sufficiently to satisfy the statute. *Murray v. Crawford*, 28: 680, 127 S. W. 494, — Ky. —. (Annotated)

16. Under a statute making invalid contracts within the statute of frauds unless a memorandum thereof be in writing, and subscribed by the party to be charged, an action for specific performance cannot be maintained against a vendee who did not sign the agreement, although he paid a small portion of the purchase money, and accepted a receipt therefor. *Harper v. Goldschmidt*, 28: 689, 104 Pac. 451, 156 Cal. 215. (Annotated)

Construction.

Parol evidence to vary terms as to time when obligation becomes due, see Evidence, 30.

Construction of contract as question for court, see Trial, 6.

17. Printed matter in the heads of letters upon which a contract is written, which is not referred to in the writing, is not a part of the contract. *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 28: 1007, 108 Pac. 621, — Wash. —.

18. An agreement whereby a landowner, in consideration of \$1 and other consideration, agreed to convey a described strip of land for an electric railway right of way as soon as the track was laid thereon, and, for other like consideration, further agreed to pay a stipulated sum as soon as the railway company put the line in operation from B. to such described strip of land, with a specified service thereon, embodies two complete contracts; one for a conveyance of a right of way, and the other to pay a bonus as specified, the latter of which may be enforced by the railway company upon completion of its road to the boundary line of the described premises and the institution of the stipulated services, although it may not be in a position to demand the right of way, because it has not complied with that part of the agreement providing for a conveyance thereof. *Boisé Valley Constr. Co. v. Kroeger*, 28: 968, 105 Pac. 1070, 17 Idaho, 384.

19. A contract providing for the payment of a bonus upon the putting in operation of a certain electric railway from B. "to the strip of land above described" does not mean "upon or over," but merely "to," the boundary of such strip of land. *Boisé Valley Constr. Co. v. Kroeger*, 28: 968, 105 Pac. 1070, 17 Idaho, 384.

20. Language in an acceptance of an order for goods, "We accept and enter same for shipment. . . . We anticipate making shipment,"—requires the seller to furnish cars. *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 28: 1007, 108 Pac. 621, — Wash. —.

Validity; public policy.

Limitation of liability by carrier, see Carriers, 12-15; Trial, 9.

Limitation of liability by telegraph company, see Conflict of Laws, 1.

Finding that contract is void as one of law, see Trial, 21.

21. A physician duly licensed in the state where the contract is made cannot be deprived of the benefit of the contract to furnish medical attendance to a patient by the fact that he temporarily accompanies the patient into a state where he has no license and performs some services for the patient there. *Re McVicker*, 28: 1112, 91 N. E. 1041, 245 Ill. 180.

22. A contract to furnish one medical attendance during life for a lump sum payable at his death is not void as against public policy, either because furnishing an

inducement to threaten his life or as a wagering contract. *Re McVicker*, 28: 1112, 91 N. E. 1041, 245 Ill. 180.

23. In determining the public policy of a state, courts are limited to a consideration of the statutes, Constitution, judicial decisions, and practice of government officers. *Re McVicker*, 28: 1112, 91 N. E. 1041, 245 Ill. 180.

24. A physician who enters into a contract with his patient is not bound, in order to sustain the validity of the contract, to show that the patient had independent and competent advice before executing the contract. *Re McVicker*, 28: 1112, 91 N. E. 1041, 245 Ill. 180.

25. The acceptance and use of a return pass by a shipper of stock who has been compelled to accompany the shipment, after the stock had been transported and delivered, cannot be held, as matter of law, to confirm a special written contract limiting the carrier's common-law liability, which had been extorted from the shipper, who rightfully declined to sign it, by means of a refusal to transport the cattle, which were already in the carrier's possession, unless such a contract was signed, although the pass was obtained under the terms of such voidable contract upon its surrender. *St. Louis & S. F. R. Co. v. Gorman*, 28: 637, 100 Pac. 647, 79 Kan. 643.

26. To constitute an affirmance of a contract which a party has been wrongfully constrained to sign, the conduct of the injured party must be such as to indicate an intention to condone the wrong, and a purpose to abide by the consequences. *St. Louis & S. F. R. Co. v. Gorman*, 28: 637, 100 Pac. 647, 79 Kan. 643.

27. Conduct exhibited in apparent recognition of a contract which a party has been wrongfully constrained to sign, while the pressure of the hardship which overcomes the mind continues, does not amount to an affirmance thereof. *St. Louis & S. F. R. Co. v. Gorman*, 28: 637, 100 Pac. 647, 79 Kan. 643.

28. One who having received an assignment of claims by an employer of labor, in consideration of his furnishing funds with which to pay the laborers, gives a duebill in satisfaction of an order upon himself by the employer for wages due for cutting timber on government land, in consideration of which he requires an assignment by the servant of his claim against the master in order to defeat a right to assert a lien on the timber, cannot defeat liability thereon on the ground that the original contract was void, since his promise is a new and independent transaction, and not tainted by the illegality of the original agreement. *Owens v. Davenport*, 28: 996, 104 Pac. 682, 39 Mont. 555.

Performance; conditions; certificate of performance.

Admissibility in evidence of architect's certificate, see Evidence, 24.

29. An architect's certificate which a

building contract provides shall be final and conclusive is so in legal effect unless impeached for fraud or such gross mistakes as would imply bad faith or a failure to exercise an honest judgment. *Shriner v. Craft*, 28: 450, 51 So. 884, — Ala. —.

Breach and its effect.

Cancellation of deed for breach of contract, see Cancellation of Instruments, 2.

Action for inducing breach of, see Case. Of condition subsequent, see Covenants and Conditions.

Damages for breach of, see Damages.

Breach of contract of sale, see Sale.

30. A contract to furnish medical attendance to a person is not broken by refusal to accompany him to another state, where the contract was made at his permanent place of residence and contains nothing to indicate any intention of a change of domicile. *Re McVicker*, 28: 1112, 91 N. E. 1041, 245 Ill. 180.

Defenses.

31. Failure to have an ordinance passed authorizing a frame building within the fire limits, so as to allow the work to be begun at a certain time, is no defense to an action for breach of a building contract, if the ordinance was in fact passed, and there is nothing to show that the building contract fixed any time when work should be commenced, or that there was any consideration for the agreement as to the ordinance. *Shriner v. Craft*, 28: 450, 51 So. 884, — Ala. —.

32. That a contract between physician and patient is presumptively fraudulent may be interposed as a defense in an action at law to enforce it. *Re McVicker*, 28: 1112, 91 N. E. 1041, 245 Ill. 180.

CONTRIBUTION.

Between indorsers, see Bills and Notes, 2.

CONVERSION.

By bailee, see Bailment.

Plea of, see Pleading, 7.

CORPORATION COMMISSION.

Review by courts of orders of, see Courts, 1.

Mandamus to compel compliance with orders of, see Parties, 2.

CORPORATIONS.

Enforcement against bankrupt of promise to return amount paid for stock of corporation if surrendered within certain time, see Bankruptcy, 5.

Necessity that subscriber sign written promise by promoter of corporation to pay for stock taken by subscriber upon its surrender within certain time, see Contracts, 14.

Rescission by infant of subscription to stock, see Infants.

Imposition of license tax on, see License, 1-6, 10-12.

Mandamus to, see Mandamus, 5.

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As to municipal corporations, see Municipal Corporations.

Conditions on which railroad company receives its charter, see Railroads, 9.

Construction of railroad charter as to highway crossing, see Railroads, 8.

Taxation of franchise of, see Taxes, 1, 3.

Officers of a corporation who issued a fraudulent prospectus to sell treasury stock are not liable in damages for the fraud to one who, in reliance upon it, purchases from an individual stock which is owned by him, and in which the corporation has no interest. *Cheney v. Dickinson*, 28: 359, 172 Fed. 109, 98 C. C. A. 314. (Annotated).

CORPUS DELICTI.

Sufficiency of evidence to show, see Evidence, 56.

COSTS.

Allowing attorney's fee against defendant in action to enforce special assessment, see Constitutional Law, 3.

Refusal to divide costs does not constitute error, where the amount recovered by the plaintiff exceeds the amount for which defendant offered to confess judgment after the action was begun. *Matheney v. Eldorado*, 28: 980, 109 Pac. 166, 82 Kan. 720.

COTENANCY.

Sale by one tenant as agent for cotenant, see Principal and Agent, 3.

COUNTIES.

Execution of railroad aid bonds by, see Railroads, 1.

COUNTY COMMISSIONERS.

Liability of, to surety of tax collector for failing to require proper settlement of accounts, see Principal and Surety, 2, 3.

COURTS.

Jurisdiction of bankruptcy court, generally, see Bankruptcy, 1.

Jurisdiction to enjoin filing of rates of interstate commerce commission, see Interstate Commerce Commission.

Amendment in exercise of original jurisdiction of alternative writ of mandamus, see Mandamus, 6.

Process of, see Writ and Process.

1. The determinations of a state railroad commission charged with control of the crossing of railroad tracks by street car lines, as to place, plan, and method of construction, are conclusive where the commissioner has not acted arbitrarily or capriciously in regard thereto. *State ex rel. Dawson v. Parsons Street R. & E. Co.* 28: 1082, 105 Pac. 704, 81 Kan. 430.

2. An order issued out of a suit founded on a creditors' bill in a Federal court, whereby the defendant is restrained from

directly or indirectly selling, transferring, assigning, pledging, or otherwise disposing of, or parting with the possession or control of, any of the property, assets, notes, stocks, bonds, claims and demands of the debtor mentioned in the complaint, does not prevent the bringing of actions at law by the debtor to recover upon any of such notes and claims, as such order cannot be construed as requiring the debtor to allow the statute of limitations to run upon its causes of action. *Guardian Trust Co. v. Kansas City S. R. Co.* 28: 620, 171 Fed. 43, 96 C. C. A. 285.

3. An injunction will not issue out of the Federal court before which a suit founded on a creditors' bill is pending for misappropriation of corporate property, to stay subsequent actions at law instituted in a state court for the recovery of personal judgments upon a debt and certain notes involved in the former suit, where such subsequent actions will not prevent the effectual determination of the issues in the equity suit over which it had acquired exclusive jurisdiction, and will not withdraw or interfere with the dominion it had acquired over specific property to such an extent that its determination of the controversy about it and the enforcement of its decree concerning it may be in any degree prevented, notwithstanding the equitable remedy of an accounting would be more complete, prompt, and adequate, and it had been stipulated in the equitable action that a final settlement of the issues of indebtedness raised in the legal actions should be had therein. *Guardian Trust Co. v. Kansas City S. R. Co.* 28: 620, 171 Fed. 43, 96 C. C. A. 285.

COVENANTS AND CONDITIONS.

Restricting use or disposition of property.

Enforcement of, see *infra*, 3-7.

1. A covenant in a deed of conveyance whereby the grantor, in part consideration for the conveyance, stipulates and agrees for himself, his heirs, and assigns, concerning an adjacent lot which he then owns, that the only building upon such lot shall be a residence and the necessary attachments, and that it shall be used for no other purposes than that of a family residence, precludes the building for tenement purposes of several dwelling houses upon such adjacent lot. *Brown v. Huber*, 28: 705, 88 N. E. 322, 80 Ohio St. 183.

2. A limitation upon the power of alienation may be imposed upon a grant of a fee in trust for a married woman. *Hauser v. St. Louis*, 28: 426, 170 Fed. 906, 96 C. C. A. 82. (Annotated)

Performance; breach; enforcement.

Injunction to compel compliance with, see *Injunction*, 2, 3.

Joinder of parties to prevent violation of, see *Parties*, 1.

3. If changes from the building restrictions imposed upon lots in a subdivision, which affect only the buildings at corners

of streets, are not of sufficient moment to interfere with the scheme as a whole, the owner of a particular lot cannot ignore the restrictions, under the rule of changed conditions. *Stewart v. Finkelstone*, 28: 634, 92 N. E. 37, 206 Mass. 28.

4. That no steps were taken to prevent the erection of a building in violation of a restrictive covenant upon the use of the land until it was all up will not defeat an injunction against its maintenance, if the complaining parties did not know of the violation of the covenant until the building was completed. *Stewart v. Finkelstone*, 28: 634, 92 N. E. 37, 206 Mass. 28.

5. A delay of ten weeks in bringing suit to enjoin the maintenance of a building erected in violation of a restrictive covenant in the use of the land, after the building was erected, and knowledge was brought home to the complaining party, is not such laches as will bar relief, if no prejudice to the rights of the owner of the building through the delay is shown. *Stewart v. Finkelstone*, 28: 634, 92 N. E. 37, 206 Mass. 28.

6. The restraint of substantial infraction of wholesome building covenants will not be denied because of possible slight infractions on the part of complainant, with respect to his own property, where his building has stood for more than forty years, and has been considered by all parties as a compliance with the restrictions. *Stewart v. Finkelstone*, 28: 634, 92 N. E. 37, 206 Mass. 28.

7. A mortgagee of real estate may maintain a suit to enjoin violation of a building restriction which has been imposed upon neighboring property for the benefit of that which is subject to his mortgage. *Stewart v. Finkelstone*, 28: 634, 92 N. E. 37, 206 Mass. 28.

Who liable or bound.

8. The vital question in an equitable action to enforce a restrictive covenant in a deed of conveyance, controlling the use or enjoyment of the land conveyed, is not whether there is a covenant running with the land, but whether the restriction asserted and relied on was one imposed upon the servient estate for the benefit of the land in behalf of which it is sought to be enforced. *Brown v. Huber*, 28: 705, 88 N. E. 322, 80 Ohio St. 183.

9. A covenant by a grantor whereby he stipulates and agrees for himself, his heirs, and assigns, that the only building upon an adjacent lot owned by him shall be a residence and the necessary attachments, and that it shall be used for no other purposes than that of a family residence, is binding upon one claiming under him, who took with notice thereof. *Brown v. Huber*, 28: 705, 88 N. E. 322, 80 Ohio St. 183.

CRIMINAL LAW.

Amendment of record on appeal in criminal prosecution, see *Appeal and Error*, 3.

Presumption that prisoner was in court when verdict was rendered, see Appeal and Error, 9.

Ex post facto law, see Constitutional Law, 1.

Evidence in criminal prosecution, see Evidence.

Presumption of innocence, see Evidence, 12.

As to sufficiency of indictment, see Indictment and Information.

Unreasonable searches and seizures, see Search and Seizure.

Directing acquittal, see Trial, 15.

See also Homicide; Intoxicating Liquors; Malicious Injury; Obstructing Justice; Receiving Stolen Property.

Capacity to commit.

1. That one accused of murder is a somnambulist, and while in this state is without self-control, and commits acts of which he has no recollection, and that his offense was committed while he was in that state, constitutes no defense other than that embraced in a plea of insanity. *Tibbs v. Com.* 28: 665, 128 S. W. 871, — Ky. —

Warrant; commitment.

2. A warrant issued by a coroner pursuant to a statute requiring him, upon the rendition by the coroner's jury of a verdict of guilty, to issue his warrant for the arrest of the accused, and providing that such warrant shall take the place of a complaint and be sufficient foundation for a preliminary examination before a magistrate, is sufficient authority for the holding of such examination, notwithstanding another statute providing that a written complaint under oath shall be filed with the magistrate before a warrant shall issue. *State v. Brecount*, 28: 187, 107 Pac. 763, 82 Kan. 195.

CROSS APPEALS.

See Appeal and Error, 6.

CROSS-EXAMINATION.

Of witness, see Appeal and Error, 26; Witnesses, 3.

CUSTOM.

Evidence of, see Evidence, 39.

DAMAGES.

Interest on amount recovered as, see Interest.

Damages for flooding of land by government dam, see Damages, 6.

Sales of personalty.

See also *infra*, 7.

1. The measure of damages for refusal to ship a car load of shingles according to contract is the difference between the contract price and their value at the date of the seller's refusal to comply with a demand for performance. *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 28: 1007, 108 Pac. 621, — Wash. —

Failure in duty to passenger.

2. Counsel fees are not a proper element 28 L.R.A. (N.S.)

of compensatory damages in an action for wrongful ejection from a street car. *United Power Co. v. Matheny*, 28: 761, 90 N. E. 154, 81 Ohio St. 204. (Annotated)

Personal injuries; death.

New trial because of inadequacy of, see Appeal and Error, 33; New Trial, 1.

Relevancy of evidence as to, see Evidence, 43.

3. An award of \$30,000 to a miner, twenty-four years old when injured, and who was earning about \$150 per month, will be reduced on appeal to \$22,000, although the lower part of his body is paralyzed so that he can move about only on crutches and has no control over his bowels and urinary organs, where the testimony shows that time may effect a slight improvement in his condition. *McKenzie v. North Coast Colliery Co.* 28: 1244, 104 Pac. 801, 55 Wash. 495.

Injury to real property; trees.

Relevancy of evidence as to, see Evidence, 43.

Who entitled to, as between vendor and purchaser, see Trial, 17.

4. The measure of damages for permanent injuries to lands caused by the construction thereon of a public improvement without right, which injuries do not totally destroy such lands, is the difference between the actual cash value thereof at the time immediately preceding the injury and the actual cash value immediately after the injury, with legal interest thereon to the time of trial. *Boisé Valley Constr. Co. v. Kroeger*, 28: 968, 105 Pac. 1070, 17 Idaho, 384.

5. The measure of damages for the wrongful destruction of shade trees, the separable and independent value of which is nominal, is the difference between the value of the land before and after the destruction. *Cleveland School Dist. v. Great Northern R. Co.* 28: 757, 126 N. W. 995, — N. D. — (Annotated)

Eminent domain cases.

6. The owner of a farm, a part of which is permanently flooded by a government dam, must be compensated, in addition to the value of the land taken, for the lessened value of the farm, caused by the consequent cutting off of a private way across the lands of others, which is the only practicable outlet from the farm to the county road. *United States v. Welch*, 28: 385, 30 Sup. Ct. Rep. 527, 217 U. S. 333, 54 L. ed. 787. (Annotated)

Loss of profits.

7. The recoverable damages for breach of an executory contract to purchase stock goods to be manufactured are the lost profits on the contract, which are the difference between the agreed price and the fair market value of the goods at the time of the breach and the place for delivery, or, in case there is no market value at such place, some other place just to the vendee. *Lincoln v. Charles Alshuler Mfg. Co.* 28: 780, 125 N. W. 908, 142 Wis. 475.

DEATH.

- Presumption of, see Evidence, 7-9.
- Presumption as to cause of, see Evidence, 13.
- Evidence of letters of inquiry in regard to absentee, see Evidence, 48.
- Sufficiency of evidence to establish, see Evidence, 54.
- Liability for, under policy insuring against permanent disability, see Insurance, 11.
- Proof of death of absentee, see Witnesses, 5.

DEBTOR AND CREDITOR.

- Insolvency of debtor, see Bankruptcy.

DECEIT.

- See Fraud and Deceit.

DECREE.

- See Judgment.

DEEDS.

- Cancellation of, see Cancellation of Instruments, 2.
- As to covenants, see Covenants and Conditions.
- Estate conveyed by deed in trust for married woman, see Husband and Wife.
- Tax deed, see Taxes, 5, 6.

Description of parties.

A mere restraint on alienation is not sufficient to cause the word "heirs" in a grant to one and his heirs to be construed as meaning "children," so as to limit the interest of the first taker to a life estate. *Hauser v. St. Louis*, 28: 426, 170 Fed. 906, 96 C. C. A. 82.

DEFEASIBLE FEE.

- Creation of by will, see Wills, 8.

DEFENDANTS.

- Parties defendant, see Parties, 2-5.

DEFENSE.

- Error in entertaining motion to strike out separate offense, see Appeal and Error, 20.
- In action on negotiable paper, see Bills and Notes, 5, 6.
- To liability on contracts, generally, see Contracts, 31, 32.
- To criminal prosecution, see Criminal Law, 1.
- Burden of establishing, see Evidence, 2.
- To enforcement of covenant, see Injunction, 2.
- To liability on insurance policy, see Insurance, 9, 13.
- In libel suit, see Libel and Slander, 3.
- To liability for special assessment, see Limitation of Actions, 5.
- Striking out immaterial defense, see Pleading 3.

DEFINITENESS.

- Of contracts, see Contracts, 8.
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DELAY.

- In transmission of telegrams, see Telegraphs.

DELEGATION.

- Of master's duty to independent contractor, see Master and Servant, 24-26.

DELIVERY.

- By carrier, see Carriers, 11.
- Of personalty sold, see Sale, 1, 2.

DEMAND.

- As condition precedent to right of action, see Action or Suit, 1.
- Necessity of making demand for performance of option within reasonable time, see Contracts, 10.

DEMONSTRATIVE EVIDENCE.

- See Evidence, 29.

DEMURRER.

- See Pleading, 9, 10.

DEPOSITIONS.

- Admissibility in evidence, see Evidence, 25-27.
- Supplying loss of suppressed deposition by cross-examination of opposite party, see Witnesses, 3.

DESCRIPTION.

- Of beneficiaries in will, see Wills, 5, 6.

DEVISE.

- See Wills.

DIRECTION OF VERDICT.

- Construction of motion for, see Motions and Orders.
- In general, see Trial, 14, 15.

DIRECTORS.

- Imputing knowledge of, to bank, see Notice, 1.

DISCHARGE.

- Of employee, see Assumpsit, 1.
- In bankruptcy, see Bankruptcy, 6-9.
- Of mortgage, see Mortgage.

DISCOVERY AND INSPECTION.

- Certiorari to review order of inspection, see Certiorari.

A statute empowering a court to order an inspection of papers, and to enforce the order by contempt proceedings, does not apply to papers which are of such a private nature as not to be receivable in evidence. *State ex rel. Seattle General Contract Co. v. Superior Court*, 28: 516, 106 Pac. 150, 56 Wash. 649.

DISCREDITING.

- Of witnesses, see Witnesses, 4-6.

DISCRETION.

- Review of, on appeal, see Appeal and Error, 12.

DISCRIMINATION.

In license tax, see License, 8, 9.
In taxes generally, see Texas, 1.

DISMISSAL.

Of cross appeal, see Appeal and Error, 6.

Of condemnation proceeding, see Eminent Domain.

On demurrer to petition, see Estoppel, 4.

1. One who contracts to perform work for a railroad company cannot complain that an action against him and the railroad company for compensation alleged to be due a subcontractor was dismissed in favor of the railroad company, and permitted to go to verdict against him alone. *Evans v. Oregon & W. R. Co.* 28: 455, 108 Pac. 1095, — Wash. —.

2. The striking out of an improper party does not work a discontinuance of the case. *Shriner v. Craft*, 28: 450, 51 So. 884, — Ala. —.

DIVORCE AND SEPARATION.

Change of decree for alimony as impairment of contract obligation, see Constitutional Law, 10, 11.

A husband and wife lived together in the state within the meaning of a statute making that fact a prerequisite to jurisdiction of the state courts over a divorce proceeding, where they came into the state with the intention of making their home there, and after remaining a few days looking for apartments selected one and sent their belongings there, although before taking up a residence in the apartment, the husband left the state on business and never returned. *Winans v. Winans*, 28: 992, 91 N. E. 394, 205 Mass. 388.

DOCUMENTARY EVIDENCE.

See Evidence, 24-28.

DOGS.

See Animals.

DOMICIL.

Presumption as to domicile of unmarried son, see Evidence, 5.

DOUBLE TAXATION.

By imposition of license tax, see License, 6.

DRAINS AND SEWERS.

Validity of statute providing for front-foot assessment to pay for, see Constitutional Law, 9.

DROWNING.

Of person caused by log jam in stream, see Logs and Logging.

DUE PROCESS OF LAW.

See Constitutional Law.

DUES.

Of members of social clubs, see Clubs.
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DURESS.

Estoppel to avoid contract for, see Estoppel, 5.

A special written contract limiting a carrier's common-law liability which has been extorted from a shipper who rightfully declined to sign it, by means of a refusal to transport cattle already in the carrier's possession, unless such a contract was signed, is voidable at the shipper's election. *St. Louis & S. F. R. Co. v. Gorman*, 28: 637, 100 Pac. 647, 79 Kan. 643. (Annotated)

DYING DECLARATIONS.

Admissibility in evidence, see Evidence, 38.

DYNAMITE.

Presumption that explosion of, was cause of death, see Evidence, 13.

Death of employee caused by explosion of, see Evidence, 51, 52; Master and Servant, 4, 5; Proximate Cause, 3; Trial, 7, 8.

EJECTION.

Of passenger, see Carriers, 4; Evidence, 41.

EJECTMENT.

Service of summons in, as arresting running of limitations, see Limitation of Actions, 6.

Waiver of remedy in, and suit upon implied contract, see Contracts, 3.

One in lawful possession of land under a tax-sale certificate, who has made valuable improvements, cannot be evicted by the landowner, who has redeemed the land, until paid for the improvements. *McDonald v. Kelson*, 28: 1080, 98 Pac. 772, 79 Kan. 105.

ELECTION.

By devisee under will, see Parties, 5; Wills, 10.

ELECTION OF REMEDIES.

As to estoppel by inconsistent acts or claims in judicial proceedings, see Estoppel, 3, 4.

ELECTIONS.

1. The name of a registered voter whose registration papers have been destroyed by fire must, upon application by him made at any time before the forty-eight hours preceding the opening of the polls, be placed on the new registry list, without requiring him to register anew, where the poll books are not required by statute to be sent to the polls until forty-eight hours before the opening thereof, notwithstanding a statute prohibiting a registrar from placing the name of a voter on his register within thirty days of the election for which the registration is made, since such a voter is not, by the destruction of the registry list, placed in the category of one who has not registered. *State ex rel. Reid v. Lebleu*, 28: 989, 52 So. 849, 126 La. —.

2. A voter, by stamping a cross in a circle at the top of a column, under a party device, votes for all the candidates in such column, under a statute providing that a voter desiring to vote a straight ticket may stamp a cross in a circle under the device and in the column, above the candidates of the party for whom he desires to vote, and that such ballot shall be counted for all the candidates in the column, although he also stamps a cross in a circle opposite all of the names in such column except one, as the extra markings are without effect, the statute being mandatory. *Potts v. Folsom*, 28: 460, 104 Pac. 353, — Okla. —.

(Annotated)

ELECTRICITY.

Negligence of physician in use of, see Physicians and Surgeons, 2.

1. It is the duty of an electric light and power company having heavily charged wires suspended over a street upon which the moving of buildings of greater height than the wires is reasonably to be anticipated, to insulate the wires, or to take such other precautions as are necessary to guard against injury to one who is liable to be upon a building being so moved, and to be brought in contact with such wires, for a breach of which duty, resulting in injury, the company is liable, in the absence of contributory negligence upon the part of the injured party. *Winegarner v. Edison Light & P. Co.* 28: 677, 109 Pac. 778, — Kan. —.

2. An electric light and power company which, pursuant to a right granted by its franchise, maintains heavily charged electric wires over a street, and the employee of one who, pursuant to a license, is, to, the knowledge of the electric company, moving a building of greater height than such wires upon such street, are not licensees as to each other, so as to relieve the electric company of its duty to have its wires in a condition safe for the house mover's employee to handle. *Winegarner v. Edison Light & P. Co.* 28: 677, 109 Pac. 778, — Kan. —.

3. An electric railway company maintaining an unprotected third rail carrying a heavy current, on its right of way at a point where the right of way is securely fenced against intruders, is not liable for injury to a child who wanders through a gate maintained in the fence by an abutting property owner, and comes in contact with such rail, although there is nothing to distinguish the dangerous rail from the harmless ones. *Riedel v. West Jersey & S. R. Co.* 28: 98, 177 Fed. 374, — C. C. A. —.

(Annotated)

ELECTRIC RAILWAYS.

As carriers, see Carriers.

Contract to pay bonus to, see Contracts, 8, 18, 19; Evidence, 34.

EMERY WHEELS.

Master's duty to guard, see Master and Servant, 6, 7, 20.
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EMINENT DOMAIN.

Implied agreement of railroad to pay for land taken without first securing right, see Contracts, 3.

As to measure of damages, see Damages, 6.

A municipal corporation may dismiss proceedings to condemn land for a street after a verdict assessing damages for the land taken, if the benefits assessed did not equal the damages awarded as required by statute, so that the right of the property owner has not become complete and no process remains by which the verdict can be corrected. *District of Columbia v. Hess*, 28: 91, 35 App. D. C. 38.

(Annotated)

EQUALITY.

In license tax, see License, 8, 9.

In taxation, see Taxes, 1.

EQUAL PROTECTION AND PRIVILEGES.

See Constitutional Law, 2, 3.

EQUITY.

Review of decision in, see Appeal and Error, 18, 19.

Error in transferring action to chancery court, see Appeal and Error, 22.

As to cancelation of instruments, generally, see Cancelation of Instruments.

Admissibility of depositions in equitable proceeding, see Evidence, 25.

As to injunction, see Injunction.

As to reformation of instruments, see Reformation of Instruments.

1. Equity has jurisdiction of a suit to compel the removal of a structure from a sidewalk, which the owner claims the right to maintain under the authority of the municipality. *New York v. Rice*, 28: 375, 91 N. E. 283, 198 N. Y. 124.

Mistake as basis of jurisdiction.

Sufficiency of plea of mistake as against demurrer, see Pleading, 10.

2. An honest mistake of law on the part of both contracting parties, as to the effect of an instrument, which operates as a gross injustice to one party and gives an unconscionable advantage to the other, is one against which equity will afford relief. *Dolvin v. American Harrow Co.* 28: 785, 54 S. E. 706, 125 Ga. 699.

(Annotated)

To avoid multiplicity of suits.

3. A bill in equity will not lie in behalf of a receiver of a club against its members to recover from them dues owing under its by-law, and the purchase money of supplies received from it, since the claims are cognizable at law, and are not common in such sense that they can be joined to prevent a multiplicity of suits. *Rogers v. Boston Club*, 28: 743, 91 N. E. 321, 205 Mass. 261.

4. Claims by the receiver of a social club against its members for unpaid dues

cannot be joined in an equity proceeding against all to prevent a multiplicity of suits, but must be enforced by separate actions at law. *Rogers v. Boston Club*, 28: 743, 91 N. E. 321, 205 Mass. 261.

(Annotated)

Retaining jurisdiction.

5. A chancery court having assumed jurisdiction of a suit involving the right to compel a beneficiary under a will to elect between the provision in his favor and a claim to property covered by the will which he alleges belonged to him may retain the case to settle the amount of mesne profits to which he is entitled and the amount to be allowed those who had been in possession for betterments. *McDonald v. Shaw*, 28: 657, 121 S. W. 935, 92 Ark. 15.

ESTATE.

Created by will, see Wills, 7-9.

ESTOPPEL.

To raise question on appeal, see Appeal and Error, 11.

To restrain violation of restrictive covenant, see Covenants and Conditions, 4.

Burden of establishing, see Evidence, 2.

To object to admission of deposition, see Trial, 1.

Of municipality.

1. A municipal corporation which appoints a superintendent to supervise the building of a bridge for it, and accepts the work done under his supervision as well as the bridge, is estopped thereafter to deny liability for such work and bridge, because of irregularity in the appointment of the superintendent. *Matheny v. Eldorado*, 28: 980, 109 Pac. 166, 82 Kan. 720.

By laches, silence, or acquiescence.

2. Although acquiescence of a landowner in the construction of a railway on his land would preclude him from thereafter maintaining ejectment and from obtaining an injunction, it does not divest him of the title to the property taken, and is not inconsistent with an assumption on his part that the company would pay him a reasonable compensation therefor, and his consequent right to recover such compensation upon failure or refusal of the company so to recompense. *Boisé Valley Constr. Co. v. Kroeger*, 28: 968, 105 Pac. 1070, 17 Idaho, 384.

By inconsistency in acts or claims.

3. An assertion made by a litigant as a part of his defense to an action on a promissory note, that he is indebted thereon to a third person, not a party to the action, is not conclusive upon such litigant, when subsequently sued upon the note by such third person. *First Nat. Bank v. Duncan*, 28: 327, 101 Pac. 992, 80 Kan. 196.

(Annotated)

4. A theory of law advanced by counsel

for the defendant on the argument in an action wherein a demurrer to the petition is sustained, and the case thereupon dismissed without prejudice, at the request of the plaintiff, is not conclusive upon such defendant in a subsequent action involving the same matter between the same parties. *First Nat. Bank v. Duncan*, 28: 327, 101 Pac. 992, 80 Kan. 196.

By receiving benefits.

5. A party cannot voluntarily act upon a contract which he has been wrongfully constrained to sign, and voluntarily take the benefit of it, and then avoid it for duress. *St. Louis & S. F. R. Co. v. Gorman*, 28: 637, 100 Pac. 647, 79 Kan. 643.

Who affected.

6. A man whose participation in an act of mortgage by his wife of her separate property is shown only by a recital that came the said woman, wife of the said husband, "herein joined, aided, and authorized by her husband," will not be held to have consented to the inclusion in the mortgage of his separate property so that it will be bound thereby as against the claim of his subsequent mortgagee, although he may be personally estopped to deny that it is included. *W. F. Taylor Co. v. Sample*, 28: 289, 48 So. 439, 122 La. 1016.

(Annotated)

EVIDENCE.

Review on appeal of admission of hearsay evidence, see Appeal and Error, 14.

Curing of error in exclusion of, see Appeal and Error, 15.

Grant of continuance to secure testimony, see Continuance and Adjournment.

Judicial notice.

1. To warrant a judgment in a proceeding commenced by attachment, the attachment and return need not be offered in evidence, since the court may take judicial notice of them. *Slater v. Roche*, 28: 702, 126 N. W. 925, — Iowa, —.

Presumptions and burden of proof.

Presumptions on appeal, see Appeal and Error, 7-9.

Presumption of reasonableness of demand in mandamus case, see Mandamus, 7, 8.

Presumptive invalidity of contract as defense in action to enforce it, see Contracts, 32.

Sufficiency of presumption to take case to jury, see Trial, 3, 5.

2. The burden is upon the party who relies upon estoppel to prove clearly and unequivocally every fact essential to the estoppel. *Kroll v. Close*, 28: 571, 92 N. E. 29, 82 Ohio St. 190.

3. The burden of proving the existence of a confidential or fiduciary relation between brothers is upon the party asserting the existence of such relationship. *Crawford v. Crawford*, 28: 353, 67 S. E. 673, — Ga. —.

4. No presumption of a confidential or fiduciary relation between brothers arises from the fact of their relation, or from the facts that one is six years the senior of the other, that they were reared together, and that one attended a school taught by the other. *Crawford v. Crawford*, 28: 353, 67 S. E. 673, — Ga. —.

5. The home of his widowed mother will be presumed to be that of an unmarried son who, upon reaching majority, goes away to work, but makes such home his headquarters, in the absence of anything to show an intention to change it to another place. *Miller v. Sovereign Camp Woodmen of the World*, 28: 178, 122 N. W. 1126, 140 Wis. 505.

6. The identity of the several separate sheets of a will offered for probate is prima facie established where each sheet but the last, which bears the signature of the testator, with an incomplete sentence, and such parts when properly arranged effect a complete subject-matter. *Kirby v. Sellards*, 28: 270, 108 Pac. 73, 82 Kan. 291.

7. Proof of diligent search and inquiry is not required to establish the presumption of death when a person has absented himself from his home or place of residence for seven years. *Miller v. Sovereign Camp Woodmen of the World*, 28: 178, 122 N. W. 1126, 140 Wis. 505.

(Annotated)

8. The relatives of one who disappeared without explanation, and has remained absent from home for more than seven years, are not bound to follow up intelligence of a tangible and definite character as to his whereabouts to avoid its rebutting the presumption of death, if the source from which it comes is so corrupt and unreliable as to destroy its value. *Kennedy v. Modern Woodmen of America*, 28: 181, 90 N. E. 1084, 243 Ill. 560.

9. Mere failure of the relatives of one who disappeared without explanation, and remained absent from home for more than seven years, to follow up rumors that he had been seen in different places, and institute diligent inquiry in such places for him, is not sufficient to overcome the presumption of death arising from such absence. *Kennedy v. Modern Woodmen of America*, 28: 181, 90 N. E. 1084, 243 Ill. 560.

10. Attorneys who purchase from their clients, and resell the subject-matter of their employment, have the burden of proving, when sued by their clients for the resulting profits, that the original purchase price was fair. *Hamilton v. Allen*, 28: 723, 125 N. W. 610, 86 Neb. 401.

(Annotated)

11. That a will is drafted by a daughter of the testator, and that she is named therein as the executrix, does not raise a presumption of undue influence, where she is otherwise merely equally favored with the other children. *Kirby v. Sellards*, 28: 270, 108 Pac. 73, 82 Kan. 291. (Annotated) 28 L.R.A.(N.S.)

12. The presumption of innocence of one on trial for a crime is one of fact and of law, and no person can be convicted, even under a joint information, without proof of his individual guilt. *High v. State*, 28: 162, 101 Pac. 115, 2 Okla. Crim. Rep. 161.

13. The absence of direct evidence as to the cause of the death of an employee whose body was found near a building in which dynamite had been stored will not prevent a finding by the jury that it was caused by an explosion of dynamite by a lightning stroke, if known facts point to that inference. *Brown v. West Riverside Coal Co.* 28: 1260, 120 N. W. 732, — Iowa, —.

14. Failure of a device installed by a master to stop machinery in case a servant becomes caught therein to work when the need of it arises is prima facie evidence of negligence on the part of the master. *Scheurer v. Banner Rubber Co.* 28: 1207, 126 S. W. 1037, 227 Mo. 347.

15. The mere exclamation of a track hand immediately after he had dropped his corner of a hand car which a repair gang was removing from the track, that he did not mean to do so, is not sufficient to overcome the presumption of negligence arising from his act. *Cahill v. Illinois C. R. Co.* 28: 1121, 125 N. W. 331, — Iowa, —.

16. The mere fact that a railroad bridge was carried away by the high water of the creek which it spanned, taking with it a portion of a train, and killing a brakeman, does not place upon the railroad company the burden of disproving its negligence to avoid liability for the death of the employee. *Johns v. Pennsylvania R. Co.* 28: 597, 75 Atl. 408, 226 Pa. 319. (Annotated)

17. The fall of a scaffold upon which men are sent to work does not of itself show that it must have fallen because something was the matter with it, where it appears that at the time of the fall the men were trying to break the connection of a pipe, and were pressing against the scaffold with all their strength, which may have subjected it to excessive strain. *Robinson v. Consolidated Gas Co.* 28: 586, 86 N. E. 805, 194 N. Y. 37. (Annotated)

18. A telephone company is bound to negative only the negligence charged against it, where specific acts of negligence are charged in the complaint for failure promptly to make a connection for a customer, although the statute provides that in case of delay it has the burden of proof that such delay was not due to negligence on its part. *Volquardsen v. Iowa Teleph. Co.* 28: 554, 126 N. W. 923, — Iowa, —.

19. Where a hired horse injured while in possession of the bailee was at the time in charge of a driver furnished by the owner, the bailee is not bound to establish his freedom from negligence in the first instance, but the burden of showing his negligence is on the owner. *Weller v. Camp*, 28: 1106, 52 So. 929, — Ala. —.

20. One who desires a decree setting

aside a deed of real estate because a portion of it was secured by false representations to apply only to such portion, upon return of a proportionate part of the purchase money, must offer evidence which will enable the court to make an apportionment, and upon his failure to do so, the court may deal with the transaction as an entirety. *Kathan v. Comstock*, 28: 201, 122 N. W. 1044, 140 Wis. 427.

21. Unimproved and unoccupied land is deemed to be in possession of the holder of the legal title. *Butler v. Smith*, 28: 436, 120 N. W. 1106, 84 Neb. 78.

22. A legal and valid conveyance of real estate by tax deed carries with it a prima facie right of possession, and, where the property is vacant and unoccupied, the constructive possession of the premises is deemed to be in the holder of such title. *Steltz v. Morgan*, 28: 398, 101 Pac. 1057, 10 Idaho, 368.

Best and secondary.

23. The material contents of an existing book which is obtainable cannot be proven by parol testimony, as the book itself is the best evidence. *Sayre v. Woodyard*, 28: 388, 66 S. E. 320, 66 W. Va. 288.

Documentary evidence.

Right to object to admission of deposition, see Trial, 1.

Supplying loss of suppressed deposition by cross examination of party, see Witnesses, 3.

24. An architect's certificate provided for by a building contract is admissible in evidence in an action for breach of the contract. *Shriner v. Craft*, 28: 450, 51 So. 884, — Ala. —.

25. Depositions may be used in the consideration by the probate court of claims against a decedent's estate, where the statutes provide for the taking of depositions in suits at law and that contested claims shall be tried in the probate court as other suits at law. *Re McVicker*, 28: 1112, 91 N. E. 1041, 245 Ill. 180.

26. A deposition which contains competent evidence as to matters in issue at the time it was taken cannot be suppressed, in whole or in part, after trial begun on an amended declaration, on the ground that such amended declaration put in issue additional matter, where it also sets up, in part at least, the same matter as to which the deposition contained competent evidence. *Sayre v. Woodyard*, 28: 388, 66 S. E. 320, 66 W. Va. 288.

27. A deposition which contains competent evidence on matters in issue at the time it was taken was not rendered inadmissible as to such evidence, by the fact that the amended declaration, on which the trial was had, put in issue matter in addition to that as to which the deposition contained competent evidence. *Sayre v. Woodyard*, 28: 388, 66 S. E. 320, 66 W. Va. 288.

28. Notes executed subsequent to the alleged assignment, by the payee thereof, of 28 L.R.A.(N.S.)

other notes to the maker of such subsequent notes, which were discounted and paid, are admissible in an action for an accounting as to the prior notes, which had been redelivered to the assignor for collection, as tending to discredit the assignment to the plaintiff of the notes as to which an accounting is demanded. *Sayre v. Woodyard*, 28: 388, 66 S. E. 320, 66 W. Va. 288.

Demonstrative evidence.

29. That a sciagraph of an injured hip was taken five years after the injury does not render it inadmissible in evidence upon the question of the character of the injury. *Bonnet v. Foote*, 28: 136, 107 Pac. 252, 47 Colo. 282.

Parol.

See also supra, 23.

30. Parol evidence is not admissible to vary the specific terms as to the time at which an obligation becomes due. *Boisé Valley Constr. Co. v. Kroeger*, 28: 968, 105 Pac. 1070, 17 Idaho, 384.

31. Where one devises a portion of his estate and there is property upon which the will can operate, evidence is not admissible for the purpose of enlarging the devise so as to include property belonging to another. *McDonald v. Shaw*, 28: 657, 121 S. W. 935, 92 Ark. 15.

32. Parol evidence is not admissible to show that testator did not intend an instrument executed in pursuance of the formal requirements of the statute of wills to be a will. *Re Kennedy*, 28: 417, 124 N. W. 516, 159 Mich. 548. (Annotated)

33. As between a bank holding a note and its immediate indorser in blank, parol evidence is admissible to show that he indorsed as its agent to transfer title to the note, including the fact that he sold certain property to the bank to be sold to the maker, and that the note was taken in his name and indorsed to the bank merely for its accommodation in the transaction. *First Nat. Bank v. Reinman*, 28: 530, 125 S. W. 443, — Ark. —. (Annotated)

34. Parol evidence is admissible to explain what is meant by the term "other consideration" in a contract whereby a landowner agrees to pay a bonus to a railway company in consideration of \$1 and other consideration. *Boisé Valley Constr. Co. v. Kroeger*, 28: 968, 105 Pac. 1070, 17 Idaho, 384.

Opinions and conclusions.

35. Upon the question of negligence on the part of a bailee of a horse, which resulted in its injury, opinion evidence is not admissible as to whether or not the vehicle was properly loaded and the driver was acting under the direction of the bailee, such questions being for the decision of the jury. *Weller v. Camp*, 28: 1106, 52 So. 929, — Ala. —.

Hearsay; declarations: res gestæ.

36. One receiving upon a trial the benefit of a declaration of an absent witness

through the admission of his opponent that he had heard of it takes it subject to the same conditions and limitations which would attach to it had the declarant been called as a witness. *Kennedy v. Modern Woodmen of America*, 28: 181, 90 N. E. 1084, 243 Ill. 560.

37. In defense of a prosecution for forgery of a will, evidence is admissible of declarations of the testator indicating an intent to execute a will of the tenor of that alleged to have been forged, if made at a period not so remote from the date of the will as to render them immaterial. *State v. Ready* (N. J. Err. & App.) 28: 240, 75 Atl. 564, — N. J. —. (Annotated)

38. That at the time of making a declaration declarant stated that he did not expect to live does not render the declaration admissible in evidence as a dying declaration, if all his other conversations and acts tend to show that he did not expect to die. *Tibbs v. Com.* 28: 665, 128 S. W. 871, — Ky. —.

Relevancy and materiality.

Relevancy and materiality under particular pleading, see *infra*, 57.

Evidence to discredit witness, see *Witnesses*, 4-6.

39. Parol testimony of usage or custom, either general in the community or special between the people engaged in the particular trade or business, is not admissible to show that an unconditional acceptance of an order to ship goods was subject to the exigencies of transportation and to the further condition that if the goods could not be shipped within a reasonable time the contract was no longer to be obligatory. *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 28: 1007, 108 Pac. 621, — Wash. —.

40. A question propounded plaintiff in an action for an accounting for notes delivered to defendant's intestate for collection, as to whether certain items in an account previously rendered defendant and offered in evidence by him represented or was intended to represent the notes as to which an accounting was demanded, was properly rejected, as the question of plaintiff's intent was not material, and it was for the court, or the jury instructed by the court, to determine whether the declaration or any of the items in the account were supported by the evidence. *Sayre v. Woodyard*, 28: 388, 66 S. E. 320, 66 W. Va. 288.

41. Evidence tending to show that passengers left a street car because of the conduct of other passengers, and that in so doing they complained to the conductor or within his hearing of such conduct, is admissible in an action by the latter passengers to recover damages for unlawful ejection from the car, as part of the *res gesta*, and as tending to explain the motive of the conductor, irrespective of whether or not such complaints were made within the hearing of the ejected passengers. *United Power Co. v. Matheny*, 28: 761, 90 N. E. 154, 81 Ohio St. 204.
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42. Evidence of the prices realized upon a resale by attorneys at a large profit of an undivided half interest in land subject to a life estate, purchased from their clients, is admissible in a suit by the clients to recover the profits realized by such resale, and may be considered in determining whether the price paid by the attorneys was fair, where their witnesses have testified to the changes in value in the meantime, and that the undivided interest had no market value at the time of the original purchase. *Hamilton v. Allen*, 28: 723, 125 N. W. 610, 86 Neb. 101.

43. Testimony as to the actual market value of shade trees is not admissible on the question of damages, in an action for their destruction, as the damages are measured by the deterioration in the value of the land. *Cleveland School Dist. v. Great Northern R. Co.* 28: 757, 126 N. W. 995, — N. D. —.

44. Evidence of the shortening of the leg is admissible upon the question of damages in an action against a surgeon for negligent failure properly to diagnose a fracture of the neck of the femur, where there is sufficient evidence in the case to establish the negligence. *Bonnet v. Foote*, 28: 136, 107 Pac. 252, 47 Colo. 282.

45. Evidence of the result of an examination of a hip, made five years after defendant was called upon to treat it, is admissible in an action against him for malpractice in failing to discover that it was fractured, in corroboration of evidence that its condition immediately after the injury tended to show a fracture. *Bonnet v. Foote*, 28: 136, 107 Pac. 252, 47 Colo. 282.

46. Evidence of an examination of the foundation of a bridge which gave way, made five months after the accident, when conditions had so far changed that it could not be relied on as proof of the conditions existing before the bridge fell, is not admissible upon the question of negligence in the construction or maintenance of the bridge. *Johns v. Pennsylvania R. Co.* 28: 591, 75 Atl. 408, 226 Pa. 319.

47. One suing for slander in being charged by another with setting fire to his building cannot be permitted to testify that he never made threats to burn the building for the purpose of contradicting witnesses who have testified that they communicated to defendant, before the fire, the fact that they had heard plaintiff make such threats. *Edwards v. Kevil*, 28: 551, 118 S. W. 273, 133 Ky. 392.

48. Evidence of having written letters subsequent to the commencement of an action on a policy of insurance upon the life of one who disappeared without explanation, and has not been heard from for more than seven years, making inquiry as to the presence of the insured in a certain place within the seven years, and about the time an informant claimed to have seen him there, is admissible in the action. *Kennedy v. Modern Woodmen of America*, 28: 181, 90 N. E. 1084, 243 Ill. 560.

Weight and sufficiency.

Review of facts on appeal, see Appeal and Error, 16-19.

Sufficiency of evidence to go to jury, see Trial, 3-5.

Sufficiency of, to justify direction of verdict, see Trial, 14.

49. The jury is not absolutely bound by the testimony of a witness, although it is not contradicted by direct evidence, where the evidence itself indicates that it is unworthy of belief. *Kennedy v. Modern Woodmen of America*, 28: 181, 90 N. E. 1084, 243 Ill. 560.

50. The jury may find negligence where one of the men lifting a hand car from the track prematurely drops it without warning, to the injury of a coservant, in violation of the custom not to drop the car until ordered to do so after all are ready to act together. *Cahill v. Illinois C. R. Co.* 28: 1121, 125 N. W. 331, — Iowa, —.

51. To maintain an action for the death of an employee through the explosion of dynamite negligently stored in a room provided for his use, plaintiff is not bound to demonstrate the manner in which the explosives were ignited. *Brown v. West Riverside Coal Co.* 28: 1260, 120 N. W. 732, — Iowa, —.

52. A master may be found to be negligent in using a single room of a small shanty for the convenience and shelter of workmen, for the storage of dynamite, and for the installation of a telephone, the electricity from the wires of which may cause an explosion of the dynamite. *Brown v. West Riverside Coal Co.* 28: 1260, 120 N. W. 732, — Iowa, —.

53. Evidence of witnesses that they did not hear signals given by a railroad train for a street crossing will not establish negligence on the part of the railroad company where the train operatives testify positively that they were given. *Anspach v. Philadelphia & R. R. Co.* 28: 382, 74 Atl. 373, 225 Pa. 528.

54. One seeking to recover on a policy of insurance upon the life of one who disappeared without explanation, and has been absent from home for more than seven years, is not bound to satisfy the jury of his death beyond a reasonable doubt, a preponderance of evidence being sufficient. *Kennedy v. Modern Woodmen of America*, 28: 181, 90 N. E. 1084, 243 Ill. 560.

55. The presence of blood in the urine does not constitute sufficient evidence of a complete parting or solution of the covering or skin of the kidney to sustain a conviction of statutory wounding. *State v. Gibson*, 28: 965, 68 S. E. 295, — W. Va. —.

56. The proof of *corpus delicti* is not sufficient to support a conviction of larceny, where it merely shows that certain goods, formerly part of the stock of a merchant, were found in possession of accused, without anything to show that they were stolen, or were not sold in due course

of trade. *Sanders v. State*, 28: 536, 52 So. 417, — Ala. —. (Annotated)

Admissibility under particular pleadings.

57. In an action on an insurance policy which required arbitration of loss in case of dispute as a condition precedent to suit thereon, the insured, under a petition alleging due performance of the conditions of the policy on his part, and a general denial by way of reply to an answer alleging that a dispute arose as to the amount of loss and that the same had never been appraised as provided by the policy, may prove that he appointed an appraiser in good faith, and that the two appraisers were unable to agree upon an umpire, for which reason no appraisal was made. *German-American Ins. Co. v. Jerrils*, 28: 104, 108 Pac. 114, 82 Kan. 320.

EXAMINATION.

Of witnesses, see Witnesses, 2, 3.

EXCEPTIONS.

To raise question on appeal, see Appeal and Error, 5.

In general, see Trial, 1, 2.

EXECUTION.

1. A writ of fieri facias in the hands of an officer for execution is, under a statute providing that an execution shall be a lien "upon all the personal estate of which the judgment debtor is possessed, or to which he is entitled," a lien upon a legacy given to the debtor, although it is in the hands of the executor. *Park v. McCauley*, 28: 1036, 67 S. E. 174, — W. Va. —.

2. W. Va. Code 1906, chap. 141, § 2, providing that notice of the issuance and placing in the hands of an officer of an execution is sufficient to fix liability on one owing money to a judgment debtor, is not modified by § 11 thereof, providing that, if such third person is liable at the time of the service on him of a summons to answer a suggestion to enforce the execution lien, he shall be required to pay, so as to relieve from liability one who, with notice of the issuance and placing in the hands of the officer of an execution against a judgment debtor, paid the judgment debt or before issuance of the suggestion and summons to answer it, since the latter section does not create a lien, but merely provides a method of enforcing the antecedent lien of the execution. *Park v. McCauley*, 28: 1036, 67 S. E. 174, — W. Va. —.

3. An execution issued upon a judgment rendered in a justice of the peace court, although not a court of record, has the same effect as a lien as one issued from a court of record, notwithstanding a statute expressly controlling justices' courts; and a contrary intent is not shown by a statute providing for the filing in a specified court of record of a transcript of the justice's docket, and the issuing of execution thereon with like effect as of a judg-

ment of that court, since such statute merely provides a discretionary method of issuing execution. *Park v. McCauley*, 28: 1036, 67 S. E. 174, — W. Va. —.

EXECUTORS AND ADMINISTRATORS.

Review of facts upon appeal from allowance of claim against decedent's estate, see Appeal and Error, 19.

Review on appeal of allowance for funeral expenses, see Appeal and Error, 12.

Reducing on appeal allowance for funeral expenses, see Appeal and Error, 32.

Use of depositions in consideration of claims against decedent's estate, see Evidence, 25.

Execution as lien upon legacy in hands of executor, see Execution, 1.

Binding effect on persons not parties of decree settling executor's accounts, see Judgment, 4.

1. An executor who, under the mistaken belief that the estate is solvent, pays a claim in full, may, upon ascertaining the fact of its insolvency, recover the excess over the portion equitably due the claimant. *Woodruff v. H. B. Clafin Co.* 28: 440, 91 N. E. 1103, 198 N. Y. 470. (Annotated)

2. That the executor, after paying a claim against the estate in full, carries on decedent's business for a time at a loss, does not prevent his recovering the overpayment in case the estate proves to be insolvent, if it is not made to appear that such conduct in any manner affected the respective rights or relations of the executor and claimant. *Woodruff v. H. B. Clafin Co.* 28: 440, 91 N. E. 1103, 198 N. Y. 470.

EXPLOSIONS AND EXPLOSIVES.

Of bottle of carbonated beverage, see Trial, 4, 5.

Negligence of master in storage of explosives, see Evidence, 13, 51, 52; Master and Servant, 4, 5; Proximate Cause, 3; Trial, 7, 8.

EX POST FACTO LAW.

See Constitutional Law, 1.

EXTENSION.

Of note, see Bills and Notes, 3, 4.

FACTS.

Review of, on appeal, see Appeal and Error, 16-19.

FALSE REPRESENTATIONS.

See Fraud and Deceit.

FELLOW SERVANTS.

Assumption of risk of negligence of, see Master and Servant, 15.

In general, see Master and Servant 17, 18.

Who are, see Master and Servant, 19, 20.

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FIDUCIARY RELATION.

Of real estate agent, see Brokers.

Necessity that patient have independent advice in making contract with physician for services, see Contracts, 24.

Burden of proving existence of, between brothers, see Evidence, 3, 4.

FIERI FACIAS.

See Execution.

FINALITY OF DECISION.

For purpose of appeal, see Appeal and Error, 1.

FINDINGS.

Review of, on appeal, see Appeal and Error, 18, 19.

By court, see Trial, 21.

By jury, see Trial, 22, 23.

FIRE DEPARTMENT.

Mandamus to mayor to compel suspension of chief of, see Mandamus, 1, 2.

FIRE ESCAPES.

Negligence of independent contractor erecting, see Master and Servant, 25, 26.

Master's duty to inspect fire escapes erected by independent contractor, see Trial, 11.

FIRE INSURANCE.

See Insurance.

FIRES.

Injunction to compel municipality to extinguish fire in mine, see Injunction, 1.

Proximate cause of loss by, see Proximate Cause, 1.

FIXED LIABILITY.

What constitutes fixed liability against bankrupt, see Bankruptcy, 5.

FIXTURES.

Tenant's rights as to, see Landlord and Tenant.

FLOOD.

Destruction by, of property in hands of carriers, see Carriers, 11.

FLOOD WATERS.

Duty of builder of bridge to provide for, see Trial, 18; Waters, 4.

F. O. B.

F. O. B. sale, see Sale, 4.

FOREIGN JUDGMENT.

See Judgment, 5.

FORFEITURE.

Of insurance policy, see Insurance.

Of oil and gas lease, see Mines, 4, 5.

Of land contract for default in payment of instalment, see Vendor and Purchaser, 2.

FRANCHISE.

- Imposition of license tax on, see License, 4-6, 10, 11.
- Taxation of, see Municipal Corporations, 1; Taxes, 1, 3.

FRAUD AND DECEIT.

- Right of appellate court to pass upon merits of plea of, see Appeal and Error, 10.
- Effect of discharge in bankruptcy on fraudulent debt, see Bankruptcy, 8, 9.
- Of agent in reissuing note after maturity, see Bills and Notes, 4.
- Presumption that contract is fraudulent as defense in action to enforce it, see Contracts, 32.
- Liability of officers of corporation issuing fraudulent prospectus, see Corporations.
- Effect of, on running of limitations, see Limitation of Actions, 3.
- In location of mine, see Mines, 2.
- Sufficiency of pleading to show fraud which will prevent bar of limitations, see Pleading, 4.
- Rescission of land contract for, see Vendor and Purchaser, 4.

1. The purchase by an insolvent of goods on credit without disclosing the facts that he has given a mortgage upon his present and future property, to secure an existing indebtedness, is such fraud as to give the vendor a right to avoid the sale and sue to recover the property, or to recover the value of the goods from the purchaser in an action for fraud, with the remedies afforded by statute in such cases, or to proceed against him in bankruptcy. *Louisville Dry Goods Co. v. Lanman*, 28: 363, 121 S. W. 1042, 135 Ky. 163.

2. One who makes representations to another of material facts, for the purpose of inducing that other to enter into contractual relations with him, and which are liable to accomplish the purpose without want of ordinary care on the part of such other, is bound at his peril to know whereof he speaks. *Kathan v. Comstock*, 28: 201, 122 N. W. 1044, 140 Wis. 427.

FREIGHT CARRIERS.

- See Carriers, 9-14.

FRIGHT.

- Of horse, see Highways, 5, 7.

FULL FAITH AND CREDIT.

- See Judgment, 5.

FUNERAL EXPENSES.

- Review on appeal of allowance for, see Appeal and Error, 12.
- Reducing allowance for, on appeal, see Appeal and Error, 32.

GAS.

- Oil and gas lease, see Cancellation of Instruments, 1; Mines, 3-5.

GRANT.

- Of land under water, see Waters, 1.
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GUARDIAN AND WARD.

- Committee of insane persons, see Incompetent Persons.

HARMLESS ERROR.

- See Appeal and Error, 20-31.

HEALTH.

- Police power as to, generally, see Constitutional Law, 9.

HEARSAY.

- Evidence of, see Evidence, 36-38.

HEIRS.

- Meaning of word "heir" in deed, see Deeds.

HEPBURN ACT.

- See Carriers, 13.

HIGHWAYS.

- As to bridges, see Bridges.
- Crossing of railroads by, see Constitutional Law, 4, 8; Municipal Corporations, 3; Railroads, 6-9.
- Cutting off of access to highway as element of damages in eminent domain case, see Damages, 6.
- License tax for use of by telephone company, see License, 6.

Obstruction.

- Jurisdiction of equity of suit to remove structure from sidewalk, see Equity, 1.

1. A municipal corporation which owns the fee of its streets has no implied authority to permit the erection by an abutting owner of a solid wall of masonry extending 6 or 7 feet onto the sidewalk, for the convenience of its building and in keeping with its architectural design, although by reason of its decorative and artistic appearance it enhances the attractiveness of the street. *New York v. Rice*, 28: 375, 91 N. E. 283, 198 N. Y. 124. (Annotated)

2. A demand by a municipal corporation which has given an illegal permit to maintain a structure on the sidewalk, that it be removed, is sufficient notice of revocation of the permit. *New York v. Rice*, 28: 375, 91 N. E. 283, 198 N. Y. 124.

3. An abutting owner cannot interfere to prevent the construction of a subway in the street for a car line, however seriously he may be inconvenienced thereby, where the public officers charged with the control of such matters have authorized such construction. *State ex rel. Dawson v. Parsons Street R. & E. Co.* 28: 1082, 105 Pac. 704, 81 Kan. 430.

Liability for injuries on.

- Negligence of person injured by automobile, see Automobiles.
- Liability for injury by electric wires in highway, see Electricity, 1, 2.
- Notice to city of injury to municipal employee in street, see Municipal Corporations, 5.
- 4. A step 4½ inches high and 10½ wide,

placed on the sidewalk against a building, to facilitate access to it, is not an obstruction to the walk which will render the municipality liable for permitting its presence there in case a pedestrian falls over it, to his injury. *Richmond v. Lambert*, 28: 380, 68 S. E. 276, — Va. —.

5. A reel of lead pipe needed for its work, which is placed by a telephone company in line with its poles near the curb of a street in which it is engaged in stringing its wires, under lawful authority from the municipality, is not an unlawful obstruction to travel, which will render it liable for injuries caused by a traveler's horse becoming frightened at it, although it is of such appearance as would be likely to frighten well-broken horses not accustomed to it. *Simonds v. Maine Teleph. & Teleg. Co.* 28: 942, 72 Atl. 175, 104 Me. 440.

6. A property owner cannot escape liability for injury to a pedestrian through ice formed on the sidewalk from water cast thereon from a pipe constructed by him, because at the time of the injury the property was in possession of a tenant. *Maloney v. Hayes*, 28: 200, 91 N. E. 911, 206 Mass. 1. (Annotated)

7. The driver of a horse approaching an appliance which a telephone company is lawfully using in a highway is bound to foresee that the horse may be frightened at it, and to take measures to avoid or prevent the possible consequences. *Simonds v. Maine Teleph. & Teleg. Co.* 28: 942, 72 Atl. 175, 104 Me. 440.

HOMESTEAD.

Effect of acceptance of option to purchase given by husband on wife's declaration of homestead made with notice of option, see *Contracts*, 9.

HOMICIDE.

Capacity to commit, see *Criminal Law*, 1.

Sufficiency of warrant of commitment, see *Criminal Law*, 2.

Murder of insured, see *Insurance*, 9; *Pleading*, 8.

1. Death resulting from the violation of a municipal ordinance is not within the meaning of a statute defining manslaughter as the unintentional killing of another while the slayer is in the commission of some unlawful act. *State v. Collingsworth*, 28: 770, 92 N. E. 22, 82 Ohio St. 154. (Annotated)

2. Inflicting upon another a wound not calculated to endanger or destroy life, but which, because of improper treatment, does have that effect, does not render one guilty of murder. *Tibbs v. Com.* 28: 665, 128 S. W. 871, — Ky. —. (Annotated)

3. A homicide resulting from the running of fire apparatus through a crowd in answer to a false alarm turned in by the participants in the run, for the avowed purpose of making the run to see the people

scatter, is not excusable under a statute providing that homicide shall be excusable when committed by accident, or in doing any other lawful act by lawful means with the usual and ordinary caution, and without unlawful intent. *State v. Brecount*, 28: 187, 107 Pac. 763, 82 Kan. 195.

HORSES.

Injury to, while in possession of bailee, see *Evidence*, 19.

Injury to, in hands of bailee, see *Evidence*, 35.

Fright of, on highway, see *Highways*, 5, 7.

Injury at railroad crossing in attempting to stop runaway horse, see *Trial*, 20.

In general, see *Animals*.

HOTELS.

See *Innkeepers*.

HUSBAND AND WIFE.

Increasing penalty of bond in prosecution for abandonment, see *Constitutional Law*, 1.

Restraint upon alienation upon grant of fee in trust for married woman, see *Covenants and Conditions*, 2.

As to divorce, see *Divorce and Separation*.

Effect of one spouse joining in execution of other's mortgage to convey former's separate property included in the instrument, see *Estoppel*, 6.

Effect of record of mortgage on wife's property as notice that husband's property is included therein, see *Records and Recording Laws*.

Under a deed in trust for the sole and separate use of a married woman and her heirs, but not her assigns, she acquires an equitable fee, which, upon the death of her husband, becomes an absolute estate, which she may assign at will. *Hauser v. St. Louis*, 28: 426, 170 Fed. 906, 96 C. C. A. 82.

ICE.

On sidewalk, see *Highways*, 6.

IDENTITY.

Presumption of, see *Evidence*, 6.

ILLEGAL CONTRACTS.

See *Contracts*.

ILLNESS.

Right of servant to recover for time lost through illness, see *Master and Servant*, 1.

IMPAIRMENT OF OBLIGATIONS.

See *Constitutional Law*, 10, 11.

IMPEACHMENT.

Of witness, see *Witnesses*, 4-6.

IMPLIED AGREEMENTS.

See *Contracts*, 3.

IMPROVEMENTS.

Allowance for, in ejectment, see Ejectment.

Retaining jurisdiction to settle amount of allowance for, see Equity, 5.

IMPUTED NOTICE.

See Notice.

INCOMPETENT PERSONS.

Competency to commit crime, see Criminal Law, 1.

Incompetency of witness, see Witnesses, 1.

The conservator of the estate of one who becomes insane after executing a will which bequeathed money and securities of a certain amount to specified legatees, subject to a contract, by which he had placed that amount with a bank, to be managed, the income to be paid to testator on demand, and the property accounted for to testator's estate after his death, has no authority to demand the income, so as to adeem the legacies, if it is not necessary, either for the conservation of the estate or the support of the ward. *Wilmerton v. Wilmerton*, 28: 401, 176 Fed. 896, 100 C. C. A. 366.

(Annotated)

INCONSISTENCY.

Estoppel by, see Estoppel, 3, 4.

INDEBTEDNESS.

Limitation of state indebtedness, see State.

INDEPENDENT CONTRACTORS.

Liability for acts of, see Master and Servant, 24, 26; Trial, 11.

INDICTMENT, INFORMATION, AND COMPLAINT.

1. An indictment for malicious cutting and wounding, with intent to maim, disfigure, and kill, need not specify the instrument with which the injury was inflicted. *State v. Gibson*, 28: 965, 68 S. E. 295, — W. Va. —.

2. Under an indictment charging cutting and wounding, with intent to maim, disfigure, and kill, thereby causing great bodily harm, proof of an injury inflicted otherwise than by cutting or wounding cannot be made, although the statute, besides inhibiting stabbing, cutting, and wounding, makes it a felony for a person maliciously to cause another bodily harm by any means, with intent to maim, disfigure, or kill him. *State v. Gibson*, 28: 965, 68 S. E. 295, — W. Va. —.

INDORSEMENT.

Of note, see Bills and Notes, 2.

On insurance policy as part of contract, see Insurance, 1.

INFANTS.

Liability for injury by electricity to trespassing infants, see Electricity, 3.

1. An infant who has paid for and re-

ceived stock for which he subscribed in a corporation may, during minority, rescind the contract and recover the money paid, upon tendering back the stock which still remains in his possession. *Wuller v. Chuse Grocery Co.* 28: 128, 89 N. E. 796, 241 Ill. 398.

(Annotated)

2. The return to a corporation of stock which has been purchased by an infant is effected upon his rescission of his contract, by the cancelation of the certificate which was issued to him. *Wuller v. Chuse Grocery Co.* 28: 128, 89 N. E. 796, 241 Ill. 398.

(Annotated)

INFORMATION.

See Indictment, etc.

INFRINGEMENT.

Of trademark, see Trademarks.

INJUNCTION.

Dismissal on appeal of bill for, see Appeal and Error, 34.

Waiver of right to, in bringing suit on implied contract, see Contracts, 3.

By Federal to state court, see Courts, 2, 3.

Against violation of building restrictions in covenant, see Covenants and Conditions, 4, 5.

Who may enjoin violation of building restriction, see Covenants and Conditions, 7.

Against filing of rates of interstate commerce commission, see Interstate Commerce Commission.

Who may enjoin violation of building restriction, see Covenants and Conditions, 7.

Right of one whose only title is under tax deed to one whose heir he is, to enjoin one holding under government title, see Cloud on Title.

Joinder of parties to restrain violation of covenant, see Parties, 1.

Mandatory Injunction.

1. A mandatory injunction will not be issued to compel a municipal corporation to extinguish a fire in a mine within its limits, which is on private property and was started without any wrongdoing on its part. *Cameron v. Carbondale*, 28: 494, 76 Atl. 198, 227 Pa. 473.

2. One who deliberately violates building restrictions placed upon his lot for the benefit of a district in a city cannot avoid a mandatory injunction to compel the modification of his building so as to comply with the restrictions, on the theory that the loss caused by it will be disproportionate to the good accomplished. *Stewart v. Finkelstone*, 28: 634, 92 N. E. 37, 206 Mass. 28.

Covenants.

See also *supra*, 2.

3. Equity will enforce by injunction a covenant in a deed of conveyance, restricting the use of the land conveyed to the building and maintenance of a family residence, where such covenant is still of sub-

stantial value to the dominant estate, and it affirmatively appears that the neighborhood continues to be a locality suitable for residential purposes, notwithstanding a change in the general condition of the neighborhood. *Brown v. Huber*, 28: 705, 83 N. E. 322, 80 Ohio St. 183. (Annotated)

Taking of, or injury to, real property.

4. Injunction will lie against the obstruction of a passageway in such a manner as to destroy it by adverse user, although substantial damage has not yet been caused by the obstruction. *Danielson v. Sykes*, 28: 1024, 109 Pac. 87, — Cal. —.

INNKEEPERS.

A guest departing from a hotel acts at his own risk in leaving money with the clerk, to be deposited in the safe until he calls for it, and cannot hold the hotel keeper responsible in case it cannot be found when he returns for it. *Oxford Hotel Co. v. Lind*, 28: 495, 107 Pac. 222, 47 Colo. 57.

(Annotated)

INNOCENCE.

Presumption of, see Evidence, 12.

INSANITY.

See Incompetent Persons.

INSOLVENCY.

Of social club, see Appeal and Error, 1; Clubs, 1; Equity, 3, 4.

As to bankruptcy, see Bankruptcy.

INSPECTION.

Master's duty as to, see Master and Servant, 8, 9, 25; Trial, 11.

See also Discovery and Inspection.

INSTRUCTIONS.

See Trial, 1-20.

INSURANCE.

Right of holder of tontine policy to accounting on its maturity, see Accounting.

Error in instructions in action on policy, see Appeal and Error, 29.

Evidence in action on policy, see Evidence, 48, 54, 57.

Right to enter judgment for amount alleged to be due by tontine policy holder where company refuses to account, see Judgment, 1.

Necessary parties in suit by holder of tontine policy for accounting, see Parties, 4.

Relief under pleadings, see Pleading, 1. Striking out immaterial denial, see Pleading, 3.

Sufficiency of pleading, see Pleading, 1, 5, 8.

Release of surety on bond of insurance agent, see Principal and Surety, 1.

Directing verdict for defendant, see Trial, 14.

Admissibility of evidence to impeach witness, see Witnesses, 5.

Construction of policy generally.

1. An indorsement on an insurance 28 L.R.A.(N.S.)

policy, designating its kind, is no part of it, and insured cannot be held to have relied on it rather than on the terms of the instrument. *Hill v. Travelers' Ins. Co.* 28: 742, 124 N. W. 898, — Iowa, —.

Use and care of property.

2. A warranty in an insurance policy that insured will use due diligence that the automatic sprinkler system shall at all times be maintained in good working order is not broken by the temporary disconnection of the system for the purpose of making extensions to it, where the work of making the alterations is prosecuted with due diligence. *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.* 28: 593, 106 Pac. 194, 56 Wash. 681. (Annotated)

3. Temporary breach by an insured of his warranty that due diligence will be used that the automatic sprinkler system shall at all times be maintained in good working order will not prevent his recovering on the policy, if, at the time of the loss, it was in good working order, and the breach had nothing to do with the loss,—at least, where there is no express provision in the policy for its becoming void for such breach, while such provisions are found in connection with other conditions and warranties. *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.* 28: 593, 106 Pac. 194, 56 Wash. 681.

Inventory.

4. The loss of an inventory by theft from an unlocked safe while the building in which such safe was located was open for business, and the consequent failure to produce the same, does not invalidate a fire insurance policy containing an iron safe clause, where the insured used such care on the occasion of the theft as prudent men acting in good faith would have used, notwithstanding a provision that a failure to produce an inventory shall render the policy null and void, as such provision does not require production of the inventory when it has been lost through no fault, neglect, or design of the insured. *German Alliance Ins. Co. v. Newbern*, 28: 337, 106 Pac. 826, — Okla. —. (Annotated)

Forfeiture.

5. Insurance policies should not be construed to work a forfeiture of either party's rights unless it plainly appears that such was the intention of both contracting parties. *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.* 28: 593, 106 Pac. 194, 56 Wash. 681.

Notice; proofs of loss.

6. A requirement of a mutual benefit society that suit cannot be brought until a certain time after proofs of death are furnished is waived by refusal of the proper officer to furnish blanks for such proof, because the notice given him was of absence for more than seven years, rather than of death. *Miller v. Sovereign Camp Woodmen of the World*, 28: 178, 122 N. W. 1126, 140 Wis. 505.

7. An insurance policy requirement that proof of loss shall be made by insured

under oath requires such proof to be sworn to personally by the insured, although in general substantial compliance with the requirements as to proof of loss is sufficient. *St. Paul F. & M. Ins. Co. v. Mittendorf*, 28: 651, 104 Pac. 354, — Okla. —

(Annotated)

Arbitration.

Admissibility of evidence of attempt to arbitrate, see Evidence, 57.

8. A provision of an insurance policy that, in event of disagreement as to amount of loss, each party shall appoint an appraiser, and the two appraisers shall select an umpire and appraise the loss, and that no action shall be maintained on the policy until such appraisement, when appraisal has been required, is satisfied as to the insured when he, acting in good faith, appoints an appraiser; and it is not incumbent on him, when the appraisement fails without his fault, to appoint or propose the appointment of a second appraiser, as a condition precedent to suit on the policy. *German-American Ins. Co. v. Jerrils*, 28: 104, 108 Pac. 114, 82 Kan. 320.

(Annotated)

Risks and causes of loss, injury, and death.

9. The beneficiary in a life insurance policy, whose intentional and felonious act causes the death of the assured, cannot recover upon the policy. *Filmore v. Metropolitan L. Ins. Co.* 28: 675, 92 N. E. 26, 82 Ohio St. 208.

Extent of recovery.

10. A separate allowance may be made for each operation necessitated by an accident, which is mentioned on the schedule of an accident insurance policy which provides that, in case an operation is necessitated by any accident, a sum shall be paid in addition to the indemnity provided for by the policy, of the sum indicated for such operation in the schedule, "provided always that not more than one amount shall be payable for one or more operations performed as the result of one accident." *Anderson v. Aetna L. Ins. Co.* 28: 730, 74 Atl. 1051, 75 N. H. 375.

11. No liability for death arises upon a policy insuring against permanent disability. *Hill v. Travelers' Ins. Co.* 28: 742, 124 N. W. 898, — Iowa, —

(Annotated)

12. An accident insurance company cannot escape liability on its contract for weekly indemnity during a certain period, for total disability caused by an accident which, among other things, results in loss of a limb, because provision for such indemnity is made subject to subsequent provisions, one of which is that, if injury results in loss of such limb, a specified sum less than the claim for total disability shall be paid, whereupon the policy shall be surrendered; and another of which provides that in no event will claim for weekly indemnity be valid, if a valid claim for any of the amounts provided for special injuries can be based upon the same accident and resulting injury,—at least where, among 28 L.R.A.(N.S.)

the provisions for special allowances, is one to the effect that, if the injuries result in total disability, the indemnity shall be the sum per week named on the face of the policy for a certain period, provided the disability continue so long. *Anderson v. Aetna L. Ins. Co.* 28: 730, 74 Atl. 1051, 75 N. H. 375.

(Annotated)

Defenses.

See also *supra*, 9.

13. A conspiracy, unaccompanied by an overt act, to burn insured property, in which the owner joins, does not, although it is in process of accomplishment at the time the property is destroyed by fire, avoid the policy, under provisions that the policy shall be void in case of any fraud touching any matter relating to the subject of the insurance, or if the hazard is increased by any means within the control or knowledge of the insured. *Ampersand Hotel Co. v. Home Ins. Co.* 28: 218, 91 N. E. 1099, 198 N. Y. 495.

INTENT.

Parol evidence to show, see Evidence, 31, 32.

Materiality of evidence as to, see Evidence, 40.

INTEREST.

To disqualify juror, see Appeal and Error, 21, 30.

Effect of to disqualify witness, see Wills, 3.

Effect of payment of interest on barred note to revive under a mortgage securing it, see Limitation of Actions, 10.

Effect of refusal of tender of amount due on mortgage on right to interest, see Mortgage, 6.

Usurious interest, see Usury.

1. Interest cannot be allowed for the retention of money vexatiously withheld, in the absence of a statutory provision for its allowance. *Young v. Kimber*, 28: 626, 98 Pac. 1132, 44 Colo. 448.

2. Damages recovered in an action *ex delicto* against a carrier for injuries to, and delay in the transportation of, live stock, draw interest, at least from the time of delivery. *Fell v. Union P. R. Co.* 28: 1, 88 Pac. 1003, 32 Utah, 101. (Annotated)

INTERROGATORIES.

To witnesses, see Witnesses, 2, 3.

INTERSTATE COMMERCE.

See Commerce.

INTERSTATE COMMERCE COMMISSION.

A state court of equity has no jurisdiction to enjoin a railroad company engaged in interstate transportation, from filing with the Interstate Commerce Commission a schedule of its rates for transportation of coal from a point in one state to a point in another state, on the ground

that such rates are unreasonable, unfair, and discriminatory, since it is the exclusive power of the Interstate Commerce Commission to pass upon that question in the first instance. *Thacker Coal & C. Co. v. Norfolk & W. R. Co.* 28: 108, 68 S. E. 107, — W. Va. —. (Annotated)

INTERVENTION.

See Parties.

INTOXICATING LIQUOR.

Action of public authorities in seizing, as defense to carrier for nondelivery of, see Carriers, 10.

Interstate commerce in, see Commerce, 2-4.

Mandamus to compel enforcement of Sunday law, see Mandamus, 3.

Validity of warrant to search for, see Search and Seizure.

1. An agent who is sent into wet territory to purchase and bring intoxicating liquors into dry territory, for a principal living therein, for use as a beverage, does not by so doing furnish intoxicating liquors to such principal, within the meaning of a statute prohibiting the direct or indirect selling, furnishing, giving away, or otherwise dealing in intoxicating liquors for use as a beverage. *State v. Lynch*, 28: 334, 90 N. E. 935, 81 Ohio St. 336.

(Annotated)

2. Illinois Crim. Code, § 259, providing punishment for one who keeps open on Sunday a place where intoxicating liquor is sold, is in force in Chicago. *People ex rel. Bartlett v. Busse*, 28: 246, 87 N. E. 840, 238 Ill. 593.

INVENTORY.

Condition for taking and keeping in insurance policy, see Insurance, 4.

JOINDER.

Of parties plaintiff, see Parties, 1.

JOINT OWNERS.

Tender by owner of half interest of amount of mortgage on other half, see Mortgage, 1, 2.

JUDGMENT.

On appeal, see Appeal and Error, 32-36.

Change of decree for alimony as impairment of contract obligation, see Constitutional Law, 10, 11.

Judicial notice of judicial records and decisions, see Evidence, 1.

Execution on, see Execution.

Right of one partner to purchase judgment against the other, see Partnership.

Form and substance.

1. In case an insurance company refuses to render an account to the holder of a tontine policy, of the amount due on the policy, the court may enter judgment against it for the amount alleged to be due, 28 L.R.A.(N.S.)

by the policy holder. *Equitable L. Assur. Soc. v. Winn*, 28: 558, 126 S. W. 153, — Ky. —.

Effect and conclusiveness.

On appeal, see Appeal and Error, 35, 36.

2. A judgment sustaining a special demurrer to a plea which alleges fraud in general terms, without setting out any facts constituting the fraud, is not upon the merits, so as to prevent a complete plea of fraud, with proper allegations, from being offered by way of amendment. *Dolvin v. American Harrow Co.* 28: 785, 54 S. E. 706, 125 Ga. 699.

3. A decree specifically enforcing performance of a contract to sell real estate in accordance with an option which had been given thereon does not affect the rights of one claiming an intermediate contract for the land who was not made a party to the suit. *Smith v. Bangham*, 28: 522, 104 Pac. 689, 156 Cal. 359.

4. One holding a claim against a decedent's estate is not bound by a decree of the surrogate's court in a proceeding to which he is not a party, settling the executor's accounts, and declaring the estate to be insolvent, nor by a decree entered on petition of the executor's surety, amending the original decree by restating the dividend to which creditors were entitled, after a citation to such claimant to attend the hearing. *Woodruff v. H. B. Claffin Co.* 28: 440, 91 N. E. 1103, 198 N. Y. 470.

Foreign judgments.

5. A judgment enforceable in the state where rendered must be given effect in another state, under the full faith and credit clause of the Federal Constitution, although the modes of procedure to enforce its collection may not be the same in both states. *Sistare v. Sistare*, 28: 1068, 30 Sup. Ct. Rep. 682, 218 U. S. 1, 54 L. ed. 905.

JUDICIAL NOTICE.

See Evidence, 1.

JUDICIAL SALE.

On mortgage foreclosure, see Mortgage, 8.

For taxes, see Taxes, 5, 6.

Purchasers and their rights and duties.

Effect of delay on right to abatement of price for deficiency in quantity. see Limitation of Actions, 2.

1. The rule *caveat emptor* does not apply to mistakes in the quantity of land sold by the acre at a judicial sale. *Singleton v. Castleman*, 28: 393, 68 S. E. 34, — W. Va. —.

2. One who purchases land by the acre at a judicial sale is entitled to an abatement of the purchase money proportionate to any material deficiency in the amount of land bid for and supposed to have been sold, resulting from mistake or misrepresentation of the court or its agents, even after deed made, at least where the purchaser still retains in his hands, unpaid,

sufficient of the purchase money out of which such abatement can be made. *Singleton v. Castleman*, 28: 393, 68 S. E. 34, — W. Va. —. (Annotated)

Confirmation.

3. Confirmation by the court of a sale of land by the acre by commissioners authorized to make sale thereof, "as a whole or in parcel," cures the irregularity of sale by the acre, and gives the sale the same validity and effect as if made upon the precise terms of the decree. *Singleton v. Castleman*, 28: 393, 68 S. E. 34, — W. Va. —.

JURISDICTION.

Of bankruptcy court, see Bankruptcy, 1.

Of divorce suit, see Divorce and Separation.

Of equity, see Equity.

JURY.

Presumption that jury were properly sworn, see Appeal and Error, 7.

Error in retaining interested persons on jury, see Appeal and Error, 30.

Reversal of verdict rendered by jury made up in part of interested persons, see Appeal and Error, 21.

Error in permitting jury trial, see Appeal and Error, 31.

As judge of trustworthiness of evidence, see Evidence, 49.

Question for, see Trial.

Time for objecting to form of oath administered to, see Trial, 2.

1. The verdict of a jury is waived by motions by both parties for directed verdicts, where there is no conflict in the evidence as to any material fact and the court is authorized to enter such judgment as the evidence warrants. *Easterly v. Mills*, 28: 952, 103 Pac. 475, 54 Wash. 356.

2. That other corporations whose liability depends upon the same state of facts are joined as defendants with a municipal corporation does not affect the plaintiff's right to challenge "to the favor" as to resident taxpayers of the city, although such jurors were competent as to the other defendants, at least where there is no difficulty in procuring jurors whose impartiality as to all the parties defendant is unquestioned. *Broadway Mfg. Co. v. Leavenworth Terminal R. & B. Co.* 28: 156, 106 Pac. 1034, 81 Kan. 616.

JUSTICE.

Obstruction of, see Obstructing Justice.

JUSTICE OF THE PEACE.

Lien of execution issued upon judgment rendered by, see Execution, 3.

JUSTIFICATION.

Of libel, see Libel and Slander, 3.

KEY.

Delivery of key as constructive delivery of property, see Sale, 1.

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LACHES.

See Estoppel, 2; Limitation of Actions, 1, 2.

LANDLORD AND TENANT.

Cancellation of oil and gas lease, see Cancellation of Instruments, 1.

Liability of landlord for injury from ice on sidewalk, see Highways, 6.

Lease for oil and gas, see Mines, 3-5.

Fixtures.

A tenant does not lose the right to remove trade fixtures which can be removed without the least injury to the freehold, by renewing his lease, and entering upon a new term thereunder, without reserving the right to remove the fixtures. *Thomas v. Gayle*, 28: 767, 120 S. W. 290, 134 Ky. 330.

LARCENY.

Sufficiency of proof of corpus delicti, see Evidence, 56.

Receiving stolen property, see Receiving Stolen Property.

LAWS.

See Statutes.

LEADING QUESTIONS.

See Witnesses, 2.

LEASE.

Oil and gas lease, see Cancellation of Instruments, 1; Mines, 3-5.

LEGACY.

See Wills.

LEGISLATURE.

Limitation on power to create debt, see State.

LEVY AND SEIZURE.

Pleading in suit to recover property levied on, see Pleading, 7.

LIBEL AND SLANDER.

Recovery for use of vile epithets, see Assault and Battery.

Evidence in action for, see Evidence, 47.

What actionable generally.

1. It is libelous *per se* for a responsible person maliciously to write to a committee whose recommendation is necessary to the obtaining of a pastorate, and before which the application of a clergyman for a pulpit is pending, of such clergymen, "I would not have anything to do with him, or touch him with a 10-foot pole," as such statement would tend to expose the applicant to contempt and injury in his business. *Cole v. Millsbaugh*, 28: 152, 126 N. W. 626, — Minn. —. (Annotated)

Privileged communications.

2. A confidential communication by one whose property has been burned, to a fellow sufferer, of the fact that he had been informed of another's intention to burn the property, for the purpose of procuring his aid in ascertaining the author of the fire,

is privileged. *Edwards v. Kevil*, 28: 551, 118 S. W. 273, 133 Ky. 392.

Actions; defenses.

3. Admission of speaking the substance of the words charged, or of so much of them as would sustain an action for slander, is sufficient to entitle one accused of slander to justify on the ground of privilege. *Edwards v. Kevil*, 28: 551, 118 S. W. 273, 133 Ky. 392. (Annotated)

LICENSE.

Imposing license tax on telephone company, see *Municipal Corporations*, 1.

On interstate business, see *Commerce*, 5.
Performance by physician of services in state where he is not licensed, see *Contracts*, 21.

Revocation of permit to obstruct sidewalk, see *Highways*, 2.

1. That a corporation refusing to pay its license tax is not thereby deprived of the right of doing business does not invalidate the statute providing for the tax. *Blackrock Copper Min. & M. Co. v. Tingey*, 28: 255, 98 Pac. 180, 34 Utah, 369.

2. That under a statute providing for the payment by a corporation of a license tax on a certain day in each year, which will entitle it to do business for the ensuing year, a corporation organized after the expiration of the specified day may do business until the next tax day arrives, does not invalidate the statute. *Blackrock Copper Min. & M. Co. v. Tingey*, 28: 255, 98 Pac. 180, 34 Utah, 369.

3. A statute providing for the payment, by corporations, of a license tax on or before a certain day of a certain month of each year, is not void for uncertainty in not fixing the time at which the duty to pay the tax arises. *Blackrock Copper Min. & M. Co. v. Tingey*, 28: 255, 98 Pac. 180, 34 Utah, 369.

4. The exaction of a percentage of the gross earnings of a telephone company by a municipal ordinance granting it a franchise is an exercise of the taxing power of the city, and is a tax upon the business or occupation of conducting a telephone business within the city. *Nebraska Teleph. Co. v. Lincoln*, 28: 221, 117 N. W. 284, 82 Neb. 59.

5. The provision for an annual payment of \$500 to a city in the respective franchise ordinances of two telephone companies, "in consideration of the rights and privileges granted," is a sum exacted by the city for the privilege of using the streets, under its proprietorship of the streets, and, while termed a "privilege tax," is in the nature of a rental charge or compensation for the use of the streets. *Nebraska Teleph. Co. v. Lincoln*, 28: 221, 117 N. W. 284, 82 Neb. 59.

Double taxation.

6. An occupation tax measured by a percentage of the gross earnings of a tele-

phone company, whose franchise is also taxed in connection with its tangible property, according to its value as a going concern, does not tax the same property twice. *Nebraska Teleph. Co. v. Lincoln*, 28: 221, 117 N. W. 284, 82 Neb. 59. (Annotated)

Power as to generally.

7. An ordinance lawfully enacted by a city under its charter power, which imposes upon telephone companies a business or occupation tax measured by the gross receipts within the city, is not invalidated by the fact that tolls and rentals collected within the city are in part for messages over lines lying in part beyond the city limits, where United States, state, and interstate business is expressly exempted. *Nebraska Teleph. Co. v. Lincoln*, 28: 221, 117 N. W. 284, 82 Neb. 59.

Uniformity and equality.

8. A provision in an ordinance imposing an occupation tax, that "the sum and amount of the occupation tax or taxes on the gross receipts required to be paid under existing ordinances" may be deducted from the amount of the tax, does not violate a constitutional provision that taxes must be uniform in respect to persons and property within the jurisdiction of the body imposing the same, because not uniform as to persons or property, since by its operation all persons engaged in the same occupation are taxed upon the same basis and in the same manner. *Nebraska Teleph. Co. v. Lincoln*, 28: 221, 117 N. W. 284, 82 Neb. 59.

9. A municipal corporation cannot impose a license tax on automatic vending machines when no tax is placed upon merchants selling the same articles as are sold by the machine, without its aid, where no police supervision or regulation of the machine is necessary. *Seattle v. Dencker*, 28: 446, 108 Pac. 1086, — Wash. —.

Reasonableness.

10. The mere right to be a corporation is not property so as to come within the operation of a constitutional provision that all property shall be taxed according to its value, and declaring that the word "property" shall include franchises. *Blackrock Copper Min. & M. Co. v. Tingey*, 28: 255, 98 Pac. 180, 34 Utah, 369. (Annotated)

11. A license tax on corporations is not a tax on their franchises in the sense that the word is used in the Constitution, declaring them to be property and requiring property to be taxed according to its value, and therefore such taxes may be proportioned to the capital involved, at least where the Constitution also authorizes a license tax on franchises. *Blackrock Copper Min. & M. Co. v. Tingey*, 28: 255, 98 Pac. 180, 34 Utah, 369.

Enforcement.

12. A license tax upon a corporation, and penalty for its nonpayment, may be made a lien upon its tangible property. *Blackrock Copper Min. & M. Co. v. Tingey*, 28: 255, 98 Pac. 180, 34 Utah, 369.

LIENS.

Agreement for support in consideration of conveyance as basis for equitable lien, see Cancellation of Instruments, 2.

Of execution, see Execution.

Of license tax, see License, 12.

Of mortgage, see Mortgage.

Of vendor, see Vendor and Purchaser, 5.

LIFE INSURANCE.

See Insurance.

LIFE TENANTS.

Right of one of several remaindermen to compel partition during life estate, see Partition.

LIGHTNING.

Explosion caused by, killing servant, see Master and Servant, 5.

LIGHTS.

Negligence in lighting bridge, see Bridges, 2.

LIMITATION OF ACTIONS.

Adverse possession, see Adverse Possession.

Effect of appearance by nonresident after limitation period, see Appearance, 1.

Effect of injunction as requiring debtor to allow limitations to run upon its causes of action, see Courts, 2.

Contractual limitation of time for action on insurance policy, see Insurance, 6.

Time for adding omitted property to tax roll, see Taxes, 4.

Estoppel by, see Estoppel, 2.

Laches.

Effect of delay in enjoining violation of restrictive covenants, see Covenants and Conditions, 5.

1. One cannot be prejudiced by delay in instituting a suit to protect his rights if it is due to the influence of one having a record interest in the property to be affected by the suit, in preventing the attorneys of complainant from proceeding with the litigation. *Stewart v. Finkelstone*, 28: 634, 92 N. E. 37, 206 Mass. 28.

2. The rule of laches does not apply to prevent the proportionate abatement of the purchase money for deficiencies in amount as to land purchased at a judicial sale, where no equities have intervened and no one has been prejudiced or injured by the delay, so long at least as the purchaser still retains in his hands, unpaid, sufficient of the purchase money out of which such abatement can be made. *Singleton v. Castleman*, 28: 393, 68 S. E. 34, — W. Va. —.

When statute runs.

3. Where one practises fraud and deceit upon another, thereby inducing acceptance by the latter of property in settlement of a debt much greater in amount than the value of the property, an injury is done to property, and not to the person, and the 28 L.R.A.(N.S.)

statute of limitations in reference to actions for injuries to property applies. *Crawford v. Crawford*, 28: 353, 67 S. E. 673, — Ga. —. (Annotated)

4. The cause of action for damages resulting from the flooding of land caused by the construction over a stream of a bridge with insufficient openings to carry the volume of water reasonably to be expected accrues at the time of the flooding, and not at the time of the construction of the bridge. *Broadway Mfg. Co. v. Leavenworth Terminal R. & B. Co.* 28: 156, 106 Pac. 1034, 81 Kan. 616.

Interruption of statute; removal of bar.

5. Owners of property against which a special assessment for local improvements is directed to be made by the court after an attempted levy has been set aside cannot avoid liability thereon on the ground that the limitation period has run since the first assessment became delinquent, if it has not run since the court ordered the new assessment. *Shaw & Hodgins v. Snohomish*, 28: 735, 104 Pac. 272, 55 Wash. 271.

(Annotated)

6. Service of summons in ejectment arrests the running of the statute of limitations in favor of a defendant who claims title by adverse possession, though the form of action is subsequently changed, by amendment of plaintiff's petition, to a suit to redeem from a mortgage. *Butler v. Smith*, 28: 436, 120 N. W. 1106, 84 Neb. 78.

7. In case process is served by publication, the action is not commenced, for the purpose of determining whether or not it is within the time allowed by the statute of limitations, until the publication is completed. *Slater v. Roche*, 28: 702, 126 N. W. 925, — Iowa, —. (Annotated)

8. An action to subject property of a nonresident to payment of a judgment against him is, for the purpose of determining whether or not it is within the time allowed by the statute of limitations, commenced when the property is attached. *Slater v. Roche*, 28: 702, 126 N. W. 925, — Iowa, —.

9. A suit is commenced when the writ is filled out with the intention of having it served. *Anderson v. Aetna L. Ins. Co.* 28: 730, 74 Atl. 1051, 75 N. H. 375.

10. Payment of interest on a note barred by the statute of limitations revives both the note and a mortgage given to secure it, so far as affects the interest of the payors, and continues the mortgage as a valid lien superior to the rights of subsequent judgment lien holders, under a statute providing that in any case founded on contract, where a payment of principal or interest has been made, an action may be brought within the statutory period after such payment. *Clark v. Grant*, 28: 519, 109 Pac. 234, — Okla. —.

11. The running of the statute of limitations upon a mortgage debt will be arrested by a payment by the mortgagor before the action is barred, although he has

transferred the property to a stranger, where, under the statute, a payment continues and keeps alive the original promise. *Kaiser v. Idleman*, 28: 169, 108 Pac. 193, — Or. —. (Annotated)

12. A mortgage is embraced by a statute providing that whenever any payment shall be made upon any existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness, the limitation shall commence from the time it is made. *Kaiser v. Idleman*, 28: 169, 108 Pac. 193, — Or. —.

LIMITATION OF LIABILITY.

By carrier, see Carriers, 12-14; Duress; Trial, 9.

By telegraph company, see Conflict of Laws, 1; Telegraphs, 3.

LIVE STOCK.

Transportation of, see Carriers, 12.

LOCAL IMPROVEMENTS.

See Public Improvements.

LOCATION.

Of mines, see Mines, 1, 2.

LOGS AND LOGGING.

The placing of loose logs in a stream in such quantities that they form a jam which is likely to be broken at any time by the rising water, without taking any precautions to prevent injury by their movement to persons navigating the river, or to warn them of danger, may be found to be negligence which will render the owner of the logs liable for the death of one drowned by the overturning of his boat through the moving of the logs. *Henderson v. Doniphan Lumber Co.* 28: 144, 127 S. W. 459, — Ark. —. (Annotated)

MACHINERY.

Failure of master to guard, see Master and Servant, 6, 7, 20.

Assumption of risk of injury by, see Master and Servant, 11.

MALICIOUS INJURY.

Sufficiency of evidence to establish offense of, see Evidence, 55.

Indictment for, see Indictment and Information.

To constitute a "wound" within the meaning of W. Va. Code 1906, chap. 144, § 9, regarding the malicious or felonious wounding of another, an injury must have been inflicted with a weapon other than any of those with which the human body is provided by nature, and must include a complete parting or solution of the external or internal skin. *State v. Gibson*, 28: 965, 68 S. E. 295, — W. Va. —.

MALICIOUS PROSECUTION.

One in possession of chattels without title cannot maintain an action for damages for malicious prosecution against one who wrongfully institutes a replevin action

against him for them. *Powers v. Houghton*, 28: 330, 123 N. W. 1108, 159 Mich. 372 (Annotated)

MALPRACTICE.

Evidence in action for, see Evidence, 44, 45.

In general, see Physicians and Surgeons

MANDAMUS.

Necessary parties defendant to mandamus proceeding, see Parties, 2.

To mayor.

1. A mayor having statutory authority to suspend for cause the chief of the fire department and communicate the facts to the board of fire commissioners, who shall proceed to consider the desirability of his removal from office, cannot be compelled by mandamus at the suit of a taxpayer to exercise the power of suspension because of charges of dishonesty against such chief, where he has investigated the charges, and determined that they were not sufficient to require suspension of the official. *State ex rel. Davern v. Rose*, 28: 194, 122 N. W. 751, 140 Wis. 360. (Annotated)

2. A mayor having all the powers of a chief executive cannot be compelled by mandamus at the suit of a taxpayer to remove from office the chief engineer of the fire department for dishonesty and perjury, misappropriation of public property, and the use of offices at his command to pay personal debts. *State ex rel. Davern v. Rose*, 28: 194, 122 N. W. 751, 140 Wis. 360.

3. Mandamus will not lie to compel the mayor of a city to enforce the Sunday closing law against a saloon keeper. *People ex rel. Bartlett v. Busse*, 28: 246, 87 N. E. 840, 238 Ill. 593. (Annotated)

To compel assessment or levy of tax.

4. Mandamus lies to compel a county clerk to enter upon the tax rolls taxable personal property omitted from the assessor's returns, as required by a statute providing for the entering of personal property subject to taxation which has not been listed by the owner or returned by the assessor, where such officer admits the existence and value of the property, but declines to correct the assessment and enter it upon the tax rolls, because of the contention that the property is not taxable, and because he is in doubt as to his power in the premises. *State ex rel. Taggart v. Holcomb*, 28: 251, 106 Pac. 1030, 81 Kan. 879.

To corporations.

Necessary parties defendant in mandamus to street railway company, see Parties, 2.

5. Under a statute requiring railroad companies to make reasonable provision for the transportation of coal and coke offered them for shipment by operators and manufacturers along their lines, a carrier may be compelled by mandamus to construct and operate upon its right of way a side track and switch, where the facts and circum-

stances show the necessity therefor. *State ex rel. Mt. Hope Coal Co. v. White Oak R. Co.* 28: 1013, 64 S. E. 630, 65 W. Va. 15.

Procedure.

6. An alternative writ of mandamus, though regarded as a pleading, is the writ of the court, and when the substantive matter thereof is sufficient to justify a part, but not all, that is commanded by the writ, the appellate court may, in a case of original jurisdiction, so amend the alternative writ as to make it conform to the mandate of the peremptory writ awarded. *State ex rel. Mt. Hope Coal Co. v. White Oak R. Co.* 28: 1013, 64 S. E. 630, 65 W. Va. 15.

7. Recitals in an alternative writ of mandamus by a coal operator commanding a railroad company, as required by W. Va. Code 1906, § 2364, to make "reasonable provision" for the transportation of coal offered it for shipment, showing that the things commanded by the writ are substantially those which in prior negotiations between the parties the carrier had regarded as reasonable and proper, will be regarded, on a motion to quash, as showing the reasonableness of the demand and as making a prima facie case for the coal operator. *State ex rel. Mt. Hope Coal Co. v. White Oak R. Co.* 28: 1013, 64 S. E. 630, 65 W. Va. 15.

8. Provisions which a railroad company had determined, before the issuance of an alternative writ of mandamus to compel it to make reasonable provision for the transportation of coal offered it for shipment, were proper, will on final hearing be assumed to be such as may reasonably be required of the carrier, at least where a different showing has not been made. *State ex rel. Mt. Hope Coal Co. v. White Oak R. Co.* 28: 1013, 64 S. E. 630, 65 W. Va. 15.

MANDATORY INJUNCTION.

See Injunction, 1, 2.

MANSLAUGHTER.

See Homicide.

MANUFACTURERS.

Taxation of finished product of, see Taxes, 2.

MARRIAGE.

Conflict of laws as to, see Conflict of Laws, 2.

Divorce or separation, see Divorce and Separation.

MARRIED WOMAN.

See Husband and Wife.

MASSSES.

Bequests for, see Charities, 1, 3, 4.

MASTER AND SERVANT.

Presumption of negligence from injury to employee, see Evidence, 14-17.

Wages.

Statute regulating assignments of wages or salaries, see Constitutional Law, 2, 7.

Agreement by third party to pay wages of employee, see Contracts, 28.

Right of discharged employee to recover for wages for whole contract period, see Assumpsit, 1.

Amendment of declaration in action for wages, see Pleading, 2.

1. A servant employed by the month can recover no compensation for the time during which he was prevented from performing services by sickness. *MacFarlane v. Allan-Pfeiffer Chemical Co.* 28: 314, 109 Pac. 604, — Wash. —. (Annotated)

Notice of injury.

Notice to city of injury to municipal employee on highway, see Municipal Corporations, 5.

2. The taking, by a railroad claim agent, of a written statement from an employee injured by the derailment of his engine, regarding the time, place, manner, and cause of the derailment, and the nature and extent of the injuries, within three weeks after the happening thereof, constitutes a waiver by the company of a clause in the injured person's contract of employment, providing that notice of a claim for an injury must be given within thirty days of the happening thereof, notwithstanding the statement did not state the amount of the claim for the injury, as required by the contract. *Smith v. Chicago, R. I. & P. R. Co.* 28: 1255, 107 Pac. 635, 82 Kan. 136.

3. Failure of the employer to receive the notice is immaterial where a statute providing for service of notice of injury for which the master is to be held liable states that it may be served by post, by letter addressed to the person on whom it is to be served. *Hurley v. Olcott*, 28: 238, 91 N. E. 270, 198 N. Y. 132. (Annotated)

Duty as to place and appliances generally.

Review on appeal of verdict as to dangerous condition of place of work, see Appeal and Error, 16.

Presumption as to cause of death of servant, see Evidence, 13.

Presumption of negligence from failure of safety device to work, see Evidence, 14.

Presumption of negligence from fall of scaffold, see Evidence, 17.

Presumption of negligence from death of employee, see Evidence, 16.

Sufficiency of evidence to show negligence of master, see Evidence, 51, 52.

Proximate cause of injury to servant, see Proximate Cause, 3.

Master's negligence as question for jury, see Trial, 7.

See also *infra*, 24-26.

4. The negligence of a master in storing dynamite in dangerous quantities in a room provided for the use of workmen is not negated by the fact that an explosion is an unusual and extraordinary occurrence. *Brown v. West Riverside Coal Co.* 28: 1260, 120 N. W. 732, — Iowa, —.

5. A master who negligently stores high explosives in a room provided for the use of workmen in storing tools and clothing and seeking shelter from storms cannot escape liability for the death of a workman killed by an explosion, by the fact that it was caused by lightning. *Brown v. West Riverside Coal Co.* 28: 1260, 120 N. W. 732, — Iowa, —.

6. Failure of an employee to replace the guard to an emery wheel which he has removed in the performance of his duties constitutes negligence *per se* upon the part of a master, under a statute requiring the guarding of machinery where practicable, as the statute in such case adopts the rule of absolute duty. *Davidson v. Flour City Ornamental I. Works*, 28: 332, 119 N. W. 483, 107 Minn. 17.

7. Emery wheels are included within the machinery required to be guarded by Minn. Rev. Laws 1905, § 1813, providing that all saws, planes, set screws, drums, "and machinery," as far as practicable, shall be guarded. *Davidson v. Flour City Ornamental I. Works*, 28: 332, 119 N. W. 483, 107 Minn. 17.

Inspection.

Question for jury as to master's negligence in failing to inspect, see Trial, 11.

See also *infra*, 25.

8. Making tests only at intervals of two or three weeks to determine whether or not a device installed to stop machinery when employees become caught in it is in working order may be found to be negligent, where it is of delicate construction, and tests made have frequently shown it to be out of order. *Scheurer v. Banner Rubber Co.* 28: 1207, 126 S. W. 1037, 227 Mo. 347.

9. A mine owner owes the duty to his servants who are working on a slope in the mine to inspect batteries or dams which are erected to prevent loosened materials from rolling down on them, to see that they are reasonably safe. *McKenzie v. North Coast Colliery Co.* 28: 1244, 104 Pac. 801, 55 Wash. 495.

Assumption of risk.

As question for jury, see Trial, 8.

10. A servant who assumes the risk of getting his hand caught in the machine at which he is required to work may hold his master liable for aggravation of his injury by failure of a device installed to stop the machine in case of such accident to work, so that his arm is drawn into the machine and crushed. *Scheurer v. Banner Rubber Co.* 28: 1207, 126 S. W. 1037, 227 Mo. 347.

11. An employee does not assume the

risk of a device installed by his master to lessen the risk of injury from the machinery at which he is required to work being permitted by the employer to get out of order, unless he himself has notice of the fact that it is so out of order. *Scheurer v. Banner Rubber Co.* 28: 1207, 126 S. W. 1037, 227 Mo. 347.

12. A miner working on a slope does not assume the risk of injury from the unsafe condition of a battery or dam maintained above him to keep loosened materials from rolling upon him, where such condition could only be discovered by examination, since the duty to maintain it in a safe condition is upon the master. *McKenzie v. North Coast Colliery Co.* 28: 1244, 104 Pac. 801, 55 Wash. 495.

13. A servant does not assume the risk of injury from the negligence of his master merely because he could have discovered and avoided it by the exercise of ordinary care; his assumption of such risk depending upon his actually being aware of and appreciating the danger. *St. Louis, I. M. & S. R. Co. v. Birch*, 28: 1250, 117 S. W. 243, 89 Ark. 424.

14. A railroad engineer does not assume the risk of injury from driving his engine over defective ties and rails, which are in place, and of which defects he has no knowledge and no opportunity of knowing except such as comes from so operating his engine thereover, where such defects have existed for such a length of time that the railway company is bound to have notice thereof. *Smith v. Chicago, R. I. & P. R. Co.* 28: 1255, 107 Pac. 635, 82 Kan. 136.

15. A miner does not assume the risk of the unsafe timbering of the mine, although the timbers are set by the miners themselves, where it is done under the supervision of the boss and they are paid extra for such work. *McKenzie v. North Coast Colliery Co.* 28: 1244, 104 Pac. 801, 55 Wash. 495.

Contributory negligence.

16. The employer of a miner engaged in cutting into a seam of coal, whose employment requires him to see that props are placed as fast as needed, is not liable for the miner's death, due to his failure to prop the roof soon enough, so that it falls upon and kills him. *Smith v. North Jellico Coal Co.* 28: 1266, 114 S. W. 785, 131 Ky. 196.

Fellow servants and their negligence.

Presumption of negligence of coservant, see Evidence, 15.

Sufficiency of evidence to show negligence of coservant, see Evidence, 50.

See also *supra*, 15.

17. That a battery or dam in a mine to prevent loosened material from rolling down a slope upon miners working below was erected by the miners themselves does not relieve the master from liability to one of them who is injured by its insufficiency, where he had no part in its construction.

McKenzie v. North Coast Colliery Co. 28: 1244, 104 Pac. 801, 55 Wash. 495.

18. The act of a repair gang on a railroad in removing a hand car from the track to permit a train to pass is connected with the operation of the road, within the meaning of a statute abolishing the fellow-servant rule in case of accidents connected with such operation. Cahill v. Illinois C. R. Co. 28: 1021, 125 N. W. 331, — Iowa, —.

Who are fellow servants.

19. A domestic servant of mature age and the fourteen-year-old son of her employer, who is also engaged in performing ordinary domestic services in the absence of the father, but pursuant to his general directions, are fellow servants, where neither are in any manner under the control or direction of the other, so as to preclude recovery of damages by the domestic from the employer for personal injuries caused by the son's negligence. Waxham v. Fink, 28: 367, 125 N. W. 145, 86 Neb. 180.

20. A servant who, in the course of his duties in operating an emery wheel, is required to remove the guard thereto and change wheels, is not a fellow servant of a coemployee who is injured by the bursting of the wheel while being operated with the guard off, the operator having neglected to replace it after having changed the wheels, since the statutory duty to guard such a wheel is a continuing, nonassignable one which cannot be discharged by merely furnishing suitable guards and exercising reasonable care in the selection of an operator. Davidson v. Flour City Ornamental I. Werks, 28: 332, 119 N. W. 483, 107 Minn. 17.

Liability of master for acts of servant or independent contractor.

Question for jury as to whether inspection of appliances erected by independent contractor would have revealed defects, see Trial, 11.

21. A watchman is guilty of wantonness which will render his master liable for the consequences of his act, in firing in the night at a technical trespasser upon the master's property, who is retreating to avoid arrest or assault, although he did not intend to hit him, but only to halt or frighten him. Conchin v. El Paso & S. W. R. Co. 28: 88, 108 Pac. 260, — Ariz. —.

(Annotated)

22. A technical trespasser on the property of a railroad company is not guilty of contributory negligence in running when told by a watchman to stop, which will prevent his holding the railroad company liable for the injury in case he is hit by a bullet. Conchin v. El Paso & S. W. R. Co. 28: 88, 108 Pac. 260, — Ariz. —.

23. A person employed to watch premises and turn over to a police officer any person whom he believes to be committing a crime against the property acts within the scope of his employment in firing at a fleeing trespasser to compel him to halt. Conchin v. El Paso & S. W. R. Co. 28: 88, 108 Pac. 260, — Ariz. —.

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24. A master cannot delegate to an independent contractor power to exercise the care to make devices safe for servants which the law imposes upon him as a personal obligation. Winslow v. Commercial Bldg. Co. 28: 563, 124 N. W. 320, — Iowa. —.

25. A mere superficial inspection, by the owner of a building, of a fire escape placed on the building by an independent contractor, is not sufficient *per se* to relieve him from liability for injury to a servant who, in attempting to use the device, is injured by its fall because the fastenings are let into the wall just far enough to hold it in place until it has passed inspection. Winslow v. Commercial Bldg. Co. 28: 563, 124 N. W. 320, — Iowa, —.

26. The owner of a building cannot avoid liability for injury to his servant through the fall, because of improper fastenings, of a fire escape upon which he was employed in the performance of his duties, merely because it was erected by an independent contractor selected with due care. Winslow v. Commercial Bldg. Co. 28: 563, 124 N. W. 320, — Iowa, —.

MATERIALITY.

Of evidence, see Evidence, 39-48.

MATURITY.

Of contract for enforcement against bankrupt estate, see Bankruptcy, 5.

Of note, see Bills and Notes, 3, 4.

MAXIMS.

1. A court of equity, having acquired jurisdiction of the property, will do complete justice as between the parties interested therein. Murray v. O'Brien, 28: 998, 105 Pac. 840, 56 Wash. 361.

2. Caveat emptor. Singleton v. Castleman, 28: 393, 68 S. E. 34, — W. Va. —.

3. Qui facit per alium, facit per se. State v. Lynch, 28: 334, 90 N. E. 935, 81 Ohio St. 336.

4. Res ipsa loquitur. Robinson v. Consolidated Gas Co. 28: 586, 86 N. E. 805, 194 N. Y. 37; Johns v. Pennsylvania R. Co. 28: 591, 75 Atl. 408, 226 Pa. 319; Dail v. Taylor, 28: 949, 66 S. E. 135, 151 N. C. 284.

5. The letter killeth, while the spirit keepeth alive. State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 28: 298, 108 N. W. 261, 98 Minn. 380.

MAYOR.

Mandamus to, see Mandamus, 1-3.

MEDICINE.

See Physicians and Surgeons.

MEMORANDUM.

Required by statute of fraud, see Contracts, 13, 16.

MERITS.

Right of appellate court to pass upon, see Appeal and Error, 10.

MESNE PROFITS.

Retaining jurisdiction to settle amount of allowance for, see Equity, 5.

MINES.

Injunction to compel municipality to extinguish fire in mine, see Injunction, 1.

Master's duty as to inspection, see Master and Servant, 9.

Assumption of risk by employees in, see Master and Servant, 12, 15.

Contributory negligence of servant injured in, see Master and Servant, 16.

On public lands.

1. A mineral location claim the exterior boundaries of which include such an unreasonably excessive area that such boundary lines cannot be said to impart notice to a prospector of a mineral location or discovery within the reasonable distance of a lawful claim as located under the statute pertaining thereto, is void, since it will be deemed that the boundaries thereof have never been marked and established as required by law. *Nicholls v. Lewis & Clark Min. Co.* 28: 1029, 109 Pac. 846, — Idaho, —.

2. A mineral location embracing an area equal to more than two and one third full claims as defined by statute, on which there was no location notice posted, and as to which the discovery cuts, if any, were very indistinct at the time of the subsequent location of another claim, which is alleged to be adverse thereto, is fraudulent and void as to the latter claim, where the latter was located in good faith, and it appears that, after learning of the excessive area of the first claim, the locator thereof made no effort to readjust his boundaries until after the filing of the adverse suit, before which time he had knowingly permitted the locator of the second claim to develop it to an extent claimed sufficient to entitle it to a United States patent, and that, when a readjustment was made, the boundaries were so swung as to include the discovery shaft on the second claim, in which position they did not correspond with the calls of the location notice of the original claim. *Nicholls v. Lewis & Clark Min. Co.* 28: 1029, 109 Pac. 846, — Idaho, —.

On private lands.

Cancellation of lease, see Cancellation of Instruments, 1.

Carrier's duty as to transportation of coal and coke, see Carriers, 9; Constitutional Law, 6; Mandamus, 5, 7, 8.

3. An estate vested in the lessee under a lease for oil and gas which is for five years and as long thereafter as oil or gas, or either of them, is produced by the lessee, 28 L.R.A.(N.S.)

which term is not limited by any requirement that oil or gas must be found in paying quantities, when a well producing gas is drilled, and the lessee, in good faith, elects to consider it in paying quantities. *McGraw Oil & G. Co. v. Kennedy*, 28: 959, 64 S. E. 1027, 65 W. Va. 595.

4. A lessor is not authorized to forfeit a lease for oil and gas which is for five years and as long thereafter as oil or gas, or either of them, is produced by the lessee, by the fact that the product of a producing gas well has not been marketed, where the lessee is willing to pay the stipulated rental for the well. *McGraw Oil & G. Co. v. Kennedy*, 28: 959, 64 S. E. 1027, 65 W. Va. 595.

5. A lessor cannot forfeit a lease for oil and gas which is for five years and as long thereafter as oil or gas, or either of them, is produced by the lessee, because he thinks the gas is not being produced in paying quantities, where the lessee claims that it is, and is willing to pay the stipulated rental, as it is for the lessee to say whether the gas is produced in paying quantities, conditioned only on his acting in good faith. *McGraw Oil & G. Co. v. Kennedy*, 28: 959, 64 S. E. 1027, 65 W. Va. 595.

MINORS.

See Infants.

MISTAKE.

As basis of equity jurisdiction, see Equity, 2.

MONEY IN COURT.

Right of one paying amount of mortgage into court to subrogation, see Subrogation.

MORTGAGE.

Right of mortgagee to enjoin violation of building restriction, see Covenants and Conditions, 7.

Effect of one spouse joining in execution of other's mortgage to convey former's separate property included in the instrument, see Estoppel, 6.

Effect of payment of interest on barred note to revive mortgage securing it, see Limitation of Actions, 10.

Effect of payment to interrupt running of limitations, see Limitation of Actions, 11, 12.

Effect of changing form of action from ejectment to suit to redeem from mortgage on running of limitations, see Limitation of Actions, 6.

Joinder of mortgagor and mortgagee to enjoin violation of covenant, see Parties, 1.

Record of, see Records and Recording Laws.

Service of process on nonresident defendant, see Writ and Process, 2.

Tender.

Subrogation of one paying amount of, into court, see Subrogation.

Exactng payment of interest for full term upon payment before maturity, see Usury, 1.

1. The owner of a half interest in a parcel of real estate has a right to tender the amount due on a mortgage on the other half interest, and be subrogated to the rights of the mortgagee, and intervene in the foreclosure suit. *Murray v. O'Brien*, 28: 998, 105 Pac. 840, 56 Wash. 361.

2. The holder of a mortgage on a half interest in a parcel of real estate cannot refuse a tender by the owner of the other half interest, on the ground that he is attempting to gain an advantage over his co-owner. *Murray v. O'Brien*, 28: 998, 105 Pac. 840, 56 Wash. 361.

3. A mortgagee cannot reject a tender of the amount due on the mortgage, because of objections to the source from which the money comes. *Murray v. O'Brien*, 28: 998, 105 Pac. 840, 56 Wash. 361.

4. The lien of a mortgage cannot be discharged by a tender of the amount due thereon out of court pending an action to foreclose the mortgage. *Murray v. O'Brien*, 28: 998, 105 Pac. 840, 56 Wash. 361.

5. A tender out of court of the amount due on a mortgage in process of foreclosure will not be permitted to destroy the lien of the mortgage as a basis for affirmative relief by removal from the record as a cloud on title, without actual payment of the amount due. *Murray v. O'Brien*, 28: 998, 105 Pac. 840, 56 Wash. 361.

6. One who refuses an unqualified tender of the amount due on a mortgage, believing it to be to his advantage to do so, will not be allowed interest on the debt after the date of the tender. *Murray v. O'Brien*, 28: 998, 105 Pac. 840, 56 Wash. 361.

Sale; confirmation.

8. The confirmation of a sale under a power contained in a mortgage does not so far divest the interest of the mortgagor as to deprive him of the right to except to the confirmation of a resale in case the first bidder defaults, and the property is resold at his risk at an amount considerably less than the first bid. *Werner v. Clark*, 28: 94, 71 Atl. 305, 108 Md. 627.

MOTIONS AND ORDERS.

Raising question for consideration on appeal by motion, see Appeal and Error, 5.

Error in entertaining motion to strike out separate defense, see Appeal and Error, 20.

Certiorari to review order of inspection, see Certiorari.

Waiver of right to jury trial by motions for directed verdict, see Jury, 1.

Motion for new trial, see New Trial, 2.

The suggestion in a motion to in-

struct the jury to find a verdict for defendant, that "the facts proven are not sufficient to entitle the plaintiff as matter of law to recover," is equivalent to assigning that the evidence is insufficient to justify a verdict for plaintiff, so as to render a denial of the motion error in case the evidence was insufficient. *Waxham v. Fink*, 28: 367, 125 N. W. 145, 86 Neb. 180.

MOTIVE.

Evidence to show motive of a conductor in ejecting passenger, see Evidence, 41.

MULTIPLICITY OF SUITS.

Jurisdiction of equity to avoid, see Equity, 3, 4.

MUNICIPAL CORPORATIONS.

Acceptance of warrant in payment for public work as accord and satisfaction, see Accord and Satisfaction.

Permitting resident tax payers to serve on jury in action against city, see Appeal and Error, 30; Jury, 2.

Authorizing obstruction of sidewalk, see Equity, 1.

Estoppel of, see Estoppel, 1.

Power to permit obstruction of sidewalk, see Highways, 1, 2.

Injunction to compel municipality to extinguish fire in mine, see Injunction, 1.

Mandamus to municipal officers, see Mandamus, 1-4.

Duty of municipal officer to declare reason for suspending or not suspending subordinate, see Officers.

As necessary party defendant in mandamus proceeding, see Parties, 2.

Sufficiency of pleading as to notice of claim, see Pleading, 6.

Ordinances.

Failure to secure passage of ordinance within time agreed as defense to action for breach of building contract, see Contracts, 31.

Death inflicted while violating municipal ordinance, see Homicide, 1.

1. A clause providing for the exaction of a percentage of the gross earnings of its business, in a municipal ordinance granting a franchise to a telephone company, is legislative in its character and subject to repeal. *Nebraska Teleph. Co. v. Lincoln*, 28: 221, 117 N. W. 284, 82 Neb. 59.

2. A municipal corporation having authority to declare what shall constitute a nuisance, and abate the same, may prevent the maintenance of ordinary railway cattle yards in its residence district. *Colton v. South Dakota Central Land Co.* 28: 122, 126 N. W. 507, — S. D. —. (Annotated)

Contracts.

3. A contract by a city with a railroad company, that the city would thereafter construct and maintain all crossings and ap-

proaches made necessary by the opening of new streets, is *ultra vires* and void, as an attempt to abdicate the police power of the city. *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 28: 298, 108 N. W. 261, 98 Minn. 380.

4. The entire claim of a contractor for work which he has performed for a municipality is not defeated by the fact that he purchased some of his supplies from the mayor, where the statute provides that any claim for materials furnished in which that officer is interested shall be void. *Shaw & Hodgins v. Snohomish*, 28: 735, 104 Pac. 272, 55 Wash. 271.

Liability for damages.

Liability for defects or obstructions in streets, see Highways, 4, 5.

5. A statutory provision that all claims for injury alleged to have been caused by defects, want of repair, or obstruction of the streets of a city, must be presented to the council, is inapplicable to an injury to a workman engaged in repairing a street by the fall of an electric light pole maintained therein, since the injury did not result from obstruction of the street as a place of travel, and the statute did not contemplate presentation of claims arising from failure to furnish employees a safe working place. *Giuricevic v. Tacoma*, 28: 533, 106 Pac. 908, 57 Wash. 329. (Annotated)

MURDER.

See Homicide.

MUTUAL INSURANCE COMPANY.

See Insurance.

MUTUALITY.

Of contracts, see Contracts, 6, 7.

NAME.

As trademark, see Trademarks.

As to tradename, see Tradename.

Mistake in Christian name in service of process, see Writ and Process, 1.

Use of initials of Christian name in service of process, see Writ and Process, 2.

NEGLIGENCE.

Of railroad company in leaving oil car where cattle can reach it, see Animals, 1.

As to bridges, see Bridges.

Of or toward passengers, see Carriers. Damages for, see Damages, 3.

As to electricity, see Electricity.

Presumption and burden of proof as to, see Evidence, 14-19.

As to highways, see Highways.

As to negligent homicide, see Homicide, 2, 3.

Of person running logs in stream, see Logs and Logging.

Of master, see Master and Servant.

Wanton negligence of servant, see Master and Servant, 21.

Of municipal corporation, see Municipal Corporations, 5.

Private action for negligent destruction of bridge, see Nuisances.

Of physician, see Physicians and Surgeons.

Notice to city of claim for personal injuries, see Pleading, 6.

Of county commissioners in failing to require settlement of account by tax collector, see Principal and Surety, 2, 3.

Of telegraph company, see Telegraphs. Sufficiency of evidence to take question to jury, see Trial, 4, 5.

Instructions as to, see Trial, 19.

Contributory.

Contributory negligence of passenger, see Carriers, 6-8.

Of servant, see Master and Servant, 16.

In attempting to cross railroad track at other point than at regular crossing, see Railroads, 5.

Instruction as to, see Trial, 20.

Question whether verdict for plaintiff violated instructions as to contributory negligence, see Trial, 23.

Of trespasser shot by servant, see Master and Servant, 22.

As to injuries from defects or obstructions in highways, see Highways, 7.

Of person injured by automobile, see Automobiles.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

Raising question for review on appeal by motion for, see Appeal and Error, 5.

Grounds for, on appeal, see Appeal and Error, 33.

1. A new trial may be granted in an action to recover damages for personal injuries, on the ground of inadequacy of the damages found by the jury, when it appears upon the facts proven that the jury must have omitted to take into consideration some of the elements of damage properly involved in the plaintiff's claim. *Toledo Railways & L. Co. v. Mason*, 28: 139, 91 N. E. 292, 81 Ohio St. 463.

2. The assignment of error in a motion for new trial, that "the verdict is not sustained by sufficient evidence" or "the verdict is contrary to law," is sufficient to challenge the attention of the trial court to its ruling in refusing to direct a verdict for defendant, under the Neb. Acts 1907, chap. 162, since there should be an instruction to find for defendant if the evidence is not sufficient to sustain a verdict for plaintiff. *Waxham v. Fink*, 28: 367, 125 N. W. 145, 86 Neb. 180.

NOTES.

Admissibility in evidence, see Evidence, 28.

NOTICE.

- Of election to try case to jury, see Appeal and Error, 31.
- Of restrictive covenants, see Covenants and Conditions, 9.
- To master of injury to servant, see Master and Servant, 2, 3.
- Of claim against city, see Municipal Corporations, 5; Pleading, 6.
- From record, see Records and Recording Laws.
- To one purchasing property as to rights of persons selling, see Sale, 9.

1. A bank whose cashier induces a stranger to substitute his note for his own, which is held by the bank, is not, by reason of the cashier's knowledge, chargeable with notice that the maker received no consideration for the note. *State Bank v. Forsyth*, 28: 501, 108 Pac. 914, — Mont. —.

2. Notice to one of the directors of a matter affecting the interest of the bank, which it is to the interest of such director to conceal, is not notice to the bank. *First Nat. Bank v. Lowther-Kaufman Oil & C. Co.* 28: 511, 66 S. E. 713, 66 W. Va. 505.

NUISANCES.

- Power of municipality as to, see Municipal Corporations, 2.

One having a contract with the Federal government to carry mail over a certain route six times a week, who is compelled to take a circuitous route because of the negligent destruction of a bridge, suffers special damages giving him a right of action against the one through whose negligence the bridge was destroyed, under a statute permitting a private person to maintain an action for a public nuisance if specially injured thereby. *Sholin v. Skamania Boom Co.* 28: 1053, 105 Pac. 632, 56 Wash. 303.

OATH.

- Presumption that jury were properly sworn, see Appeal and Error, 7.
- Requirement that proofs of loss shall be made by insured under oath, see Insurance, 7.
- Time for objecting to form of oath administered to jury, see Trial, 2.

OBJECTIONS.

- To raise question on appeal, see Appeal and Error, 5.
- In general, see Trial, 1, 2.

OBSTRUCTING JUSTICE.

- Review of conviction for resisting execution of warrant, see Appeal and Error, 13.

When warrant is void so as to justify resistance to execution of, see Search and Seizure.

Standing on the threshold of a house and refusing to permit an officer to enter to execute a search warrant, without further overt act, is sufficient to support a conviction of obstructing the officer in the 28 L.R.A. (N.S.)

execution of process. *Appling v. State*, 28: 548, 128 S. W. 866, — Ark. —.

OBSTRUCTION.

- Of highway, see Highways, 1-5.

OFFICERS.

- Liability of constable for killing dog, see Animals, 2.
- Review of conviction for resisting execution of search warrant, see Appeal and Error, 13.
- Of corporation, see Corporations.
- Mandamus to, see Mandamus.
- Obstruction of, in exercise of right, see Obstructing Justice.
- Liability of public officer to sureties of other officer for loss sustained by them through former's neglect to require proper settlement of accounts, see Principal and Surety, 2, 3.

An executive officer of a city having statutory authority to suspend subordinate officials from office is not bound to declare the reasons for his action or nonaction in any particular case. *State ex rel. Davern v. Rose*, 28: 194, 122 N. W. 751, 140 Wis. 360.

OIL.

- Oil and gas lease, see Cancellation of Instruments, 1; Mines, 3-5.

OPINIONS.

- As evidence, see Evidence, 35.

OPTION.

- Option contracts, generally, see Contracts, 6, 9, 10.
- Effect as to strangers of decree for specific performance of option contract, see Judgment, 3.
- Specific performance of option contract, see Specific Performance.

ORCHESTRA.

- Protection of right to name of, see Tradename.

ORDINANCES.

- Infliction of death while violating, see Homicide, 1.
- In general, see Municipal Corporations, 1, 2.

OVERPAYMENT.

- Right of executor to recover, see Executors and Administrators.

PAROL EVIDENCE.

- See Evidence, 30-34.

PARTIES.

- Error in failing to dismiss suit for misjoinder of, see Appeal and Error, 24.
- To contract, see Contracts, 2.
- Right of defendant to complain of dismissal as to codefendant, see Dismissal and Discontinuance, 1.

Effect of striking out of party to work discontinuance of case, see Dismissal and Discontinuance, 2.

Conclusiveness of judgment against persons not parties, see Judgment, 3, 4.

Plaintiffs.

Who may enforce covenants, see Covenants and Conditions, 7.

Who may have remedy against nuisance, see Nuisances.

1. A mortgagor and mortgagee of property for the benefit of which a building restriction has been imposed upon neighboring property may join in a suit to enjoin violation of the covenant. *Stewart v. Finkelstone*, 28: 634, 92 N. E. 37, 206 Mass. 28.

Defendants.

2. A city, in the streets of which a street railway company holding a franchise providing that its tracks be laid at the grade of the streets has been ordered by the state railroad commissioners to construct a subway beneath the tracks of a railroad, is not a necessary party to a mandamus proceeding by the state, to compel compliance therewith, especially where a majority of the city officers who, by acting together, could represent it, disclaim any desire for it to be heard, and it is not apparent that any injury will result to it by the decision. *State ex rel. Dawson v. Parsons Street R. & E. Co.* 28: 1082, 105 Pac. 704, 81 Kan. 430.

3. A joint action may be maintained by the holder of a negotiable note, and a joint judgment recovered against the maker and all the indorsers, where notice and protest have been waived by the indorsers, under a statute providing that an action may be maintained and a joint judgment rendered against the maker and indorser of negotiable paper, "if the same be protested." *First Nat. Bank v. Lowther-Kaufman Oil & C. Co.* 28: 511, 66 S. E. 713, 68 W. Va. 505.

4. The other members of the class are not necessary parties to a suit by the holder of a tontine policy of life insurance against the insurer for an accounting of the amount due on his policy. *Equitable L. Assur. Soc. v. Winn*, 28: 558, 126 S. W. 153, — Ky. —.

5. No election can be compelled between a devise and property covered by the will which is alleged to belong to the devisee, in a suit to which the person to whom the devise was made is not a party. *McDonald v. Shaw*, 28: 657, 121 S. W. 935, 92 Ark. 15.

Intervention.

Right of owner of half interest to intervene in foreclosure of mortgage on other half, see Mortgage, 1.

6. In a suit to recover possession of real estate in which a cross complaint is filed to compel the claimant to elect between claiming it and accepting a benefit under a will which is alleged to have cov-

ered it, claims cannot be presented by persons who claim to have purchased property from testator's administrator, to subrogation against that estate for the amount of the purchase price paid, or by persons who claim compensation for support furnished to the beneficiary. *McDonald v. Shaw*, 28: 657, 121 S. W. 935, 92 Ark. 15.

PARTITION.

One of several remaindermen after a life estate cannot compel partition during the continuance of the life estate, even though he has acquired such life estate, unless he waives it. *Brown v. Brown*, 28: 125, 67 S. E. 596, — W. Va. —. (Annotated)

PARTNERSHIP.

Presentation against bankrupt of claim growing out of partnership venture, see Bankruptcy, 3, 4.

One member of a partnership organized for a limited purpose may purchase with his own funds a judgment against his copartner having no connection whatever with the partnership transaction, prior to the institution of any proceedings affecting the partnership affairs or the existence of any funds out of which the latter is entitled to claim profits, and use the same as a set-off in settlement of its accounts. *Miller v. Ferguson*, 28: 618, 65 S. E. 562, — Va. —. (Annotated)

PART PAYMENT.

As affecting limitation of actions, see Limitation of Actions, 10-12.

PASS.

Acceptance of, by shipper of stock as ratification of contract limiting liability, see Contracts, 25.

PASSAGEWAY.

Injunction against obstruction of, see Injunction, 4.

PASSENGER CARRIERS.

See Carriers

PAYMENT.

Application of deposit by bank, see Banks, 3.

As affecting limitation of actions, see Limitation of Actions, 10-12.

Subrogation for, see Subrogation.

Exacting payment of interest for full term upon payment of debt before maturity, see Usury, 1.

PEDDLERS.

Interstate business of, see Commerce, 5.

PENALTIES.

Act increasing, as *ex post facto* law, see Constitutional Law, 1.

PERFORMANCE.

Of contract, see Contracts.

PERMIT.

Revocation of permit to obstruct sidewalk, see Highways, 2.

PERSONAL INJURIES.

On bridge, see Bridges.

To passengers, see Carriers.

Damages for, see Damages, 3.

New trial in action to recover damages for, see New Trial, 1.

Notice to city of claim against, for, see Pleading, 6.

PERSONAL PROPERTY.

Sale of, see Sale.

PHYSICIANS AND SURGEONS.

Validity of physician's contracts for services, see Contracts, 21, 22, 24, 32.

What constitutes breach of contract to furnish medical attendance, see Contracts, 30.

Evidence on question of damages for malpractice, see Evidence, 44, 45.

1. A surgeon is guilty of malpractice in treating as a mere bruise a fracture of the neck of the femur, where, when patient is placed on his back, his foot lies over on one side, without power on his part to control it. *Bonnet v. Foote*, 28: 136, 107 Pac. 252, 47 Colo. 232. (Annotated)

2. A physician who, after placing a patient on an insulated platform, puts a conical cap above and in front of the patient's head, through which static electricity is discharged, and leaves the room for eight or ten minutes, during which no attendant is present, is guilty of actionable negligence rendering him liable for the burning of the patient's head by the electricity during such absence from the room. *Frisk v. Cannon*, 28: 262, 126 N. W. 67, 110 Minn. 438. (Annotated)

PLACE OF WORK.

Master's duty as to, see Master and Servant.

PLAINTIFFS.

Parties plaintiffs, see Parties, 1.

PLAT.

Right of one purchasing with reference to, see Vendor and Purchaser, 1, 6.

PLEADING.

Review as to, on appeal, see Appeal and Error, 10.

Evidence admissible under, see Evidence, 57.

Relief under pleadings.

1. In an action on an insurance policy, a petition alleging specific acts as a waiver of proof of loss, in proof of which contradicted evidence was introduced without objection, sufficient to show a waiver thereof upon other grounds, will be considered as amended so as to conform to the facts proved, and a waiver so proved is fairly in 28 L.R.A. (N.S.)

issue. *St. Paul F. & M. Ins. Co. v. Mitten-dorf*, 28: 651, 104 Pac. 354, — Okla. —.

Amendment.

Error in allowing amendment, see Appeal and Error, 25.

Effect of amending declaration on admissibility of deposition in evidence, see Evidence, 26, 27.

Right to amend plea after judgment sustaining demurrer to plea because insufficient, see Judgment, 2.

Effect of amendment changing form of action on running of limitations, see Limitation of Actions, 6.

Amendment of alternative writ of mandamus, see Mandamus, 6.

2. The declaration in an action to recover for services rendered under a contract for labor cannot be amended so as to claim damages for a wrongful discharge from the service. *Derosia v. Firland*, 28: 577, 76 Atl. 153, — Vt. —.

Striking out.

Error in entertaining motion to strike out separate offense, see Appeal and Error, 20.

Effect of striking out party to work discontinuance, see Dismissal and Discontinuance, 2.

3. A mere denial in a suit by the holder of a tontine insurance policy to compel an accounting of the amount due on the policy, that its books would show the amount to be due which is claimed by plaintiff, is not a good defense to the suit, and will be stricken out of the answer. *Equitable L. Assur. Soc. v. Winn*, 28: 558, 126 S. W. 153, — Ky. —.

Declaration or complaint.

4. Where an action brought to recover damages for fraud is apparently barred by the statute of limitations, the petition, in order to relieve the action of the bar, on the ground that it was brought within the statutory period after discovery of the fraud, must show that the plaintiff used proper diligence to discover the fraud. *Crawford v. Crawford*, 28: 353, 67 S. E. 673, — Ga. —.

5. To sustain an action on an insurance policy, the insured must allege and prove compliance with conditions precedent or a waiver thereof. *St. Paul F. & M. Ins. Co. v. Mitten-dorf*, 28: 651, 104 Pac. 354, — Okla. —.

6. That a claim for personal injuries was presented in writing to the city council, as required by statute, is not shown by a complaint which states that plaintiff caused the city and its officers and agents to be fully informed of the extent of the injury, and that the officers and agents investigated the same. *Giuricevic v. Tacoma*, 28: 533, 106 Pac. 908, 57 Wash. 329.

7. An allegation that, at the time of the seizure of property to satisfy the debt of a third person, plaintiff was the owner and in possession of it, and that such property continued to be his until its sale by the sheriff, is sufficient to support an action

for conversion. *Western Min. Supply Co. v. Quinn*, 28: 214, 105 Pac. 732, 40 Mont. 156.

Pleas and answers.

8. An averment that the beneficiary in a policy of life insurance "murdered" the assured sufficiently alleges an intentional killing of the assured by the beneficiary to prevent recovery by the latter upon the policy, where, under the statutes, intent is an essential element of murder. *Filmore v. Metropolitan L. Ins. Co.* 28: 675, 92 N. E. 26, 82 Ohio St. 208.

Demurrer.

Conclusiveness of theory of law advanced for defendant in action dismissed on demurrer in subsequent action on same matters between same parties, see Estoppel, 4.

Right to amend plea after judgment sustaining demurrer to plea because insufficient, see Judgment, 2.

9. A complaint showing on its face that the agreement sued upon is within the statute of frauds, and fails to comply with its requirements, is demurrable. *Harper v. Goldschmidt*, 28: 689, 104 Pac. 451, 156 Cal. 245.

10. A plea of mutual mistake as to the effect of an instrument given by the agent of the payee of a renewal note to the maker, by which the payee agreed "to receipt" the maker "for note given me to-day," in that the agreement to receipt was a meaningless paper, whereas it was intended by both parties to signify an agreement upon the part of the payee to receipt for and cancel the obligation represented by the note upon performance of the conditions to secure compliance with which the note was given, and that the new note would not have been given had not the parties thought the agreement would protect the maker, except in case of breach of the conditions, against liability on the renewal note, which it was alleged would destroy a good plea of failure of consideration as to the original note, is sufficient as against general demurrer, although the plea may have contained certain allegations regarding, and references to, other papers and transactions which did not constitute a good plea of mutual mistake as to them. *Dolvin v. American Harrow Co.* 28: 785, 54 S. E. 706, 125 Ga. 699.

POLICE.

Liability for killing dog, see Animals, 2.

POLICE POWER.

See Constitutional Law, 4, 8, 9.

PONDS.

Grant by public of outlet of, see Waters, 1.

POSSESSION.

Adverse, see Adverse Possession.

Presumption as to, see Evidence, 21, 22.

As condition of right to maintain trespass, see Trespass, 3.

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POSTOFFICE.

Failure of master to receive notice of injury mailed by employee, see Master and Servant, 3.

PREJUDICIAL ERROR.

See Appeal and Error, 20-31.

PRESCRIPTION.

Title by, see Adverse Possession.

PRESENTATION.

Of claims against bankrupt, see Bankruptcy, 3-5.

PRESUMPTIONS.

On appeal, see Appeal and Error, 7-9.

In general, see Evidence, 2-22.

PRINCIPAL AND AGENT.

Power of agent of public contractor to compromise dispute with city as to amount due him, see Accord and Satisfaction, 2.

Authority of bank cashier, see Banks, 1, 2.

Authority of agent to indorse extension of time on past-due note, see Bills and Notes, 3.

Fraud of agent in reissuing note after maturity, see Bills and Notes, 4.

Duty of broker to account to principal for secret profits, see Brokers.

As to carrier's agent, see Carriers.

Effect of limitation of liability in receipt prepared by shipper's agent, see Carriers, 14.

Written authority to agent to contract for sale of property as dispensing with necessity that contract of sale itself be in writing, see Contracts, 12.

Estoppel of municipality to deny authority of agent to act for it, see Estoppel, 1.

Liability of one purchasing liquors as agent of another with latter's money, see Intoxicating Liquors, 1.

Imputing agent's knowledge to principal, see Notice.

Extent of agent's authority as question for jury, see Trial, 13.

1. The mere fact that an agent for the sale of a horse for \$3,000 took \$1,000 for it is not sufficient, as matter of law, to charge the purchaser with notice that he is exceeding his authority, although he at first said he had no authority to accept the latter sum, where he subsequently states that he has received such authority. *Galbraith v. Weber*, 28: 341, 107 Pac. 1050, — Wash. —.

2. One purchasing a horse which has been placed in the hands of an agent for sale has a right to rely upon the agent's having authority to fix the price. *Galbraith v. Weber*, 28: 341, 107 Pac. 1050, — Wash. —.

Sale of land by agent.

3. A contract by one cotenant to sell the real estate belonging to both is not

binding on the other where it does not comply with the terms of the written authority conferred upon him. *Hartenbower v. Uden*, 28: 738, 90 N. E. 298, 242 Ill. 434.

Undisclosed principal.

4. A purchaser of coal who does not know, and has no good reason to know, that he is dealing with the agent of the owner, is justified in treating the agent as owner, and in a suit by such undisclosed principal for the purchase price, is entitled to credit thereon for the amount of loss sustained by him on the sale of a suit of clothes agreed by the agent to be by him received in part payment for the coal, but which was not delivered because of the agent's death. *Eldridge v. Finninger*, 28: 227, 105 Pac. 334, — Okla. — (Annotated)

Ratification of agent's acts.

5. The payee of a renewal note cannot, after knowledge of all the facts, ratify the act of his agent in obtaining such note by suing thereon, and at the same time repudiate as unauthorized the act of his agent in executing contemporaneously therewith an agreement detrimental to him, which contemporaneous agreement was the inducing cause of the execution of the renewal note. *Dolvin v. American Harrow Co.* 28: 785, 54 S. E. 706, 125 Ga. 699.

PRINCIPAL AND SURETY.

1. The change of the state in which a solicitor of life insurance is to work, after the execution of a bond conditioned for the faithful performance of his duties, will not, although it enlarges his responsibilities, release the surety, where the bond provides that it shall not be annulled or revoked without the consent of the obligee, but shall remain in force, whether under the agent's existing appointment or any future one, and the agency contract provides that the agent shall have authority in the original state, and shall give a satisfactory bond which shall hold good "under this or any future agreement." *Daly v. Old*, 28: 463, 99 Pac. 400, 34 Utah, 74. (Annotated)

2. The failure of county commissioners to effect a settlement with the tax collector, and require him to exhibit the necessary receipts for one year before placing the duplicates of the next year in his hands, as required under penalty by statute, does not render them liable to the sureties on his bond, who are compelled to make good money which he collects and fails to account for under the new duplicates. *Hudson v. McArthur*, 28: 115, 67 S. E. 995, 152 N. C. 445. (Annotated)

3. Failure of county commissioners to effect a proper settlement with a tax collector, and require him to exhibit the necessary receipts for one term before entering upon the duties of a succeeding one, is not the cause of injury to persons signing his bond for the succeeding term, through losses occasioned by his embezzlement during such term and afterwards, so as to give the sureties a cause of action against the 28 L.R.A. (N.S.)

commissioners for their negligence. *Hudson v. McArthur*, 28: 115, 67 S. E. 995, 152 N. C. 445.

PRIORITY.

As between option to purchase and declaration of homestead, see Contracts, 9.

As between unrecorded contract for purchase and prior unrecorded option, see Specific Performance, 1.

PRIVILEGED COMMUNICATIONS.

In libel case, see Libel and Slander, 2.

PROBATE.

Of Wills, see Wills, 3.

PROBATE COURT.

Admissibility of depositions in proceedings before, see Evidence, 25.

PROCESS.

See Writ and Process.

PROFITS.

Loss of, as element of damages, see Damages, 7.

PROOFS OF LOSS.

In general, see Insurance, 6, 7.

PROPERTY.

Guaranty of right to, see Constitutional Law.

PROSPECTUS.

Liability of officers of corporation issuing fraudulent prospectus, see Corporations.

PROXIMATE CAUSE.

Of loss by fire.

1. Failure of a telephone company for several minutes to connect a subscriber with the fire department is not the proximate cause of the destruction of his property, where the fire was under way when he awakened from sleep, and the department responded to a summons from a neighbor, so that there was not much actual delay in reaching the fire, and there is nothing to show that prompt service would have saved the property. *Volquardsen v. Iowa Teleph. Co.* 28: 554, 126 N. W. 928, — Iowa, — (Annotated)

Of injury to passenger.

2. The negligence of a railroad company in starting its train before one who has entered to assist a passenger has had time to alight is not the proximate cause of his injury in attempting to alight after the train is in motion, without the consent and against the will of the carrier's servants. *Chesapeake & O. R. Co. v. Bell*, 28: 773, 68 S. E. 398, — Va. — (Annotated)

Of injury to servant.

3. A master's negligence in storing dynamite in a place where its accidental

ignition will endanger the lives of his employees is the proximate cause of the death of a servant through its explosion, notwithstanding the cause of the explosion is purely accidental or wholly unknown. *Brown v. West Riverside Coal Co.* 28: 1260, 120 N. W. 732, — Iowa, —.

PUBLICATION.

Service of process by, see Limitations, 7.

PUBLIC CHARITIES.

See Charities.

PUBLIC IMPROVEMENTS.

Validity of statute providing for front-foot assessment, see Constitutional Law, 9.

Allowing attorney's fee against defendant in action to enforce special assessment, see Constitutional Law, 3.

Effect of running of limitations since original assessment upon reassessment, see Limitation of Actions, 5.

Damages for permanent injuries to land by construction of, thereon, see Damages, 4.

Property subject to assessment.

1. Benefits to accrue from an improvement consisting as a whole of the cutting down of the grade of a street, the construction of a viaduct, and the acquisition of private property to widen a street, cannot be assessed to pay for the cutting down of the street and the acquisition of the property, where that would be of no benefit to the public without the viaduct, and no definite plan as to it has been adopted, but it is merely talked about as desirable, without any present means on the part of the municipality to build it. *Kansas City v. St. Louis & S. F. R. Co.* 28: 669, 130 S. W. 273, — Mo. —. (Annotated)

2. A freight depot and spur tracks of a railroad company, although part of its entire system, are subject to special assessment for local improvement, under a statute providing that the property of railroad companies shall be in all respects subject to all special assessments for local improvement in the same manner and to the same extent as the property of individuals. *Chicago, M. & St. P. R. Co. v. Janesville*, 28: 1124, 118 N. W. 182, 137 Wis. 7.

PUBLIC LANDS.

Effect of invalidity of contract for cutting timber on liability of third person agreeing to pay wages of employees so engaged, see Contracts, 28.

Mines on, see Mines, 1, 2.

PUBLIC POLICY.

See Contracts.

PUBLIC SERVICE COMMISSION.

Mandamus to compel compliance with orders of, see Parties, 2.

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QUANTITY.

Of land sold, see Vendor and Purchaser, 3.

QUESTION FOR JURY.

See Trial.

QUIETING TITLE.

See Cloud on Title.

RAILROAD COMMISSION.

Review by courts of orders of, see Courts, 1.

Mandamus to compel compliance with orders of, see Parties, 2.

Authorizing street railway company to construct subway beneath tracks of railroad, see Railroads, 3.

RAILROADS.

Negligence in leaving leaky oil car where cattle can reach it, see Animals, 1.

As carriers, see Carriers.

Implied agreement to pay for land taken for right of way, see Contracts, 3.

Contract to pay bonus to electric railway, see Contracts, 8, 18, 19; Evidence, 34.

Estoppel to sue on implied contract to pay for land taken for right of way, see Estoppel, 2.

Presumption of negligence from carrying away of railroad bridge by high water, see Evidence, 16.

Weight of evidence of witnesses that they did not hear signals, see Evidence, 53.

Assumption of risk by railroad employees, see Master and Servant, 14.

Forbidding maintenance of cattle yards in residence district, see Municipal Corporations, 2.

Assessments on, for local improvements, see Public Improvements, 2.

Damages for injury to land by wrongful construction of railway thereon, see Trial, 17.

Railroad aid.

1. A statute providing for the formation of railroad districts and the voting of bonds for the purchase or construction of railroads by such districts, and for the operating or leasing thereof, violates a constitutional provision prohibiting counties or other subdivisions of the state from lending their credit, either directly or indirectly, to any business enterprise in aid of any individual, association, or corporation, since the building of a railroad is not within itself an exercise of governmental power, but is a business enterprise. *Atkinson v. Board of County Commissioners*, 28: 412, 108 Pac. 1046, — Idaho, —. (Annotated)

Crossing by street railway.

Review of determination of state railroad commission as to crossing of tracks by street car lines, see Courts, 1.

Mandamus to compel street railway company to construct subway for tracks beneath railroad tracks, see Parties, 2.

2. A street railway company which is operating a continuous line across a city, except for a break caused by a number of railroad tracks, may be regarded as in effect operating its line across the railroad by means of a transfer, and may, therefore, be required to change its mode of crossing by the construction of a subway. State ex rel. Dawson v. Parsons Street R. & E. Co. 28: 1082, 105 Pac. 704, 81 Kan. 430.

3. Under a statute empowering the board of railroad commissioners to determine whether there is a necessity for the crossing of a railroad track by a street car line, "and, if so, the place thereof, whether it shall be over or under the existing railroad, or at grade, and in other respects the manner of such crossing," the board can authorize a street railway company to construct a subway in the street of a city beneath the tracks of a railroad company, in accordance with whatever regulations it may see fit to impose, so that they have relation to the safe operation of both roads and are not unreasonable. State ex rel. Dawson v. Parsons Street R. & E. Co. 28: 1082, 105 Pac. 704, 81 Kan. 430.

4. The legislature, having paramount authority over public streets, may, either directly or through a body to which it has delegated the power, authorize and require a street car company, which, by ordinance, has been granted a right to operate only a surface road, to construct a subway beneath the tracks of a railroad. State ex rel. Dawson v. Parsons Street R. & E. Co. 28: 1082, 105 Pac. 704, 81 Kan. 430.

Crossing by highway.

Requiring companies to pay for safety devices, see Constitutional Law, 4, 8.

Agreement by city with railroad to construct and maintain all crossings made necessary by new streets, see Municipal Corporations, 3.

5. A railroad company is not liable for injury to one who voluntarily turns aside from a crossing over the track, left unsafe by the company, and attempts to make the crossing over the unprotected rails, and is thrown from his wagon by the unevenness of the crossing place. Moore v. Great Northern R. Co. 28: 410, 107 Pac. 852, — Wash. —.

6. A municipality which lays out a street across a railroad right of way is vested with power to open the street at grade or by an overhead crossing, as propriety, necessity, and public safety require. State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 28: 298, 108 N. W. 261, 98 Minn. 380.

7. A highway bridge over a railroad track, when necessary to make the crossing safe for public use, is a "safety device," within the meaning of a rule requiring railroads to construct and maintain at cross-

ings all such safety devices as are reasonably necessary for the protection of the traveling public. State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 28: 298, 108 N. W. 261, 98 Minn. 380.

8. A provision in a railroad company's charter that the company may construct its railroad along or over any highway, if that be necessary, but that the highways so crossed shall be put in such condition as not to impair or interfere with its free and proper use, applies to streets and highways laid out over the railroad after its construction. State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 28: 298, 108 N. W. 261, 98 Minn. 380.

9. A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may require; and that right on the part of the state attaches, by implication of law, to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense such suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed. State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 28: 298, 108 N. W. 261, 98 Minn. 380.

Contributory negligence.

Instruction as to contributory negligence, see Trial, 20.

See also supra, 5.

10. Contributory negligence, as matter of law, is not shown by proof that plaintiff in attempting to stop a horse attached to a wagon, but without a driver, which he saw approaching a much used railroad crossing, was injured by being jerked, by the horse in its flight from an approaching train which came suddenly into view around a nearby sharp curve at a high rate of speed and with whistle blowing, in front of, and struck by, such train, where it also appears that plaintiff, when stopping the horse, was not upon the track nor near enough to be struck by a train, and did not intend to go upon the track, but only to back the horse to a place of safety. Campbell v. Chicago G. W. R. Co. 28: 346, 121 N. W. 429, 108 Minn. 104.

(Annotated)

11. A railroad company cannot be held liable for the death of one who drives on the track upon a railroad crossing without looking or listening for approaching trains, because he was unfamiliar with the country, where it omits the performance of no duty which it owes him. Anspach v. Philadelphia & R. R. Co. 28: 382, 74 Atl. 373, 225 Pa. 528.

(Annotated)

12. One who goes near enough to a railroad track to be in danger from any source is bound to exercise due care to avoid harm, but this does not require that such person must stop, look, and listen, and continue to look under all circumstances and at all

times, nor is such person bound to anticipate negligence in the operation of the trains thereon. *Campbell v. Chicago G. W. R. Co.* 28: 346, 121 N. W. 429, 108 Minn. 104.

RATES.

Injunction against filing, of interstate commerce commission, see Interstate Commerce Commission.

RATIFICATION.

Of contract, see Contracts, 25-27.

Of agent's act, see Principal and Agent, 5.

REAL-ESTATE BROKERS.

See Brokers.

REAL PROPERTY.

Option to purchase, see Contracts, 6, 9, 10.

Validity under statute of frauds of contracts as to, see Contracts, 12, 13, 15, 16.

Damages for injuries to, see Damages, 4, 5.

Deeds of, see Deeds.

When statute of limitations begins to run in action respecting, see Limitation of Actions, 4.

Partition of, see Partition.

Records of title, see Records and Recording Laws.

Sale of, see Vendor and Purchaser.

Estates or interests created by will, see Wills, 7-9.

REBUTTAL.

Rebuttal evidence, see Evidence, 47.

RECEIVERS.

Appeal from decrees affecting members of club in hands of receivers, see Appeal and Error, 1.

Of social clubs, see Clubs, 1.

Bill in equity on behalf of receiver of club to recover dues from members, see Equity, 3, 4.

RECEIVING STOLEN PROPERTY.

Under a statute making it a crime to purchase any horse with intent to defraud the owner, which is known by the purchaser to have been stolen, a conviction may be had upon proof that stolen horses were bought with the necessary guilty knowledge and fraudulent intent, though the theft occurred in another state, and notwithstanding it is not a crime to bring stolen property into the prosecuting state, since receiving and buying stolen property is an independent substantive offense. *Ex parte Sullivan*, 28: 750, 121 N. W. 456, 84 Neb. 493. (Annotated)

RECORDS AND RECORDING LAWS.

Record on appeal, see Appeal and Error, 2-4.

Right to removal of mortgage from, see Mortgage, 5.

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Priority as between unrecorded contract for purchase and prior unrecorded option, see Specific Performance, 1.

The recordation of a mortgage which purports to relate exclusively to the property of a married woman is not notice to strangers of the fact that property of her husband is included therein, so as to prevent their securing a good title from him in case the property was so included without his authority. *W. F. Taylor Co. v. Sample*, 28: 289, 48 So. 439, 122 La. 1016.

REFORMATION OF INSTRUMENTS.

One who as heir of the deceased owner of a tax-sale certificate took out a tax deed thereon, wherein the name of the deceased person was inserted as grantee, cannot maintain an equitable action to have the deed reformed by a decree substituting her own name as grantee therein, since she might, upon due application to the county clerk, have obtained a deed made to herself as grantee, notwithstanding the issuance of the former instrument. *Baker v. Lane*, 28: 405, 109 Pac. 182, 82 Kan. 715.

REGISTRATION.

Effect on rights of voters of destruction of registration papers, see Voters and Elections, 1.

RELATIVES.

Fiduciary relation between, see Evidence, 3, 4.

RELEASE.

Of surety, see Principal and Surety, 1.
Of purchase-money note secured by mortgage, see Usury, 1.

RELEVANCY.

Of evidence, see Evidence, 39-48.

RELIGIOUS SOCIETIES.

Slander of clergymen, see Libel and Slander, 1.

REMAINDERMEN.

Right of one to compel partition during existence of life estate, see Partition.

REMEDIES.

Of parties to sale, see Sale.

RENEWAL.

Of note, see Bills and Notes, 3, 4.
Effect of renewing lease without reserving right to remove fixtures, see Landlord and Tenant.

REPLEVIN.

Action for malicious prosecution against one wrongfully instituting replevin action, see Replevin.

REPRESENTATIONS.

By insured, see Insurance.

REPUTATION.

Proof of to discredit witness, see Witnesses, 4.

RESCISSION.

Of contract to sell real estate, see Evidence, 20.

Of land contract, see Vendor and Purchaser, 4.

RESISTING OFFICER.

See Obstructing Justice.

RES JUDICATA.

Of judgment, see Judgment, 2-4.

RESPONDEAT SUPERIOR.

See Master and Servant, 21-26.

RETAINING JURISDICTION.

See Equity, 5.

REVERSIBLE ERROR.

See Appeal and Error, 20-31.

REVOCATION.

Of permit to obstruct sidewalks, see Highways, 2.

ROUTE.

Duty of carrier's agent to instruct passenger as to, see Carriers, 1, 2,

SALARY.

Statute regulating assignments of, see Constitutional Law, 2, 7.

SALE.

On foreclosure, see Mortgage, 8.

By agent, see Principal and Agent, 1, 2, 4; Trial, 13.

For taxes, see Taxes, 5, 6.

Of land generally, see Vendor and Purchaser.

Passing of title; delivery.

1. Change of possession of a warehouse on leased land, and its contents, is effected by a delivery of the key, and ceasing to exercise control over the property. *Western Min. Supply Co. v. Quinn*, 28: 214, 105 Pac. 732, 40 Mont. 156.

2. Delivery of possession of chattels under a contract of sale is sufficient as against an attachment, if made prior to the time it is levied, although the sale is not accompanied by immediate delivery, as required by statute. *Western Min. Supply Co. v. Quinn*, 28: 214, 105 Pac. 732, 40 Mont. 156. (Annotated)

Rights and remedies of parties.

Effect of recovery by seller on wrong theory, see Appeal and Error, 23.

Breach of parol warranty as defense to action on note for purchase price see Bills and Notes, 5.

Construction of contract for, see Contracts, 20.

Measure of damages for breach of contract, see Damages, 1, 7.

Evidence of custom to show that unconditional acceptance of order was subject to condition, see Evidence, 39.

What constitutes fraud justifying rescission, see Fraud and Deceit, 1.

3. In determining the question whether or not a seller has complied with his contract to ship goods ordered within a reasonable time, the fact of difficulty in getting cars because of shortage on the part of the carrier should be considered, and also the fact that the goods were to be shipped through mountains in the winter. *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 28: 1007, 108 Pac. 621, — Wash. —.

4. Acceptance of an order for goods f. o. b. requires the seller to procure and load the cars. *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 28: 1007, 108 Pac. 621, — Wash. —.

5. Although the vendor under an executory contract to sell and deliver goods on credit may, if the purchaser default on an existing indebtedness, treat the sale as one for cash, he must, where the executory vendee has repudiated the contract before time for tender at the delivery point, in order to entitle him to liquidate his damages by a sale of the goods as the property of such vendee, and maintain an action for the balance of the purchase price, comply with the terms of the agreement as to time and place of delivery. *Lincoln v. Charles Alshuler Mfg. Co.* 28: 780, 125 N. W. 908, 142 Wis. 475.

6. The remedy of an executory vendor for refusal of his vendee to carry out his agreement to purchase a specified quantity of the ordinary output of a manufacturer is for damages for the breach, where the particular goods to satisfy the agreement have not, prior to the breach, been segregated from the general stock, and not for the purchase price. *Lincoln v. Charles Alshuler Mfg. Co.* 28: 780, 125 N. W. 908, 142 Wis. 475.

Rights as to third parties.

7. One who in good faith purchases diamond earrings, paying a cash consideration, from a diamond setter in whose hands they have been placed with the right to sell and pay a specified sum therefor, or to dissolve the transaction by a return of the goods within a reasonable time, acquires a good title, since the transaction constitutes a "sale and return," the right to return the goods and dissolve the transaction being a condition subsequent. *Frantz v. Fink*, 28: 539, 52 So. 131, 125 La. 1013.

8. Mere possession of personal property is not such *indictum* of ownership as will enable the possessor to convey a good title as against the true owner. *Frantz v. Fink*, 28: 539, 52 So. 131, 125 La. 1013.

9. A dealer who places diamond earrings in the hands of a diamond setter who is not a retailer, with power to sell and pay a specified sum therefor, or to dissolve the transaction by a return of the goods within

a specified time, may recover such earrings from one who has redeemed them, at the request of the diamond setter, from a pawn-broker with whom he had unlawfully pledged them, as a means of settlement for other jewelry which the diamond setter had embezzled from the redeemer, since in such case he is put upon inquiry as to the possible right of other persons in the property. *Frantz v. Fink*, 28: 539, 52 So. 131, 125 La. 1013.

SCAFFOLD.

Presumption of negligence from fall of, see Evidence, 17.

SCIAGRAPH.

Admissibility in evidence, see Evidence, 29.

SEARCH AND SEIZURE.

Review of conviction for resisting execution of search warrant, see Appeal and Error, 13.

Resisting officer in execution of search warrant, see Obstructing Justice.

A warrant to search for liquors alleged to be illegally kept for sale, issued without a supporting affidavit, is not so far void as to justify resistance of its execution. *Appling v. State*, 28: 548, 128 S. W. 866, — Ark. —. (Annotated)

SECOND APPEAL.

See Appeal and Error, 35, 36.

SECONDARY EVIDENCE.

See Evidence, 23.

SEIZURE.

See Search and Seizure.

SEPARATION.

See Divorce and Separation.

SET-OFF AND COUNTERCLAIM.

By bank against its own claim of deposit by bankrupt of fund for creditors, see Banks, 3.

In partnership accounting, see Partnership.

SHOOTING.

Of trespasser by servant, see Master and Servant, 21-23.

SICKNESS.

Right of servant to recover for time lost through illness, see Master and Servant, 1.

SIGNALS.

At railroad crossings, see Evidence, 53.

SIGNATURE.

Effect of signing name to contract to make one a party thereto, see Contracts, 2.

Of testator, see Wills, 1.

SILFENCE.

Estoppel by, see Estoppel, 2.

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SLANDER.

See Libel and Slander.

SOCIAL CLUBS.

See Clubs.

SOMNAMBULISM.

Effect of, on liability for murder, see Criminal Law, 1.

SPECIAL FINDINGS.

By jury, see Trial, 22.

SPECIAL INJURY.

As condition of right to maintain private action for nuisance, see Nuisance.

SPECIFIC PERFORMANCE.

Mutuality of contract, see Contracts, 7.
Validity of contract under statute of frauds, see Contracts, 16.

Effect of decree for performance of option contract on rights of one claiming under intermediate contract who was not party to suit, see Judgment, 3.

1. An unrecorded contract for the purchase of real estate has no priority over a prior unrecorded option upon the same property, which will prevent specific performance of the option. *Smith v. Bangham*, 28: 522, 104 Pac. 689, 156 Cal. 359.

2. The inadequacy of the consideration for an option to purchase real estate cannot defeat the right to performance of the contract to convey after the option has been accepted, if the price to be paid for the land is adequate. *Smith v. Bangham*, 28: 522, 104 Pac. 689, 156 Cal. 359.

SPLITTING.

Of cause of action, see Action or Suit, 2.

SPRINKLER.

Provision in insurance policy as to maintaining, see Insurance, 2, 3.

SPUR TRACK.

Requiring railroad company to construct, to private property, see Constitutional Law, 6, 6.

STATE.

1. Under a constitutional provision that the legislature shall not create any debt or liability which shall exceed a specified per centum upon the assessed value of the taxable property in the state, the legislature, when passing an act authorizing the issuance of bonds, must be governed by the assessed value of the taxable property as the same has been ascertained and then exists, and not with reference to the possible assessed value at or after the time when the legislative act authorizes the sale of the bonds, as the legislature cannot anticipate the future and leave it within the power of ministerial and executive officers

to swell the total assessed value, that they may sell state bonds at their pleasure. *Lewis v. Brady*, 28: 149, 104 Pac. 900, 17 Idaho, 251.

2. The words "debt" and "liability" in Idaho Const., art. 8, § 1, which provides that the legislature shall not create any debt or liability which shall exceed a specified per centum upon the assessed value of the taxable property in the state, are used not in a technical sense, but in the sense that the debt or liability is created at the date of the passage of an act authorizing an expenditure, so that the validity of an act authorizing the issuance of bonds must be determined as based on the assessed valuation at the date of the passage of the act, and not at the time of the issuance of the bonds. *Lewis v. Brady*, 28: 149, 104 Pac. 900, 17 Idaho, 251. (Annotated)

STATUTE OF FRAUDS.

See Contracts.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Construction of statute as to inspection of paper, see Discovery and Inspection.

Validity of statute imposing license tax on corporations, see License, 1, 2.

As to repeal of ordinances, see Municipal Corporations, 1.

To overthrow a tax law on the ground that it violates the Constitution, it must be clearly shown to do so. *Blackrock Copper Min. & M. Co. v. Tingey*, 28: 255, 98 Pac. 180, 34 Utah, 369.

STREET RAILWAYS.

As carriers, see Carriers.

Review by courts of orders of railroad commission as to crossing of railroad by, see Courts, 1.

Construction of subway in street by, see Highways, 3.

Mandamus to compel compliance with order of state railroad commission to construct subway beneath tracks of railroad, see Parties, 2.

Crossing of railroad tracks by, see Railroads, 2-4.

STREETS.

See Highways.

STRIKING OUT.

Of party, see Dismissal and Discontinuance, 2.

Of pleading, see Pleading, 3.

SUBROGATION.

Of owner of half interest tendering amount of mortgage on other half, see Mortgage, 1.

The owner of a half interest in a parcel of real estate will not lose his right to subrogation to the rights of a mortgagee 28 L.R.A. (N.S.)

on the other half interest, by paying the amount due into court in a proceeding for the foreclosure of the mortgage, without making a formal tender thereof to the mortgagee. *Murray v. O'Brien*, 28: 998, 105 Pac. 840, 56 Wash. 361.

SUBSCRIPTION.

To wills, see Wills, 1.

SUBWAY.

Construction of, in street, see Highways, 3.

Construction of, by street railway under railroad tracks, see Railroads, 2-4.

SUCCESSIVE SUITS.

See Action or Suit, 2.

SUMMONS.

See Writ and Process.

SUNDAY.

Sale of liquors on, see Intoxicating Liquors, 2.

Mandamus to compel enforcement of Sunday law, see Mandamus, 3.

SUPPORT.

Cancellation of deed given in consideration of agreement for, see Cancellation of Instruments, 2.

Lien in case of conveyance in consideration of agreement to support grantor, see Vendor and Purchaser, 5.

SURETYSHIP.

See Principal and Surety.

SURGEONS.

See Physicians and Surgeons.

TAX COLLECTOR.

Right of sureties on bond of, to recover for loss caused by negligence of other public officer, see Principal and Surety, 2, 3.

TAXES.

Assumpsit to recover illegal tax, see Assumpsit, 2.

Assessments for public improvements, see Public Improvements.

Validity of tax law, see Statutes.

Equality; uniformity.

Uniformity and equality as to license tax, see License, 8, 9.

1. The mere right to be a corporation is not within the operation of a constitutional provision for uniform and equal taxation, so that every person or corporation shall pay a tax in proportion to the value of his or its property. *Blackrock Copper Min. & M. Co. v. Tingey*, 28: 255, 98 Pac. 180, 34 Utah, 369.

What taxable.

2. The finished product of a manufacturer is subject to taxation, under a statute defining "property" as including every

kind of property subject to ownership, and providing that all property "not expressly exempted" "shall be subject to taxation in the manner provided in this act," where not expressly exempted, although not mentioned in the act, as the clause, "in the manner provided in this act," relates to the method of imposing taxes upon property already declared to be subject to taxation, instead of limiting the right to tax to the kinds of property specially named in the act. *State ex rel. Taggart v. Holcomb*, 28: 251, 106 Pac. 1030, 81 Kan. 879.

(Annotated)

3. A corporation organized for the personal convenience of its largest stockholder, to take and hold title to his real estate, upon one parcel of which a dwelling house is in process of construction, is within the operation of a statute requiring every corporation to pay an annual franchise tax computed upon the basis of the amount of its capital employed in the state, although it transacted no business. *People ex rel. — Wacklark Realty Co. v. Williams*, 28: 371, 91 N. E. 266, 198 N. Y. 54. (Annotated)

Assessment: omitted property.

Mandamus to compel placing of omitted property upon tax rolls, see *Mandamus*, 4.

4. Taxable property not listed for taxation nor returned by the assessor may be added to the tax rolls by the county clerk after the settlement of the county treasurer in October of the year the assessment should have been made, and after the tax rolls have been turned over to the county treasurer, where proceedings to make the correction were commenced in August of that year, and the reason for the delay was the opposition of the owner, notwithstanding a statute providing that an assessment may be corrected and omitted property added "at any time before the final settlement with the county treasurer," since a property owner cannot escape taxation by contesting the right to tax beyond the time fixed by law for making the assessment, and the county clerk cannot, by failure to perform his duty, nullify the statute imposing it. *State ex rel. Taggart v. Holcomb*, 28: 251, 106 Pac. 1030, 81 Kan. 879.

Sale: deed; rights of purchasers.

Adverse possession as against purchaser at tax sale, see *Adverse Possession*, 2.

Right of heir of grantee in tax deed to maintain action to quiet title, see *Cloud on Title*.

Right of one in possession under tax deed to allowance for improvements on eviction by landowner, see *Ejectment*.

Tax deed as giving prima facie right of possession, see *Evidence*, 22.

Reformation of tax deed, see *Reformation of Instruments*.

Trespass by holder of tax deed, see *Trespass*, 1, 2.

5. A tax deed to a deceased person and his heirs and assigns does not vest title 28 L.R.A.(N.S.)

in the heirs of such deceased person, but is void as a conveyance. *Baker v. Lane*, 28: 405, 109 Pac. 182, 82 Kan. 715.

(Annotated)

6. A tax deed has no more force or effect as a writ of assistance for procuring the possession of real estate than any other deed, and the holder of such deed who finds the property occupied must, if the occupant refuses to surrender possession, resort to the same legal remedy for possession as the holder of any other deed would employ. *Steltz v. Morgan*, 28: 398, 101 Pac. 1057, 16 Idaho, 308.

TAXPAYERS.

Permitting resident taxpayers to serve on jury in action against city, see *Appeal and Error*, 30; *Jury*, 2.

TELEGRAPHS.

Question for jury as to whether telegram is tendered after close of office of destination, see *Trial*, 10.

Failure to transmit; delay.

1. A telegraph company receiving a message for transmission, with notice that it is important that it go forward promptly, is bound to notify the sender if an obstacle to speedy transmission arises. *Box v. Postal Telegr.—Cable Co.* 28: 566, 165 Fed. 138, 91 C. C. A. 172.

2. A telegraph company which receives for transmission an important message, with notice that failure to deliver it by a certain time will cause loss, and promises to notify the sender by telephone when it is sent, and subsequently erroneously states in answer to his call, at a time when other avenues of communication were still open to him, that it had been sent, cannot escape liability for the loss occasioned by failure to transmit the message in time. *Box v. Postal Telegr.—Cable Co.* 28: 566, 165 Fed. 138, 91 C. C. A. 172.

Stipulations and conditions.

Conflict of laws as to, see *Conflict of Laws*, 1.

3. A telegraph company cannot avoid liability for full damages for failure to transmit a message within the stipulated time, under a rule limiting its liability to the amount received for transmission in case of mistake or delay in the transmission of unrepeatable messages. *Box v. Postal Telegr.—Cable Co.* 28: 566, 165 Fed. 138, 91 C. C. A. 172. (Annotated)

TELEPHONES.

Burden of proof in action for failure promptly to make connection for customer, see *Evidence*, 18.

Liability for fright of horse by object left in street by telephone company, see *Highways*, 5, 7.

License tax on telephone company, see *License*, 4-7.

Repeal of ordinance as to taxation of franchise of company, see *Municipal Corporations*, 1.

Failure to connect subscriber with fire department, see Proximate Cause, 1.

TENDER.

Of amount due on mortgage, see Mortgage, 1-6.

Effect of failure to make formal tender to mortgagee on right of one paying amount into court to subrogation, see Subrogation.

THEFT.

Receiving stolen property, see Receiving Stolen Property.

TIMBER.

Effect of invalidity of contract for cutting on public land on validity of other contract arising therefrom, see Contracts, 28.

TIME.

For demand for performance of contract, see Contracts, 10.

Parol evidence to vary terms of written contract as to, see Evidence, 30.

For adding omitted property to tax roll, see Taxes, 4.

For objections, see Trial, 2.

For determination of remaindermen under will, see Wills, 6.

TITLE.

Record of, see Records and Recording Laws.

Of personal property, passing of, see Sale, 1, 2.

FONTINE POLICY.

Right of holder to accounting, see Accounting; Judgment, 1; Parties, 4; Pleading, 3.

TRADEMARK.

See also Tradename.

A person may bona fide use his own name upon marks or brands placed upon articles of his own manufacture, although it has first been rightfully used by another who had established the reputation of, and built up a trade in, like articles by the use of the same name in a trademark, sign, or label thereon; but he cannot by artifice, device, or otherwise, induce or attempt to induce the belief in customers or others desiring to purchase, that the articles so marked are the product of the other. *Aetna Mill & E. Co. v. Kramer Milling Co.* 28: 934, 109 Pac. 692, 82 Kan. 679.

TRADENAMES.

See also Trademarks.

A name like "Finney's Orchestra" may be protected against unfair competition by those whose efforts have made it valuable, although the one who originated the organization and gave it his name is dead. *Finney's Orchestra v. Finney's Famous Orchestra*, 28: 458, 126 N. W. 198, — Mich. — (Annotated)

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TREES.

Damages for destruction of shade trees, see Damages, 5.

Evidence on questions of damages for injury to, see Evidence, 43.

TRESPASS.

Suit on implied contract as waiver of remedy in trespass, see Contracts, 3.

1. The holder of a tax title to real estate, who finds the property unoccupied, may enter upon and take actual possession of the premises, and, in doing so, he is not liable to the original owner of the property, whose title has been divested by the tax deed. *Steltz v. Morgan*, 28: 398, 101 Pac. 1057, 16 Idaho, 368. (Annotated)

2. In order for one who was the original owner of real estate, and whose title has been divested through taxation and a tax deed, to maintain an action of trespass against the holder of a valid tax deed for entering into possession of the premises, such original owner must maintain and be in actual possession of the premises at the time of the trespass. *Steltz v. Morgan*, 28: 398, 101 Pac. 1057, 16 Idaho, 368.

3. Under an action of trespass *quare clausum fregit*, where the plaintiff does not allege title either in fee or for a term in himself, he must show actual possession of the realty at the time of the trespass. *Steltz v. Morgan*, 28: 398, 101 Pac. 1057, 16 Idaho, 368.

TRESPASSER.

Liability for injury to, by electric shock, see Electricity, 3.

Shooting of, by servant, see Master and Servant, 21-23.

TRIAL.

New trial, see New Trial.

Objections and exceptions.

1. One offering a deposition against a claim in the probate court cannot complain that depositions are admitted in support of the claim. *Re McVickery*, 28: 1112, 91 N. E. 1041, 245 Ill. 180.

2. Objection to the form of the oath administered to the jury to try a civil action cannot be made for the first time after verdict. *First Nat. Bank v. Lowther-Kaufman Oil & C. Co.* 28: 511, 66 S. E. 713, 66 W. Va. 505.

Sufficiency of evidence to go to jury.

Taking case from jury, see *infra*, 14, 15.

3. The presumption of care on the part of one killed through the alleged negligence of another, where there is no witness of the accident, is sufficient to take to the jury the question of the absence of contributory negligence on his part, in the absence of clear and unmistakable proof of the contrary. *Brown v. West Riverside Coal Co.* 28: 1260, 120 N. W. 732, — Iowa, —.

4. Evidence of the explosion, to the in-

jury of the purchaser of a bottle of carbonated beverage, accompanied by evidence that other bottles put up by the same bottler had exploded during the several preceding months, is sufficient to carry to the jury the question of the latter's negligence, in an action to hold him liable for the injury. *Dail v. Taylor*, 28: 949, 66 S. E. 135, 151 N. C. 284.

5. The mere explosion of a bottle of carbonated beverage to the injury of a purchaser is not sufficient to carry to the jury the question of the negligence of the one who bottled it, under the doctrine of *res ipsa loquitur*. *Dail v. Taylor*, 28: 949, 66 S. E. 135, 151 N. C. 284.

Questions of law and fact.

Question for jury as to passenger's negligence, see *Carriers*, 8.

Question for jury as to ratification of contract, see *Contracts*, 25.

6. The court, and not the jury, must construe a contract all of which is in writing. *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 28: 1007, 108 Pac. 621, — Wash. —.

7. The question of a master's negligence in storing powder, dynamite, and dynamite caps in dangerous quantities in the room provided for the storing of workmen's tools, clothing, and lunches, and which is used by them for refuge from storms, is for the jury. *Brown v. West Riverside Coal Co.* 28: 1260, 120 N. W. 732, — Iowa, —.

8. The question of the assumption of risk on the part of an employee whose duties require him to be near stored dynamite is for the jury, where he was inexperienced, and not shown to have appreciated the gravity of his peril. *Brown v. West Riverside Coal Co.* 28: 1260, 120 N. W. 732, — Iowa, —.

9. A shipper who delivers cattle to a carrier for transportation, with the understanding that a written contract will be signed, cannot be held, as matter of law, to have bound himself, by general preliminary negotiations relating to the shipment, to sign a special written contract limiting the carrier's common-law liability, although he had been a regular shipper of cattle for years, and intended to sign a contract of the kind he had theretofore used, where it appears that he was not familiar with the terms of such contracts and that the carrier did not have a standard form of contract which it invariably used. *St. Louis & S. F. R. Co. v. Gorman*, 28: 637, 100 Pac. 647, 79 Kan. 643.

10. Whether or not a telegram was tendered for transmission after the close of the hours of the office of destination is for the jury where the evidence tends to show that it was tendered about 6 o'clock P. M., and that the hours of the office at destination terminated usually at 6 or 6:30 P. M., but might on occasions continue until late in the evening. *Box v. Postal Teleg. Cable Co.* 28: 566, 165 Fed. 138, 91 C. C. A. 172.

11. The question is for the jury whether

or not reasonable inspection, on the part of the owner of a building, of a fire escape which had been erected by an independent contractor, would have revealed a defect in the fastenings and permitted the defect to be remedied prior to the injury of a servant through the attempted use of the appliance, for which the owner is sought to be held liable. *Winslow v. Commercial Bldg. Co.* 28: 563, 124 N. W. 320, — Iowa. —.

12. The sufficiency of the consideration for a contract is for the determination of the court, and not the jury. *Evans v. Oregon & W. R. Co.* 28: 455, 108 Pac. 1095, — Wash. —.

13. The jury must determine whether or not the authority of an agent in possession of a horse for purposes of sale includes apparent authority to take notes payable to himself for the purchase price, where there is nothing to show that he might not have taken cash in payment. *Galbraith v. Weber*. 28: 341, 107 Pac. 1050, — Wash. —.

(Annotated)

Taking case from jury.

Waiver of right to jury trial by motions for directed verdict, see *Jury*, 1.

Construction of motion to instruct jury to find verdict for defendant, see *Motions and Orders*.

Assignment of error in motion for new trial in refusing to direct verdict, see *New Trial*, 2.

14. The court cannot direct a verdict for an insurance company in an action on a policy upon the life of one who has been absent from his home for more than seven years, merely because of evidence that the absentee has been seen within that time, since the question of the credibility of such evidence is for the jury. *Kennedy v. Modern Woodmen of America*, 28: 181, 90 N. E. 1084, 243 Ill. 560.

15. An acquittal should be directed on request in a criminal prosecution, where the evidence only raises a mere suspicion of guilt. *High v. State*, 28: 162, 101 Pac. 115, 2 Okla. Crim. Rep. 161.

Instructions.

Sufficiency of assignment of error in overruling motion to instruct, see *Appeal and Error*, 4.

Estoppel to complain of, see *Appeal and Error*, 11.

Reversible error as to instructions, see *Appeal and Error*, 21, 28, 29.

16. An instruction should not be given where there is no evidence to support it. *Scheurer v. Banner Rubber Co.* 28: 1207, 126 S. W. 1037, 227 Mo. 347.

17. An instruction allowing one who has sold his land to recover only such damages for injuries thereto caused by the building of a railway grade thereon prior to the sale, as may have accrued between the building of such grade and the time of such sale, is erroneous, since the purchaser took whatever portion of the land he acquired as it existed at the time of sale,

and could not recover for the original wrong; and, moreover, when the road was completed the grade from which the injury flowed was patent, obvious, and of a permanent nature, in which case the whole damages, past, present, and prospective, must be recovered in one action. *Boisé Valley Constr. Co. v. Kroeger*, 28: 968, 105 Pac. 1070, 17 Idaho, 384.

18. The addition of the statement that no liability can attach for the result of unusual rains or extraordinary freshets to an instruction, in an action for damages for unlawfully damming back flood waters, that the builder of a bridge over a stream is required to leave openings for the passage of all water reasonably to be expected to flow therein, renders the instruction as a whole materially erroneous, in the absence of further explanation, since the term "extraordinary freshets" as used is misleading, unless understood to include only those so outside of ordinary experience that their occurrence could not reasonably have been anticipated; and in the absence of specific instruction it cannot be assumed that the jury gave it that force, the word "unusual" in connection therewith being insufficient to imply that significance. *Broadway Mfg. Co. v. Leavenworth Terminal R. & B. Co.* 28: 156, 106 Pac. 1034, 81 Kan. 616.

19. The court cannot enter into particulars in instructing the jury in an action to recover damages for personal injuries, so as to inform them just what acts would be negligent and what would not. *McKenzie v. North Coast Colliery Co.* 28: 1244, 104 Pac. 801, 55 Wash. 495.

20. In an action for being injured at a much used railroad crossing by being jerked in front of a train by a driverless horse attached to a wagon, which plaintiff was attempting to stop as it approached the crossing, whose course was diverted by the train, which came suddenly into view around a nearby sharp curve at a high rate of speed, with whistle blowing, an instruction that the plaintiff was bound to exercise ordinary care at all times up to the time of the accident, and that, if he had notice or knowledge that the train was approaching, or in the exercise of ordinary care should have taken notice, in coming upon the track he would have been guilty of contributory negligence sufficient to bar recovery, is as favorable to defendant as warrantable, where it also appears that plaintiff, when stopping the horse, was not upon the track nor near enough to be struck by a train, and did not intend to go upon the track. *Campbell v. Chicago G. W. R. Co.* 28: 346, 121 N. W. 429, 108 Minn. 104.

Findings by court.

Review of findings on appeal, see Appeal and Error, 18.

21. A finding that a written contract is void as against public policy is one of law, and not of fact. *Re McVicker*, 28: 1112, 91 N. E. 1041, 245 Ill. 180.
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Verdict or findings of jury.

Raising question for review on appeal by motion to set aside verdict, see Appeal and Error, 5.

Review of verdict on appeal, see Appeal and Error, 16, 17.

22. A party is entitled to have a jury make special findings of the ultimate facts of the case, but has no right to ask for mere evidentiary matters, nor that the jury shall file a bill of particulars as to each fact. *Matheney v. Eldorado*, 28: 980, 109 Pac. 166, 82 Kan. 720.

23. A jury, by returning a verdict for plaintiff in an action brought to recover damages for personal injuries sustained by being thrown to the ground upon stepping from a moving train, cannot be said to have violated an instruction that it is contributory negligence, as matter of law, for a passenger on a train to undertake "to alight from it in the darkness of the night," while it is in motion, without any light to guide his steps, in that the jury disregarded the element of darkness, where they also find that it was light enough for him to see where he was stepping, although the accident occurred between half past three and four o'clock on a July morning. *Walters v. Missouri P. R. Co.* 28: 1058, 109 Pac. 173, 82 Kan. 739.

TROVER.

Conversion by bailee, see Bailment.

Sufficiency of pleading to show conversion, see Pleading, 7.

TRUSTEES

In bankruptcy, see Bankruptcy, 2.

TRUSTS.

Bank's duty as to trust funds, see Banks, 3.

For married woman, see Covenants and Conditions, 2; Husband and Wife.

UNDISCLOSED PRINCIPAL.

See Principal and Agent, 4.

UNDUE INFLUENCE.

See Evidence, 11; Wills, 2.

UNFAIR COMPETITION.

See Tradename.

UNIFORMITY.

Of license tax, see License, 8, 9.

In taxation generally, see Taxes, 1.

USURY.

Statute forbidding assignment of wages given as security for loan tainted with, see Constitutional Law, 2.

1. Exactng payment of the legal interest which will accrue, prior to the maturity of the debt, as a condition to accepting payment of the principal and releasing purchase-money notes secured by mortgage on real estate, does not constitute usury. *Smithwick v. Whitley*, 28: 113, 67 S. E. 914, 152 N. C. 366. (Annotated)

2. The difference between the cash and the credit price on a sale of property may be put into the form of interest on a note given for the purchase price, without violating the usury law, although the per cent agreed upon is greater than the lawful rate of interest. *Davidson v. Davis*, 28: 102, 52 So. 139, — Fla. —. (Annotated)

VENDING MACHINE.

License tax on, see License, 9.

VENDOR AND PURCHASER.

Action by vendee against one inducing vendor to break contract, see Case.

Mutuality of contract, see Contract, 6, 7.

Option to purchase property, see Contracts, 6, 9, 10.

Oral contracts for land, see Contracts, 11, 12.

Sufficiency of writing in case of contract for purchase or sale of land, see Contracts, 13, 15, 16.

Effect of part performance of contract void under statute of frauds, see Contracts, 16.

Restraints upon alienation, see Covenants and Conditions, 2.

Deeds, see Deeds.

Sale under execution or attachment, see Judicial Sale.

Sale of land by agent, see Principal and Agent, 3.

Sale for taxes, see Taxes, 5, 6.

Right, as between vendor and vendee, to damages for building of grade on land prior to sale, see Trial, 17.

Putting difference between cash and credit price of property into form of interest, see Usury, 2.

1. The right of the grantee of a lot on a recorded plat is not limited to the adjoining street and the connections necessary to reach a public highway, but extends to the use of all the ways appearing upon the plat, and none can be closed against his protest, if it can be of material benefit to his lot. *Danielson v. Sykes*, 28: 1024, 109 Pac. 87, — Cal. —.

Payment of purchase money.

2. The vendor in a land contract providing for payment in instalments and reserving the right of forfeiture for default, making time of the essence of the contract, may enforce the forfeiture for default in the last instalment, and retain the payments made, if he is not himself in default with respect to the contract obligations as to abstract of title and delivery of deed. *Reese v. Westfield*, 28: 956, 105 Pac. 837, 56 Wash. 415.

Deficiency in quantity.

Abatement of price on judicial sale because of deficiency in quantity, see Judicial Sale, 2; Limitation of Actions, 2.

3. In the sale by the acre of valuable farm lands only such allowance should be made for inaccuracies as to amount of land sold as, considering the inequality of the

ground and other obstacles hindering an accurate survey, may reasonably be imputable to variations of instruments and small errors in survey. *Singleton v. Castleman*, 28: 393, 68 S. E. 34, — W. Va. —.

Rescission of contract.

Burden of proof in action to set aside deed, see Evidence, 20.

4. A representation by one claiming a tax title to real estate, that the title is perfect,—made for the purpose of securing a conveyance in form by the true owners, for a nominal consideration,—which can only be true in case the land was vacant and unoccupied during the period necessary to perfect the title under the statute, involves a representation that it was so in fact; and if such representation was false, the one making it is guilty of fraud in law, which will entitle the grantor to a rescission of the contract, although the one making it had no knowledge on the subject, and believed it to be true. *Kathan v. Comstock*, 28: 201, 122 N. W. 1044, 140 Wis. 427. (Annotated)

Vendor's lien.

Agreement for support in consideration of conveyance as basis for lien, see also Cancellation of Instruments, 2.

5. No vendor's lien exists where the consideration for the conveyance of land is an agreement to support the grantor during life. *Burroughs v. Burroughs*, 28: 677, 50 So. 1025, — Ala. —. (Annotated)

Rights of parties as to third persons: bona fide purchasers.

6. A grantee of the maker of a plat of building lots cannot close an alley against the protest of a grantee of one of the lots, because of uncertainty as to whether or not the alley will ever be of any benefit to the lot. *Danielson v. Sykes*, 28: 1024, 109 Pac. 87, — Cal. —.

VERDICT.

Review of, on appeal, see Appeal and Error, 16, 17.

In general, see Trial, 22, 23.

VOTERS AND ELECTIONS.

See Elections.

WAGES.

Recovery of, by discharged employee, see Assumpsit, 1.

Statute regulating assignments of, see Constitutional Law, 2, 7.

Agreement by third party to pay, see Contracts, 28.

Right of servant to recover for time lost through illness, see Master and Servant, 1.

WAIVER.

Of statutory period after notice of bill of exceptions in which to file objections and amendments thereto, see Appeal and Error, 8.

Of provision as to bringing of action within certain time after proofs of death, see Insurance, 6.

Of right to jury trial, see Jury, 1.

Of notice to master of injury to servant, see Master and Servant, 2.

WAREHOUSE.

Sale of warehouse on leased land, see Sale, 1.

WARRANT.

Of commitment, see Criminal Law, 2.

WARRANTY.

Breach of parol warranty as defense to action on note, see Bills and Notes, 5.

In insurance contract, see Insurance.

WATCHMAN.

Master's liability for shooting by, see Master and Servant, 21-23.

WATERS.

Use of waters for logging generally, see Logs and Logging.

Rights as between public and individuals.

1. The public cannot, after granting the bed of the outlet of a pond to private owners, use the water in the pond to the injury of such owners, without making compensation to them, although it retains title to the bed of the pond. *Taggart v. Jaffrey*, 28: 1050, 76 Atl. 123, 75 N. H. 473.

Rights as between individuals.

When action for damages resulting from flooding accrues, see Limitation of Actions, 4.

Instructions in action for damming back flood waters, see Trial, 18.

2. The rights of an owner of land on an artificial channel made for a stream of water which was evidently intended to be permanent, and has existed for more than sixty years, are the same as though the course was the natural one. *Taggart v. Jaffrey*, 28: 1050, 76 Atl. 123, 75 N. H. 473.

3. The fact that proper conservation of the water left in a stream would render it sufficient to serve the purpose to which a complaining riparian owner was putting the stream is no defense to an action by him for wrongful diversion of water from the stream. *Taggart v. Jaffrey*, 28: 1050, 76 Atl. 123, 75 N. H. 473.

4. The duty of the builder of a bridge over a water course does not necessarily end with making provision for the escape of so much water as can be carried within the channel, since, if there is reason to anticipate that the stream will at times overflow its banks, he must also, if practicable, provide an outlet for the flood water; and for failure so to do he is liable for the consequent damages. *Broadway Mfg. Co. v. 28 L.R.A.(N.S.)*

Leavenworth Terminal R. & B. Co. 28: 156, 106 Pac. 1034, 81 Kan. 618. (Annotated)

WILLS.

Bequest for masses, see Charities, 1, 3, 4.

Statute requiring devise to be made directly to beneficiary, see Charities, 2.

Retaining suit for other relief other than that asked for, see Equity, 5.

Parol evidence to show intent of testator, see Evidence, 31, 32.

Evidence in prosecution for forgery of, see Evidence, 37.

Establishment of identity of sheets of will, see Evidence, 8.

Execution as lien upon legacy, see Execution, 1.

Power of servitor of incompetent to adeem legacies, see Incompetent Persons.

Necessary parties in suit to construe will, see Parties, 5.

Signature of testator.

1. A will which there is evidence tending to show had been duly signed in ink by the testator below the attestation clause, in the presence of the subscribing witnesses, and a few weeks later delivered by him to the executrix, who retained possession of it until the testator's death, was properly admitted to probate, although, when produced for that purpose, the testator's signature had been partially erased by knife scratches and written in pencil above the attestation clause, apparently by the testator, although when, by whom, or with what purpose, was not shown. *Kirby v. Sellards*, 28: 270, 108 Pac. 73, 82 Kan. 291.

Undue Influence.

Presumption of undue influence, see Evidence, 11.

2. That a will is drafted by a daughter of the testator, who shares its benefits equally with the other children, and who is not shown to have occupied a position of confidence and trust toward her father beyond that arising from their relationship, does not bring the will within the statutory provision that a will written by the principal beneficiary, who is the confidential agent or legal adviser of the testator, or who occupies any other position of confidence or trust to him, shall not be valid unless it affirmatively appear that the testator knew the contents and had independent advice with reference thereto. *Kirby v. Sellards*, 28: 270, 108 Pac. 73, 82 Kan. 291.

Probate: contest.

3. A statute making void a devise or bequest to a witness to a will which cannot be proved without his testimony does not apply to persons other than attesting witnesses called upon to testify when the will is offered for probate. *Kirby v. Sellards*, 28: 270, 108 Pac. 73, 82 Kan. 291.

Construction generally.

4. The construction of a will should in case of doubt be in favor of the first rather than of the second taker, and of a general or primary intent rather than of a particular or secondary one. *Fidelity Trust Co. v. Bobloski*, 28: 1093, 76 Atl. 720, 228 Pa. 52.

Description of beneficiaries; who may take.

5. Under a bequest to the nearest of kin of testator, his brothers and sisters will take to the exclusion of children of deceased brothers and sisters. *Clark v. Mack*, 28: 479, 126 N. W. 632, — Mich. —.

(Annotated)

6. Under a gift of property to one for life, remainder to testator's next of kin, the remaindermen will be determined at the death of testator, and not at that of the life tenant. (*Clark v. Mack*, 28: 479, 126 N. W. 632, — Mich. —.

Nature of estate or interest created.

7. A bequest of property to testator's sisters to be used and controlled by them during their joint lives and that of the survivor, and then over, gives a life estate only to them. *Clark v. Mack*, 28: 479, 126 N. W. 632, — Mich. —.

8. A defeasible fee which becomes absolute on the death of the widow without remarriage is created by a will which, after reciting that testator is fully convinced that his wife will educate the children and administer "our joint property" as well as if testator was living, directs that she shall take possession and enjoy and administer the property for the time that she remains a widow, with a direction that she assist the children to procure the means best adapted for their future welfare; and it is immaterial that she is forbidden to sell the realty without the consent of the executors or that, in the event of her remarriage, the property is to go to the children. *Fidelity Trust Co. v. Bobloski*, 28: 1093, 76 Atl. 720, 228 Pa. 52.

9. Where one who has willed property to her sister for life with remainder to her nearest of kin permits the will to stand for two years after the death of the sister, until her own death, without alteration, the property will pass to the nearest of kin. *Clark v. Mack*, 28: 479, 126 N. W. 632, — Mich. —.

Election.

Retaining suit to compel beneficiary to elect, see Equity, 5.

Right to compel election by devisee in suit to which he is not a party, see Parties, 5.

10. The intent to devise property of a beneficiary in a will must appear upon its face to compel him to elect between asserting his title to such property and claiming the benefit of the provision in the will. *McDonald v. Shaw*, 28: 657, 121 S. W. 935, 92 Ark. 15. (Annotated)

Charge upon donee or land devised.

11. Where a devisee is subject to a charge or burden, doubts as to the quantum 28 L.R.A.(N.S.)

of the estate should be resolved in his favor. *Fidelity Trust Co. v. Bobloski*, 28: 1093, 76 Atl. 720, 228 Pa. 52.

WITNESSES.

Right of jury to reject testimony of, see Evidence, 49.

Credibility of, as question for jury, see Trial, 14.

Competency.

Effect of interest to disqualify witness in will contest, see Wills, 3.

1. The maker of a promissory note which has been assigned is a competent witness in an action by the assignee against the administrator of the assignor, to prove both the assignment and payment by him to the assignor in his lifetime, as the agent of the assignee. *Savre v. Woodyard*, 28: 388, 66 S. E. 320, 66 W. Va. 288. (Annotated)

Examination.

2. A question propounded plaintiff in an action for an accounting for notes delivered to defendant's intestate for collection, as to whether certain items in an account previously rendered defendant, and offered in evidence by him, represented or was intended to represent the notes as to which an accounting was demanded, was properly rejected as leading. *Savre v. Woodyard*, 28: 388, 66 S. E. 320, 66 W. Va. 288.

Cross-examination.

Error as to cross-examination of witnesses, see Appeal and Error, 26, 27.

3. Alleged admission to the opposite party of the same facts testified to by a witness whose deposition has been suppressed cannot be shown in evidence, on the cross-examination of such opposite party, to supply the loss of the deposition suppressed. *Savre v. Woodyard*, 28: 388, 66 S. E. 320, 66 W. Va. 288.

Discred'iting.

4. That a witness removed from a community ten years previous to a trial does not render inadmissible impeaching testimony of those who knew him when there as to his general reputation for truth and veracity, on the theory that it relates to a period too remote. *Kennedy v. Modern Woodmen of America*, 28: 181, 90 N. E. 1084, 243 Ill. 560.

5. A statement of a stranger reported to the beneficiary of a benefit certificate the holder of which has been absent without explanation for seven years, that he had seen the absentee, the receipt of which is admitted by the beneficiary at the trial of the action to enforce the certificate, is merely hearsay, and evidence is properly admissible to impeach the credibility of the one who made it. *Kennedy v. Modern Woodmen of America*, 28: 181, 90 N. E. 1084, 243 Ill. 560.

6. Evidence of a witness given at a trial which involved the same facts, and of

statements out of court tending to discredit his testimony, is admissible to impeach him. *Kennedy v. Modern Woodmen of America*, 28: 181, 90 N. E. 1084, 243 Ill. 560.

WRIT AND PROCESS.

Effect of appearance by nonresident defendant where process was not served upon him within limitation period, see *Appearance*, 2.

When action in which process is served by publication is commenced, see *Limitation of Actions*, 7.

1. No valid judgment can be entered in a proceeding to enforce unpaid taxes against one whose Christian name is Michael, upon a constructive service of process against him by the name of Mike, where there is nothing to show that he ever answered to or tolerated such name. *Ohlman v. Clarkson Sawmill Co.* 28: 432, 120 S. W. 1155, 222 Mo. 62. 28 L.R.A.(N.S.)

2. Jurisdiction of a nonresident defendant in a suit to foreclose a mortgage not signed by him is not acquired by publication of a summons in which only the initials of his Christian names are stated, where the verification does not state that his true name could not be discovered, and neither the summons nor notice contained the words "real name unknown," as required by statute, although it is shown that he had transacted business and acted as deputy county clerk and notary public by the name by which he was sued, since a legal name includes the first Christian name in full, and the surname. *Butler v. Smith*, 28: 436, 120 N. W. 1106, 84 Neb. 78. (Annotated)

X-RAY.

Admissibility of sciagraph in evidence, see *Evidence*, 29.

Ex J. H.
1/6/11

